



REPUBLIC OF KENYA



KENYA LAW
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**Sande v NCBA Bank Kenya PLC (Cause 269 of 2020)
[2023] KEELRC 808 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 808 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 269 OF 2020
M MBARÚ, J
MARCH 28, 2023**

BETWEEN

BEATRICE CAROLINE ACHIENG SANDE CLAIMANT

AND

NCBA BANK KENYA PLC RESPONDENT

JUDGMENT

1. The claimant was employed by Commercial Bank of Africa, as it was then called on August 3, 2012 on renewable short term contracts. The contract was converted to permanent and pensionable terms on February 3, 2014.
2. The claimant started as the receptionist in the commercial services department and later she joined the union and her employment became governed under the CBA on permanent and pensionable terms.
3. The claimant was then deployed to the Logistics Assistant a role she held until the September 11, 2018 when she was unfairly and unlawfully terminated from employment for contravening the Bank's Group Human Resources Policy (the Policy).
4. On February 1, 2018 the claimant received letter reassign her to a new role in the security and investigations department. In the said letter, the respondent alleged that there were some payments which the claimant had handled while working within the purchasing and vendor management unit of commercial services which were under investigations. On February 28, 2018 the claimant received another letter extending her redeployment in the security and investigations unit.
5. On March 1, 2018 the claimant received another letter inviting her to a disciplinary hearing following allegations of soliciting and or receiving funds from some vendors of the bank. The respondent alleged that there were concerns that the claimant had solicited and received funds by way of Mpesa transfers amounting to ksh 129, 650 on various dates from directors of Sideways Tours and Care Hire, Brandon Tours and Travel Ltd and Delights Cabs who were providing taxi services to the bank.



6. The respondent alleged that such action contravened the bank policy and without any warning as required under the CBA hurriedly fabricated charges used to terminate the claimant's employment for no good cause. This was unlawful, unfair and invalid.
7. The claimant is seeking the following;
 - a) An order of reinstatement back into employment without loss of benefits;
 - b) Compensation at 12 months at Ksh 122,414 x 12 total 1,468,968;
 - c) Lost salaries and opportunities due to unfair termination of employment Kshs 2,693,108;
 - d) Damages for mental anguish and social degradation ksh 1,200,000;
 - e) Notice pay Ksh 122,414;
 - f) Costs of the suit.
8. The claimant testified in support of her case that she was employed by the respondent as a receptionist with duties of receiving visitors and corporate clients and taking calls from outside and from staff members as appropriate. In the year 2014 she joined the union and her employment became governed under the CBA and which allowed review of employment terms periodically as agreed between the union and Kenya Bankers Association.
9. The claimant testified that in 2014 she was given a new position of Logistics assistant, which required handling of staff accommodation, flight booking, staff transfers, courier, consultant's bookings and facilitating payments of Logistics services. In this regard, the claimant was handling logistics and paid several vendors and particularly dealt with 4 vendors who were directors of Sideways Tours and Car Hire Limited, Brandson Tours and Travel Limited and Delight Cabs who were providing taxi services to the respondent. The directors were;
Noah Karanja of telephone number 0720...993; Jim Irandu of telephone number 0722...902;
Newton Kagundu of telephone number 0721...413; and Danson Kamau of telephone number 0720...847.
10. The claimant testified that she related well with many customers of the respondent and as a result of the good working relations did at times exchange gifts during festivities or any other time. She remained in constant communication and dealings with some customers and could support each other at times of distress. Upon such relations, there were exchanges of Mpesa transfers with the 4 vendors.
11. On February 1, 2018 as a result of the Mpesa exchanges with these vendors, the claimant received a letter referring to these payments received while she was working in the Purchasing and Vendor Management unit of Commercial Services and got redeployed to the Security and Investigations unit to assist with investigations.
12. On March 19, 2018 the claimant was invited to attend disciplinary hearing to show cause why she had solicited and received funds in the form of Mpesa transfers amounting to ksh 129, 650 from the year 2013 to 2017 from vendors. The disciplinary hearing was held on March 22, 2018 and where the claimant explained to the panel that she had not solicited for money from the vendors and asked that the vendors be interrogated. Some transfers had been received while working at the reception on November 15, 2013 and another on June 9, 2014 from Noar karanja for ksh 28, 000 to demonstrate there was no solicitation. 3 of the vendors gave statements confirming that monies transferred to the claimant was not meant to influence anybody and were a friendly token.



