



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 355 OF 2017

JENIPHER MWENDE KIWANZA.....CLAIMANT

VERSUS

CFC STANBIC BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. In the yester years, if a bank customer needed to withdraw money from their account, they would have to physically show up at their specific branch. They would identify themselves to the paying Teller, by producing their account opening documentation; the Teller would then open a physical roll and confirm the account details as well as availability of sufficient funds to meet the customer's request.
2. Owing to the frequent physical contact between customers and front office bank staff, the Know Your Customer (KYC) protocols were easy as a Teller could identify a customer by simply looking at their face. It was also not difficult to check the account history and confirm availability of funds, to satisfy a cash withdrawal request. Predictably, white collar bank crime was not easy to execute and if one wanted to rob a bank, they would have to appear physically.
3. With technological advancement, all that has changed; we now have Automated Teller Machines (ATMs), Mobile and Internet Banking and more significantly Branchless Banking, where a customer can make transactions at any branch of their bank. The theatre of this dispute is the latter scenario.
4. On 7th May 2014, a customer deposited Kshs. 650,000 at the Respondent's Waiyaki Way Branch. A Teller at the Branch, by the name Nelly Njeru credited the deposit, into the core banking system, as Kshs. 6,500,000. In a bizarre twist, Nelly Njeru started convulsing and had to be rushed to hospital.
5. At the time, another Teller was at work at the Respondent's Digo Road Branch-Mombasa. That Teller was Jenipher Mwende Kiwanza, the Claimant in this Case.
6. On the same day, a gentleman by the name Steven Chorio Kiai walked into the Digo Road Branch and found the Claimant. The customer asked to withdraw the sum of Kshs. 1,000,000 over the counter, which was duly paid.
7. The following day on 8th May 2014, the same customer went back to Digo Road Branch, seeking to make an over the counter withdrawal of Kshs. 6,160,000 which, upon the customer's instructions, was converted to USD 70,000. The customer also presented an in house cheque of Kshs. 95,000 with a request that the funds be deposited in a newly opened savings account.
8. As it turned out, the transactions of 8th May 2014, were made in an account that did not have the funds to cover them. The Claimant, who was the paying Teller was held culpable by the Bank and she lost her job. This is the genesis of this dispute, which now falls for determination before me.
9. At the trial, the Claimant testified on her own behalf and thereafter called Anthony Maina and Corporal No. 58871 Joseph Waweru. The Respondent called its Senior Human Capital Business Partner, Sylvester Odhiambo and former Financial Crime Control Manager, Joel Kiarie. The parties also filed written submissions.

The Claimant's Case

10. By her Statement of Claim dated 4th May 2017 and filed in court on 5th May 2017, the Claimant states that she was employed by the Respondent Bank on 15th January 2013. She was deployed as a Teller at the Respondent's Digo Road Branch, Mombasa.
11. On 7th May 2014, the Claimant paid a customer by the name Steven Chorio Kiai, vide an open cheque for Kshs. 1,000,000. She states that the transaction was preceded by a rigorous verification exercise, including confirmation of the identity of the customer, matching of signature and checking on sufficiency of funds. The transaction was approved by the Team Leader, Customer Service.
12. The following day on 8th May 2014, the same customer went back to the Claimant's workstation, this time in the company of an Executive Sales Agent of the Respondent, by the name Faith Thiong'o. The customer wanted to make an over the counter withdrawal of Kshs. 6,160,000 which was converted to USD 70,000.
13. The rate of exchange had been negotiated and agreed upon between the customer and the Executive Sales Agent. The customer also presented an in house cheque of Kshs. 95,000 with instructions that the funds be transferred to a new savings account. These transactions were also approved by the Team Leader.
14. On 9th May 2014, the Claimant was called by the Head of Service Support to write a statement explaining the events surrounding this particular customer. The Claimant, who claims to have been caught by surprise, wrote a general statement and went back to her workstation. By evening of the same day, the Claimant was handed a suspension letter by the Head of Service Support. The Claimant recorded a statement with the Police while under suspension.
15. On 16th May 2014, the Claimant was invited to attend a disciplinary hearing at the Respondent's Head Office in Nairobi. The Claimant claims that the panel was very unfriendly to her and that she was only asked structured questions, without a chance for explanation.
16. By letter dated 30th June 2014, the Claimant's employment was terminated. The reasons given for the termination were that the Claimant had disregarded the Anti-Money Laundering (AML) guidelines and did not consider the transaction history of the subject account.
17. The Claimant's case is that the termination of her employment was unfair as the outcome was already pre-determined and the said termination was not informed by the evidence adduced and the facts surrounding the case.
18. The Claimant therefore seeks the following remedies:
 - a) Reinstatement to the position of Bank Teller or equivalent position;
 - b) Backdated salary from 30th June 2014 to date;
 - c) 12 months' salary in compensation for unfair termination;
 - d) Leave pay for 16 months;
 - e) 1 month's salary in lieu of notice;
 - f) Damages for unfair labour practices contrary to Article 41 of the Constitution.

