



**Yatch v Kenya Commercial Bank (Cause 1882 of 2015)
[2022] KEELRC 1706 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1706 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1882 OF 2015**

**MN NDUMA, J
MAY 19, 2022**

BETWEEN

TIMOTHY ROTICH YATCH CLAIMANT

AND

KENYA COMMERCIAL BANK RESPONDENT

JUDGMENT

1. The suit was filed on October 21, 2015 by the claimant seeking the following reliefs:-
 - (a) The respondent pays unpaid salaries from January, 2013 to June, 2015.
 - (b) Salary in lieu of notice.
 - (c) Unpaid leave allowance.
 - (d) Unpaid NSSF and NHIF from date of employment of claimant.
 - (e) Damages for wrongful, unfair and unlawful termination of employment.
 - (f) An order for reinstatement of the claimant.
 - (g) Any other award or benefit which this honourable court may deem fit and just to grant.
2. The claimant testified as C W 1. He testified that he was employed on October 18, 2011 as sales representative. The claimant worked continuously until December 28, 2012. At the time the claimant earned a gross salary of kshs 38,000. The claimant was suspended on the day upon suspicion of being involved in fraud transactions involving three Bank accounts of judiciary court fees; Jomo Kenyatta University of Science and Agriculture (JKUAT), Nairobi Centre Account and Egerton University Fees Account.
3. The claimant was placed on half pay pending investigations. A forensic investigation was conducted.



4. The claimant received two Notices to Show Cause to explain himself which he did. The claimant denied being involved in the alleged fraudulent withdrawal of funds totaling Kenya shillings 60 million. C W 1 testified that one Mr Gonje made the first inquiry about the theft.
5. C W 1 testified that he met Mr Gonje on December 29, 2012 upon responding to the charges in writing. Another memo dated December 29, 2012 stated that the response was unsatisfactory. The claimant was asked to supply further information which he did on December 29, 2012. C W 1 testified that no disciplinary hearing was conducted until he received a letter of termination of employment dated January 4, 2013. C W 1 denied he was interviewed on December 29, 2012. C W1 stated he received the letter of termination in June, 2013.
6. C W 1 alleged malice in that his access code was not used in committing fraud and the employees whose codes were used to commit the fraud were questioned, suspended and later reinstated back to work.
7. C W 1 testified that he was arrested and charged with a criminal offence in Criminal Case no 1940 of 2012. The claimant was acquitted in June, 2015, for no case to answer since no witness turned up to testify against him.
8. C W 1 testified that he was paid notice pay; in lieu of leave days not taken and salary for days worked in December, 2012.
9. C W 1 prays to be granted the reliefs sought stating that the termination of his employment was unlawful and unfair.
10. The respondent called R W 1 Robley Ngoje, who testified that he was head of employment relations of the respondent. That he was at the material time branch manager at Ongata Rongai in the year 2012 and was in charge of business growth.
11. R W 1 testified that the claimant was involved in fraudulent transactions on December 28, 2012 at the branch. That the claimant was a teller at the time. That Kenya Shilling 60 million was defrauded from two counters where the claimant was stationed at the material time. That he was the only teller on the day at work with access to the two computers that were used to input fraudulent transactions and authorize the said transactions using two different computers.
12. R W 1 testified that the explanation by the claimant was not satisfactory. That the claimant admitted he operated from the two counters where the two computers used were kept.
13. R W 1 stated that he issued two notices to show cause to the claimant to which he responded.
14. That on December 29, 2012, a meeting was held with the claimant and the forensic department and evidence was placed before him. That on December 31, 2012, a further meeting was held with the claimant and the claimant was informed of the reasonable grounds for his suspicion as the perpetrator of the fraud since he was the only one with opportunity to do so.
15. R W 1 stated that the claimant was given opportunity to explain himself but his defence was not satisfactory hence his employment was terminated for gross misconduct. That the letter of termination gave the claimant reasons for the termination.
16. That the claimant was paid one month salary in lieu of notice , in lieu of 19 leave days not taken and salary for days worked .
17. R W 1 testified that the claimant was acquitted of the criminal charges levelled against him because the prosecution did not bond and /or call the witnesses to testify against the claimant from the Bank. R W 1 testified that the bank complained about the manner in which the trial was conducted.



