



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 18 OF 2019

EDISON SAFARI KUSA.....CLAIMANT

VS

NIC BANK (K) PLC.....RESPONDENT

JUDGMENT

Introduction

1. When an employee is transferred to a new station, it is often a mixed bag. On the one hand, there may be new opportunities for growth but on the other, a transfer could portend anxiety about uncharted waters; there might even be dark alleys to navigate and at the worst, minefields waiting to erupt.
2. Edison Safari Kusa an employee of NIC Bank (K) PLC was transferred from the Bank's Meru Branch to Nyali Branch and appears to have walked right into a scam or did he? Was he an innocent victim of circumstances, perhaps too trusting or was he too careless or even a cunning accomplice? These are the questions the Court is faced with in this case.
3. Kusa brought his claim against the Respondent Bank by a Memorandum of Claim dated 18th March 2019 and filed in court on 26th March 2019. The Bank filed a Reply on 20th September 2019 to which the Claimant responded on 20th September 2019.
4. The matter went to full trial and the Claimant testified on his own behalf. The Bank called its in-house Counsel, Angela Njoroge. Both parties then filed written submissions.

The Claimant's Case

5. The Claimant was employed by the Respondent Bank on 16th July 2013, in the position of Branch Operations Assistant. He was first deployed at Changamwe Branch.
6. The Claimant was later promoted to the position of Customer Service Officer and re-deployed at Meru Branch.
7. By letter dated 17th November 2017, the Claimant was transferred to Nyali Branch in the same position of Customer Service Officer. He was to report to the Branch Operations Manager. He states that his job description was to be discussed at a later date, after the transfer had taken effect.
8. On the date of reporting being 11th December 2017, the Claimant found the Operations Manager, Kevin Omondi on leave. Omondi was due to resume duty on 15th December 2017.
9. The Claimant avers that the Operations Manager was the person in charge of handling the strong room and the main door keys, which duty was taken over by the Customer Service Officer at Nyali Branch, Julianah Mwashigadi.
10. Between 4th January 2018 and 15th January 2018, the Respondent carried out a cash count audit at Nyali Branch.
11. The Claimant states that the audit related to the year 2017 and at the time it was being conducted, he had been at Nyali Branch for only 17 days. He was therefore not able to respond to any queries and/or inquiries as he had just reported to the Branch and was not conversant with the affairs of the Branch for the year 2017.
12. According to the Claimant, there were operational differences in Nyali Branch as compared to Meru Branch, in the way business and

administration were carried out.

13. The Claimant states that the subject audit was supposed to be carried out under the supervision of the Branch Manager but was actually under the supervision of the Operations Manager because the Branch Manager for Nyali had been transferred to Harbour House Branch, thus creating a vacuum at Nyali Branch.

14. On 1st February 2018, the Claimant received a phone call from the Branch Manager, Amos Mactolo in respect of queries by the Auditor on entries, to which queries the Operations Manager, Kevin Omondi was delaying in responding. The Claimant was asked to peruse the entries to see if they made sense.

15. The Claimant states that upon looking at the entries the following day, he reported that they seemed normal. The Claimant claims to have been unaware of the intentions of the Branch Manager.

16. The Claimant goes on to state that at around 3.00 pm, he received an email from Kevin Omondi, summoning him and Julianah Mwashigadi to a meeting with respect to an urgent matter, which Omondi insisted could lead to his last day at the office, depending on how the day would unfold.

17. The Claimant and Mwashigadi heeded to Omondi's summons. After the meeting, Omondi left the Branch unannounced and without handing over the keys to the vault, never to show up again.

18. On 3rd February 2018, two branch managers; one from Harbour House Branch, Amos Mactolo and the other from Nkurumah Road Branch, Mary Wambugu visited Nyali Branch to carry out a full cash count in the vault. The cash count established that Kshs. 50,000 was missing from the bundles of cash in the vault.

