



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1136 OF 2017**

**KENNEDY ONDIMU GIKENYI.....CLAIMANT**

**VERSUS**

**FAMILY BANK LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant vide a memorandum of claim dated 6<sup>th</sup> June 2017 avers that he was employed by the respondent with effect from 2<sup>nd</sup> July, 2014 until sometimes in November, 2014, when he was wrongfully and unfairly terminated from employment. As such, he prays for compensatory damages in the sum of Kshs 2,541,000/= together with costs of the suit and interest.
2. The claim was opposed with the respondent stating that the claimant deliberately and casually failed to follow established procedures necessary when paying out or handling money despite constant reminders to that effect. That as a result of the claimant's actions, it sustained a loss of Kshs 222,000/=. The respondent further averred that the claimant was granted a fair hearing prior to his termination.
3. The matter proceeded for part hearing on 25<sup>th</sup> October 2021 and later on 8<sup>th</sup> November, 2021, when the respondent closed its case. At the trial, each side called one witness.

**Claimant's Case**

4. The claimant testified in support of his case. At the start of the hearing, he adopted his witness statement to constitute part of his evidence in chief. He also produced the documents filed together with his claim as exhibits before court.
5. In his evidence, he told court that he was the Branch Operations Manager of the respondent bank and was stationed at Molo. He averred that on 23<sup>rd</sup> September, 2014, he gave the cashiers cash from the bank's vault and thereafter handed over the key to one Mr. Francis Karanu, while he went to undertake marketing activities at Michinda Secondary School.
6. He told court that they were 2 custodians to the bank's vault and that the same is allowed by the bank's procedure. It was his further testimony that, at the close of the day, while confirming the cash in the deposits, it was ascertained that there was a deficit of Kshs 200,000/=. The claimant in explaining the procedure of retrieving money from the bank's vault, stated that the custodian would retrieve the cash, hand it over to the cashiers who would then sign for the same. He averred that the money was lost while he was out of the office doing marketing.
7. The claimant further told court, that the shortage was reported and upon investigations, he was issued with a letter terminating his employment. He denied being given an opportunity to defend himself though he admitted appearing before the respondent's disciplinary committee. In summing up his testimony, he stated that he served the respondent diligently otherwise he would not have worked under its employment for a period of 8 years.

8. In cross examination, the claimant admitted that he did not confirm the cash available at the vault when he took back the keys from Mr. Francis. He also denied admitting the loss of the money during the disciplinary hearing and maintained that he was merely apologised for the loss but made no admission. He also admitted that the loss was not reported immediately as they were still doing reconciliation.

**Respondent's case**

9. The respondent called oral evidence through Mr. Stephen Ng'aru who testified as RW1. At the outset, he adopted his witness statement to constitute part of his evidence in chief. He also produced the bundle of documents filed on behalf of the respondent as exhibits before court. Mr. Ng'aru identified himself as the Human Resource Manager of the respondent bank.
10. Mr. Ng'aru told Court that the claimant as the operations manager of the branch was required to report daily on the figures. That he was

the one who held the keys to the vault and as such, he was to issue cash to the cashiers as and when required. That the cash issued, was to be accounted for using a register designed for that purpose. That investigations revealed that some money in the sum of Kshs 200,000/= had been lost at the branch on 23<sup>rd</sup> September, 2014, but the same was only reported on 27<sup>th</sup> September, 2014. That the loss of the cash was attributed to the custodians at the branch, with the claimant being one of them. That upon investigations, it was later revealed that the actual loss was Kshs 222,122/=.

11. It was the testimony of RW1 that the claimant was subjected to a disciplinary hearing, which he attended and confirmed that there were lapses at the branch and that he had not followed the laid down procedures at the bank in regards to handling of the register to the vault. He further told court that the claimant was surcharged for part of the loss sustained by the bank and the same was recovered from his terminal dues. RW1 further stated that the claimant appealed purely on humanitarian grounds but his appeal was denied and the termination upheld.