13. The claimant testified that it was the bank practice to have staff receive gifts and presents in various forms and while serving at the reception she witnessed various staff receiving bouquets of flowers, gift hampers of various amounts some including expensive items and most of which she could not ascertain the monetary worth. It was the bank policy to declare gifts worth over Ksh 8, 000 but she never observed such practice being implemented. For her she never received such physical gifts save for the Mpesa transfers on a friendly basis because she had come to relate well with the vendors and at times of festivities, need and as friends they exchanged money transfer. She did not declare such money transfers because there were not physical gifts to be declared as stated in the bank policy. She explained the same matters at the disciplinary hearing but the respondent went ahead and terminated her employment which was unfair and not justified in the circumstances.
14. The claimant also testified that the vendors she was accused of having received funds from were never called to testify as to the nature of Mpesa transfers and the reasons which was not based on soliciting of such transfers. The Bank Group Human Resources Management Policy reviewed and circulated in October, 2016 under Clause 5.2.7 on Personal Gifts, the policy appreciates that the common practice for customers, contractors and suppliers to give gifts to members of staff at Christmas or other appropriate occasions provided that the gifts are of value of less than Kes 8, 000 or its equivalent and cannot influence the individual receiving them, then these are Acceptable.
15. Receiving gifts was therefore not an offense or categorised for gross misconduct. The practice of receiving gifts within the respondent bank was common even for top management and it was extremely difficult for any employee to know the exact value of a gift so that one may disclose the gifts which are of value more than Ksh 8, 000. It was unfair for the respondent to use such reason to terminate employment and an order of reinstatement should issue.

Response

16. In response, the respondent's case is that in the year 2019 the NIC Bank Kenya PLC (NIC) and Commercial Bank of Africa Limited commenced the formal process of amalgamation by a transfer of business and assets and the business and assets of NIC and Commercial Bank of Africa were transferred to the respondent from October 1, 2019.
17. The claimant was employed as the logistics assistant until September 11, 2018 when her contract was lawfully terminated. While working in the Purchasing and Vendor Management Unit of the Bank, the claimant processed a number of payments. These payments were under investigations by the Security and investigations Unit and on this basis, on February 1, 2018 the claimant was reassigned to the unit to assist with investigations.
18. In a letter dated March 19, 2018 the claimant was invited to the disciplinary hearing to respond to allegations that she solicited and received funds from the respondent's taxi service providers as a personal benefit in order to process their respective payments; she did not disclose to her line manager and the head of Business function as she was required to do that she had received sh 129,650 on her Mpesa account number 0721...312 from directors of 3 taxi service providers; and that the claimant's conduct was in breach of Section 10.2.11 of the respondent's Group Human Resources Management Policy Guidelines (the Policy) as relates to gifts, meals and entertainment from outsiders; Section 5.2.7 of the policy on personal gifts; and Section 2.2.2 of the Procurement and Vendor management Policy Guidelines on conflict of interest.
19. The claimant was notified of the disciplinary hearing date where she attended with her representative on March 22, 2018, she was notified of the right to appeal and which was dismissed and employment terminated on September 11, 2018 with payment of all salaries for the entire period.



