



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 133 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DANVAS MIYOGO MOMANYI.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant brought in a claim for unlawful termination dated 26th January, 2016.

FACTS/CLAIMANT'S EVIDENCE

2. The Claimant says he was engaged by the bank from 3rd November, 2008 and was working as a checker.

He says he was terminated under unclear circumstances on 8th October, 2015.

3. He says his untimely termination was premised on the grounds that he shared data with LG that facilitated erroneous payments to LG for works done and therefore allegedly failed to adhere to bank's laid down procedures and terms of his employment.

4. He says during his employment he performed his work with diligence and had never received any warning.

5. He denies he was involved in manipulation of data. He says data sharing was going on since 2014 to activating clients on hello money internet banking. He says he never benefitted for sharing the data but was purely doing it for work related purposes.

He says he never sent data to personal emails.

6. He says that even though his termination was based on clause of 5 (b) and (d) of the bank's policy the said clause requires two warnings in writing before dismissal. He says he never received any warning for the eight years he worked with the bank.

7. He says he was never given a notice before termination.

8. Furthermore he claims discrimination as other staff members sent out emails but was the only one singled out. He says the alleged loss has not been traced to any account and the same cannot be traced to the Claimant.

9. He says his right to privacy was infringed on as his personal mobile phone was confiscated.

10. (a) The Claimant says he has suffered damages and loss and prays for compensation for 12 months equivalent salary amounting Kshs.2,092,536/=.

(b) Salary in lieu of notice equivalent to one month Kshs.174,378/=.

TOTAL kshs.2,266,914/=

and costs and interest.

RESPONDENT'S CASE

11. The Respondent actually says the Claimant was employed in 2007 and was promoted on 3rd November, 2008 as supervisor in charge of Hello Money Customer on boarding among others and was earning a salary of Kshs.154,470/=.

12. The Respondent says that according to the terms and conditions of service clause 15(a) the Claimant was expected to observe strict professional secrecy.

13. On 2nd July, 2015 the Respondent's investigation department received a report that some lead generators (LGS) were registering customers on BIR without customers knowledge.

The LGs were apparently receiving data from unknown person which they used without contacting the customers.

14. The investigation revealed some LGs were receiving data about customers who had already activated internet banking and were claiming commission from customers who were already in the data base.

15. The investigations further revealed communication between the Claimant and some of the LGs and evidence that the Claimant had sent data of LGs to enable them earn higher commission.

16. Claimant was not authorized to share such information and had no authority of his managers/supervisors to do so.

17. Respondent says Claimant was terminated under clear circumstances.

18. The Respondent says Claimant sent the data which facilitated fraud. The Respondent says he found text messages between Claimant and one Victoria Mekenzia (a lead generator) where he was asking her to provide personal email to send her sensitive data.

19. The Respondent invited Claimant for a disciplinary hearing scheduled for 30th September, 2015 and was advised on his right to be accompanied by a colleague or a union representative in accordance to Section 41 of Employment Act and Respondent's grievance and disciplinary procedures.

20. At the disciplinary hearing Claimant admitted he sent the confidential information to LGs Victoria and Mark despite knowing it was provided in the Rules and Regulations of Respondent's IRM policy which provide how to handle information.

21. Following the hearing the panel observed Claimant was responsible for adherence of operational standards and further he had acknowledged that by sending confidential information he exposed Respondent and cost bank confidentiality and overpayment and so the panel recommended he should be terminated.

22. On 8th October, 2015 the Claimant's employment contract was terminated for negligence in performing his duties by sharing data with LGs that facilitated erroneous claims and lack of integrity by denying interaction with the LGs beyond data query resolution.

23. At termination Claimant was informed he would be paid one month salary in lieu of notice as in provision of CBA clause A(5) b and d and was informed he had a outstanding staff personal loan amounting Kshs.1,676,884.25/=. He was informed of his right to appeal.

24. He appealed on 13th October, 2015 and said he was dissatisfied with the termination as he had no previous disciplinary issues.

25. On 30th October, 2015 Claimant was invited for appeal and he attended on 5th November, 2015 with Mr. Julius Muiruria a Union representative.

26. He said at the appeal he was aware of procedure to send data but could not show whose authority enabled him to send the data.

Subsequently his termination was upheld and was informed by letter dated 9th November, 2015. He signed for the letter. He was issued with a certificate of service.

RESPONDENT'S COUNTER CLAIM

(a) The Respondent claims the Claimant owes a staff loan of Kshs.2,057,706/21.

(b) Visa Gold account Kshs.128,010.04/= and they continue to accrue interest.