19. The Claimant avers that due to operational differences as compared to other branch practices, the Branch Operations Manager was the permanent custodian of the main door keys but when the Operations Manager was on leave, Julianah Mwashigadi would take over the role. The Claimant adds that at no point was he in permanent custody and/or possession of the main door keys.

20. The Claimant points out that according to the policy of the Bank, the Operations Manager and the Branch Manager ought to have been the main custodians of the main door keys, by virtue of being senior administrative Officers.

21. Following the events of 6th February 2018, the Respondent issued the Claimant with a letter requiring him to explain matters concerning performance lapse and lack of escalation. By this letter, the Claimant was suspended for one month, which suspension was later extended for a further one month effective 6th March 2018.

22. On 12th March 2018, the Claimant attended a disciplinary hearing and explained what had transpired.

23. Upon being issued with the minutes of the disciplinary meeting for his signature, the Claimant noted that the minutes were contrary to the information he had given at the meeting. The Claimant therefore cancelled his signature.

24. On 19th April 2018, the Claimant was issued with a termination letter dated 13th April 2018.

25. The Claimant's case is that the termination of his employment was unlawful and unfair. The Claimant therefore claims the following:

- a) 12 months' salary in compensation.....Kshs. 1,234,113.96
- b) Annual health benefits.....134,576.82
- c) Leave days accrued for the year 2018.....102,842.82
- d) Gratuity pay @ 18 days for 6 years worked.....427,192.92
- e) Costs plus interest

The Respondent's Case

26. In its Response dated 14th May 2019 and filed in court on 20th May 2019, the Respondent admits having employed the Claimant. The Respondent states that as at 13th April 2018, the Claimant held the position of Customer Service Officer.

27. The Respondent further states that the Claimant's reporting date at Nyali Branch was 1st December 2017 and not 11th December 2017 as alleged by the Claimant.

28. While admitting that there were some structural differences between its branches, the Respondent avers that the core operations were similar in all branches.

29. Regarding the audit, the Respondent maintains that the absence of the Branch Manager, which is denied, did not vitiate the audit carried out.

30. The Respondent agrees that the Claimant had attended a meeting with the Branch Operations Manager; which meeting the Respondent states was held contrary to the Respondent's policy and which partly contributed to the termination of the Claimant's employment.

31. The Respondent avers that the Claimant in fact had possession of the main door keys during and after the tenure of the Operations Manager, Kevin Omondi.

32. The Respondent states that the letter dated 6th February 2018 sought the Claimant's explanation on the following issues, which it reasonably believed to have compromised its operational security and exposed it to financial and reputational risk:

- a) The meeting between the Claimant and Kevin Omondi at Café Arabika after the latter had informed the former of the audit issues;
- b) The Claimant's decision to take over the vault, upon Kevin Omondi's departure, without the supervision of the Branch Manager;
- c) The Claimant's failure to disclose to the Branch Manager that he had been sharing (the Claimant) the keys to the main door;
- d) The Claimant's failure to disclose to the Branch Manager that he had information that Kevin Omondi had misplaced his keys to the main door;
- e) The loss of Kshs. 50,000 during the cash count done on 3rd February 2018.

33. Regarding the minutes of the disciplinary hearing held on 12th March 2018, the Respondent states that the statement disputed by the Claimant, even if corrected, would not negate numerous statements supporting the Claimant's culpability.

34. The Respondent avers that the Claimant's explanation in response to the charges levelled against him was considered and found to be inconsistent and inadequate. His employment was consequently terminated on those grounds.

35. The Respondent holds that the Claimant, having undergone vault custodian training at the Kenya School of Monetary Studies in February 2017, had failed to carry out his duties with honesty and to the best of his abilities as would be expected of an employee in similar circumstances.

36. The Respondent states that despite having cogent grounds to summarily dismiss the Claimant, it gratuitously terminated the contract and paid to the Claimant the equivalent of one (1) month's salary in lieu of notice.