18. R W 1 stated that the claimant was nonetheless guilty of the charges of fraud laid against him by the respondent.
19. Under cross-examination R W 1 reiterated that the two computers used to input the withdrawal and then authorize the transactions had personal access credentials. That the claimant had access to those codes belonging to a teller by the name Irene Munyao and another code belonged to an operations manager Mr Ogeto who was in the strong room counting cash for repatriation at the time the personal code of the two officers were used in two different counters where the computers used to commit the fraud were stationed. That circumstantial evidence pointed fully to the claimant in that he had access and indeed accessed the two computers at the time the frauds were committed.
20. That the respondent had valid reason to dismiss the claimant from employment but chose to be lenient and instead terminated the claimant with notice so that he was able to access his benefits.
21. R W 1 testified that Irene Munyao was dismissed from employment. She appealed the dismissal and was reinstated to work. That Ogeto, the operations manager, had his employment terminated, he appealed the decision and he was reinstated.
22. R W 2 Lumumba Mutonga, testified that he was a forensic investigator, who investigated the matter and prepared the forensic report produced at the disciplinary hearing and before court. R W 2 testified that he had a meeting with the claimant on December 29, 2012 having received a complaint of fraud that took place on December 28, 2012.
23. R W 2 testified that he prepared the excel sheet which detailed the fraudulent transactions done vide the pins of Irene Munyao and Ogeto. That Irene's Pin was used to input the transactions and Ogeto's Pin was used to authorize the transactions.
24. R W 2 testified that he discovered that the transactions were done on December 28, 2012 using specific I/P address and their institutional accounts were debited including Judiciary Court fees Account; JKUAT Nairobi Centre Account; /and Egerton University Fees Account. That a total of Kenya Shillings 60 million was fraudulently withdrawn.
25. R W 2 testified that the forensic report laid a justifiable basis that the claimant was guilty of the fraud. That he was not bonded nor called to testify in the criminal trial. That the acquittal did not mean the claimant was not involved in the fraud at the work place. That the claimant's suit be dismissed with costs.

Determination

27. The parties filed written submissions which the court has duly considered. The issues for determination are:-
 - (i) Whether the respondent had a valid reason to terminate the employment of the claimant.
 - (ii) Whether the respondent followed a fair procedure to terminate the employment of the claimant.
28. The totality of evidence by R W 1 and R W 2 demonstrates on a balance of probabilities that the claimant was reasonably suspected of having accessed the pins of his two colleagues and used the two to input withdrawal of kshs 60 million from three institutions aforesaid and authorize the transactions. That the claimant was the only teller with the opportunity to 'steal' the pins from the two named officers and had access to their two computers on December 28, 2012 when the fraud was committed.



29. The court is satisfied that the claimant was given adequate opportunity to explain himself in writing and via an interview and his explanation was found to be insufficient. The court finds that the respondent complied with the provisions of section 36, 41, 43, and 45 of the *Employment Act*, 2007 in concluding that the claimant was guilty of gross misconduct by fact of committing fraud using computers of his colleagues in their absence.
30. On the contrary, the claimant has failed to discharge the onus placed on him under section 47(5) of the *Employment Act*, to prove that the termination of his employment was wrongful and unfair.
31. The court finds that the suit lacks merit and it is dismissed. On the basis of relative parity of resources, and recognizing the service given to the respondent by the claimant we find that each party to meet their costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

MATHEWS N NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N NDUMA

JUDGE

Appearances:-

Mr. Nduati for claimant

Mr. Watangule for Respondent

Ekale: Court Assistant.

