



**Tanui v Family Bank Limited (Cause 1931 of 2017)
[2023] KEELRC 950 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 950 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1931 OF 2017
BOM MANANI, J
APRIL 27, 2023**

BETWEEN

DAVID KIPKETER TANUI CLAIMANT

AND

FAMILY BANK LIMITED RESPONDENT

JUDGMENT

1. This is a claim for unfair termination of a contract of employment. The claimant, who until October 10, 2016 was an employee of the Respondent, alleges that the Respondent unfairly terminated his contract of service. The claimant has therefore sued the Respondent seeking for inter alia, an order that the contract of service between the parties was unfairly terminated.
2. The Respondent does not admit liability for the claim. It is the Respondent's case that the claimant was lawfully relieved of his employment.

Claimant's Case

3. Through his amended Statement of claim, the claimant has averred that sometime in September 2010, the Respondent engaged his services as an Operations Officer. It is the claimant's case that he rose through the ranks to the position of Branch Supervisor, a position that he held until his contract of service was terminated on October 10, 2016.
4. The claimant states that for the duration he served the Respondent, he was a high performer. The claimant asserts that the Respondent acknowledged this fact through the periodic accolades it accorded him.
5. In an apparent turn of events, the claimant asserts that on August 24, 2016, the Respondent issued him with a notice to show cause letter. That this letter triggered a disciplinary process which resulted in the termination of the employment relation between the parties.



6. The claimant maintains that the Respondent had no valid reason to terminate the contract of employment between the parties. It is the claimant's case that the reason for terminating his employment was not related to his conduct, capacity or compatibility. That the incident for which he was dismissed occurred before he reported at the Kilimani Branch of the Respondent bank. The claimant further contends that he was dismissed without being issued with the requisite notice to terminate employment in contravention of the law.
7. The claimant asserts that the Respondent ignored his response to the notice to show cause. He accuses the Respondent of having acted in haste in terminating the employment relation between the parties.
8. The claimant further argues that although he challenged the decision to terminate his employment on appeal, the Respondent did not grant him the chance to be heard. In effect, the claimant asserts that the manner in which the Respondent handled the process of separation of the parties was a travesty of justice without regard for the Constitution, the Employment Act and the principles of natural justice.

The respondent's case

9. The Respondent does not deny employing the claimant. It is the Respondent's case that after the long period of service, the Respondent trusted that the claimant had acquired sufficient expertise to transit to a higher position in the Respondent institution. Because of this trust, the Respondent appointed the claimant to the position of Operations Supervisor. The Respondent states that it granted the claimant the opportunity to serve in this position because the claimant had exhibited an understanding of the Respondent's operations.
10. The Respondent states that after working in its operations department for six years, the claimant knew that it was against the bank's operations policy for an employee to make unauthorized adjustments to the Respondent's general ledger and superagency accounts. The Respondent states that despite this knowledge, the claimant sanctioned a series of irregular transactions on these accounts on diverse dates between 2015 and 2016.
11. The Respondent also accuses the claimant of failing to take corrective measures in respect of one of the Respondent's customer's account to the detriment of the Respondent. It is the Respondent's case that despite the claimant being instructed to recover some Ksh 115,500.00 from this account, he disregarded these instructions.
12. According to the documentary evidence tendered by the Respondent, the questionable transactions in issue were partially triggered by a cheque for Ksh 115,500.00 which was deposited by one of the Respondent's customers on February 12, 2014. The cheque was to have matured on February 14, 2014. However, on February 13, 2014, the said cheque was faulted due to an error in the scanning of its code.
13. From the investigation report produced in evidence by the Respondent, the Respondent's staff was asked to address the code issue and rescan the cheque for clearing. However, these instructions are said not to have been acted on in time.
14. By the time customer came for the cash the cheque had not been presented for clearing due to the failure to rescan it for clearing. According to the report, on realizing the mistake, the Respondent's staff credited the customer with Ksh 115,500.00 and debited the suspense mismatch account with a similar figure. This entry remained in the suspense mismatch account until it was flagged by the Respondent's Head of Operations personnel.
15. There was also a wrong posting of a superagency Mpesa transaction of Ksh 100,000.00 on December 21, 2015. Instead of posting the transaction on the Respondent's superagency account, the member of staff handling the issue posted it on the Mpesa Main Bulk Fund account. On the following day, the said



