



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

NAIROBI

CAUSE NO 511 OF 2017

WILSON MUTABARI MWORIA.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The cause of action arose out of a memorandum of claim dated 16th March, 2017 through which the claimant has alleged to have been unlawfully terminated by the respondent. He sought several reliefs including; determination that his termination was unfair, wrongful, and unlawful; determination that his termination on charges of fraud was unfair, wrongful and unlawful; an order for the payment of his actual pecuniary loss suffered as the result of the wrongful termination; constitutional damages; general damages; interest; and costs.

2. The claim was opposed vide a response to the memorandum of claim dated 25th May, 2017 and through which the respondent averred that the claimant's termination was lawful and fair in the circumstances, given that on 9th and 16th August, 2016, he was involved in a fraudulent outward swift transfer of USD 15,000 and USD 12,000 respectively.

3. The matter proceeded for hearing on 27th July, 2021 and each side called one witness to render oral evidence.

Claimant's case

4. The claimant testified in support of his case and relied on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the documents filed on his behalf as exhibits before Court. The claimant told court that he was employed by the respondent as a customer advisor and rose through the ranks to the position of Branch Coordinator.

5. It was his testimony that on 9th and 16th August, 2016, he received two outward swift transfer instructions of USD 15,000 and USD 12,000 respectively in the account name of Mr. Floyd Ingram who was a non-resident customer of the respondent bank. It was his testimony that no one at the bank knew the customer. He averred that both instructions were received by the Premier Manager Assistant (PMA), one Ms. Lilian Mueni given that the Relationship Manager was away on leave. He averred that the said PMA had confirmed the instructions.

6. The claimant further averred that he tried calling the customer through the disclosed contacts, so as to confirm the instructions but he was unreachable hence he proceeded to seek the appropriate authorization through the customer's email in the bank system which email was floyd.ingram@azhelia.com. That prior to this, he also confirmed that the customer had signed an indemnity form. That he later received an email from the client, confirming the instructions as valid, hence he released the funds as instructed.

7. The claimant further averred that on 24th August, 2016, he received information from the Relationship Manager who notified him that the instructions purportedly issued, were invalid as the same had not emanated from the customer.

8. That the respondent later on initiated investigations through the fraud department. He confirmed writing a witness statement regarding the transaction during the investigations stage.

9. He also stated that upon conclusion of the investigations, he was invited to appear before a disciplinary committee on 16th November, 2016 where he registered his protest to the effect that he had not received the investigation report despite his request.

10. That one of the panelists, Mr. Mathew Kimitu wrote findings and recommendations to the effect that the loss was attributable to the Relationship Manager.

11. That he was therefore surprised to receive a letter asking him to show cause why disciplinary action should not be taken against him. That he sought clarification as to whether he was facing new charges as the disciplinary proceedings had already been undertaken. That the respondent did not respond to his query but instead, proceeded to serve him with a letter terminating his services.

12. That he appealed against the said termination but he was constrained in the process, as he did not have in his possession the necessary documents to enable him mount a good appeal. That his appeal was dismissed hence the instant claim. In summary, he termed his termination as unfair given that the respondent refused to furnish him with the investigation report, thus affecting the quality of his defence.

13. In cross examination, the claimant admitted being well acquainted with the Standard Operating Procedures (SOP) and moreover, the segregation of duties in that regard. He also admitted that the bank had not flagged email communication as a way of confirming instructions in respect of funds transfer and that he was aware that emails could be hacked.

Respondent's case

14. The respondent's Head of Employee Relations, Mr. Vaslas Odhiambo, testified as RW1. He produced his witness statement, which he adopted as part of his evidence in chief. He also relied on the bundle of documents filed on behalf of the respondent and which he produced as exhibits before court.

15. RW1 told court that he deals with disciplinary issues at the respondent bank. He stated that he was aware that the claimant was an employee of the respondent and that the reason for his termination was the transfer of a total of USD 27,000 without following the laid down procedures. That in particular, the claimant effected money transfer from a client's account without confirming the instructions as stipulated under the SOP. That it was imperative that the client be "called back" as opposed to being contacted through email which could be hacked. That the 'call back' was a mandatory requirement which ought to have been done before execution of the transaction.

