



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 966 OF 2016

SYLVESTER NYAGA NYAGA.....CLAIMANT

VERSUS

WANANDEGE CO-OPERATIVE

SAVINGS & CREDIT SOCIETY.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent as a credit control officer with effect from 12th March, 2012 and was later appointed to serve in the position of FOSA (Front Office Services Activities) Manager with effect from 17th April, 2013 until 18th March, 2016 when he was dismissed from employment. It is that dismissal which has triggered the instant suit through which the claimant has prayed for the following orders;

- i. One month salary in lieu of notice Kshs 98,251/=.**
- ii. Salary for the months of January, February, March, 2016 Kshs 294,753/=.**
- iii. 12 months salary pursuant to section 49(1) (c) of the Employment Act Kshs 1,179,012/=.**
- iv. Service gratuity Kshs 98,251x4 Kshs 393,004/=.**
- v. Certificate of service pursuant to section 51(1) of the Employment Act.**
- vi. General and exemplary damages.**
- vii. Costs of the suit.**

2. The claim was opposed vide a response to the statement of claim filed before this Court on 15th July, 2016 and through which the respondent averred that the claimant's dismissal from service was as a result of his own actions and commissions which occasioned it to lose the sum of Kshs 3,205,349.22.

3. The employment relationship is not contested. What is in contest is the manner in which the employment relationship was terminated and the benefits payable as a result thereof.

4. During the hearing, each side called one witness to render oral evidence.

Claimant's case

5. The claimant testified in support of his case and sought to adopt his witness statement together with the bundle of documents which were filed together with the claim. The claimant avers that during his employment with the respondent, he served diligently and exercised fidelity and utmost care in the discharge of his duties. That the respondent appreciated and acknowledged this fact vide its letter of 19th December, 2014.

6. It was the claimant's testimony that he was sent on compulsory leave with effect from 23rd December, 2014 on account of some unsubstantiated allegations of fraud attaching to his user name (SNYAGA).

7. The claimant averred that he later received a letter dated 4th January, 2014 through which he was alleged to have failed to exercise due care and attention in the performance of his duties thereby occasioning loss to the respondent in the sum of Kshs 3,205,349.22. That the letter did not specify the allegations facing him and thus he sought for particulars vide his letter dated 8th January, 2016 but instead, he was placed on interdiction vide a letter dated 18th January, 2016.
8. It was also his testimony that vide a letter 23rd February, 2016, he was required to appear before the respondent's Board of Directors (Board) to defend himself against the charges he was being accused of. That the invitation letter was served upon him on 25th February, 2016 at 11:25 am and that once again, he requested for specifics of the offences against him so as to enable him prepare his defense accordingly, but the respondent snubbed his request.
9. The claimant further stated that he appeared before the respondent's Board on 27th February, 2016 where he reiterated the request to be furnished with specific particulars in regards to the charges he was facing. That on 18th March, 2016 the respondent served him with a letter of summary dismissal which was backdated to take effect from 23rd December, 2016.
10. The claimant further averred that he was summoned sometimes in January, 2016 to appear before the Banking Fraud Investigations Unit to record a statement but no charges were brought against him. That however, another employee was charged in court over the same incident.
11. In cross examination, the claimant admitted receiving the journal marked as Appendix 1 which contained the transactions in question. He maintained that someone must have used his credentials to approve the fraudulent entries in the system. The claimant also denied making any admission in his response as regards the fraudulent entries and averred that he was merely seeking a clarification.
12. He prayed that the court grants his prayers as set out in the claim.

Respondent's case

13. On its part, the respondent called one witness, Ms. Joanne Cheruto, its Chief Executive Officer (CEO) who testified as RW1. She also adopted her witness statement as part of her testimony in chief as well as the respondent's bundle of documents which she produced before court as exhibits. RW1 confirmed that the claimant was sent on compulsory leave following preliminary investigations that revealed that there was a fraudulent system-based transaction in the FOSA which had been undertaken under the claimant's username (SNYAGA). That the claimant was therefore suspended to pave way for further investigations and that he was later served with a notice to show cause through which he was accused of negligence which had occasioned the loss of Kshs 3,205,349.22 to the respondent.
14. That the claimant in response to the show cause letter confirmed that certain entries in the transactions were approved under his username but denied being the originator of the said entries.
15. RW1 further told court that the claimant appeared before the respondent's Board on 27th February, 2016 where he defended himself against the allegations leveled against him. That it was after the hearing that the respondent through its Board, resolved to dismiss the claimant from employment.
16. That the decision to dismiss the claimant was on the basis that he admitted that his username and pass word may have been used by someone else to make certain entries specifically, 4 and BRZ 2299 and 3760 being MFI accounts through which members can only access business loans. That it was therefore questionable how a third party had accessed the claimant's pass word which was a personalized code that is private. That as a result, the claimant was culpable for the fraudulent transactions as he was an approver in the system.
17. In cross examination, RW1 admitted that some employees were arrested in connection with the fraud and that the claimant only recorded a statement but was never arrested or charged before a court of law.
18. RW1 averred that the claimant was not entitled to the prayers sought and asked the court to dismiss his claim.

