



**Maithya v Barclays Bank of Kenya Limited (Cause 2283 of 2017)
[2022] KEELRC 12948 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12948 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2283 OF 2017
J RIKA, J
OCTOBER 28, 2022**

BETWEEN

LILIAN MUENI MAITHYA CLAIMANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed her statement of claim on November 15, 2017.
2. She avers that she was employed by the respondent bank between 2005 and 2007, while still studying as an undergraduate.
3. She was formally employed on July 1, 2008, as a Premier Service Assistant. In April 2015, she was confirmed as a Premier Manager Assistant, which position acted as the support and backup to the relations managers.
4. On August 9, 2016, she received telegraphic transfer instructions in PDF form, from a client, Floyd Ingram, from his bank registered e-mail, through the claimant's own official bank e-mail account, after receiving an out-of-office response from the relations manager.
5. The client instructed the respondent bank to transfer the sum of USD 1,500, to the beneficiary, Floyd Ingram at his detailed bank account in the UK. The claimant sent an official e-mail to Ingram through the official e-mail. She sent to his bank-registered e-mail. He told her that he had tried calling her, and she should proceed with the transfer as instructed.
6. The claimant realised she had a missed call from an unknown number. She received a call from unknown number. She picked the call, and talked to one Floyd Ingram, who advised that he had sent the telegraphic transfer instructions and the beneficiary was himself. She consulted the branch operations officer Wilson Mworira, and informed him that the client had reached her, using an



- unknown number. She asked Mworia to make an independent call back in accordance with the bank's funds transfer operating standards. Mworia confirmed calling.
7. On August 16, 2016, the claimant received similar instructions from Ingram for transfer of USD 12,000 to a beneficiary identified as Ingram's mother, Lynn Beardmore, holder of a bank account in the UK. The claimant undertook the same procedure involving Mworia, and transferred the money.
 8. On or about August 24, 2016, she learnt that the 2 transactions were fraudulent.
 9. She recorded a statement with the respondent's investigation officers. She was issued letter to show cause. She was summoned for a disciplinary hearing. She was heard. It was concluded that she failed to follow the laid down procedures in the transactions, and a letter of termination dated December 1, 2016 issued.
 10. Her last salary was Kshs 191,593 monthly.
 11. She avers that termination was unfair. There was no notice; there were no valid reasons to justify termination; she was humiliated and denied adequate facility to defend herself; and there was no justification whatsoever.
 12. She prays for: -
 - a. Declaration that termination was unfair.
 - b. Reinstatement.
Alternatively-
 - c. 3 months' salary *in lieu* of notice at Kshs 574,774.
 - d. 12 years of loyal service at the rate of 1-month salary for every complete year of service at Kshs 2,299,166.
 - e. Damages for premature and unlawful termination at Kshs 2,299,116.
Total...Kshs 5,173,011.
 - f. Cost
 - g. Interest.
 13. The respondent filed its statement of response on July 10, 2018. It is not contested that the claimant was an employee of the respondent, in the position pleaded in her statement of claim. Her contract was terminated by the respondent. Her last salary was as pleaded.
 14. She was involved in fraudulent outward SWIFT transactions of USD 27000, from the bank account of respondent's client, Floyd Ingram. At the time fraud was discovered, the fraudsters had already wired out USD 11,447. USD 15,553 was recovered. Investigations revealed that the client's e-mail account may have been compromised and used to generate instructions to the claimant. The claimant did not contact the client, on the client's documented mobile phone number. Investigators, Africa Forensics and Security recommended disciplinary action against staff who were involved.
 15. The claimant was invited for disciplinary hearing through a notice dated November 7, 2016. Hearing was scheduled for November 16, 2016. She was advised of the charges against her, and her right to be accompanied to the hearing. She attended in the company of her representative, Kennedy Kisekwa. She told the panel that she received instructions from Ingram on both occasions, using an unknown



- number. She could only identify him, by his voice. She did not establish the client's location. She apologized for the money which was not recovered.
16. The respondent states that it issued the claimant a letter to show cause why disciplinary action should not be taken against her, after the disciplinary hearing, on November 25, 2016. She responded to the letter to show cause, on November 30, 2016, explaining that on both occasions, the client was unreachable on the documented contact number. The respondent found her explanation unsatisfactory, and terminated her contract on December 1, 2016. She was offered notice pay of 1 month, and accrued leave of 6.7 days. She was advised that she owed the respondent Kshs 6,814,138 in staff housing loan and gold card. Her debt would be offset against any terminal dues. She was advised of her right of appeal. She appealed on December 8, 2016. She was heard on appeal, on December 15, 2016. She was heard in the presence of her representative, Wainaina Karega. She told the appellate panel that she was comfortable dealing with Ingram, and did not see the need to refer to her supervisor. She narrated how she made effort in recovery of the money. The appeal panel found that she failed to consult her superiors. Termination decision was sustained.
 17. The respondent states that the claimant had a history of disputed cash transactions and cash differences, over which she received warning letters.
 18. Her contract provided for a notice period of 1 month, not 3 months; she was a beneficiary under the pension scheme and the respondent contributed to her NSSF account; the respondent had valid reason and followed fair procedure in termination, and compensation is not merited; and the prayer for damages has no foundation. The respondent prays the court to dismiss the claim with costs.
 19. The respondent counterclaims Kshs 6,786,963 on the claimant's housing loan account and Kshs 27,174, on her gold credit card. In total the respondent counterclaims Kshs 6,814,138 plus interest at 14% per annum. The claimant filed her reply to the counterclaim, on February 19, 2019. She denies owing the respondent the sum claimed, stating that she has been servicing her loan, even after termination.
 20. The claimant gave evidence, as did the respondent's Head of Employees Relations, Vaslas Odhiambo, on June 30, 2022, when the hearing closed. The matter was last mentioned on July 29, 2022, when the parties confirmed filing and exchange of their submissions.
 21. The claimant restated the contents of her pleadings and adopted her witness statement and documents [1-114] on record, in her evidence. She stated that her role was to receive instructions from the client and handover to the overall operations officer, Mworira, who would call back the client and confirm instructions. Mworira confirmed he did so. The claimant reiterated that she discharged her role in accordance with the respondent's funds transfer standards. Mworira was the final authority on transfer. The claimant told the court that the respondent acted with malice, in terminating her contract. She was heard at first instance and on appeal as pleaded.
 22. Cross-examined, she stated that she was dismissed on allegation of fraud. The client was not Kenyan. The claimant had conducted previous transactions for him. Call back was made before the money was transferred. She did not know which number was used. There was a procedure for call back. She tried calling Ingram on the number in the system. It did not go through. She received a call from unknown number. She received e-mail communication. She was not sure that it was Ingram calling. She was supposed to escalate the matter to her supervisor. She did so. She provided this evidence at the disciplinary hearing. She received notice of disciplinary hearing. She was advised of her procedural rights. Investigations took place. She was interviewed. She told the panel that she relied on her instinct, to identify Ingram. She received termination letter. The reasons were given. She appealed. She had been trained on e-mail hacking. The disciplinary hearing and appeal hearing minutes are correct. She had a



- warning in 2011. She was taken through a disciplinary process. She denied that she acted against the respondent's policy. redirected, she told the court that she did not do the call back. Mworira did not deny doing the call back. She did not process the transfer itself. Mworira was also dismissed. She did not know why he was dismissed.
23. Vaslas Odhiambo adopted the statements of response, witness statement and documents filed by the respondent, in his evidence. Ingram was a premier client. The claimant was the first line of defence, in the transaction. She confirmed receipt of instructions. She confirmed that instructions were genuine, to the next person in the transaction chain. She called the alleged client and confirmed instructions to Mworira. The e-mail was hacked and there was loss of Kshs 1,144,700, as a result of the fraudulent transactions. Bank policy was violated. She was not supposed to call the client from an e-mail number. It was her responsibility to authenticate instructions. Due diligence was a prime component of her responsibilities. When asked what she did when she could not reach the client, she says she wrote an e-mail, and the client called her. This is not allowed, because it allows fraud to take place. She said she was not sure if the client called her, but had a feeling that he did. She did not give evidence of her communication with the relations manager. She said that she confirmed instructions, and the second officer in turn, relied on her advice. She was heard on appeal, and the decision made known to her.
 24. Cross-examined, Odhiambo told the court that he joined the respondent on November 16, 2016, before the Ingram transactions. He relied on the bank records in his evidence. The claimant received the initial instructions. She was not the relations manager. Joseph Muthee was. She processed the transaction for that day. Muthee's statement was not placed before the court. The client's contacts were in the system. There was nothing to prevent him from issuing instructions on e-mail. A client can call any bank staff. She should have stopped, when she called, and the client did not call back. She implemented the transaction. She said she confirmed instructions. It is one of the procedures in transacting. The respondent insures against fraud. Mworira was at the next level. He made the same error, by using the same number. Muthee was confirmed to have been away when the transaction took place. The claimant did not call him. Mworira also failed in his duty. That is why they were both dismissed. The respondent suffered loss. Being insured against fraud, did not allow staff to be negligent. Redirected, Odhiambo told the court that there was no call back, because the call did not go through.
 25. The issues are whether the claimant's contract was terminated fairly, on valid ground and fair procedure; whether she merits the pleaded remedies; and whether the respondent has established its counterclaim.

The Court Finds: -

26. There is no dispute that the claimant was employed by the respondent bank. The relevant dates, and terms and conditions of her service are not contested. Her job title was premier manager assistant. Her last salary as of December 1, 2016, when the respondent terminated her contract, was Kshs 191,953. It is agreed that the respondent terminated her contract on December 1, 2016, on the ground that she did not follow bank procedure for outward remittance on the SWIFT transactions of August 9, 2016 and August 16, 2016, of USD 15,000 and USD 12,000 respectively, processed at Muthaiga Branch from client's account number 2033059275, in the name of Floyd Ingram.
27. Parties agree that the incident was investigated, the claimant was issued with the letter to show cause. She replied and was invited to a disciplinary hearing. She was heard in the presence of a representative of her choice. She was found culpable, and advised on her right of appeal. She exercised this right and was heard in the presence of a representative of her choice. Her appeal did not succeed and the decision was made known to her.



28. Counterclaim. The respondent states that the claimant owed a staff housing loan at Kshs 6,786,963 and gold credit card amount of Kshs 27,174 – total Kshs 6,814,138.
29. The respondent’s witness, Vaslas Odhiambo said nothing of this debt in his evidence. The claimant availed her bank statements, showing that she has been servicing her loan, and as June 5, 2022, her loan balance was Kshs 2,871,752. There is no evidence to support the counterclaim. The counterclaim is declined.
30. Procedure. As stated at paragraph 27 above, the SWIF transaction was investigated. The claimant was interviewed by the Investigators. She was invited to a disciplinary hearing through a letter dated November 7, 2016. Disciplinary hearing took place on November 16, 2016. The claimant attended the hearing in the presence of her representative as advised, and was heard. A decision was made to terminate her contract. She was advised on her right of appeal. She appealed and was again heard, in the presence of her representative. Her appeal was dismissed.
31. While the procedure above appears faultless, it is disturbing that the letter to show cause, came after the disciplinary hearing. What was the use of a letter to show cause, after the claimant had been heard, and explained in full her side of the story? A letter to show cause does not issue after the hearing. It precedes the hearing. It comes after investigation, but before the hearing. It is meant to assess whether there is sufficient cause, to take the employee through a disciplinary hearing. The only letter an employee could be called upon to write, after the hearing is concluded, is perhaps one asking her to mitigate, before the employer pronounces itself on the sanction. Why would the respondent be asking the claimant to show cause why disciplinary action should not be taken against her, while it had already been decided that she is taken through the disciplinary process, and while she had already been taken through that process, and was only waiting for the appeal process? Did not what she said at the disciplinary hearing constitute cause why she should not be disciplined?
32. There was however, no prejudice suffered by the claimant, through this unorthodox letter to show cause. She did not complain about the letter to show cause coming after the hearing. She was fully engaged on investigation and the hearing. The charges were communicated to the claimant. She was not in any way hampered by the letter to show cause, and the court does not think that termination can be said to have been unfair, only for the reason that the letter to show cause was unconventional. Procedure met the threshold of fairness, under sections 41 and 45 of the *Employment Act*.
33. Justification. The claimant served as the premier management assistant. She received instructions from Ingram for outward remittance of USD 15,000, on August 9, 2016. She received another set of instructions for transfer of USD 12,000 on August 16, 2016. She was called through an unknown number by the alleged client. She stated that she tried to call the client through his number provided by the financial planning guide, without success. She however went on with the instructions, alleging that she had a feeling, an instinct, that it was indeed Ingram, calling through an unknown number. She identified him through his voice.
34. The court does not think that the claimant acted in accordance with the bank’s policy. She was not prudent. She had worked for 9 years, and there was no explanation why she would go for voice identification, for purposes of executing instructions on SWIFT transfer, of a sizeable amount of money, on account of a client who was not physically present in the bank. She had training in e-mail hacking, yet it did not occur to her, on 2 separate dates, that the person or persons she opted to engage through e-mail could have been hackers. She compounded the situation by not seeking the advice of the relations manager. The claimant took to shifting blame on branch operations officer Wilson Mworira, who was himself found negligent over the incident and dismissed. She explained that she made a lot of effort in recovering the transferred funds, and it was through these efforts that some of the funds were



recovered. The court does not think that this would exonerate the claimant. She was closing the stable door, after the horse had bolted. It also did not help her cause, to argue that the respondent was insured against loss. The insurance against loss did not justify any employee of the bank, to act negligently and without due regard to protection of client's money against fraudsters. Banks place their reputation on high pedestal, and whenever fraud takes place from within their banking halls, there is always a risk of reputational damage. Insurance against fraud, did not allow the claimant to engage in communication with unknown persons, and act on instructions from inauthentic sources. Her effort in recovering the money she had wired to fraudsters, and the fact that the respondent was insured against fraud and did not in the end suffer monetary loss, were matters in the discretion of the respondent to consider, in meting out an appropriate disciplinary sanction against the claimant. These are not matters which would absolve the claimant of the employment offences which led to her dismissal.

35. The court is persuaded that the claimant's contract was terminated for valid reason, in terms of sections 43 and 45 of the *Employment Act*.

It is ordered: -

- a. The claim is declined.
- b. The counterclaim is declined.
- c. Parties to bear their own costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 28TH DAY OF OCTOBER 2022.

JAMES RIKA

JUDGE

