



REPUBLIC OF KENYA



KENYA LAW
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**Cheti v SBM Bank (Kenya) Ltd (Cause E601 of 2020)
[2023] KEELRC 2762 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2762 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E601 OF 2020
DKN MARETE, J
OCTOBER 24, 2023**

BETWEEN

ODERAH OSCAR CHETI CLAIMANT

AND

SBM BANK (KENYA) LTD RESPONDENT

JUDGMENT

1. This matter was originated by way of a Claimant's statement of Claim dated 12th March, 2020. The issues in dispute are herein cited as;
 1. Wrongful/Unlawful/Unfair Termination From Employment Of Odera Oscar Cheti
 2. Underpayment Of Salary And Housing Allowance
 3. Unpaid Leave Allowance
 4. Leave Days Not Taken
 5. Disturbance/transport Allowance
2. The Respondent in a Response to Memorandum of Claim dated 13th October, 2021 denies the Claim and prays that this be dismissed with costs.
3. The Claimant's case is that the Claimant is covered by a valid Recognition Agreement (RA) and he is a beneficiary of a negotiated Collective Bargaining Agreement by the union and Kenya Bankers Association whereby the Respondent is a member bank. The RA is clear that an employee cannot be discriminated either by the employer or union in enjoyment of CBA terms based on his/her union membership.



4. The Claimant's further case is that the unionisable employees in the banking industry include; Section Heads/Supervisors/Officers, checkers, Clerks and Copy typists, Technical and Subordinate staff. Their job profiles are well captured in the CBA. The Claimant in this dispute was a clerical staff.
5. The Claimant's other case is that the Collective Bargaining Agreement has clear provisions for disciplinary procedure on grounds of misconduct under Clause A5 of the CBA before dismissal and/or termination and all other terms and conditions of employment; including basic salary, Housing allowance, leave days entitlement, annual leave allowance and transfer allowances.
6. The Claimants further case is that he was employed *vide* a letter of appointment dated 7th January, 2014 ref. 13.01.204 as a Cashier and posted at Diani Branch at a Gross Salary of Kshs.35,000/= which was increased to Kshs. 35, 875/= in the month of March 2014. The Claimant was confirmed on permanent and pensionable basis by a letter dated 29/1/2014. The Claimant remuneration was reviewed with effect from May 2018 to a consolidated salary of Ksh.77,657/= per month.
7. He avers that he was discharged of his duties as a teller until 1st March 2018. From 2nd March, 2018, the Claimant was removed and denied access rights from the bank core system until he was terminated on 14th December, 2018. He could not even access e-mails. He reported to office without any duty allocation as a teller.
8. Again, that on March 1, 2018, the Claimant paid a customer withdrawal cheque amounting to Kshs.458,606.00 after it was approved and authorized by the supervisor. On 12th March, 2018, he was issued with a show cause letter alleging misconduct. He responded and denied any wrong doing as he followed due process when making the payment. The supervisor on the face of the cheque wrote and signed "OK TO PAY". The claimant was called for a disciplinary hearing by a letter dated 3rd April, 2018 and the Claimant exonerated himself from any misconduct. The Claimant was issued with a warning letter dated 18th April, 2018 and the matter rested.
9. The Claimant's other case is that on 5th July, 2018, the Claimant was issued with a show cause letter allegedly for leaving the branch without clearance from supervisor, sharing access password/code details through a text message to Operations Manager, rudeness and refusal to take time off without written instructions. He replied and denied the allegations on 12th July, 2018 in that;
 - i. The custodian and/or Operation Manager and/or the supervisor had similar codes for arming the branch.
 - ii. There was no offer of the taxi services as alleged
 - iii. He was cooperating with the branch manager and operations manager but only objected to signing a statement which did not reflect the true picture of the conversations.
 - iv. He did not refuse to take time off but only requested the branch manager to put it in writing for ease of reference.
10. His other case is that on 27th July, 2018, he was issued with a show cause letter (allegations of gross misconduct) on grounds of fraud and/or deliberate falsification of records. He was later subjected to disciplinary proceedings which were geared toward a forced resignation from his employment.
11. The Claimants contract of service was terminated on 14th December, 2018 on the following grounds.
 - a. "With regard to first accusation of leaving the Branch Door unarmed, you indeed departed from the bank premises knowing very well that you were one of the people in possession of the code to be used in arming the door, you did not inform your supervisor that you were leaving



and despite several appeals to you that you return to the branch and secure the premises you still declined to do so yet no other employee had the code to close the branch. You persisted with your defiance even after transport in the form of a fully paid taxi was put at your disposal by the Operations Manager to bring you back to the premises. It is also apparent that the following day when asked about the incident by your supervisor, you were insubordinate to him as you refused to give a report.