12. During cross examination, RW1 stated that the custodians to the bank's vault were only two and that the said Mr. Francis Karanu, was not one of them. That the other one was a Ms. Lavrine Lovoni. He further stated that the claimant was not issued with a 1<sup>st</sup> warning given that the allegations against him amounted to gross misconduct.

### **Submissions**

13. Both parties filed written submissions upon close of the hearing. The claimant submitted that his termination was unfair and unlawful as the respondent did not adhere to the stipulated procedures under the law in particular, section 41 of the Employment Act. That he was not issued with a show cause and neither was he issued with a warning prior to his termination. He further urged the court to find in his favour and award him 12 months gross salary being compensatory damages. On this issue, he placed reliance on the case of **Benson Nguti vs Kenfright (Ea) Limited Cause No. 146 of 2013**.

14. On its part, the respondent submitted that there was reason to terminate the employment of the claimant on account of negligence in the performance of his duty which had resulted in the loss of Kshs 222,122/=. It further submitted that the claimant was subjected to a fair disciplinary process in accordance with its Human Resource Manual and the Employment Act. It invited the court to consider the cases of **Eliud Nyaenga Gwaro vs Kenya Revenue Authority [2021] eKLR**, **Alice Nyanduko Omwancha vs Kenya Industrial Estates Limited [2019] eKLR** and **Daniel Otieno Mbola vs Robinson Investments Limited [2014] eKLR**.

### **Analysis and determination**

15. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before court and the parties' rival submissions and to my mind, the court is being called to determine the following issues;

**i. Whether there was justifiable cause to terminate the services of the claimant?**

**ii. Whether the claimant was accorded procedural fairness?**

**iii. Is the claimant entitled to the reliefs sought?**

### **Whether there was justifiable cause to terminate the services of the claimant?**

16. As reasonably expected, both parties hold opposing views on this issue. On the one hand, the claimant states that the respondent was not justified in taking disciplinary action against him as the money was lost while he was out of the respondent bank undertaking another assignment. On the other hand, the respondent maintains that the claimant was to blame for the procedures of handling the vault as well as the register and had indeed apologized for the lapse.

17. Against these competing positions, it is imperative to evaluate the circumstances that caused the claimant to be terminated from employment against the applicable law. This is also known as substantive justification.

18. The starting point is **Section 43(1)** of the Employment Act (Act) which requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. Further, **section 45 (2) (a) and (b)** of the Act provides that a termination of employment is unfair if the employer fails to prove-

**a) that the reason for the termination is valid;**

**b) that the reason for the termination is a fair reason-**

**i. related to the employees conduct, capacity or compatibility; or**

**ii. based on the operational requirements of the employer; ...**

19. The import of the provisions of section 45 (2) (a) and (b) is that it is not enough to spell out the reasons for termination. The same must pass the "fairness and "validity" test. Consequently, over and above proving existence of reasons to justify termination, an employer is required to prove that the said reasons were fair and valid. It is also worth noting that the issue of fairness and validity is quite subjective and can only be determined on a case by case basis.

20. Further, in terms of section 43 (2) of the Act, such reasons resulting in an employee's termination must be matters the employer

genuinely believed to exist.

21. The claimant herein was terminated on grounds of negligence in the performance of his duty. The pertinent question is whether the claimant was indeed negligent in the performance of duty thus availing the respondent fair and valid reason to terminate his employment.

22. These reasons can be traced to the claimant's letter of termination which reads in part as follows;

*“We refer to the incident that led to the loss of Kshs 222,000.00 from the vault. During the Bank's disciplinary Committee hearing on Wednesday, 9<sup>th</sup> October, 2014, it emerged that as an Operations Manager, you were negligent in the performance of your duties in that you did not ensure that laid down policies and procedures were followed which led to the said loss. It was evident from the meeting that the branch controls and supervision of staff was lacking from your side despite you being the custodian and supervisor in Branch Operations. This has been discussed severally with your Line Manager and there has been no improvement on your part...”*

23. In order to determine the validity of the reasons for the termination of the claimant, it is imperative to consider his duties and responsibilities as the Branch Operations Manager of the respondent bank. The job description of the claimant was not produced before court. Nonetheless, during cross examination he stated that his key responsibilities included; being one of the custodians to the bank's vault at the branch; issuing cash to the cashiers; retrieving cash from the vault and mobilizing deposits for the bank.