16. That the claimant used the same email that had sent the instructions which may have been hacked, hence it could not be used to validate the instructions. That indeed, even the email transmitting the instructions had a telephone number which was not in the system and this ought to have been a red flag to the claimant. That in the circumstances, the claimant ought to have ensured that the client is called back to verify the authenticity and completeness of the instructions. That in the event the client was unreachable, he ought to have put the process on hold. That the bank eventually lost some money since not all of it was recovered.

17. It was also the testimony of RW1 that the investigations revealed that the claimant was indeed negligent and as a result, the fraud had taken place.

18. RW1 averred that the claimant was accorded a fair hearing as he knew from the onset the allegations leveled against him and the same were not altered at any stage of the proceedings. That he was eventually terminated on account of the fraudulent transactions, and all facts were within his knowledge. That the investigation report did not introduce any new facts outside the transactions.

19. That the show cause letter issued to the claimant was indeed a second chance to allow him defend himself. That it was not a fresh trial. That he did not respond to the said show cause hence he squandered the opportunity to present his case for a second time.

20. He summed up the examination in chief by stating that the claimant was highly negligent hence the respondent had reasons to terminate him and in so doing, followed the laid down procedure.

21. During cross examination, RW1 stated that the claimant was not issued with the investigation report as he was already made aware of the allegations he was facing and that there were no fresh charges against him.

Submissions

22. After conclusion of the hearing, both parties filed written submissions. On his part, the claimant submitted that the respondent did not advance sufficient reasons to justify his termination, given that the account belonged to a virtual client who had always communicated with the Relationship Manager via the same email he used to confirm the instructions. That besides, the customer had signed an indemnity form in consideration of the bank acting upon his instructions from time to time. The claimant further submitted that he was not accorded a fair hearing as he was not provided with a copy of the investigation report which he considered a crucial document in his defense. He sought reliance on the cases of **OI Pejeta Ranching Limited vs David Wanjau Muhoro (2017) eKLR** and **Kahara Mbugua vs National Industrial Training Authority (2020) eKLR**.

23. On the other hand, the respondent submitted that the claimant was negligent in the performance of his duties and had acted without due diligence hence his actions warranted termination of his services. The respondent further submitted that it had complied with the minimum requirements set out under section 42 (1) of the Employment Act. It relied on the case of the **National Bank of Kenya vs Samuel Mutonya CA No. 118 of 2017**. The respondent further submitted that the claimant had not established his case on a balance of probability. On this issue, he sought reliance on the case of **Kenya Plantation & Agricultural Workers Union vs Sotik Highlands Tea Estate Limited (2016) eKLR**.

Analysis and determination

24. I have considered the pleadings before Court, the documentary evidence, oral testimonies rendered before court and the parties' rival submissions and to my mind, the court is being called to determine the following issues;

i. Whether there was justifiable cause to terminate the services of the claimant?

ii. Whether the claimant was accorded procedural fairness?

iii. Is the claimant entitled to the reliefs sought?

25. I now proceed to consider the first issue for determination.

Whether there was justifiable cause to terminate the services of the claimant?

26. The parties have adopted rival positions on this issue, with the claimant maintaining that the respondent did not advance a justifiable reason to terminate his services. The respondent disagrees. It is therefore imperative to analyse the facts and circumstances pertaining this case against the applicable law in order to establish whether indeed, there were reasons to warrant the claimant's termination.

27. **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-

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason-

i. related to the employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c) that the employee was terminated in accordance with fair procedure.

28. Therefore, over and above proving existence of reasons to justify termination, an employer is required to prove that the said reasons were valid and fair. The concept of "valid" and "fair" in this respect, can only be determined on a case by case basis.

29. Further, in terms of section 43 (2) of the Act, such reason resulting in an employee's termination must be matters the employer genuinely believed to exist.

30. In the instant case, the reason for the claimant's termination, was negligence. The pertinent question therefore, is whether the said reason is valid and fair?

31. It is not a disputed fact that the claimant authorized the transfer of a total of USD 27,000 on 9th and 16th August, 2016 from one of the respondent's customers, Mr. Floyd Ingram. It is also common ground that it was later ascertained that the said transactions were not authorized by Mr. Floyd and it is at that juncture that everything went downhill.