The Respondent's Case

19. In its Statement of Response dated 18th July 2017 and filed in court on 21st July 2017, the Respondent admits having employed the Claimant in the position of Clerk Teller within the Personal and Business Banking Department at Digo Road Branch in Mombasa, effective 15th January 2013.
20. The Respondent states that on 8th May 2014, a customer by the name Stephen Chorio Kiai was introduced to the Claimant, in the course of her duties, by her branch colleague, Faith Thiong'o who held the position of Executive Sales Agent.
21. The customer made a request to withdraw Kshs. 6,160,000 in cash over the counter from Account Number 0100002810632 and purchase United States Dollar denominations of equivalent value, which amounted to USD 70,000.
22. The Respondent avers that in breach of Clause 10 of her employment contract and in disregard of duly laid down policies and procedures within her knowledge, the Claimant proceeded to pay the customer the entire amount of US Dollars, notwithstanding the fact that the transaction had not been approved by the authorising officer.
23. The Respondent also accuses the Claimant of failure to exercise caution as required, by failing to check the customer's account history and the Respondent's Anti Money Laundering guidelines on transactions of such nature.
24. The Respondent denies any wrongdoing on its part and states that:
 - a) On 8th May 2014, Nelly Njeru, a Teller at the Respondent's Waiyaki Way Branch reported that she had erroneously credited

Kshs. 6,500,000 into Account Number 0100002810632 instead of Kshs. 650,000 which she had received;

- b) As a result of a withdrawal transaction effected by the Claimant on the same day, at the Digo Road Branch in favour of Stephen Chorio Kiai, Account Number 0100002810631 was overdrawn by Kshs. 5,705,130;
- c) As a result of the status of the customer's Account, the Respondent commenced investigations;
- d) Thereafter, pursuant to Clause 9.10 of the Respondent's *Human Resources Consequent Management Guide* and taking into consideration the seriousness of the situation, the Respondent invited the Claimant to record a statement on 9th May 2014 and suspended her from duty to allow for further investigations;
- e) The suspension of the Claimant was in good faith and in accordance with the Respondent's *Human Resources Consequent Management Guide*, whose provisions were within the Claimant's knowledge.

25. On 14th May 2014, the Respondent issued a Disciplinary Enquiry Notification Form, in accordance with the Respondent's *Human Resources Consequent Management Guide* and the obtaining Collective Bargaining Agreement.

26. The Disciplinary Enquiry Notification Form invited the Claimant to a disciplinary hearing on 16th May 2014, at the Respondent's Head Office. The charges preferred against the Claimant were '*Failure to produce work of acceptable standard and/or poor work output contrary to Section 1.1 of the Human Resources Consequent Management Guide.*'

27. The hearing took place on 16th May 2014 as scheduled and the Claimant was accompanied by a Union Shop Steward.

28. The Respondent avers that the Claimant was invited to make representations and that by her own admission, she confirmed that her actions of 8th May 2014 were contrary to the guidelines on payment of cash.