Submissions

19. Both parties filed written submissions. The claimant maintained that he was dismissed for an offence he did not commit. He faulted the respondent's disciplinary process against him and submitted that his right to due process and fair hearing were infringed hence his summary dismissal was unfair and unlawful. In support of his submissions, he cited the case of **Ann Wambui Kamuiru vs Kenya Airways Limited (2016) eKLR**.
20. On its part, the respondent submitted that it followed due process stipulated under section 41 of the Employment Act prior to dismissing the claimant from employment. On this issue, it sought reliance on the case of **National Bank of Kenya vs Anthony Njue John (2019) eKLR**.
21. The respondent further submitted that the claimant's dismissal was pursuant to section 44(4) (g) of the Employment Act as he was suspected of having committed a criminal offence since his username was used to commit a fraud. The respondent further submitted that it had reasons to dismiss the claimant from its employment and on this score, it cited the case of **Thomas Sila Nzivo vs Bamburi Cement limited (2014) elkr**.
22. It was also the respondent's submission that the claimant had not proved its case hence was not entitled to the reliefs sought. It relied on the case of **George Okello Munyolo vs Unilever Kenya limited (2019) eKLR**.

Analysis and determination

23. Having considered the pleadings filed by parties, the testimonies rendered before court and the submissions on record, the issues falling for the court's determination can be distilled as follows;

- a) **Whether the respondent has proved that it had sufficient reasons to terminate the claimant?**
- b) **Whether the respondent accorded the claimant procedural fairness?**
- c) **Is the claimant entitled to the reliefs sought?**

Whether the respondent has proved that it had sufficient reasons to dismiss the claimant?

24. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. Further, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

25. The claimant was summarily dismissed on grounds that he was negligent in the performance of his duties and which negligent acts or omissions resulted in the respondent suffering financial losses. The particulars of the alleged negligence were that fraudulent transactions were posted in the system using the claimant's credentials thus exposing the respondent to financial loss.

26. The claimant denied being negligent and asserted that he had no knowledge of the transactions and maintained that if indeed the transactions did occur, then someone must have accessed the system using his credentials to perform the said fraudulent acts.

27. The letter inviting the claimant to appear before the board invoked the provisions of section 44(4)(c) and (g) of the Employment Act. As can be discerned from that letter, the show cause letter and the letter of interdiction, the claimant was largely being accused of negligence in the performance of his duty.

28. It is therefore imperative to analyse the allegations of negligence as leveled against the claimant vis a vis the documentary evidence before court so as to determine whether indeed the claimant was negligent in the conduct of his duty hence the reason for his dismissal.

29. The claimant did not deny having access to the system as an approver. He however maintained that his rights in the system were limited and that he could not have been an initiator and an approver. The journal which was marked Appendix 1 and annexed to both the claim and the response indicated that there were transactions which were undertaken using the claimant's credentials.

30. The claimant admitted that he was issued with a password from the respondent's IT department. As expected in the circumstances, he was the sole custodian of the said password. A password by its very nature is meant to be kept secret and confidential.

31. A password is a secret code that is private and is used to limit access to a computer system or service. It is and must be kept confidential at all times. The court of Appeal in the case of **Violet Kadala Shitsukane v Kenya Post Savings Bank, Nairobi Civil Appeal No. 295 of 2016** had to this say on the issue;

“A password, especially that which is used to access money is unique to the user. A password protects everything that is personal and sensitive. With the ever-growing threat from cyber criminals, passwords are guarded like princesses: Even a strong password is useless if it is exposed.”

32. Knowing the significance of the password especially in the context of his work, it was incumbent upon the claimant to safeguard his password in the best way he could.

33. In the case of **Daniel Waweru Kinyua v Nairobi City Water & Sewerage Company Limited [2016] eKLR**, the Court held as follows;

“To permit or suffer to be accessed ones password is a case of negligence. It matters not that the claimant subsequently benefited from the fraud or malfeasance committed. The mere act of letting one's password land in the wrong hands is enough. The respondent therefore had a good reason to dismiss the claimant.”

34. The fact that a third party was able to access the system using the claimant's username and password, speaks volume as to how he handled the same. It can only be inferred that the claimant was negligent in the way he handled the said password.

35. Besides, the respondent is a financial institution which takes custody of its members' savings. Its operations are more or less similar to a bank. In the **Violet Kasada case**, the court of Appeal held that;

“Banks are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment and therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customers points to fraud, such a staff risks termination of his or her employment...Even

though there was no evidence to suggest that she benefited from or participated in the fraud, the fact that her password was used was sufficient for the respondent, in view of its nature of business, to lose faith and trust in the appellant.”

36. It was therefore imperative that the funds held by the respondent be safeguarded. One of the ways this could have been achieved was by prohibiting any unauthorized access to the said funds.