Findings and Determination

37. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

38. The Claimant's employment was terminated by letter dated 13th April 2018 which is reproduced below:

"Dear Edison,

TERMINATION OF EMPLOYMENT CONTRACT

Reference is made to the discussions held with you on 6th February, 2018 and 12th March, 2018 in which you were interviewed in connection with ongoing investigations by the Bank regarding the following incidences at NIC Bank Kenya PLC Nyali Branch:

- 1) Loss of Kes. 50,000 which was discovered on 3rd February 2018.*
- 2) Sharing of the branch main door keys with the Branch Operations Manager.*
- 3) A private meeting held on 2nd February 2018 in café Arabica near the branch with the Branch Manager and the second Customer Service officer.*

Our investigations reveal that you failed to follow the proper handover process of undertaking a full cash count in the vault when receiving your hand over at Nyali Branch. Further investigations also revealed that with full knowledge of the Branch Operations Procedures you shared your branch main door key with the Branch Operations Manager and withheld pertinent information

regarding operational lapses which were happening in Nyali branch without escalating this information to the bank management. Your private meeting with the branch operations manager outside the branch on 2nd February 2018 was also questionable because it is after this meeting that he left you in charge of the branch without a proper handover as required by policy. This irregularity was also not reported to your branch manager immediately.

After careful consideration of your explanation, we are satisfied that you acted in breach of your terms and conditions of employment as stipulated in clause 8 (a & b), by failing to carry out your duties and responsibilities with honesty and to the best of your ability and failing to observe the rules, regulations and instructions pertaining to bank dual custodianship. This is tantamount to gross misconduct and contrary to the bank values, thereby causing financial and reputational risk to the bank.

In accordance with **clause 11** of your employment contract dated **23rd December, 2016**, and the provisions of the employment act 2007 clause 36, this letter serves to notify you that your employment has been terminated with effect from **16th April, 2018**. You will be paid an equivalent of **one (1) month** salary in lieu of notice and any outstanding leave days as stipulated in the said contract of employment. You will be required to handover all bank property in your possession to your manager and get the necessary clearance from all the relevant departments as per the attached clearance form before your departure.

We also note that you have an outstanding personal unsecured Loan balances of approximately **Kshs. 1,145,646.75** respectively in our **Staff Loan Ledger**. Please let us have your written proposal on how you intend to settle these debts before you exit. Your loans will be converted to applicable commercial rates by 16th May, 2018 without further notice as below;

Commercial Rate = CBR + Margin.

Kindly note your credits card(s) shall immediately be blocked and you shall be required to fully clear any outstanding balances (presently at **Kshs. 10,550.00**) which if not done by 23rd April, 2018, shall be cleared by your final dues. In the event that you may wish to retain the credit card, a fresh appraisal by our Credit Risk team will be required. Payment of **your final dues will be subject to successful completion of the Bank's clearance procedure**. Make appropriate arrangements to open your desired commercial account(s) before **16th May, 2018** to avoid unnecessary **inconveniences upon closure of your staff account(s)**.

All other staff benefits will be withdrawn with effect from 11th May 2018. We take this opportunity to remind you of clause 6 of your employment contract which highlights the importance of confidentiality and you are expected to uphold the same after your exit from the Bank.

This letter comes in duplicate. Kindly acknowledge its receipt by signing the attached copy and returning the same to us.

Yours faithfully,

(signed)

MONICAH KIHIA

DIRECTOR, HUMAN RESOURCES

39. Section 43 of the Employment Act, requires an employer to establish a valid reason for terminating the employment of an employee. The law is now settled that in determining whether an employer has discharged its obligation under Section 43 of the Act, the test to be applied is one of 'reasonable response'.

40. In the final submissions filed on behalf of the Respondent on 22nd December 2020, reference was made to the decision in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR** where the Court of Appeal restated the 'reasonable responses' test by citing with approval the following excerpt from the **Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642**:

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair."

41. The termination letter dated 13th April 2018 accuses the Claimant of failure to follow proper procedure in taking over the vault at the Respondent's Nyali Branch; sharing of branch main door keys with the Branch Operations Manager; withholding information regarding operational lapses at the Branch and holding an irregular private meeting with the Branch Operations Manager.

