



REPUBLIC OF KENYA



KENYA LAW
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Nganda & another v National Bank of Kenya Limited (Employment and Labour Relations Cause E042 of 2021) [2025] KEELRC 188 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 188 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E042 OF 2021**

**BOM MANANI, J
JANUARY 30, 2025**

BETWEEN

DENNIS WAMBUA NGANDA 1ST CLAIMANT

NICHOLAS KIBET SILE 2ND CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. This suit challenges the Respondent’s decision to terminate the Claimants’ contracts of service. Whilst the Claimants contend that the decision was unmerited, the Respondent expresses a contrary view.

Claimants’ Case

2. The Claimants were both employees of the Respondent stationed at its Upper Hill branch at the time their contracts of service were terminated. The 1st Claimant was serving in the position of Cash Team Leader at the time whilst the 2nd Claimant was serving as a Teller.
3. The Claimants contend that throughout their service to the Respondent, they worked with dedication and zeal. They contend that prior to the events that led to termination of their contracts, they had served the Respondent without blemish.
4. The Claimants aver that on diverse dates between 23rd April 2020 and 5th May 2020, one of the Respondent’s customers by the name Ngugi Ayub whose account was domiciled at the Respondent’s Harambee Avenue branch visited the Upper Hill branch for a series of transactions on the aforesaid account. They contend that the said customer withdrew a total of Ksh. 4,972,150.00 from the account during this period.



5. The Claimants contend that they verified the customer's details before he was allowed to execute any of the impugned transactions. As such, they contend that the transactions were executed after due diligence.
6. The Claimants aver that on 26th May 2020, the Respondent was served with a demand notice from a Law Firm alleging that the aforesaid transactions were fraudulent. As such, it (the Respondent) was asked to refund the account holder the money that had allegedly been irregularly withdrawn from the account.
7. The Claimants aver that after the aforesaid demand, the Respondent issued them with letters of show cause dated 4th August 2020 in respect of the impugned transactions. They contend that they responded to the letters as demanded by the Respondent.
8. The Claimants contend that the accusations which the Respondent leveled against them were unfounded. In their view, the Respondent subjected them to a hurried disciplinary process before it had conducted exhaustive investigations into the impugned transactions. They, for instance assert that the Respondent did not conduct investigations on the customer in question to ascertain whether he had lawfully withdrawn funds from the account only to turn around and allege that it (the account) had been fraudulently debited. As such, they contend that the decision to terminate their contracts of service was without justification.

Respondent's Case

9. On its part, the Respondent maintains that the Claimants failed in their duties when they authorized withdrawal of funds from the impugned account without following the laid down procedure and policies. As a consequence, it contends that the Claimants' actions not only resulted in the loss of funds belonging to a customer but also exposed it (the Respondent) to financial and reputational loss.
10. The Respondent contends that as employees of the bank, the Claimants were bound to execute their duties in accordance with its Code of Conduct and other policies. It contends that these instruments required the Claimants to exercise due diligence whilst executing their duties. It contends that the two failed in this respect when they allowed fraudulent withdrawal of funds totaling Ksh. 4,972,150.00 from the customer's account.
11. The Respondent avers that it learned of the fraud on 26th May 2020 when the customer raised a complaint regarding suspect transactions on his account. It contends that following the complaint, it conducted investigations which showed that the Claimants had negligently permitted withdrawals from the account in disregard of its policies.
12. The Respondent contends that the Claimants permitted a fraudster to withdraw funds from the account by failing to authenticate the requests he made to access it (the account) from the Upper Hill branch in disregard of the laid down procedure. As a consequence, the account holder lost a substantial sum of money which the Respondent was forced to refund to save its image from being ruined.
13. The Respondent contends that following the outcome of the internal investigations, it issued the Claimants with letters to show cause why disciplinary action should not be taken against them for gross misconduct. It contends that the response by the Claimants were unsatisfactory and hence the decision to subject them to disciplinary hearings.
14. The Respondent avers that the Claimants were heard and their defenses considered before a decision was made to terminate their contracts of service. It further contends that the Claimants' appeals were



considered and rejected. As such, it contends that the Claimants were accorded fair procedure before their contracts were terminated.