29. Upon hearing representations, admission by the Claimant and mitigation by the Shop Steward, the Panel recommend termination of the Claimant's employment for reasons of:

- a) Disregarding the due diligence measures in as far as Anti Money Laundering guidelines are concerned;
- b) Failing to observe the customer's account transaction history as required, which would have shown the Claimant that the customer's transaction was not in tandem with the account history, hence the need to exercise more caution;
- c) Failing to exercise caution while paying a non-domiciled account holder;
- d) Failing to adhere to the stipulated payment authorisation procedure; and
- e) Making payments when the system transaction was incomplete in respect of all relevant approvals.

30. The Respondent's case is that there was justification for the termination of the Claimant's employment and she was afforded a fair hearing. The Respondent avers that it followed the procedures laid down in Clauses 9.12 and 9.16 of the *Human Resources Consequent Management Guide* and the provisions of the Employment Act.

Findings and Determination

31. 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

32. The Claimant's employment was terminated by letter dated 30th June 2014 stating:

"Dear Jenipher,

TERMINATION FROM THE BANK'S SERVICE

We write pursuant to the Disciplinary Enquiry hearing held on 24th April 2014 (sic).

As you will recall, the enquiry was held on the basis of the following charge against you:-

· Failure to produce work of acceptable standard and/or poor work out put (contrary to Section 1.1 of HR Consequence Management Guide) which arise out of the following incident:

On 8th May 2014, in the course of your duties you received an instruction from one of our customers, by the name Stephen Chorio Maina holder of Account no. 010002810632 domiciled at Kenyatta Avenue Branch Nairobi. The instruction was to purchase USD 70,000/- equivalent to Kes. 6,160,000/-.

You then proceeded to pay the customer the amount of USD 70,000/- notwithstanding the fact that the transaction had not been authorized in the system by the authorizing officer.

Findings of the Disciplinary Committee confirm that you deliberately disregarded AML guidelines and did not consider the transactional history of the Account causing the Bank to lose Kes. 6,160,000/-.

Arising from the above, the Bank has lost confidence in you and in conformance with the penalty prescribed for the above charge under Clause 1.1 of the Human Resources Guide, has terminated your employment with immediate effect.

If you would like to appeal against the decision, you may send a written appeal to the Chief Executive within five (5) full working days of receipt of this letter. On receipt of the appeal, your termination will be reviewed on the grounds set out in the written appeal. The Chief Executive will advise you of his decision in writing.

Kindly make arrangements to hand over any Bank assets under your charge to your Manager or any other person as your manager may instruct. You are also advised to make immediate arrangements to clear your liabilities, if any, with the Bank. Please get in touch with Human Resources personnel regarding completion of clearance forms.

Your terminal dues, if any, will be computed and credited into your account in due course.

Yours sincerely,

(signed)

Dan Omoro

Head of Physical Distribution & Risk Management”

33. This letter cites ‘Failure to produce work of acceptable standard and/or poor work out put’ as the reason for termination of the Claimant’s employment. A prior Disciplinary Enquiry Notification Form issued to the Claimant on 14th May 2014, gives the following events in relation to the charge against the Claimant:

(i) On 8th May 2014, in the course of your duties you received an instruction from one of our customers, by the name of Stephen Chorio Kiai holder of Account no. 010002810632 domiciled in Digo Branch to Mombasa (sic). The instruction was to purchase USD 70,000/- equivalent to Kes. 6,160,000/-.

(ii) You then proceeded to pay the customer the amount of USD 70,000/- notwithstanding the fact that the transaction had not been authorized in the system by the authorizing officer.