24. It is common ground that the claimant was the head of the operations at the respondent's branch in Molo, hence performed a supervisory role. It is also common ground that there was a cash difference of Kshs 200,000 by the close of business on 23<sup>rd</sup> September, 2014 and the same could not be accounted for.

25. The claimant has denied negligence on his part and averred that on the material day, he counted the cash in the vault in the morning and handed over the key to Mr. Francis Karanu. From the testimony before court and the evidence on record, several issues are discernable.

26. Firstly, the claimant admitted during cross examination that at the time he handed over the keys to Mr. Francis, he did not confirm how much money was in the vault and similarly, when taking back the keys from Mr. Francis, he did not confirm the cash at the vault. This was a major error on his part as he was not in a position to clearly tell when the money went missing from the vault. Had he confirmed the cash at the time he took back the keys from Mr. Francis, he would have been in a better position to ascertain in good time that the money was missing and probably, arrest the situation. The lapse of time in confirming the amount of cash in the vault, was to his own detriment.

27. Secondly, whereas the cash difference was noted on 23<sup>rd</sup> September, 2014, the same was reported by the claimant on 27<sup>th</sup> September, 2014, almost 4 days later. The respondent through Ms. Jayne Stephen upon receiving the report from the claimant, noted as follows in her response;

*“In reference to your email, why was a difference of this magnitude not reported to the operations and security the same day as per policy??? Why has it taken a whole week to report the same? please explain.”*

28. Judging from the email communication, the claimant was to report the loss the same day as per the Bank's policy. It was not clear why he delayed in lodging the report.

29. Thirdly, the claimant reported the initial loss as being Kshs 200,000/=. However, upon further investigations and audit at the branch, the actual loss ascertained was Kshs 222,122/=. It would thus seem that the claimant had not accurately accounted for all the money in the vault and noted the actual deficit. This was yet another error on his part.

30. As per the record of the disciplinary proceedings, the claimant admitted not adhering to the procedures in handling the vault and the register. He did not dispute this fact during the trial and did not demonstrate how he complied with the procedures in regards to the vault, so as to avert the kind of loss that was experienced.

31. Further, from the report of Ms. Nancy Wanjau, the claimant and the other custodian, Ms. Lavrine, admitted that that at certain instances, they get money for the tellers without the out slips. Yet again, the claimant did not dispute this fact at the trial.

32. The foregoing incidences do not portray a supervisor who was diligent in the performance of his duties especially noting his years of experience which spanned close to 8 years. It is apparent that there was some laxity from his end. Being head custodian and overall supervisor of the respondent branch, he was bestowed with an immense responsibility of safeguarding the funds of the respondent at the branch level. This is an obligation he fell short off and the buck stops with him. It is for that very reason that he reported the loss, took responsibility and apologized for the lapse.

33. The level of integrity, prudence and financial probity expected of banks and their staff, could not have been put better as was in the case of **Violet Kadala Shitsukane vs Kenya Post Savings Bank, Nairobi Civil Appeal No. 295 of 2016**, where the learned Judges of the Court of Appeal held thus;

**“Banks are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment and therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customers points to fraud, such a staff risks termination of his or her employment.”**

34. I fully adopt and reiterate the finding in the above case and hold that nothing short was expected of the claimant. His overall conduct as regards the funds placed under his custody by the respondent on behalf of its customers at the branch level, presented to the respondent a cause for termination.

35. It is also noteworthy that Section 43(2) of the Act provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination ***genuinely believed to exist***, and which caused the employer to terminate the services of the employee.