32. According to the claimant, he confirmed the transfer instructions via email prior to approving the transaction. He placed reliance on the fact that the Relationship Manager had always used the said email to contact Mr. Floyd who had signed an indemnity with the bank.

33. The respondent relied on its Standard Operating Procedures (SOP) and specifically on the segregation of duties which provides as follows;

"The following separation of duties must exist to avoid job domination (for payment instructions not delivered in person):

Step 1. Receive the instruction and verify the signature. The recipient of funds transfer (FT) instructions can verify the signature but cannot perform any additionally required security procedure.

Step 2. Perform the call back. The person performing the call back cannot be the recipient and verifier of signature on the FT instruction.

Step 3. Scan the instruction. For workflow tools, the recipient can scan the workflow tool but cannot be the same person that performs the callback and passes the accounting entries.

Step 4. Pass the accounting entries.... the same person cannot do two consecutive steps in the process described above. For example, person A can do steps 1 and 3 while person B can do steps 2 and 4."

34. The respondent's contention is that the claimant flouted the above procedure by performing dual roles in the same transaction. That hence, having received the instructions, he was not the appropriate person to make the call back. In this case, the claimant received the instructions and attempted to make the call back before authorizing the funds transfer. That the call back failed as the client was unreachable. These set of facts were not disputed by the claimant.

35. The claimant did not give a plausible explanation as to why he undertook 2 consecutive steps/roles in respect of the transaction in question and in so doing, went contrary to the requirements of the SOP.

36. Further, the SOP provides for the option of calling back a customer for the authenticity and completeness of an instruction. It provides that the call back should be made before execution of the instruction.

37. The claimant averred that Mr. Floyd had signed an indemnity in consideration of the bank acting on his instructions. According to the claimant, the bank had therefore been given express instructions by the client to act on all tested and untested instructions. Hence his basis for confirming the instructions via email when he could not reach the client on phone.

38. The respondent maintains that the indemnity executed by the client was for general purposes. In regards to indemnity in cases of “call back”, the SOP reads as follows **“If a customer does not wish to be called back, they should be requested to complete a call back indemnity form...”**.

39. In my view, the indemnity form to be completed in that regard is very specific and regards to a “call back”. There is no indication or evidence to suggest that Mr. Floyd executed the specific **“call back indemnity form”**.

40. Indeed, there is an indemnity form on record which was produced as an exhibit by the claimant. The same is titled **“indemnity-facsimile/email instructions”** which is signed by Mr. Floyd and it covers issuance of instructions to effect funds transfer from his account to any other of his accounts or other beneficiaries. It does not make any reference at all to a “call back”. It would thus be inferred that the same was a general indemnity and not related to call backs as required by the SOP.

41. Be that as it may, the SOP has made provisions for the identification and verification of a customer’s identity prior to and confirmation of a transaction. It provides as follows; **“Before confirming the transaction, the customer should be identified without doubt by confirming certain basic information such as;**

1. Identification number, passport number etc.

2. Date of birth of the customer.

3. Mother’s maiden name.”

42. It is notable that the above provision is in mandatory terms. The claimant did not indicate whether upon receiving the email instruction, he attempted to confirm the identity of the customer as stipulated above.

43. Further, the SOP provides for a secondary set of identification and verification procedures. Once again, the claimant did not give any indication whether he undertook any of the stipulated secondary verification procedures.

44. The indemnity signed by the client was not a blanket cover to waive and bypass all these verification procedures. There must be a good reason why the bank had to put in place the procedures in respect of confirmation and verification of the customer’s identity prior to authorization of any transaction. At the very least, the claimant ought to have acted more prudently and undertook verification to ascertain the correct identity of the person behind the email communication. He did not furnish evidence to suggest or prove that he undertook any of these verification procedures and in absence thereof, it can only be inferred that he did not undertake the same.

45. Further, the claimant confirmed that he finalized the transaction from his end without escalating the same to any of his seniors at the bank. He confirmed during cross examination that had he done so, the fraud may have been averted hence the respondent may not have been exposed to the attendant financial loss.