- employee is said to have debited the Respondent's cash account and credited the superagency account with Ksh 100,000.00 in a bid to correct the wrong posting. The audit investigation report shows that the claimant authorized this latter transaction.
16. According to the audit report, several months down the line on May 31, 2016, the wrong entry of Ksh 100,000.00 to the Mpesa Main Bulk Fund account was flagged by the ABC unit. The branch was asked to correct the anomaly. In reaction to this directive, the claimant is said to have reversed the entry by debiting the Mpesa Main Bulk Fund account and crediting the superagency account. This is said to have created a hanging transaction of Ksh 100,000.00 in the superagency account.
 17. It is the Respondent's case that the hanging Ksh 100,000.00 in the superagency account created an opportunity for several other irregular debits and credits in a series of the Respondent's accounts. The questionable posts and debits are said to have been made to the Respondent's branch float, suspense and mismatch, superagency and sundry accounts.
 18. According to the audit report relied on by the Respondent, all these latter transactions occurred at the Respondent's Kilimani branch during the currency of the claimant's tenure as branch supervisor at the branch. From the report, most of the postings were either by the claimant or had his approval. All the postings according to the audit report involved movement of Ksh 100,000.00 and Ksh 15,500.00 from one account to another.
 19. It is the Respondent's case that the claimant together with one Gloria Ogaro, were instructed by the Head of Operations to recover the Ksh 115,500.00 from either the bank's client who had drawn the funds or the employees who had triggered the erroneous transaction. However, it is indicated that the two did not implement the instructions.
 20. Further, the Respondent states that the entries aforesaid in the Respondent's superagency and sundry income accounts resulted in unexplained variances. According to the audit report relied on by the defense, this is because manual vouchers to support the postings were not maintained.
 21. The details of the defense case are traceable in the several documents filed by the Respondent to include: the statement of defense; the defense witness statement; the audit investigation report; the show cause letter; and the other documents introduced in evidence as defense exhibits. This is also partly supported by the oral evidence on record.
 22. The Respondent's case is that as a result of the above events, the claimant was subjected to disciplinary action and eventually terminated from employment. The Respondent states that in terminating the claimant's contract, it observed all the procedural safeguards provided in law. Consequently, the Respondent posits that the claimant's dismissal from employment was legitimate both on account of reasons and procedure for termination.

Issues for determination

23. The parties did not file a joint list of agreed issues. Each one of them framed their own issues. Although the claimant appears to have framed several issues for determination, an analysis of them in comparison with the issues framed by the Respondent yields the following questions for determination:-
 - a) Whether the claimant's contract of employment was unfairly terminated.
 - b) Whether the claimant was entitled to notice before termination.
 - c) Whether the parties are entitled to the reliefs set out in their respective pleadings.



Analysis

24. I have considered the evidence on record on the issues at hand. It is clear to me that the initial mishandling of the cheque for Ksh 115,500.00 happened before the claimant joined the Respondent's Kilimani branch. However, the effects of the loss arising from the said cheque persisted into the period when the claimant was serving at the Kilimani branch. It is how the claimant handled the process of recovery of the aforesaid amount rather than how the deficit arose in the Respondent's books that was the issue that confronted the claimant.
25. The issue against the claimant in respect of this cheque was his failure to implement the Respondent's instructions to recover this money from either the customer who had drawn the funds or the employees who were responsible for the error that led to the client drawing the funds before the cheque was cleared. The instructions to make this recovery were issued to the claimant during his term at the Respondent's Kilimani branch. The claimant does not deny this fact.
26. The charge of failure to recover the Ksh 115,500.00 was put to the claimant in the notice to show cause dated August 24, 2016. In the minutes of the disciplinary session the claimant is quoted as admitting that he had been instructed to recover this money but had failed to do so for a considerable amount of time. Instead, he had authorized some entries in respect of records relating to this transaction without approval of the Respondent. In his own words before the disciplinary committee, the claimant is quoted as saying "we did a mistake". In his response to the notice to show cause, the claimant appears to indicate that he debited the sundry account with Ksh 15,500.00 and credited the suspense mismatch account in order to clean the account as efforts were made to recover the Ksh 115,500.00 which he had been tasked to recover but was yet to.
27. In relation to the Ksh 100,000.00 Mpesa wrong posting, the claimant states that the cashier was asked to trace the source of the short. After it became apparent that they were unable to establish the source of the short, the cashier was asked to transfer the post to the suspense mismatch account.
28. In response to a question asked by one John whether the procedure adopted had regard for integrity, the claimant is quoted as saying "No, it is not". In response to a question by Jayne whether it was appropriate to address the problem by posting (suspending) it to another account, the claimant is quoted as saying "a difference should be booked but we opted to suspend the Mpesa issue because it was a December issue".
29. Sections 41, 43, 44 and 45 of the *Employment Act* require an employer to only terminate the services of an employee for valid reason. In the context of the claimant's case, the Respondent asserts that it summarily dismissed him for violating the Respondent's operations policies and procedures.
30. In my view, the evidence on record in respect of the two impugned transactions is a clear manifestation of failure by the claimant to observe the Respondent's operations procedures in handling the anomalies. There is evidence (and the claimant admits) that the erroneous debits and credits relating to the Ksh 100,000.00 Mpesa transaction happened under the claimant's watch and with his approval. There is also evidence that the claimant failed to follow the Respondent's instructions to recover the sum of Ksh 115,500.00 that had arisen from the erroneous transaction of 2014.
31. Admission of fault by the claimant in this respect is implicit in his response to the notice to show cause which was produced in evidence by the Respondent. In the response, the claimant indicates that his actions were not with ill intent and that he was not going to repeat them. Why would the claimant commit not to repeat the impugned acts if they were regular? In his letter of appeal dated October 10,