20. The union reported the matter to a conciliator whose decision was fundamentally wrong and untenable. The disciplinary hearing was not based on criminal acts but breach of the policy and the claimant was accorded the due process and the claims made should be dismissed with costs.
21. In evidence, the respondent called Angela Njoroge the legal and company secretary who testified that based on the records and information received from the respondent and having joined the respondent in July, 2020 after the claimant's employment terminated has gone through the materials and well versed to testify for the respondent.
22. Ms Njoroge testified that the respondent is a financial services institution offering banking products and services in the region. As legal counsel, she offers legal advice to the respondent and with regard to the claimant, she was found to have received Mpesa payments from vendors while working in the Purchasing and Vendor Management Unit of the commercial Services Department. The claimant processed various payments to taxi service providers, Sideways Tours and Care Hire Limited, Brandon Tours & Travel Limited and Delight Cabs. Payments to these vendors were under investigations by the Security and Investigations unit on the basis that the claimant may have solicited and received money from these vendors in order to process their invoices.
23. In order to assist with the investigations, on February 1, 2018 the respondent reassigned the claimant to the unit on full time basis where she was expected to cooperate and assist the unit with investigations.
24. From information received, the respondent had reason to believe that the claimant solicited and received funds in the form of Mpesa transfers amounting to ksh 129, 650 on various dates from the year 2013 to 2017 from directors of the 3 taxi service providers. On this basis the respondent invited the claimant to the disciplinary hearing through notice dated March 19, 2018 and she attended with her representative and allowed to give her responses and the right of appeal.
25. Ms Njoroge testified that during the disciplinary hearing, the claimant admitted to receiving money by way of Mpesa to her account on phone number 0721...312 from the 3 taxi service providers, Sideway Tours & Car Hire Limited, Branson Tours & Travel Limited and Delight Cabs. The claimant denied soliciting for the money from the vendors in order to influence payment of their invoices and in her view, the monies received was negligible compared to the payments she made to the vendors over the stated period. The claimant accepted that she was aware of the respondent Policy on receiving of gifts and presents but did not disclose to her line manager as required. The fact of the claimant receiving the amount of ksh 129, 650 to her Mpesa account from vendors was therefore not challenged. The payment exceeded Ksh 8, 000 which she was supposed to disclose to her line manager and hence formed good and justified reasons for termination of employment.
26. At the close of the hearing, parties filed written submissions.
27. The claimant submitted that it was the policy of the respondent that an employee may not solicit or accept directly or indirectly any gift, meal, favour, service, entertainment or other thing of monetary value from a person or institution that does or seeks to do business with the respondent. any receipt of such gift worth more than ksh 8,000 including hospitality or benefits or any kind falling within disclosure definitions received from a third party under the policy must be disclosed to the line manager and the head of the business Function who was to advise whether it was in order to accept them or not. The nondisclosure of gifts then became an offence which may result in disciplinary action.
28. The claimant also submitted that under clause 2.2.2 of the Procurement and Vendor Management Policy Guidelines, it was a conflict of interest for an employee to solicit from suppliers' favours, commissions, gifts and other forms or remuneration.



29. The claimant was accused of receipt of Mpesa payments from vendors but such were friendly gifts over time and were not solicited and no evidence was called to this effect. the disciplinary process was hurried and the respondent failed to treat the claimant well all meant to terminate her employment contrary to what was held in the case of *Boniface Musyoka Kyambo v DPL Festive Limited* Cause No 129 of 2017. The claimant was not issued with any investigations report. No findings of fault existed at the time the disciplinary process commenced as held in *Shankar Saklami v DHL Global Forwarding (K) Limited* Cause No 562 of 2013. In the case of *Kelvin Birundu Monyancha v Ole Sereni Hotel Limited* Cause No 2000 of 2017 the court held that where the employer claimed that the employee was seen stealing through CCTV but failed to produce it in evidence, such resulted in unfair termination of employment. The CCTV footage produced was not dated and the employee had not been allowed to view it.
30. In this case, the claimant was not given the investigations report. This has not been produced to incriminate her and this resulted in unfair termination of employment.
31. The respondent submitted that there were substantive justification under Section 43 and 45 of the *Employment Act, 2007* (the Act) to terminate employment as held in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. the claimant was issued with notice of the allegations facing her and was allowed to respond and she admitted to receiving money from the respondent's taxi service providers and she did not disclose to her line manager as per the policy and on this basis, on these responses, the respondent was justified to terminate employment as held in *David Gichana Omuya v Mombasa Maize Millers Limited* [2014] eKLR.
32. The policy of the respondent required that all gifts received over Ksh 8, 000 in value they had to be disclosed. The claimant received a total Ksh 129, 650 without making any disclosures and upon the matter being investigated, it emerged that the payments were received from vendors providing services to the respondent but she did not disclose the same. When put to explain, the claimant admitted to receiving the same and that she was aware of the policy but failed to act as required. Such was also in conflict of interest because, the claimant was processing the service providers invoices for services rendered yet failed to disclose the receipt of money gifts and for breach of policy, termination of employment was justified as held in *Kenfreight [EA] Limited v Benson K Nguti* [2016] eKLR. The respondent being a bank required the employees to be honest and ensure no conflict of interests as held in *Michael Njoroge v Barclays Bank Limited & another* [2021] eKLR.

