



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 196B OF 2014

(Before Hon. Justice Mathews N. Nduma)

JULIUS BII KIPYEGON BATI.....1ST CLAIMANT

ROBERT WATILA.....2ND CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed by a memorandum of claim on 17th February 2014, in which the claimant prays for compensation equivalent to salary that would have been earned in the remaining six (6) years of service; General damages for mental anguish and humiliation equivalent to 12 months salary; interest and costs.
2. The claimant testified in person as CW1, and called two other witnesses being Robert Watila (CW2) and James Wakunda CW3.
3. CW1 testified that he was employed on 1st February 1993 by the respondent and on 20th March 2011 he was promoted to the position of cash manager Kakamega Branch. At the time he earned a consolidated Basic salary of Kshs. 149,184 and was placed on six (6) months' probation. The duties of the claimant were set out in a job description attached to the letter of appointment in which fifty (5) listed duties and responsibilities are contained. The duties in respect of ATM's were listed from number 1to16.
4. CW1 testified that he served for 19 years with a clean record. However between the period 30th August 2011 and 17th November 2011, a fraud took place at the Kakamega branch of the Bank in which the Bank lost Kshs. 2 Million. The fraudulent transaction was for Kshs. 4 Million. CW1 testified that the fraudster was a teller named Pauline Were employed at the Branch by the Bank. At the time, the operations manager was Robert Watila, the 2nd claimant. Their supervisor was the Branch Manager.
5. CW1 was third in command and had a T24 system, Kshs. 1 Million authorization limit for withdrawal. Anything above had to be sanctioned by CW2 and the Branch Manager.
6. CW1 testified that tellers receive and pay out cash on a daily basis. The branch had eight (8) tellers. Each teller had a checker. The tellers close their daily work. The eight checkers confirm the cash in the till upon close of business daily. They check that against the posting reports per each teller. CW1 stated that the reports came to him as cash manager for filing purposes. That there was no provision for CW1 to counter check the filed reports daily. The teller and checker signed the report and that was all that was required on a daily basis. CW1 referred to the T24 checking guidelines for cash above Kshs. 200,000.
7. CW1 testified that the filed report is checked by the operations manager. CW1 also testified that surprise checks were conducted regularly and the back office supervisors were involved in this exercise. These were random extra checks to make sure everything was okay. CW1 testified that he was one of the random checkers and they did these twice a month. CW1 confirmed that tellers were answerable to him. CW1 kept a duty roster for daily checks. Even the operations manager and Branch Manager acted as checkers.
8. On 17th November 2011, CW1 did a surprise check and discovered a fraudulent transaction of Kshs. 300,000 in the Account of Lake Victoria Water Services. This had not been detected earlier.
9. The teller manipulated the T24 system where she could post a transaction as an inputter and then authorize within her limit below Kshs. 500,000. The teller pocketed the money. This was a weakness in the newly installed South African T24 system. By the year 2011, the

system had a lot of challenges, CW1 testified. This was one of them. The teller had mandate to input and authorize within her/his limit. Any anomaly is supposed to be picked out by the checkers at the close of business. This had not happened until CW1 discovered the loophole and the theft of money by the teller. CW1 explained that the teller utilized an option to override a transaction in the T24 system. Override option was meant to correct a mistake. In this case, the fraudster did not correct the mistake but encashed the money. This was difficult to detect for the checkers in the new system, hence the fraud of up to 4 Million Kenya Shillings over several transactions until CW1 discovered the loophole. This was because the system did not give an override report. CW1 testified on the several overridden transactions all involving the same letter. When CW1 did the surprise check on 17th November 2011, he picked the anomalies and the theft. On the day, CW1 had been allocated the duty to check this lady. CW1 counted the physical cash and compared same with the General Ledger and the balance. CW1 printed a report and checked vouchers. CW1 noted cash deposits without a slip.

10. CW1 testified that the checker should have noted these anomalies earlier but they had not done physical check on the cash, vouchers and the General Ledger. CW1 faulted the checker for failure to detect the problem earlier. CW1 testified that upon inquiry on the Lake Victoria Account, one Mr. Boke had informed him that they had noted the shortfalls and unsupported transactions in their account and had spoken to Pauline, the teller involved and Pauline had promised to reverse the transactions.

11. CW1 reported the matter to CW2 and the Branch Manager and investigations started over the issue. Memos were written to Pauline to explain. Customers started writing complaints about miscellaneous debits in their accounts. The net total loss discovered was Kshs. 2 Million from the unsupported cash transactions by Pauline but had made reverse transactions of up to Kshs. 4 Million. The matter was taken up with the Human Resource department and Pauline was dismissed from work for gross misconduct before the investigation had concluded.

12. CW1 told the court that the investigation report blamed the system loopholes and not himself or CW2. The problem was ability for unscrupulous teller to override the system something not known or experienced by the bank prior. CW1 stated that the bank simply looked for scape goats in him and CW2 so that the loss could be paid by insurance.