36. From the record, there were issues pertaining the overall operations of the respondent's branch at Molo. These are besides the loss of the Kshs 222,122/=. Majority of these issues are contained in the report by Ms. Nancy Wanjau. Indeed, the claimant in his letter of Appeal admitted as much in the following manner;

*"...To be sincere I regret the lapse that occurred of Kshs 222,000 and the recommendation from my Line Manager that he has been talking to me without improvement..."*

37. It would thus appear that ultimately, the respondent genuinely believed that the claimant could not be trusted anymore with its funds at the said branch hence had a valid reason to terminate his employment. In the end, it would seem that termination of the claimant was the most reasonable decision it could make, as an employer confronted with the circumstances at hand.

38. On this issue, I am guided by the decision of the Court of Appeal (Kiage JA) in the case of **Judicial Service Commission vs Gladys Boss Shollei & another [2014] eKLR**, where the learned Judge determined thus;

**"From my own analysis of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1<sup>st</sup> respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1<sup>st</sup> respondent, I find and hold that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same BRITISH LEYLAND case (ibid.);**

**"Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair."**

**The dismissal was fair and the orders by the learned judge quashing the proceedings and the dismissal cannot be countenanced."**

39. The totality of the foregoing is that I find that the termination of the claimant was based on valid and fair grounds hence the respondent discharged its burden under sections 43 (1) and 45 (2) (a) and (b) of the Employment Act.

40. That said, I now move to consider whether in terminating the services of the claimant, the respondent did so in accordance with fair procedure.

#### **Whether the claimant was accorded procedural fairness?**

41. Section 45 (2) (c) of the Employment Act, requires an employer to comply with the provisions of fair process and prove that it accorded an employee a fair hearing. The details encompassing a fair hearing are provided for under section 41 of the Act and requires an employer to notify an employee of the intended termination. In this regard, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

42. In the instant case, the claimant denied being granted a fair hearing. In this case, the record speaks for itself. Vide a letter dated 21<sup>st</sup> October, 2014, the claimant was invited to attend a disciplinary hearing on Wednesday, 29<sup>th</sup> October, 2014 in regards to the loss of Kshs 222,122/=. He was also notified of the venue of the hearing and was advised to bring a long a fellow employee if he so wished. The letter reads in part;

*"This is to invite you to attend a disciplinary committee hearing regarding the loss of Kshs 222,122.00 from the vault"*

43. The claimant has contested that he was not issued with a show cause on the allegations he was to face and to that end, he has faulted the disciplinary process. First and foremost, section 41 of the Act, does not stipulate the format of the "notification" to be issued. It merely requires a notification of the allegations, and leaves the manner as to how the same is to be crafted, entirely on the employer.

44. In this case, the claimant was well aware of the loss of the Kshs 222,122/= from the vault, as there is a trail of email communication from his end to his supervisors in that regard. Further, the opening sentence of the invitation letter notified the claimant of the purpose of the disciplinary hearing, as being the loss of Kshs 222,122/=. As such, and in my considered view, the said letter performed a dual role, that is, notification and invitation. Accordingly, the spirit of section 41 was fulfilled.

45. In his oral evidence, the claimant admitted appearing before the disciplinary panel and making his representations thereat. He did not raise any issue regarding the manner in which the proceedings were conducted. Following his termination, the claimant lodged an Appeal vide his letter dated 25<sup>th</sup> September, 2014 and in the said Appeal, it is notable that he did not raise the issue on the manner in which the proceedings were conducted and any dissatisfaction or reservation he may have had in that respect. The Appeal was purely on humanitarian

grounds.

46. In the circumstances, I cannot help but note that the claimant was accorded procedural fairness as he was informed of the allegations levelled against him, given an opportunity to be heard on the allegations and had another shot at the Appeal stage.

**Orders**

47. In the final analysis, I find that the claimant is not entitled to the prayers sought hence I dismiss the claim in its entirety and make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JANUARY, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Oyugi

For the Respondent Mr. Mwangi appearing alongside Mr. Kipng'etich Court Assistant Barille Sora

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**