34. The Disciplinary Enquiry Notification Form further states:

“The Bank’s Management is of the opinion that you have a case to answer arising out of your conduct in the above mentioned events. The charges therefore preferred against you in this case shall include, but not limited to: [Emphasis Added]

Failure to produce work of acceptable standard and/or poor work out put (Contrary to Section 1.1 of HR consequent Management Guide)

Please note that you have a right to be accompanied by a representative of your choice who must be an employee of the Bank. If you intend to use this option please advise the undersigned (or HR Business Partner) of the name of your representative before, 16.00 HRS on Thursday 15th May 2014.”

35. In the minutes of the disciplinary hearing on 24th May 2014, the charges levelled against the Claimant are captured as follows:

“On 8th May 2014, in the course of her duties Jenipher received an instruction from one of our customers, by the name of Stephen Chorio Kiai, holder of Account no. 010002810632 domiciled in Kenyatta Avenue Nairobi. The instruction was to purchase USD 70,000/- equivalent to Kes. 6,160,000/-.

Jenipher then proceeded to pay the customer the amount of USD 70,000/- notwithstanding the fact that the transaction had not been authorized in the system by the authorizing officer.

*The Bank's Management is of the opinion that Jenipher had a case to answer arising out of her conduct in the above mentioned events. **The charges therefore preferred against her in this case shall include, but not limited to: [Emphasis Added] Failure to produce work of acceptable standard and/or poor work out put. (Contrary to Section 1.1 of HR consequent Management Guide)***"

36. From the foregoing documents, which were supplied by the Respondent, the Claimant's fault was effecting a cash withdrawal without authorisation. The Claimant's former supervisor, Anthony Maina however told the Court that he had actually approved the transaction.

37. In its decision in **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** this Court held that an employee facing disciplinary proceedings is entitled to prior notification of the exact charges levelled against them. This is the essence of Section 41 of the Employment Act which provides:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

38. Both in the Disciplinary Enquiry Notification Form issued to the Claimant and in the record of the proceedings of the disciplinary hearing held on 24th May 2014, the Respondent seems to have been under the illusion that they could progressively keep adding charges against the Claimant.

39. I say so for two reasons; first, the Respondent expressly uses the phrase 'shall include, but not limited to', in relation to the charges facing the Claimant and second, in their testimony before the Court, the Respondent's witnesses kept adding factors of breach against the Claimant, such as breach of Anti Money Laundering regulations, including failure to make a call back to the account domicile Branch.

40. In a situation where the Respondent itself appeared unsure as to the exact nature of the charges against the Claimant and therefore kept shifting goal posts, how could the Claimant be expected to prepare her defence? The lack of clarity on the charges coupled with the supersonic speed with which the disciplinary proceedings were conducted compromised the entire process.

41. And there is more to say; the Respondent states that the Claimant admitted having breached operational guidelines but did not provide any evidence to support this assertion. It was not lost on the Court that the Claimant had not signed the minutes of the disciplinary hearing, which were really a rehashing of the Disciplinary Enquiry Notification Form.

42. Regarding the issue of making the subject payment without authorisation, the Claimant's former Team Leader, Anthony Maina was categorical that he had indeed authorised the payment before the Claimant handed over the cash to the customer and that the only thing pending was remote authorisation, whose purpose was to balance the Claimant's till in terms of actual cash and system balances. The Respondent did not adduce any evidence to contradict Maina's testimony in this regard.

43. The Respondent went further to state that the transaction should in fact have been authorised by the Branch Manager or Assistant Branch Manager. Again, no evidence was adduced to back this proposition. Additionally, Maina told the Court that at the material time, he was the Acting Branch Manager as the substantive Branch Manager was in Nairobi for training. The Branch Manager would have been a crucial witness to shed light on this but the Respondent chose not to call him. Maina's testimony was therefore uncontroverted and unchallenged.