46. Further to the foregoing, the claimant did not advance any reason as to why he failed to put on hold transaction, upon failing to reach the client. Indeed, there was nothing that stopped him from consulting the Relationship Manager, Mr. Joseph Muthee. Instead, he proceeded too hastily in confirming the transaction and as a result, money was lost. After all, the transfer involved a colossal sum of money hence the need to proceed cautiously.

47. The claimant had about 14 years working experience at the bank. Therefore, he was skilled and experienced enough to understand the significance of the procedures and the safeguards put in place by the respondent bank and essentially, the importance of complying with the same. Further, given the claimant’s work experience, the degree of skill and care expected of him was high.

48. The upshot of the foregoing is that, it is apparent that the claimant did not comply with the laid down procedures under the SOP hence failed to exercise due diligence in the performance of his duties and consequently, fell short of the standards expected of him. Thereby, he was negligent and the respondent had reason to terminate his services.

49. 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 when confronted with a similar issue;

“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.”

50. In line with the above holding, I find that the claimant’s conduct as regards the funds held by the bank on behalf of its customers, presented to the respondent a cause for termination.

51. The totality of the foregoing is that the respondent discharged its burden under sections 43 (1) and 45 (2) of the Employment Act and justified that it had reasons to terminate the services of the claimant.

52. That said, I now move to consider whether in terminating the services of the claimant, the respondent did so in accordance with fair procedure.

Whether the claimant was accorded procedural fairness?

53. An employer is required to comply with the requirements of fair process above and beyond proving that it had reasons to terminate an employee's services. Specifically, Section 45 (2) (c) of the Employment Act, requires an employer to comply with the provisions of fair process and prove that it accorded an employee procedural fairness.

54. More importantly, section 41 of the Employment Act provides for the manner in which fair procedure is to be realized. It requires an employer to notify an employee of the intended termination. In this regard, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

55. The respondent was therefore required to prove that it accorded the claimant an opportunity to make his representations in answer to the allegations leveled against him.

56. The record indicates that the respondent instituted investigations upon detection of the fraudulent transactions. The claimant was invited to prepare a statement in regards to the investigation.

57. Following conclusion of the investigations, the claimant was invited to appear for a disciplinary hearing scheduled for 16th November, 2016. The invitation letter which is titled "**Notification of the interview arrangements**" reads in part as follow;

"Following the completion of the investigation regarding fraudulent outward swift dated 9th August, 2016 and 16th August, 2016 of USD 15,000 and USD 12,000 respectively in which you processed funds transfer instructions at Muthaiga branch from customer account INO Floyd Ingram without obtaining the customer's call back confirmation from the bank system-maintained contacts thereby breaching the bank policies and procedure..."

58. The letter further went ahead to notify the claimant of the date, time and venue of the said hearing. He was also advised to bring along a colleague, if he so wished. The letter further informed the claimant that *"depending on the outcome of the meeting, he may be subjected to disciplinary action..."*

59. It is instructive to note that up to that point, the claimant was notified of the substance constituting the allegations he was facing. Similarly, he was well advised of the possible outcome of the said hearing, which in this case, was disciplinary action.

60. As advised, the claimant attended the disciplinary hearing and defended himself as shown in the minutes of 16th November, 2016. He was also accompanied by a colleague.

61. He was later issued with a letter to show cause dated 25th November, 2016, which reads in part;

"Further to the disciplinary hearing, the bank has reasonable grounds to believe that you did not follow the laid down process and procedure for outward remittance and particularly in regards to call back. You continued to process the transaction without getting a confirmation from the customer on the cell number maintained on financial planning guide and instead used email instructions contrary to laid down procedure. As a result, Kshs 1,144,700/= was lost. The above act amounts to gross misconduct warranting summary dismissal. In view of this, we request you to provide us with a written explanation on the circumstances resulting in your actions and show cause why disciplinary action should not be taken against you. If your response is not received within the stipulated time, it will be assumed that you do not have any defence to these allegations and the company will proceed with the disciplinary process based on the available evidence."

62. The claimant responded to the show cause letter vide his, dated 29th November, 2016 and through which he sought clarification whether he was facing new charges as he had already attended a disciplinary hearing where he defended himself.

63. The claimant challenged the issuance of the show cause letter on the basis that the respondent failed to adhere to its own processes.

