



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 197 OF 2017

KEVIN OTINGA ONGALO.....CLAIMANT

VERSUS

EQUITY BANK (K) LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 30 April 2019 when Kevin Otinga Ongalo (the Claimant) testified and closed his case and on 16 November 2021 when an Employee Relations Manager with Equity Bank (K) Ltd (the Respondent) testified.
2. The Claimant's submissions were not on record by the agreed timeline of 16 December 2021. The Respondent filed its submissions on 20 January 2022.
3. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

4. Section 35(1) of the Employment Act, 2007 requires an employer to issue a written notice of termination of employment while section 41 of the Act contemplates the employer affording the employee an opportunity to be heard before a termination of employment.
5. The Respondent issued a show-cause notice dated 11 March 2015 to the Claimant. The notice set out the allegation(s) against the Claimant called upon him to make a written response before 13 March 2015.
6. The Claimant responded on 13 March 2015 and on 19 March 2015, he was invited to attend an oral hearing.
7. On 23 March 2015, the Respondent suspended the Claimant in order to carry more investigations and an oral hearing was held on 3 June 2015.
8. The Claimant attended the hearing and defended himself and on 8 August 2015, the Respondent issued a letter terminating his employment.
9. The Court is satisfied that the Respondent complied with the statutory tenets of procedural fairness.

Substantive fairness

10. By dint of sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove the reasons leading to the termination of the Claimant's employment.
11. The reason for terminating the Claimant's employment was that he had irregularly linked a customer's card to the wrong account leading to loss of Kshs 494,400/-.
12. The Respondent's witness testified that the Claimant was the officer responsible for issuance of cards and that on 6 August 2014, he had issued two ATM cards to 2 different customers and signed on the issuance register, and that the Claimant's supervisor had confirmed he (Claimant) was in-charge of card issuance on 6 August 2014.

13. The witness further testified that the system indicated that the issuance had been initiated by an officer who had been moved to account opening desk in April 2014.

14. The said officer had stated that she had put on an auto-remember password.

15. The witness also testified that it is the Claimant who had linked the customer's ATM card to a wrong account leading to the withdrawal of monies from the account in dispute.

16. In his defense, the Claimant attributed the wrong linkage to a system malfunction which he alleged he had reported to the Respondent's technical team and that at the material time, himself and another officer had credential/access rights to the system. In the same vein, the Claimant admitted that he had changed his computer without any approval.

17. The Claimant also contended that it was the duty of a supervisor to check the linkage of a card and an account and that his role was to verify that customers details were correct.

18. The Claimant issued 2 ATM cards to different customers.

19. In re-examination, he admitted that he processed the cards from start to finish. One card was linked to the wrong account.

20. The Claimant, though alleging a system malfunction did not give particulars of the persons he reported to or how he made the reports. He did not ask the Respondent to produce any records of such reports despite asserting that a journal was kept for that purpose.

21. Since the other officer the Claimant alleged had access credentials to the system was not shown to have physically come into contact with the application forms, the buck for the wrong linkage can only stop with the Claimant.

22. The Court is satisfied that the Respondent proved valid and fair reasons to terminate the Claimant's employment.

23. Compensation and pay in lieu of notice are thus not available as remedies.

Severance pay

24. The Claimant did not separate with the Respondent on account of redundancy. He is not entitled to severance pay.

Gratuity

25. The Claimant prayed for Kshs 62,100/- as gratuity. He did not lay a contractual or evidential foundation to the head of claim and relief is declined.

Overtime

26. The Claimant did not lead any evidence to show that he worked overtime or that he was entitled to overtime and relief is declined.

Conclusion and Orders

27. The Cause is dismissed with no order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 16th day of February 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ken Omollo & Co. Advocates

For Respondent Oundo, Muriuki & Co. Advocates

Court Assistant Chrispo Aura