



Muteshi v Caritas Microfinance Bank Limited (Employment and Labour Relations Cause E487 of 2021) [2024] KEELRC 1324 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1324 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E487 OF 2021**

MN NDUMA, J

MAY 30, 2024

BETWEEN

HARRIET KHABEYI MUTESHI CLAIMANT

AND

CARITAS MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. The suit commenced on 17/6/2021 by way of a statement of claim in which the claimant prays for an order in the following terms:-
 - a. A declaration that the claimant suffered unfair and unlawful summary dismissal.
 - b. Reinstatement to her previous job without loss of benefits.
 - c. Payment of special damages as set out at paragraph 9.
 - d. Damages for pecuniary loss and discrimination.
 - e. Damages for unfair summary dismissal.
 - f. Costs of this suit with interest.

Facts of the claim.

2. CW1 the claimant testified by adopting a witness statement dated 8th June 2021. CW1 stated that she was employed by the respondent on 2/2/2020 as the first operations officer before the bank was fully opened. That she was involved in system and branch set up and policy review and trained other cashiers to be operation officers as the bank grew.
3. That she was then re-assigned to the position of the central operations officer at the Head Office Branch where she worked until she was dismissed from employment.



4. That in August 2020, a customer complained about a debit transaction in the sum of Kshs 380,000/= done in September 2019 about a year to the date of the complaint.
5. That upon checking the account, CW1 established that the transaction originated from a cashier by the name Justus Mauya on 23/9/2019 and the logs showed that the CW1 authorized the transaction.
6. CW1 requested for the physical cheque to confirm the validity of the transaction from that branch vault where the transaction scroll are stored. That the cheque was missing from the batch filed for that day and had not been sighted to date. The cheque book containing the particular leaf was also not found.
7. That questions arose as to who was the customer who requested for the cheque book, who raised the cheque book order and authorized at branch level, who collected the cheque book, and was it signed for as per the procedure?
8. CW1 said the branch did not answer these questions. CW1 said that the internal cheque amount was credited to a different branch in a business account operated by Justus Mauya, the originator of the transaction and the same was withdrawn immediately.
9. CW1 said the other transactions in issue related to a third party portal reversals which was not verifiable. These related to bulk M-pesa payments which the said Justus Mauya was left to solely handle. The amounts were credited to an account number belonging to people known to the transaction originator.
10. That the branch manager wrote an email for the claimant to give an explanation on the transactions in question. The claimant explained in good faith. The claimant was asked to record a statement at central police station. The branch manager without asking the banking fraud unit to investigate the matter asked the claimant to repay the funds which the claimant declined since she had not taken the money.
11. On 27/10/2020, the claimant was given a letter of suspension by the human resource manager. The branch manager was also suspend for an indefinite period on half pay.
12. The claimant stated that she was on 22/12/2020, called to a disciplinary hearing which she attended. CW1 stated that she explained to the committee that she suspected that the authorization of the impugned transaction were done via unauthorized access to her computer since she did not get the physical cheque to confirm the same.
13. CW1 said she had served the bank diligently for a period of five years with no loss of funds and had uncovered numerous cheque fraud; account opening frauds and stopped transactions that would have caused losses to the bank. That her record was clean. That the money withdrawn was deposited in the account of Justus Mauya which shows that he was aware of the transactions and was the beneficiary of the fraud. That the fraudulent M-pesa transactions were also benefited by him.
14. That the bank has not investigated the loss of the cheque records to date.
15. On 27/1/2021, CW1 received a letter of dismissal for gross misconduct. CW1 states that the dismissal was unlawful and unfair. On 17/2/2021, CW1 appealed the dismissal but the bank never acknowledged receipt of the appeal.
16. CW1 subsequently filed the suit and prays to be awarded as prayed.
17. At the time of dismissal, the claimant earned a monthly salary of Kshs 84,000/= and was due to retire at 60 years of age.



18. The claimant prays that she be reinstated to her employment and in the alternative to be awarded terminal benefits and damages set out at paragraph 8 of the statement of claim including:
 - a. 1 month salary in lieu of notice.
 - b. 33 days in lieu of untaken leave.
 - c. Three months half salary not paid during suspension.
 - d. 12 months compensation for the unlawful and unfair dismissal.
19. Under cross-examination CW1 said she was employed on 2/2/2013 and sought to correct an error apparent in the statement of claim regarding the date. CW1 said that in the absence of the transaction records and the cheque which was not provided to her, there was no way of confirming how fraudulent transactions were authorized.
20. CW1 insisted that she needed to see the cheque to defend herself. CW1 said she was not accompanied by any staff at the disciplinary hearing. CW1 said she did not see nor confirm the minutes of the hearing and that she did not agree with the minutes.
21. CW1 said three other staff got last warning yet the cheque originated from them. That the pass word for authorization was not an issue since she did not see the cheque to confirm how the transaction was authorized. CW1 said that the appeal was ignored.
22. CW1 said she was only paid for days worked. CW1 said the trail of the transactions were not given to her to defend herself and no investigations were conducted at all since she did not receive any investigation report. That one Justus was charged with her but she was not allowed to ask him questions.