- 2016, the claimant concedes that he acted in breach of the Respondent's operations procedures but states that this was not motivated by ill intent.
32. The totality of this evidence leaves no doubt in my mind that the claimant's conduct fell short of appropriate conduct. The infractions by the claimant fall within acts that constitute gross misconduct under section 44 of the *Employment Act*. Failure by the claimant to uphold the Respondent's operations procedures amounted to failure by him to heed the employer's lawful instructions. The failure by the claimant to recover the Ksh 115,500.00 contrary to instructions by the Respondent amounted to willful neglect of duty.
 33. As demonstrated in the earlier parts of this decision, during the disciplinary session, the claimant admitted to failing to uphold some of the Respondent's operating procedures. In my view therefore, the Respondent had valid reason to terminate the claimant's contract of employment.
 34. On whether the decision to terminate the claimant's contract was in accordance with due process, I hold that it was. There is evidence that the claimant was issued with a notice to show cause dated August 24, 2016. The letter provides, in detail, the charges against the claimant. There is also evidence that the claimant was invited for a disciplinary session by the Respondent's letter dated September 2, 2016. The letter set out the charge against the claimant in clear terms. The letter further indicated that the particulars of the accusations against the claimant were as set out in the notice to show cause against him.
 35. The letter inviting the claimant to the disciplinary session reminded him of his right to be accompanied by a witness who should be a fellow employee. The document shows that the claimant received the invite on September 5, 2016, two days before the disciplinary session scheduled for September 7, 2016.
 36. There is also evidence that the disciplinary session took place on September 7, 2016. The raw minutes of the session were produced in evidence. The attendance register for the session is annexed to the minutes. The claimant signed the attendance register thereby authenticating the minutes. It is not a legal requirement that minutes of a disciplinary session be typed for them to be valid as suggested by the claimant.
 37. The record also shows that the claimant was issued with the letter of termination on October 10, 2016, about three days after close of the disciplinary session. He lodged his appeal on the same date.
 38. In the letter of appeal, the claimant once again admits that there were some lapses on his part in implementing the Respondent's operations procedures. However, he states that the lapses were not actuated by bad intention on his part and that the Respondent did not suffer actual financial loss as a result.
 39. In the appeal, it is noteworthy that the claimant did not challenge the finding of the disciplinary panel. The only issue he raised was that he felt that the summary dismissal was harsh as it did not take into account his long service with the bank. The claimant was beseeching the Respondent to lift the summary dismissal and permit him to resign since a summary dismissal was inimical to prospects of getting re-employed. It is this appeal that the Respondent rejected as raising no new grounds on the merits of the case.
 40. My view of the process is that it was substantially within the tenets of sections 41, 43 and 45 of the *Employment Act*. I see no lapses in the process. Accordingly, I find that the Respondent observed due process in terminating the claimant's contract of service.
 41. As regards whether the claimant was entitled to notice before his dismissal from employment, the answer is in the negative. It is noteworthy that the claimant was summarily dismissed from



employment. This is a dismissal under section 44 of the *Employment Act*. Under this section, once the employer reaches the conclusion that an employee is guilty of gross misconduct, he is entitled to terminate the services of such employee without notice.

Determination

42. The Respondent's termination of the claimant's contract of employment was for valid reason and in accordance with due process.
43. The current action by the claimant against the Respondent is therefore without merit. It is dismissed with costs to the Respondent.

Dated, signed and delivered on the 27th day of April, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the claimant

.....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