13. CW1 was called to a disciplinary hearing. CW1 did not get a notice to show cause with charges levelled against him. CW1 testified that he found the charges at the disciplinary hearing meeting. CW1 stated that consequently he did not have any document to defend himself. There were six charges. CW1 denied all the charges levelled against him. CW1 testified that he had performed his duties faithfully and diligently on a daily basis. That his diligence led to the discovery of the mischief and theft by Pauline. That it was wrongful to blame either himself or CW2 for the loopholes found and used by an internal thief.

14. CW1 withstood very close cross examination by Mr. Kimani for the respondent regarding his role as cash manager and denied that he was negligent and/or misconducted himself in any manner suggested by counsel for the defendant or at all. CW2 Robert Simiyu Watila testified that he was the operations manager Kakamega Branch. That his employment was terminated for gross negligence. The termination arose from the loss of Kshs. 2 Million stolen by a teller by the name Pauline from various customer accounts at the Branch. CW2 stated that the teller manipulated a newly installed system T24 to duplicate cheque entries and withdrawing cash for her own benefit. CW2 testified that he was accused of not checking the tellers properly and/or at all. CW2 was also accused of not printing daily reports to be utilized in counter checking the daily work by the tellers and checkers. CW2 testified that the supervisor CW1, checked the eight (8) cashiers. That CW1, the cash manager was in charge of the cashiers.

15. That on 18th November 2011, CW1 brought to the attention of CW2 theft of Kshs. 300,000 by duplication of cheque entries. CW2 and CW1 interrogated the teller. That the teller gave unsatisfactory answers and CW2 removed the teller from the tills. That the Branch Manager was away then. CW2 reported the matter to the Branch Manager and the two decided to check all the work by the said teller from 30th August 2011 to 17th November 2011 and complaints raised by some customers on missing funds from their accounts. CW2 testified that in that process, they unearthed more discrepancies in the tune of Kshs. 2 Million. CW2 stated that the checkers were not keen in their work hence the failure to detect the duplication.

16. CW2 testified that the Branch made an incident report to the head office for guidance. The forensic department was called to action on the matter. The human Resource department then terminated the employment of Pauline, the fraudulent teller. The termination did not await conclusion of the investigations. CW2 further stated that Pauline was not charged before any criminal court. Central Bank antifraud department was called in. The head office then authorized refund of the debits to the customers. The finance department made a claim to the insurance company for refund. The insurance company demanded among other documents a concluded investigation report. There was none at the time. The respondent was forced to commence investigations three months later in 2012. The investigations were focused on the teller, the cash manager and the operations manager. The officers were then charged with similar offence. They were found guilty and their employment was terminated. CW2 testified that this was a case of system failure and he was not to blame for the loss. CW2 testified that up to the time of his termination the system failure had not been rectified. CW2 stated further that the respondent mis-advised the insurance that the loss was due to human error of CW1 and CW2. That the respondent avoided mentioning the system failure to the insurance so as to get refund from the insurance. In the process the deception caused the termination of the employment of CW1 and CW2. CW2 faced a disciplinary hearing and he explained the charges made against him. CW2 stated that the respondent ignored his explanation and terminated his services.

17. The claimants pray that their suit be allowed with cost and interest be paid on the award of damages for the wrongful termination of employment.

18. CW3 James Waliula Wekunda, testified in support of the claimants' case. CW3 testified that he was a supervisor advances department, Kisumu West. That between 30th August 2011 and 17th November 2011, he was a business banker at the KCB Kakamega Branch. That he opened accounts for business customers and gave them loans. He was a supervisor then. That part of his duties was to check the work by the tellers. He was a section head. That there were about five (5) to six (6) supervisors and tellers were also about the same number. That CW1 gave him instructions to check the tellers. That the employment of CW1 and CW2 was terminated as a result of fraudulent transactions by a teller named Pauline. CW3 stated that he checked the said teller regularly at the time. That CW1 and CW2 also checked the tellers regularly. CW3 stated that he was a checker for cash in the till and not transactions. That checkers were to check the work of tellers daily and tick the report. CW3 stated that he reported to CW1. Their work was to check cash in the till vis a vis cash drawn in the system. That

the two had to balance. The checker then signed the report and the teller countersigns to confirm correctness of the daily transactions. CW3 testified that CW1 had a duty of ensuring that the tellers and checkers performed their work daily.

19. CW3 stated that checkers failed in their work in some of the instances. He emphasized that their work was mainly to ensure that cash in the till balanced with cash drawn and deposited during the day. In short the transactions had to mirror the cash in the till by the end of the day. CW3 stated that they could not detect system failure.