Determination

33. In a letter dated September 11, 2018 the respondent terminated the claimant's employment on the reasons that following investigations and disciplinary hearing, it was established that she had solicited and or received funds in the form of Mpesa transfers amounting to Ksh 129, 650 on various dates between 2013 and 2017 from the directors of Sideways Tours & car Hire Ltd, Brandson Tours & Travel Ltd and Delights Cabs who were providing taxi services to the respondent bank.
34. In response to the allegations made against the claimant and also what formed her grounds of appeal against the decision to terminate employment, the claimant stated as follows;

"I would like to clarify that while it is true that there were some transfers to my M-pesa account from the directors of the said companies, I wish to categorically reaffirm that the money was not transferred to me as a result of solicitation as alleged by the Bank. In fact, some of the transfers were done way back in 2013, long before I official started dealing with these vendors via M-pesa to my account on November 15, 2013.



...

In the Banks Group Human Resources Management Policy guidelines, it is evidently clear that an employee is allowed to receive gifts, meals, favour, service, entertainment or other things of monetary value of not more than Kes 8, 000. Looking at the transactions in question from 2013-2017, there are only 5 instances where more than Kes 8,000 was received in my M-pesa

account and I wish to state that on those instances, these were sent to me for other friendly reasons and not work related gifts or solicitation for payment or otherwise. In fact on 26th of February 2016 that day I received Kes 10, 000 from Noar Karanja, I was actually away on leave and the Bank can confirm that from the leave/attendance records. That Group Human Resources management policy 5.2.7 (personal Gifts) it states as follows: That it is common practice for customers, contractors and suppliers to give gifts to members of staff at Christmas or other appropriate occasions providing the gifts are of a value of less than Kes 8, 000 or its equivalent an cannot influence the individual receiving them, then these are acceptable. ..."

35. The claimant was therefore very clear on the applicable policy. As an employee of the respondent, receipt of gifts was allowed save, gifts worth more than Ksh 8, 000 were to be disclosed to the line manager.
36. The claimant does not deny that the Policy in place in this regard had been brought to her attention and was conversant with its contents. She however went ahead and received gifts from service providers who were engaged by the respondent and was gifted with over Ksh 10,000 all amounting to Ksh 129,650 but failed to disclose as required of her under the Policy.
37. In the case of *Bernard Ongeta Mburu v Simba Apparels (EPZ) Limited; Tailors and Textile Workers Union (Interested Party)* [2022] eKLR the court held that an employee who was in fundamental breach of the employment contract could not claim that there was unfair termination of employment. an employee who was in breach of the confidentiality and trust of the employer by going contrary to matters addressed in the policy cannot claim the protection under the law by claiming termination of employment as held in *Josephine Ndirima v Medecins Sans Frontiers Belgium* (Cause 454 of 2022) [2022] KEELRC 3814 (KLR) (19 August 2022) (Ruling).
38. The claimant in her response was of the view that she had not solicited for any monies from the service providers. That in fact, she had been receiving such monies from them way before from the year 2013 when she was at the reception and not only when she joined the Logistics department. The claimant gave the example of receiving Ksh 10, 000 from Noar Karanja on February 26, 2016 while on leave.
39. It was not wrong for any employee to receive gifts from customers and service providers. This was an accepted practice of the respondent. However, Ms Njoroge for the respondent testified that, the policy which allowed receipt of gifts gave the conditions that all such gift valued above Ksh 8, 000 had to be disclosed to the line manager which the claimant failed to disclose. Put to account, the claimant in her response admitted to receipt of over Ksh 8, 000 from taxi service providers and she never disclosed. Her case was that other employees received gifts of higher value but never disclosed. However, the claimant cannot be found to justify her conduct and breach of the given policy because other employees were receiving gifts yet they did not disclose. This defence is lame and cannot be used to justify her own misconduct. How the respondent or the other employee addressed receipt of gift cannot justify her breach of the given policy.



40. An employee who deliberately goes out and acts in breach of the employer's policy cannot avoid the sanction issued and including summary dismissal as required under Section 44(3) of the Act as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.
41. On her own admission that she had received monies from various service providers as gift or on friendly terms but failed to disclose to her line manager so as to be advised on what to do with such gifts, the claimant being in breach of policy, the sanction issued cannot be faulted. However the respondent took time to undertake investigations and indeed had the vendors and service providers file statements in this regard. All implicated the claimant by confirming that indeed they had sent various amounts of money to her M-pesa. That was direct and indirect receipt of gift valued at more than Ksh 8, 000 in breach of policy.
42. Termination of employment in this case is found justified.
43. The claimant cannot seek reinstatement in a case where employment terminated for good cause.
44. The court finds no matter of breach of the claimant's constitutional rights to a fair hearing to justify any award of damage.
45. Accordingly, the claim herein is found without merit and is hereby dismissed save each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF MARCH, 2023.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