27. The Respondent prays judgment be entered against the Claimant for Kshs.2,185,716.49 plus interest. The Respondent witness Vaslas Odhiambo said they withdrew the Claimant's counter claim. Also they pray the Claimant's suit be dismissed with costs.

ISSUES FOR DETERMINATION

(a) Did the Respondent have a valid reason to terminate the Claimant's employment.

(b) Is the Claimant entitled to the reliefs sought?

29. Whether the Respondent had a valid reason to terminate the Claimant's employment.

The Claimant claims he was terminated for a reason which was not valid and was wrong doing of other staff members which he claims he had no role to play and the other staff members were not disciplined.

He said he was discriminated because other members shared their emails and yet were not terminated.

He also says the loss alleged by the Respondent cannot be quantified.

30. The reason for terminating the Claimant's employment according to the Respondent was that Claimant was sharing data with LGs who would use it to manipulate accounts and claim false commissions.

The Claimant admitted he shared the information. In fact in the pleadings the Claimant said he was not the only one who shared data but he claimed he was discriminated against.

31. In the disciplinary meeting the Claimant admitted if given another chance he would have consulted the line Manager before sharing the data.

32. Claimant having worked with the Respondent for many years and knowing the sensitivity of sharing information in a bank should have been careful not to share information with people was not supposed to share with.

33. Section 45 (2) of the Employment Act provide that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer terminate the services of an employee.

Also Section 44(4) of the Employment Act 2007 defines element of gross misconduct as careless and improper performance by the employee at work which from its nature was his duty under the contract to have performed carefully and properly.

34. The Claimant does not deny he shared the data with one Victoria and Mark. He says he was supposed to share the data upon request.

He is non committal on who was meant to give him authority to share the data.

Finally during the investigation interview he admitted, he would given another chance consult his line manager before sharing such data.

35. Even though he says that he did not benefit from sharing the data the fact remains he acted negligently in a sensitive industry and had signed a commitment to act in strictest confidence. Yet he shared data he was not supposed to share with people whom he was not authorized to share.

The Claimant was aware of the IRM policy of sharing information. The bank avers as a result of the claimant's action it lost money.

36. The Respondent having found the Claimant wa culpable of gross misconduct involved him for a disciplinary hearing and informed him he could invite a fellow worker as his witness or a shop floor steward.

During the disciplinary meeting held on 30th September, 2015 he conceded he was aware of IRM policy which provided information from him was to be shared with the team leaders and management and no one else.

37. The court found the Respondent as well as having a valid reason which they informed the Claimant in writing by the letter of 25th September, 2015 also advised him to have his witness in attendance.

The Respondent caused the minutes to be written and were signed by those in attendance including the Claimant.

In that respect, I am satisfied the requirements of Section 41, 43 and 45 of the Employment Act were complied by the respondent.

38. I gather support from the **CASE OF JANET NYANDIKO VS KENYA COMMERCIAL BANK LIMITED (2017) eKLR** where the court held that Section 41 of the Act enjoins employer in mandatory terms before terminating the employment of the employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that he understands the reason for which employer is considering termination in the presence of his witness.

The reason for termination in this case is captured in the letter of the Claimant's termination and letter inviting her for disciplinary meeting dated 25th September, 2015.

39. So having clearly considered the evidence on record and submissions, I am satisfied the Respondent had a valid reason to terminate the Claimant's employment and instead of dismissing him summarily he paid him one month salary in lieu of notice.

I find also fair procedure was followed and that Claimant failed to discharge his burden of proof under Section 47 of the Employment Act which provide "for any complaint of unfair termination of employment or wrongful dismissal the burden of proving unfair termination or wrongful dismissal has occurred rests on the employee, while burden of justifying the grounds for termination or wrongful dismissal rests on the employer".

In view of the above, I find the termination of the Claimant by the Respondent was not unfair and unlawful as alleged by the Claimant.

40. The Claimant prays for one month pay in lieu of notice. The Respondent claims they paid and attached a slip dated 31st October, 2015. The Respondent should provide proof of payment if Claimant is denying receipt within 30 days or settle the same within 30 days from the date of judgment.

41. The Claimant having failed to prove unlawful termination is not entitled to compensation of 12 months.

42. The Respondent during the court hearing informed the court they wished to withdraw the counter claim.

I will make a separate order about that.

43. The Claimant having worked for the Respondent for many years I would not be unfair to order Respondent undergoes the costs.

Each party to meet their costs.

DELIVERED, DATED AND SIGNED IN NAIROBI THISDAY OF2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

Parties to appear in court on 31st March, 2022 to confirm if the Respondent has indeed withdrawn the counter claim against the Claimant of Kshs.2,185,716.49 plus interest.

Secondly the respondent will tender proof of payment of the one month salary in lieu of notice.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE