



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO 293 OF 2018

GORDON MAGAK ODHIAMBO.....CLAIMANT

VERSUS

THE CO-OPERATIVE BANK OF KENYA.....RESPONDENT

JUDGMENT

1. The suit was filed on 14th September, 2018 by the Claimant praying for an Oder in the following terms:

- (a) A declaration that the summary dismissal of the claimant by the respondent was unlawful and amounted to unfair labour practice contrary to provisions of Section 41,43, & 49 of the Employment Act No. 11 of 2007.
- (b) Payment of terminal benefits including notice pay and service pay.
- (c) Compensation for the unlawful dismissal.
- (d) Interest and costs.

2. The respondent filed Memorandum of response and Counter Claim on 17/12/2018 in which is denied all particulars of claim and the claimant is put to strict proof thereof. In addition the respondent Counter-Claims Kshs.1,839,218.07 from the claimant being monies owed by the claimant to the respondent as

- (a) credit card – Kshs. 28,150.07
- (b) Residential property loan Kshs.1,477,318 and
- (c) Personal loan Kshs.333,750.

Consent

3. By a consent entered into by the parties dated 20/2/2020 the parties agreed to interalia:-

- (i) Admit their respective witness statements, one dated 29/8/2018 and filed on 14/9/2018 by the claimant and one dated 10/2/2020 and filed by the respondent as their respective evidence in Chief.
- (ii) Both parties agreed to forego cross-examination of the respective witnesses.
- (iii) Both parties agreed to have list of documents filed by the claimant and dated 29/8/2018 marked exhibits '1' to 12 and the one filed by the respondent on 16/4/2019 and marked exhibits '1' to '27' admitted as their respective documentary evidence.
- (iv) Both parties declared their respective cases closed.
- (v) Both parties appended their signatures to the consent dictated to the Court and adopted as an Order of the Court.
- (vi) Both parties filed their respective final submissions on 17/6/2020 and 9/7/2020 respectfully.

4. The issues for determination are:-

(a) Whether the respondent dismissed the claimant from employment for a valid reason following a fair procedure.

(b) Whether the claimant is entitled to the reliefs sought.

(c) Whether the respondent is entitled to the reliefs sought in the Counter-Claim.

5. The testimony by the claimant as contained in his witness statement dated 29/8/2018 and filed on 14/9/2018 is that he was employed by the respondent on 30/8/2020 as a teller and /or cashier upto and including the 7/9/2015.

6. That on or about the 19/6/2015 and the 1/7/2017 the respondent Branch Operations Manager, Rongo Branch who was an authorized and designated officer of the respondent directed and/or instructed the claimant to process and make payments in the sum of Kshs.3,500,000 and Kshs.2,800,000 respectively to and in favour of a designated bank customer who had been duly identified and confirmed by the said Branch Operations Manager.

7. The claimant obeyed the instructions and paid the customer accordingly with the authority and duly approval of the Branch Operations Manager according to and in compliance with the respondent's Bank Operating manual.

8. That it turned out later that the customer obtained the said sums fraudulently and unlawfully and the Branch Manager, Rongo Branch caused a complaint to be made to Rongo Police Station and the claimant was arrested, detained, charged with the offence of conspiracy to defraud, jointly with the Branch Operations Manager Rongo Branch in SRM CR. Case No. 227 of 2015.

9. The respondent also instituted disciplinary proceedings against the claimant pertaining to the said payments. The claimant was then summarily dismissed on allegations of fraudulent over the Counter withdrawals which matter was still pending before the Criminal Court.

10. The dismissal was on 17/9/2015. The claimant states that the dismissal was premature and ought to have awaited the outcome of the aforesaid criminal case.

11. The claimant states that the dismissal was unlawful, irregular and unfair and he prays for the reliefs sought in the statement of claim.

12. The claimant states that the dismissal violated Article 41(1) of the Constitution and was unfair labour practice.

13. The claimant states he suffered loss and damage and he be compensated in terms of section 49 of the Employment Act, in addition to payment of one month salary in lieu on notice.

14. The claimant relies on the list of documents marked exhibit '1' to '12 in support of his case.

15. The respondent relied on two witness statements of Simon Muriithi Maina (R.W.1) and Duncan Wambugu Macharia (R.W.2).

16. R.W.1 states in his witness statement dated 5/10/2018 that he worked for the respondent as the Investigations Manager having joined the Respondent on 1/2/2011.

17. R.W.1 testified that the Claimant worked as a Teller with the respondent and was based at Rongo Branch at the time of his dismissal on 21/9/2015.

18. R.W.1 stated that the respondent received a complaint from one of its customers, Lawrence Ngige Gitonga operating Account No. 01109405576700 domiciled at Donholm Branch that Kshs.6,300,000 had been fraudulently withdrawn from his account.

19. That the respondent in its preliminary inquiry established that the claimant processed the fraudulent cash withdrawals.

20. The claimant was suspended from duty on 17/7/2015 to facilitate investigations into the matter.

21. The claimant was interviewed with others and a report was submitted to the Human Resource Division for action.

22. R.W.1 testified that the claimant in facilitating the withdrawals did not adhere to the provisions of the Respondent's Operating Manual in that the signatures used to make the cash withdrawals were different from that held in the Bank's system and the person who was paid and collected the cash was actually the Branch Operations Manager Wycliffe Momanyi.

23. That the Claimant failed to cooperate with the Bank's security Department or even record a statement on the matter alleging that he had already recorded statements with the police thereby contravening the Banks internal investigations Procedure and left the Bank with no option but to address him based on the available information on the matter.

24. It was established that the claimant was presented by the Acting Branch Manager (Wycliffe Momanyi) with a pre-signed blank cash withdrawal voucher to be processed by the claimant allegedly signed by the Respondent's customer Lawrence Gitonga Ngige.

25. R.W.1 stated that the claimant was negligent in this respect. Furthermore the claimant was not presented with any identification

documents nor did he interview the customer.

26. The claimant did not hand over the cash to the customer as required but he instead handed over the cash to Wycliff Momanyi which is against the Bank's policy.

27. R.W. 1 testified that the investigations established that the claimant violated the provisions of the Bank's Operating Manual, Business Code of conduct and Ethics and staff manual and the summary dismissal was lawful and fair and in accordance with the Bank's Disciplinary procedure as provided for under Appendix 14 of the Bank's Staff Manual.

28. R.W.1 produced exhibits '1' to 27 including the said Operating Manual under which Section 9.1.5 was instructions for Tellers and Teller Services.

29. R.W.2 Simon Muriithi Maina testified that he was the Employee Relations Manager of the Respondent and was conversant with this case. R.W.2's testimony is per the statement dated 5/10/2018 which was adopted as his evidence in Chief.

30. R.W.1 stated that the Claimant was employed as a graduate clerk on 8/8/2010 subject to 6 months' probation. The claimant was dismissed on 21/9/2015 whilst he worked as a Teller at Rongo Branch.

31. On 19/11/2011, the Claimant was issued with a warning letter for negligence of duty by failing to account for 6 cheques that were deposited by a Bank's customer. The claimant had written a letter of apology dated 15/9/2011 regarding the matter.

32. The claimant requested to be transferred to Rongo on 22/9/2014. On 22/10/2014 the claimant was duly transferred to Rongo.

33. On 3/7/2015 the present complaint was reported by a customer named Lawrence Ngige Gitonga that Kshs.6,300,00 had been fraudulently withdrawn from his account.

34. R.W.2 corroborated R.W.1 on how the investigations were conducted and that the claimant had on 19/6/2015 and 1/7/2015 withdrawn kshs.3,500,000 and 2,800,000 respectively from the account of the said customer, in the absence of the customer and without the National identity card of the customer.

35. R.W.1 testified that on 17/8/2015 the claimant was issued with a Show Cause letter for breach of security and occasioned loss of Kshs.6.3 million to the respondent in contravention of Respondent's Staff Manual, Operating Manual and Business Code of Conduct and Ethics.

36. The claimant responded to the Show Cause Letter on 21/8/2015 and his response was not satisfactory and he was invited to a disciplinary hearing meeting held on 17/8/2015. The claimant attended the disciplinary hearing and was accompanied by a Union official one Mr. Bethwel Komen in terms of Section 41 of the Employment Act, 2007.

37. The Panel established that the claimant negligently paid out cash withdrawals from the customer's account without ascertaining that it was indeed the account holder who had requisitioned the money contrary to the procedures for cash withdrawal under Clause 9.1.5 and Clause 18 on respondent's Operating Manual Instructions for Tellers and Teller Services. Clause 3.1 which states that-

"All withdrawals must be authenticated for encashment. Tellers should observe the approved limits and refer transactions to authorized officers as necessary."

38. The Teller and the checking officer must authenticate and confirm the:-

- Signature (authority)
- Customer photo
- Amount
- P.A.Y.E (identification)
- Date
- Domicile
- Account number
- Funds i.e. correctness of the debit in all ways.

39. R.W.2 stated, the claimant did not authenticate the customer's signatures which had been forged on cash withdrawal vouchers. That the claimant was well aware of the provisions of the Code of conduct and staff manual and that his commission and omission led to breach of the Respondent's security policy that occasioned it loss.

40. The claimant was summarily dismissed on 21/9/2015 and was informed of his right of appeal. That Clause 28.12 of the Respondent's Staff Manual allow the respondent to discipline an employee for misconduct whilst the matter is pending before Court as happened in this case.

41. That the Claimant was accorded a fair hearing. That the claimant is not entitled to service pay as he was not declared redundant and was a member of the Pension fund and as such eligible to claim for his pension contributions and 50% of the employer's contribution. He was also registered for National Social Security Fund (NSSF) where the Respondent was remitting his contributions. That the claimant was lawfully summarily dismissed and is not entitled to payment of one month salary in lieu of notice.

42. That the claimant owed the respondent Kshs.1,839,218.07 at the time of dismissal in respect of Credit card Kshs.28,150,07, Residential property Loan (new) Kshs.1,477, 318 and personal loan Kshs.333,70.

43. That the Court finds that the claimant is liable to pay the said sum in counterclaim and order accordingly.

44. The Court has carefully considered the testimony by the claimant vis a vis that by R.W.1 and R.W.2 and has considered elaborate documentary evidence produced by both parties.

45. It is manifestly clear that the claimant withdrew Kshs.6,300,000 from Account No. [xxxx] owned by a customer named Lawrence Gitonga Nginge, in the absence of the said customer and the claimant was at the time he withdrew the said sums in two batches on 19/6/2015 and 1/7/2015 not in possession of the customer's identity card for purpose of verification of the signatures of the customer and his image. It is not in dispute also that the claimant gave the cash to his operating manager who was then Acting Branch Manager Rongo contrary to bank operating procedures.

46. The claimant has not offered any tangible defence to the blatant breach of the provisions of the Bank's operational manual.

47. The claimant had served the Bank for a period of over 5 years and was well versed with cash encashment procedures at the Bank. The claimant was employed as a graduate clerk in the year 2010 and so was not naïve. The claimant had requested to be transferred to the Rongo Branch where the fraudulent transaction was done by himself and his supervisor hardly a year after his reporting to the Branch.

48. The claimant had a previous working warning for negligence given to him in the year 2011. The claimant did not therefore have a clean record. The loss occasioned the Bank was immense and in the sum of Kshs.6,300,000.

49. The Court finds that the respondent had a valid reason to summarily dismiss the claimant. The summary dismissal was effected following a fair procedure in that the claimant fully participated in the Disciplinary process but was found guilty.

50. The claimant has not proved any duress and/or any undue influence by his supervisor to exonerate him from a disciplinary offence that he willingly committed.

51. It is trite that an employer need not await conclusion of a related criminal trial to discipline an employee as the respondent did to the claimant.

52. Accordingly, the respondent having satisfied the provisions of sections 41, 43, 44 and 45 of the Employment Act, 2007, the suit by the claimant lacks merit and is dismissed.

53. The Counter claim by the claimant is commercial in nature. There is not sufficient material before the Court to adjudicate the matter especially regarding the contracts entered into between the parties for the credit, Loan and mortgage purpose. The Court is also not aware how far the repayments have taken place. The Court does not know what securities had been provided by the claimant to secure the loans.

54. The Court finds that this is not an appropriate forum to determine the Counter-Claim and strike out the same accordingly.

51. The respondent is entitled to the costs of the suit.

Dated and delivered at Nairobi this 28th day of January, 2021.

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. Ogutu for Claimant

Mr. Ogejo for the respondent

Chrispo: Court clerk