37. The claimant was not just an ordinary employee of the respondent, he was the FOSA Manager and an approver in the system hence his actions and/or omissions had significant financial implication in the respondent's operations. It was therefore incumbent upon the claimant to ensure that no third party gained unauthorized access to the system using his credentials. That is a duty of care he owed to the respondent and unfortunately, he failed in that duty when an unauthorized person gained access to the system using his credentials and as a result, funds were lost.

38. From the foregoing, it is apparent that the respondent had reason to terminate the services of the claimant as it did, on grounds of negligence.

39. In the case of **Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others Nairobi, Civil Appeal No. 66A of 2017**, the Court of Appeal found that all an employer is required to prove, are the reasons that it **“genuinely believed to exist,”** causing it to terminate the employee's services. Section 43(2) of the Employment Act provides as much.

40. In the instant case, it is perceptible that the respondent genuinely believed that there was negligence on the part of the claimant thus had reason to dismiss him. To this extent, the respondent cannot be faulted.

41. In view of the foregoing, I find that the respondent has proved that it had reasons to dismiss the claimant from its employment.

42. I will hasten to add that in as much as the claimant may not have been found liable in a criminal process, nothing stopped the respondent from taking disciplinary action against him.

43. I now turn to address the next issue for determination.

Whether the claimant was accorded procedural fairness?

44. Over and above proving that it had reasons to terminate the services of an employee, an employer is required under the Employment Act to go further and prove that it accorded an employee procedural fairness prior to terminating his services.

45. This position is aptly captured under **section 45(2) (c)** of the Employment Act which stipulates that for termination to be fair, it ought to be in line with fair procedure. Indeed, section 41(1) requires an employer to accord an employee a hearing prior to termination. This procedure entails the steps undertaken by the employer leading to the claimant's termination. Such steps include notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations.

46. The claimant does not deny that he was issued with a letter through which he was required to show cause in writing why disciplinary action should not be taken against him. The show cause letter was also accompanied by a document named “Appendix 1” which disclosed the transactions undertaken using his credentials.

47. The said Appendix 1 contains several columns namely, the posting date, account/membership particulars, description, source no, debit amount, credit amount, user ID and entry no.

48. The claimant responded to the show cause letter vide a 3 page letter wherein he denied the allegations leveled against him. In the said response, the claimant questioned the transactions and under the heading, **“Summary and Observations of schedule Appendix 1”**, made extensive remarks on the journal entries.

49. The claimant has faulted the disciplinary process on grounds that he was not supplied with details regarding the alleged transactions. The record states otherwise since the claimant was given a summary of the transactions which had been undertaken using his credentials through the said Appendix 1. As stated herein, Appendix 1 contains several particulars/ details of the summary of transactions undertaken using the claimant's credentials. It was therefore not clear what other details and/or particulars the claimant required from the respondent. His request was quite general to that extent.

50. Further, the claimant requested in his response, that someone takes him through Appendix 1. This was demanding too much from the respondent as an employer in the circumstances. All an employer is required to do under the law, is to furnish sufficient details to inform the charge and to avail documentation upon request.

51. The claimant was made aware from the word go of the allegations levelled against him and the reasons the respondent was considering terminating his employment. Indeed, the letter sending the claimant on compulsory leave, the show cause letter, the interdiction letter and the letter inviting the claimant for the hearing of his disciplinary case, referred to the fraudulent transactions. To contextualize, the allegations, the respondent even provided the claimant with a summary of the fraudulent transactions undertaken using his credentials. Therefore, the claimant had knowledge of and was sufficiently informed of the reasons that would result in his dismissal.

52. The claimant further confirmed that he was invited to appear before the respondent's Board and was advised through the said invitation to bring any evidence he may have.

53. The claimant admitted that he appeared before the respondent's Board for a hearing on 27th February, 2016.

54. In view of the foregoing, I find that the respondent discharged its burden in terms of section 45(2) (c) and 41 (1) of the Employment Act and accorded the claimant procedural fairness. To this end, the procedure for termination as applied by the respondent cannot be faulted as it met the legal threshold under the Employment Act.

55. I now turn to consider the reliefs available to the claimant, if any.

Reliefs

56. Having found that the respondent's termination was not unfair, the claimant is not entitled to the compensatory damages sought.

57. The claimant is however entitled to the certificate of service pursuant to section 51(1) of the Employment Act.

58. Further, the claimant's Letter of Appointment provided that he would be eligible to join the respondent's provident fund which is contributory. As a result, he is entitled to his benefits as accrued under the said fund.

Conclusion

59. In the final analysis, I dismiss the claim with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

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STELLA RUTTO

JUDGE

APPEARANCE:

FOR THE CLAIMANT MR. KIMATHI

FOR THE RESPONDENT MR. OPIYO

COURT ASSISTANT BARILLE SORA

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

STELLA RUTTO

JUDGE