- b. With regard to the second accusation of absenting yourself from duty on 29th and 30th June, 2018, it has been established that you indeed failed to report to work. You then knowingly went to an unregistered facility which purported to be a medical provider and obtained medical chit (sheet 1 belief) which upon verification turned out to be fraudulent in an attempt to justify your absence from duty.)
12. It is his case that the process of dismissal was in contravention of clause A3 of the CBA and Section 43 and 45 of the *Employment Act*, 2007. This also includes a contravention of Section 41 of the Act which provides for substantive and procedural fairness in the process of termination of employment.
 13. The prays as follows
 - i) Declaration that the termination from employment of the Claimant was substantively and procedurally unlawful/unfair.
 - ii. The Claimant be paid twelve(12) months gross salary compensation for suffering wrongful/ unfair/unlawful termination totalling to Ksh.1,280,196/= (i.e. Kshs.106,683 CBA rate x 12 months).
 - iii. The Claimant be paid all the underpayments canvassed and as herein;
 - a. Basic salary and house allowance underpayments equivalent to Kes.2,618,607/=
 - b. Compensation for 20 working annual leave days unpaid equal to Kes.76,202/=
 - c. Compensation for annual leave allowance unpaid being 5 years x Kes.9,100 equal to Kes.40,550/=
 - d. Two (2) months basic salary as disturbance allowance equivalent to Kes.192,366/=
 - e. The total claim for underpayment under iii (a) to (d) id Kshs.2,927,725/=
 - iv. Interest at courts rate from the date of filing the claim
 - v. Costs of the claim to the Claimant.
 14. The Respondent's case is a denial of the claim. This is as follows;
 3. The Respondent denies the contents of paragraph 1.3 of the *Plaint*. The Respondent however, agrees that the Claimant was its employee on a permanent and pensionable contract which he served under until his termination on 14th December, 2018. Further, that the Claimant only became a member of the Union on 26th November, 2017 and his membership was submitted to the Respondent on 19th January, 2018 and cannot therefore claim benefits of membership prior to that period.

She further denies the contents of paragraph 1.8 and states as follows:

 - i. The Claimant was transferred to the Respondent's Westlands Branch *vide* a letter dated 4th September, 2017 as a cashier;



- ii. At the Westlands Branch, the Claimant's duties included but not limited to the following:
 - a. Maintaining the schedule of payments;
 - b. Processing cheque payments;
 - c. Raising of vouchers;
 - d. Reconciliation of all GLs;
 - e. Passing of internal transfers;
 - f. Custodian of bank access codes, specifically the main entrance; and
 - g. Attending to duties assigned from time to time the supervisor.
- iii. The Westlands Branch is a cash centre (money from other branches is stored in the Bank) and the Respondent had entrusted the Claimant together with other employees with access codes for purposes of enhancing security within the Branch;
- iv. On 4th May, 2018, the Claimant and Quinter Ooko, who were entrusted with the Branch's Main Entrance Access Codes, left the Branch without clearance from their immediate supervisor, as was required;
- v. Quinter Ooko later called the Human Resource Manager and informed her that she was in class and could not get back to arm the Branch's Main Entrance;
- vi. The Claimant was called by the Branch Manager, Mr. Paul Ongare and was asked to go back to the Branch for purposes of arming the Branch but he declined and inform the Branch Manager that he was already home and had other commitments and he was not the only one who could arm the Branch;
- vii. Further, the Branch Manager even offered to pay taxi services for the Claimant to take him back to the Bank but he still declined to go back to work;
- viii. On 5th May, 2018, the Branch Manager and the Operations Manager had a meeting with the Claimant herein where they sought to understand why the Claimant refused to honour his obligations as a custodian. The Claimant refused to respond to the queries raised and was rude to the Operations Manager and the Branch Manager.
- ix. The Claimant also received an email on 5th May, 2018 from the Operations manager asking him for an explanation for his refusal to come back to the Branch and arm it and he declined to give the same;
- x. Their actions resulted in the vault custodians being held up at the Bank and exposed the Bank to risks including theft of the money in its vaults as the Main Entrance of the Branch remained unlocked; and
- xi. Consequently, the Respondent invited the Claimant for a disciplinary hearing and the Disciplinary Committee recommended that he be dismissed from the Respondent's service.

15. Again, the Respondent denies the contents of 1.9 of the Statement of Claim and avers that it entrusted the Claimant with the main door access codes together with another employee called Quinter Ooko.



She also alludes that contrary to paragraph 2.6 of the Statement of Claim that there were various disciplinary hearings on the allegations of misconduct against the Claimant on 6th April, 2018 and 10th August, 2018 and the disciplinary hearings were conducted fairly and in accordance with the Respondent's Human Resource Policy Manual.

16. The issues for determination therefore are;
 1. Whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Claimant is entitled to the relief sought.
 3. Who bears the costs of this cause.
17. The 1st issue for determination is whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in his written submissions dated 26th May 2023 support the case of wrongful, unfair and unlawful of employment.
18. In such endeavour he relies on authority of Civil Appeal No. 118 of 2017: *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR at page 6&7 of the judgment wherein the court emphasized the need for compliance of Section 41, 43 and 45 of the *employment act*.
19. The Respondent Submission disagrees with all this. It is his case and submissions that from the brief facts enumerated above and from the pleadings filed by the Respondent, the Respondent has demonstrated the events and procedures that led to the termination of the Claimant's employment.

He submits as follows;

...what constitutes fair termination is a well settled principle as enumerated in the case of *Walter Ogal Anuro -v- Teachers Service Commission* (2013) eKLR, where the Honourable Court held that:

...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

20. Further, the Respondent seeks to rely on the authority of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR, where the court held thus:

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44[4] of the *Employment Act* 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Claimant protested he received such oil.....all gave the Respondent reasonable and sufficient grounds to act against the Claimant.”

21. In all, the Respondent's case overwhelms that of the Claimant. She has ably demonstrated case of untoward conduct of the Claimant in the course of performing his duties at his work place. This is was followed by an appropriate and procedural disciplinary process which met all the threshold



provided for in law. The Claimant's case therefore becomes a cropper. I therefore find a case of lawful termination of employment and hold as such.

22. With finding of lawful termination of employment, the payment is not entitled to the relief sought.

23. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF OCTOBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Monoru for the claimant Union.

Miss Ondongo instructed by Robson Harries Advocated LLP for the Respondent.