Defence.

23. RW1 Evalyne Mutuku testified for the respondent. She adopted a witness statement dated 3/3/2022 as her evidence in chief. She also produced list of documents marked exhibit '1' to '6'.
24. RW1 said she knew the claimant well. That she was the Human Resource and Administration Manager of the respondent serving at the head office. That claimant was employed as operations officer on 28/1/2015 earning Kshs 80,000/= per month. That she was confirmed on 10/11/2015.
25. That claimant's primary role as operations officer was to maintain cash limit for the branch and individual cashier, ensure daily reconciliations of cash book and to core banking system, ensure daily reports are actioned; report to operations manager; evaluation repatriation on a daily basis, ensure key rotations are done without compromise, ensure offsite storage for duplicate keys and to do any other duty as assigned.
26. That the position of claimant was redesigned from operations officer to central operations officer by a letter dated 27/9/2015. All other conditions remained the same.
27. That the claimant was implicated in:-
 - a. Authorizing a fraudulent cheque No 104 of Kshs 380,000/= on 16/9/2019 from account No (Particulars withheld) belonging to Divine World Parish, Kayole, posted by Justus Mauya without any call back to the customer as per laid down policies and procedure.
 - b. Authorizing opening of a fraudulent account (Particulars withheld) by Jemiah Moraa Njoroke in which a fraudulent M-pesa transaction was perpetuated by Justus Nyaemo on 16/3/2020 for Kshs 50,817/= which was posted to Jemiah's account and supervised by the claimant.



- c. Authorizing a reversal refund of bulk payment of dividends of Kshs 4,500/= on 19/1/2019 to Jemiah Moraa Njoroke's account.
28. The claimant was suspended on half pay from 27/10/2020. The claimant was called to a disciplinary hearing on 20/11/2020 as per HR Policies and Procedure.
29. On 22/12/2020, the hearing took place. The claimant explained that the account of Jemiah Moraa Njoroke was not fraudulent but activities later conducted in the account were fraudulent. That claimant explained that she did not know who authorized the fraudulent transactions posted by Justus. That the claimant was unable to explain why money that was supposed to be credited to a group account was sent to Moraa Njoroke's account.
30. That claimant did not follow procedures in authorizing the fraudulent transactions but denied having benefited from the same.
31. RW1 said claimant admitted she was negligent in authorizing group commissions to be paid in an individual's account.
32. That claimant also said she suspected that someone had hacked into her system and authorized the irregular activity. RW1 said CW1 could not explain how these transactions could have been done without 3 minutes in which the system requested for a password to log in.
33. RW1 said that CW1 when asked if she was ready to repay the money declined the offer.
34. RW1 said that the committee recommended summary dismissal of the claimant and she was served with a letter of dismissal on 17/1/2021.
35. That on 18/2/2021, the claimant appealed to the ECO and RW1 wrote to her asking the claimant to appeal to the Board but the claimant did not redirect the appeal to the right recipient. On 15/3/2021, RW1 wrote to the claimant asking if she was still pursuing her appeal but she did not respond. That on 4/3/2021 the respondent received a demand letter from the claimant.
36. That the summary dismissal was lawful and fair and the suit be dismissed with costs.
37. Under cross-examination RW1 admitted that the impugned cheque was not found. That the claimant was responsible for making a callback and record the result at the back of the cheque leaf. RW1 admitted that the cheque was necessary for the claimant to defend herself but same was missing. RW1 insisted however that the claimant was solely responsible for authorizing the online transactions. RW1 said investigation report was not before court though it was there. RW1 said the minutes of the hearing were not signed by the claimant and copy before court was not signed by any person.
38. RW1 said claimant was linked to Justus. RW1 said Mpesa policy was not before court. RW1 was not sure if the bank lost money through the alleged fraudulent transactions. That the money belonged to the church.
39. RW1 however insisted that the claimant authorized fraudulent payments and opening of fraudulent accounts. RW1 said the suit be dismissed with costs.

Submissions

40. The claimant filed written submissions on 25/1/2024 and the respondent filed on 21/3/2024 which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:



- a. Whether the summary dismissal of the claimant was for a valid reason following a fair procedure.
 - b. Whether the claimant is entitled to the reliefs sought including reinstatement without loss of remuneration or compensation for the unlawful dismissal and payment of terminal benefits.
41. The claimant in the submissions emphasized the good record kept by the claimant from the date of employment up to the time of indictment for authorizing fraudulent transactions which led to her summary dismissal.
 42. That the complaint about a debit of Kshs 380,000/= was originated by a cashier named Justus Mauya on 23rd September 2019 but the cheque leaf was missing from the bank storage and so there was no evidence to confirm the allegation that the claimant had authorized the transaction. That the respondent was unable therefore to answer the queries raised by the claimant regarding the transaction.
 43. That the other transactions related to 3rd party portal reversals that were not humanly possible to verify. That there was no evidence therefore implicating the claimant regarding the transactions. That there were M-pesa payments which Justus Mauya solely handled. That this was a risk knowingly carried by the bank.
 44. That the claimant fully exonerated self from any wrong doing. That it was clear that the beneficiary of the withdrawn money was Justus Mauya, the cashier and the claimant was not to blame.
 45. That the dismissal was unlawful and unfair and the claimant be reinstated and or compensated in respect thereof.
 46. The respondent in the submissions reiterated the evidence by RW1 that the claimant was guilty of gross misconduct comprising authorizing fraudulent debit of cash account and reversal of Mpesa transactions. That the claimant was given opportunity to explain herself but did not give any satisfactory explanation. That claimant was offered opportunity to repay the money but declined. That the respondent had no alternative but to summarily dismiss the claimant from employment.
 47. Upon a careful consideration of the facts of the case, the court is not satisfied that the respondent proved on a balance of probability that the claimant was guilty of authorizing a fraudulent cheque of Kshs 380,000/= since the said cheque was missing from the bank storage and there was therefore no evidence as to who had countersigned the cheque at the bank to authorize payment of the same to a business account of one Justus Mauya who in any event was an employee of the respondent. It was clear that Justus Mauya had stolen the money for his benefit and no evidence linked the claimant at all to that fraudulent transaction.
 48. Furthermore, it was not humanly possible and no evidence was offered to show that the claimant had authorized and/or pertained in reversal of bulk Mpesa, cash transactions. Again, the respondent failed to adduce any satisfactory evidence in that respect.
 49. As regards the alleged opening of fraudulent accounts, RW1 did not table any satisfactory evidence to incriminate the claimant, in those impugned transactions. There was no investigation report tabled before court by the audit and or any fraud departments which had participated in the investigations if indeed that had happened.
 50. RW1 did not impeach the testimony by CW1 that she had a very clean record at the bank for the 5 years period she had served as an operations officer and central operations officer.



51. Indeed, RW1 did not rebut the evidence that CW1 had played a key role in the opening of the bank; putting systems in place and training of key staff to run the bank.
52. The court is satisfied with the explanation offered by the claimant that the summary dismissal was wrongful and unfair and was in violation of sections 36, 41, 43 and 45 of the [Employment Act](#) 2007.
53. The show cause and the hearing did not serve any useful purpose in the absence of the primary documents required by the claimant to defend herself. The very absence meant that the respondent had no valid reason to summarily dismiss the claimant and the failure to provide the documents to the claimant to defend herself meant that the procedure that led to the decision to summarily dismiss her from employment was flawed and unfair.
54. Accordingly, the summary dismissal of the claimant was unlawful and unfair and in violation of section 36, 41, 43 and 45 of the [Employment Act](#), 2007. The claimant is entitled to remedies provided under section 49 of the Act.
55. In this respect the court has considered the provision of section 49(1) and (3) to determine whether the remedy of reinstatement is suitable in the circumstances of the case.
56. The court has established that even though the claimant was a good employee with a clean record for a period of five (5) years, in the banking industry. mutual trust of employee and employer is paramount. The wrongful accusation and dismissal of the claimant by the respondent had irreversibly broken this trust. It would not be reasonable in the circumstances to reinstate the claimant due to the closely, nit environment of the bank in the branch she worked or at the headquarters.
57. This case is appropriate for the award of compensation in terms of section 49(1)(2) and (4). In this respect, firstly, the claimant is entitled to payment of one-month salary in lieu of notice in the sum of Kshs 84,000/=.
58. With regard to compensation, the court has considered the case of [Johana Kipngeno Chebongei v Bob Morgan Services](#), Cause No 2623 of 2016 in which the court awarded the claimant the equivalent of six months' salary in compensation for unlawful and unfair dismissal and the case of [Alfred Sagini Nyagaka v East African University](#) Cause No 55 of 2018 which has similarities with the present matter.
59. The court has considered the clean record kept by the claimant before she was wrongly dismissed; the role the claimant had played in establishing the 1st branch systems and training the staff of the bank. The fact that the claimant was employed on permanent and pensionable basis and was to retire upon attainment of 60 years. The claimant had not obtained alternative employment at the time of hearing the case. The claimant suffered loss and damage and was not paid terminal benefits or compensation for the unlawful and unfair summary dismissal.
60. The claimant was blamed for mistakes done by others who were not dismissed from the bank and felt discriminated upon in the circumstances of the case and awards the claimant the equivalent of eight (8) months' salary in compensation in the sum of (84,000 x 8) = Kshs 672,000/=.
61. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:-
 - a. Kshs 672,000/= in compensation
 - b. Kshs 84,000/= notice pay
Total award Kshs 756,000/=
 - c. Interest at court rates from date of judgment till payment in full.



d. Costs of the suit.

DATED AT NAIROBI THIS 30TH DAY OF MAY, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Ms. Guserwa for claimant

Mr. Kiptum for respondent

Mr. Kemboi, Court Assistant