44. In support of its accusation that the Claimant had breached Anti Money Laundering regulations, the Respondent made reference to Clause 1.4 on cash withdrawal which provides:

"All branches must exercise caution before paying out money whenever a customer wishes to make a withdrawal either:

Ø Immediately upon receipt of a deposit into the customer's account lodged at another branch or bank, particularly if the account has recently been opened or the customer is not well known to the branch, or;

Ø Where the customer has just credited his/ her account by cheque and is using any form of account withdrawal voucher to obtain cash.

The Teller is responsible for establishing the identity of a person who either presents a cheque for encashment, or requests a withdrawal.

In case of doubt, the Teller should refer to:

Ø the Team Leader Customer Service, Asset Custodian or

Ø another Senior official (HSS, BM)

Care must be exercised with all withdrawals to ensure they are genuine."

45. It is on record, that on the day the subject withdrawal was made, the customer had been escorted to the Claimant's station by the Executive Banking Agent, Faith Thiong'o, who had negotiated the exchange rate with the Bank Treasury. In addition, the Claimant sought approval of the transaction from her Team Leader. Overall, the Court did not find any breach of the Anti-Money Laundering guidelines by the Claimant.

46. I have held elsewhere that bankers must be held to a high standard of care because of their nature of business (see *Agnes Murugi Mwangi v Barclays Bank of Kenya Limited [2013] eKLR*).

47. I must however put a caveat that bankers are mere human beings and not angels. The test must always be whether they have acted reasonably in their line of duty. Maina told the Court that every banker must have faith in the core banking system, otherwise they would never work. Maina further testified that the fraud in this case was unprecedented.

48. On his part, the Respondent's Senior Human Capital Business Partner, Sylvester Odhiambo testified that the core banking system is very safe and Tellers are not supposed to doubt it.

49. Joel Kiarie, who was at the material time the Respondent's Financial Crime Control Manager, told the Court that the misposting at Waiyaki Way Branch was discovered at around 12.00 Noon but the correction was not effected until 17.03 Hours. By that time the funds had already been withdrawn and a fraud had crystallised. Kiarie further told the Court that after the Teller at Waiyaki Way Branch had fallen ill, it was the duty of the Team Leader there to ensure that everything was handled properly. Clearly, this did not happen and the entire Bank and its branch network were exposed.

50. What emerges in this case is a classic case of institutional failure for which the Claimant was blamed, simply because she was at the tail end of a well-choreographed fraud which may have been abetted from within and which caught the Managers at Waiyaki Way Branch flat footed. As a result, the Claimant lost her job at the young age of 30 years.

51. Flowing from the foregoing findings, I have reached the conclusion that the termination of the Claimant's employment was unlawful and unfair.

Remedies

52. The Claimant seeks reinstatement. However, given the time lapse from the date of termination, I find that this is not an appropriate remedy in this case.

53. Instead, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service accentuated by her young age and the fact that she is unlikely to secure a similar job in the foreseeable future. I have further considered the cavalier manner in which the Respondent handled the Claimant's case.

54. I also award the Claimant one (1) month's salary in lieu of notice.

55. In the absence of leave records to the contrary, I invoke Section 10(7) of the Employment Act and allow the claim for leave pay.

56. No basis was established for the claims for backdated salary and damages which therefore fail and are disallowed.

57. Finally, I enter judgment in favour of the Claimant as follows:

a) 12 months' salary in compensation.....	Kshs. 738,000
b) 1 month's salary in lieu of notice.....	61,500
c) Leave pay for 1 year (61,500/30*26).....	53,300
d) Prorata leave for 5 months (61,500/30*1.75*5).....	<u>17,938</u>
Total.....	<u>870,738</u>

58. This amount will attract interest at court rates from the date of judgment until payment in full.

59. The Respondent will meet the costs of this case.

60. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OCTOBER 2021

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JUDGE

Appearance:

MR. MUCHIRI FOR THE CLAIMANT

MR. MUEKE FOR THE RESPONDENT