64. The show cause letter in this case appears to be a consequence of the disciplinary proceedings of 16th November, 2016 which had identified disciplinary action as a possible outcome. Therefore, it was not clear from the claimant's end how else, such a disciplinary process would have been commenced. In fact, the claimant has also not demonstrated the prejudice he suffered by being invited for a second disciplinary hearing. In any event, the same was yet another opportunity for him to ventilate his case.

65. Furthermore, the show cause letter is very clear that the claimant was being called upon to attend a further hearing and indeed, it made reference to the previous hearing of 16th November, 2016. It also restated the allegations levelled against the claimant in an extensive manner thus, it did not leave any doubt as regards the charges he was being called upon to answer.

66. As a matter of fact, the show cause letter was explicit to the effect that the allegations if proved, warranted summary dismissal. The claimant was therefore aware of the possible outcome of that disciplinary hearing. He was also advised on the consequences of not tendering

a defence.

67. The claimant did not tender a defence hence as advised in the show cause letter, he was served with a termination letter dated 1st December, 2016. The termination was pursuant to his contract of service hence he was paid one month's salary in lieu of notice.

68. The termination letter further reiterated the allegations which had been levelled against the claimant through previous communication and indeed, the same were tendered as the reasons for his termination.

69. The claimant appealed against the termination vide his letter of 7th December, 2016 which contained detailed grounds of appeal. The respondent acknowledged the Appeal and notified the claimant that his appeal hearing would take place on 15th December, 2016. He was also advised to bring along a colleague if he so wished. He was also advised of the possible outcome of the appeal, which included upholding of the decision to terminate his services.

70. The claimant attended the appeal hearing as scheduled and as per the minutes on record, he maintained his initial line of defence. Upon consideration, the claimant's appeal was denied and the appeal panel upheld his termination.

71. It is noteworthy that the claimant has faulted the disciplinary process on account that he was not given the investigation report despite requesting for the same. He sought to rely on the case of **Ol pejeta Ranching Limited vs David Wanjau Muhoro (2017) eKLR** where the court found that the termination process was unfair on the basis that the claimant was not issued with the audit report.

72. It is also notable that in the **Ol pejeta case**, the accusations therein were general in nature as opposed to the case herein where the allegations against the claimant were specific and remained consistent throughout the disciplinary process and indeed, constituted the reasons for termination. As a matter of fact, the claimant's line of defence also remained consistent all through to the appellate stage that is; Mr. Floyd was a virtual client hence was not known to any of the staff of the bank; that he relied on the instructions from the PMA; and that the customer had always been contacted via email.

73. As regards fairness, the court pronounced itself as follows in the **Ol pejeta case (supra)**; **"Fairness in the circumstances would inform that the respondent be supplied with the allegations against him in sufficient detail to adequately prepare for a defence.... As also rightly found by the learned trial Judge, no evidence was placed before court to show that the respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing."** Emphasis added

74. To my mind, what is important in determining the fairness of a disciplinary process is the sufficiency and detail of the charge against an employee. Hence, the test should be whether an employee has been sufficiently informed of the allegations he or she is facing.

75. In this case, the allegations against the claimant were specific and remained constant throughout the discipline process. The same were in respect of the transactions of 9th and 16th August, 2016 and related to an outward swift transfer of USD 27,000 from the account of Mr. Floyd Ingram. There was no new allegation that was ever raised. This can also be discerned from the minutes arising out of the disciplinary proceedings. During cross-examination, the claimant admitted that at the time he attended the disciplinary hearing, he was aware that the issue at hand was in regards to the transactions relating to Mr. Floyd Ingram's account.

76. In the circumstances, the claimant was not in any way prejudiced by the absence of the investigation report as the allegations spelt out, were sufficient and comprehensive enough to enable him defend himself adequately.

77. Besides, the claimant participated in the investigations process. He appeared for a hearing and was even invited for a second hearing. Further, he appeared before a different panel to present his appeal which was considered and a determination made.

78. The foregoing series of events point to the fact that the claimant was subjected to a procedure which met the legal threshold stipulated under the Employment Act.

79. Against this background, I find that the claimant was accorded a fair hearing.

Orders

80. In the final analysis, I find that the claimant is not entitled to the prayers sought hence I dismiss the claim in its entirety and make no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of November, 2021.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Were

For the Respondent Mr. Masese

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