Issues for Determination

15. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues for determination in the dispute:-
 - a. Whether the Claimants' contracts of service were unfairly terminated.
 - b. Whether the Claimants are entitled to the reliefs that they seek through these proceedings.

Analysis

16. The Claimants are accused of having authorized fraudulent payments from the Respondent's customer's account. The money is said to have been paid to a third party who impersonated the true account holder. The parties are in agreement that account in question was domiciled at the Respondent's Harambee avenue branch and not the Upper Hill branch where the Claimants were stationed.
17. The evidence on record shows that both Claimants handled payments from the said account. Both of them concede that they did not confirm the account holder's details from the domicile branch before they sanctioned the impugned transactions. They both confirm that the Respondent's regulations obligated them to verify these details from the domicile branch before finalizing payments.
18. The Claimants gave varying justifications for their failure to verify the account holder's details from the domicile branch. For the 1st Claimant, he alleged that every time the purported account holder sought to transact on the account, he (the 1st Claimant) would call the domicile branch to confirm the customer's details but the calls would go unanswered. As such, he was forced to conduct his own due diligence before making a decision whether to honour the request to transact. However, he did not place before the Disciplinary Committee or this court evidence of call logs to prove that he tried to call the domicile branch before he approved each payment to the fraudster.
19. The 1st Claimant also confirmed that the Respondent's regulations required him to scan documents of a customer from a non-domicile branch and share them with the domicile branch before he could process any transaction from a non-domicile account so that it (the domicile branch) could verify it (the transaction). However, he conceded that he did not do this with respect to the impugned transactions.
20. He contended that during his first encounter with the fraudster, he could not scan and share the documents in question with the domicile branch before he completed the transaction because the Respondent's machines had broken down. However, he did not give a justification for the failure to comply with this requirement on the subsequent occasions that he approved payments from the account.
21. There is also evidence that the 1st Claimant assisted the fraudster to make changes to the impugned account by inserting a new phone number without the involvement of the domicile branch. The 1st Claimant not only confirmed this fact during the disciplinary hearing but also confirmed that he did not verify whether the phone number was the customer's before he effected the changes.
22. As regards the 2nd Claimant, he contended that he was the only teller at the Upper Hill branch at the time the transactions happened and that it was not possible for him to verify all transactions with the domicile branches before sanctioning payments. He contended that he was therefore forced to rely on his own due diligence to sanction the payments.



23. From the above evidence, it is not in doubt that the two Claimants sanctioned payments from the impugned account in contravention of the Respondent's guidelines regarding processing payments from non-domicile accounts. It is also not in doubt that the Claimants were aware of these guidelines but disregarded them for various reasons as indicated above without seeking the approval of the Respondent.
24. The minutes of the disciplinary hearing for both Claimants were tendered in evidence. From them (the minutes), it is apparent that the Claimants owned up to their mistake in approving the impugned transactions albeit they sought to justify their actions on other grounds.
25. After hearing them, the Respondent arrived at the conclusion that the two had breached its policies with respect to processing payments relating to non-domicile accounts. As such, it terminated their services.
26. In my view, the Respondent has demonstrated that it had justifiable reason to terminate the Claimants' contracts. There is proof that the two acted in contravention of the Respondent's policies.
27. The Claimants were under no obligation to complete the impugned transactions before they had verified the transactional details with the domicile branch. They had the option of declining to make the payments and refer the customer to his branch. Indeed, the Respondent's guidelines allowed them to delay paying a customer if this was necessary in ensuring that the right individual is the one who is paid. However, they opted to ignore these precautionary measures and proceed with the impugned payments.
28. The court is not entitled to upset an employer's decision to terminate an employee's contract of service merely because the trial judge considers that had he been in the employer's shoes, he would have arrived at a different verdict. All that the court is expected to do is to examine whether the employer's decision falls in the band of reasonable reactions which he (the employer) would have made. If it does, the court must uphold the decision.
29. The Court of Appeal made the above position clear in the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR when it expressed itself on the matter as follows:-

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”
30. In my view and having regard to the evidence which was tendered before the Respondent's Disciplinary Committee, I am satisfied that any reasonable employer, standing in the Respondent's shoes, would have terminated the Claimants' contracts of service for breach of his/its Code of Conduct. As such, I find that the Respondent had valid reason to terminate the Claimants' employment.