42. In his testimony before the Court the Claimant stated that on 1st February 2018, he received a call from the Nyali Branch Manager asking him to check on audit queries with respect to some transactional entries; the Claimant checked the entries on the morning of 2nd February 2018 and later on the same day, he attended a meeting called by the Branch Operations Manager, Kevin Omondi, whose agenda was the

same audit queries. On the very same day, the Branch Operations Manager left the Branch without handing over. A total vault cash count conducted on 3rd February 2018 returned a loss of Kshs. 50,000.

43. Regarding the issue of keys, the Claimant, in his witness statement dated 18th March 2019, states the following:

“Due to the operational differences regarding handling of strong room and main door keys, when I reported to the Nyali Shift Branch Julianah Mwashigadi and Kevin Omondi shared the main door keys, upon taking over custodial duties Kevin Omondi and I started sharing the main door keys due to differences in working shifts. At all times relevant I believed that Mr. Amos Mactolo the Branch Manager was in possession of the other main door keys but later came to my attention that Mr. Amos Mactolo was not holding the keys, when I queried on about (sic) the keys after Mr. Amos Mactolo was transferred to the Harbour House branch Mr. Kevin Omondi informed me and Julianah Mwashigadi that it was at his home and later stated that it was misplaced at his home.”

44. In his response to the suspension letter dated 6th January 2018, the Claimant makes two significant disclosures; first, that it was his proposal that the meeting called by Kevin Omondi be held outside the Branch at the neighbouring Café Arabika and second, that he and his co-custodian conducted a vault balancing on 2nd February 2018, without a full cash count.

45. This Court has, on several occasions, cautioned bankers that they operate in a highly sensitive sector that requires the highest degree of diligence. In **Banking, Insurance & Finance Union (Kenya) v Cooperative Bank of Kenya Limited [2018] eKLR** I stated the following:

“This Court has stated elsewhere that bankers operate in a highly sensitive environment, within which they handle other people’s money. The duty of care must therefore be commensurably high (Agnes Murigi Mwangi v Barclays Bank of Kenya Limited [2013] eKLR).”

46. By his own admission, the Claimant walked into an unusual brand of operations at Nyali Branch where main door keys were shared. Being an experienced banker, the Claimant quickly took note of this strange arrangement but there was no evidence that he ever documented his concerns.

47. What is more, the Claimant himself flouted well known bank procedures by sharing keys and failing to do a cash count at the vault on 2nd February 2018. It was also a breach of protocol for the Claimant to attend a meeting with the Branch Operations Manager whose agenda was a matter he had been assigned by the Branch Manager.

48. On the whole, I find and hold that the Claimant acted negligently and irresponsibly and the Respondent therefore had a valid reason for terminating his employment.

49. The next question is whether in effecting the termination of the Claimant’s employment the Respondent observed due procedure. On 6th February 2018, the Claimant was issued with a show cause letter setting out the accusations levelled against him, to which he responded on the same day.

50. On 9th March 2018, the Claimant was issued with a notice of disciplinary hearing and on 12th March 2018, he attended a disciplinary meeting. I have looked at the handwritten objections made by the Claimant on the record of the disciplinary proceedings of 12th March 2018 and find nothing that invalidates the record.

51. I have also looked at the list of documents contained in the Notice to Produce filed by the Claimant on 25th October 2019 and find that in light of the actual accusations facing the Claimant, none of the listed documents would have changed the verdict passed against him.

52. The resultant finding is that the termination of the Claimant’s employment was substantively and procedurally fair. His claim for compensation is therefore without basis and is dismissed.

53. No evidence was led to support the claims for annual health benefits, accrued leave and gratuity. Consequently, these claims also fail and are dismissed.

54. In the end, the Claimant’s entire claim fails and is dismissed.

55. In light of the previous employment relationship between parties and given the Claimant’s existing level of indebtedness to the Respondent, I direct that each party will bear their own costs.

56. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Matheka with Miss Maiga for the Claimant

Mr. Kongere for the Respondent