31. The evidence on record shows that after the impugned transactions were brought to the attention of the Respondent, it issued the Claimants with notices to show cause. The notices were issued on 4th August 2020 although the 1st Claimant received his much later on 10th August 2020. The 2nd Claimant received his on 4th August 2020.
32. The record shows that the notices to show cause set out, in sufficient detail, the accusations that were leveled against the Claimants. The two tendered their responses on 10th August 2020,
33. The Respondent avers that it was not satisfied with the responses. As such, it invited the Claimants for disciplinary hearings.
34. The letters inviting the Claimants for disciplinary hearing are dated 12th August 2020. They invited them for disciplinary sessions which were scheduled for 21st August 2020.
35. The record shows that the 1st Claimant received the notification on 13th August 2020, approximately eight (8) days to the trial date. The 2nd Claimant received the notification on 15th August 2020, approximately six (6) days before the trial date.
36. The record shows that the two appeared before the Disciplinary Committee and tendered their defense. They largely conceded to having made the impugned payments without reference to the domicile branch in contravention of the Respondent's regulations.
37. The record shows that both Claimants challenged the decision to terminate their contracts through appeals. For the 1st Claimant, he contended on appeal that although he called the domicile branch, he did not receive a response. As such, he had to make a decision to pay. During the hearing of the appeal, he contended that it was not practically possible to verify all customer instructions with their domicile branches because the Upper Hill branch was serving so many of such customers at the time. He contended that he had to strike a delicate balance between complying with the Respondent's instructions on non-domicile accounts and ensuring acceptable service standards for customers.
38. For the 2nd Claimant, he contended on appeal that he only paid the purported customer after doing due diligence. He confirmed that he did not refer the matter to the domicile account before authorizing the payments because he was the only teller at the branch at the time. However, he conceded that the Respondent's regulations required him to refer to the domicile branch before approving the payments.
39. After considering the two appeals, the Respondent rejected them. As such, the decision to terminate the Claimants' contracts was upheld.
40. The Claimants' advocates contend that the Respondent did not adhere to the procedure for terminating their clients' contracts. In their final submissions, they contend that the Respondent did not accord the Claimants sufficient time to prepare their defense. However and as has been demonstrated above, the Claimants had more than five (5) days after they were invited for their hearings to prepare their defenses. As such, counsel's contention in this respect is not correct.
41. The Claimants' lawyers also contend that the Respondent did not give the Claimants notice prior to termination of their contracts. It is unclear what counsel intended to communicate by this statement. However, if the notice he alludes to relates to the notification of charges before trial, it is apparent that the Claimants were notified of this through the notice to show cause letters that were served on them.
42. If the complaint on notice is premised on section 35 of the *Employment Act*, it is apparent that the Claimants were dismissed from employment from the dates of their letters of termination for gross negligence. Under the Respondent's Code of Conduct, gross negligence is part of what constitutes the wider infraction of gross misconduct. Further, section 44 of the *Employment Act* categorizes



negligent performance of duty by an employee as gross misconduct for which an employer is entitled to terminate the services of the affected employee without notice. As such, the Respondent's decision to terminate the Claimants' contracts without notice was based on its Code of Conduct as read with the *Employment Act*.

43. There may have been some procedural missteps in processing the release of the Claimants from employment. However, the critical question to consider is whether such missteps should be the reason to upset the employer's decision in the face of the Claimants' admission that they made the impugned payments in breach of the Respondent's policies regarding processing of payments from a non-domicile account. The position would perhaps have been different if their (the Claimants') case was that they adhered to the Respondent's guidelines on non-domicile accounts whilst processing the impugned payments.
44. Having regard the foregoing, the Claimants' counsel's statements in his submissions are without justification. In the premises, the court finds that the Respondent's decision was processed substantially in compliance with the law.

Determination

45. The upshot is that the court finds that the Claimants' contracts were fairly and lawfully terminated.
46. As such, they (the Claimants) are not entitled to the reliefs which they seek through these proceedings.
47. Consequently, the court dismisses the suit with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimants

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