Defence

20. The respondent called RW1, RW2 and RW3 to testify in opposition to the case by the claimants. RW1 was the internal investigator. He testified that he was involved in the investigation of fraudulent transactions at the Kakamega KCB Branch in the year 2011. That he established that a teller by the name Pauline had duplicated transactions to steal from Bank customers a sum of Kshs. 2,005,220. RW1 testified that CW1 and CW2 failed to ensure printing of cashier reports so as to detect any fraudulent transactions. That as a result of their omission, the fraudulent transactions by teller Pauline continued undetected for a while. RW1 testified that he questioned both officers and they both recorded statements. RW1 concluded that CW1 and CW2 did not adhere to bank procedures as the cash manager and operations manager respectively. RW1 stated that had the checking been done properly, the fraud by Pauline would have been stopped immediately it started. The reports were not checked and ticked because they were not printed. This was a failure by the managers. Under cross examination RW1 admitted that the fraud was contributed to largely by system failure. That they had recommended to the IT department to review the system to ensure effective controls and pick violations immediately which was not the case. RW1 admitted that the T24 system had many problems and it did not prompt duplicate posting. This was the loophole the fraudulent teller had used. The system prompted a fraudulent cashier to override transactions and was not easily detected by the supervisors. The system authorized and permitted fraud. RW1 however recommended action to be taken against the fraudulent cashier, CW1, and CW2 for gross negligence. RW2 Eliud Siganga was currently the KCB Branch Manager Kakamega from October 2011.

21. RW2 testified that on 17th November 2011, a customer wrote a letter of complaint that their accounts had been debited twice with the same cheque. Other complaints followed also from different customers. In other words, one cheque was used to remove money twice from an account. This was done by the teller named Pauline. RW2 wrote letters to the teller and to CW1 and CW2 to explain.

22. That CW1 and CW2 responded to the letter by RW2. They said about 2 Million Kenya Shillings was lost. Investigations were carried out. RW2 was not involved in the investigations. RW2 was also not involved in the disciplinary hearing against CW1 and CW2. RW2 stated that the core responsibility to mitigate risks lay with the operations manager, CW2. That the fraud happened in November 2011, just before RW2 had reported at Kakamega Branch. RW2 stated that former Branch Manager was Francis Kadiya.

23. RW2 explained that CW2 had on 28th November 2011, asked CW1 to explain why it had taken CW1 eight (8) days to report the fraud upon discovering it. Eventually both CW1 and CW2 were called upon to account for failure of oversight over eight (8) cashiers leading to the fraud. RW2 denied under cross examination by Advocate Kubai for claimants that he was coached to lie. Checkers were cautioned for failure to check the cashiers. RW2 explained that checkers merely assist the cash manager to oversight cash in the Bank. RW2 concluded that CW1 and CW2 were lawfully and fairly terminated.

24. RW3, Bramwel Simiyu, the Employee Relationship Manager KCB, Nairobi testified that he was employed in 2015 after CW1 and CW2 had left the employ of the respondent. RW3 produced human resource records including minutes of the disciplinary hearing for CW1 and CW2 which took place on 25th October 2012. RW3 stated that the disciplinary committee recommended termination of employment of CW1 and CW2 for negligence. Both were issued letters of termination dated 8th November 2012. That the letter gave reasons for termination to be gross negligence. RW3 stated that the bank suffered loss in the sum of Kshs. 2 Million.

25. That CW1 and CW2 Appealed the decision to terminate their employment on 19th November 2012 and 21st November 2012 respectively. That the Appeals were heard and decision to terminate was upheld. RW3 insisted under cross examination that the termination was for a valid reason and the Bank followed a fair procedure in terminating the employment of the claimants.

Determination

26. The issues for determination are:

- (a) Whether the termination of employment of CW1 and CW2 was for a valid reason and if the respondent followed a fair procedure.
- (b) Whether the claimants are entitled to the reliefs sought.

Issue (a)

27. A careful analysis of the evidence adduced before court has led court to the following finding of fact:

- (a) That CW1 and CW2 were cash manager and operations manager respectively at the Kakamega branch of KCB in the year 2011.
- (b) That a cashier by the name Pauline working at the Branch on diverse dates overrode the T24 Banking system and duplicated cheque transactions enabling her to steal from various customer accounts a sum of about Kshs. 2 Million.
- (c) That the theft took place between the months of October and November 2011 and it was not until November 2011 when CW1 while conducting a random check on cash reports, discovered fraudulent transaction of Kshs. 300,000 in one account.

(d) Meanwhile the Bank received complaints from several customers complaining about double withdrawals from their accounts using one cheque.

(e) CW1 escalated the issue to CW2 and CW2 escalated this to the Branch Manager and investigations were commenced that led to discovery of theft of over 2 Million Shillings by Pauline.

(f) Pauline was dismissed from employment summarily before the investigations were concluded.

(g) Disciplinary action against CW1 and CW2 did not commence until a year later in 2012.

(h) The disciplinary action was actuated by a demand by the insurance company from whom the Bank had sought compensation for the loss of two Million Kenya Shillings.

(i) The court believes the testimony by CW1 and CW2 that were it not for the demand by the insurance company, no disciplinary process would have commenced against them because preliminary investigations had blamed the fraud on the T24 system failure which was unknown to the Bank and/or its managers at the time.

(j) The insurance could not refund the bank if it was discovered that the loss was systemic and that the loophole that led to the loss still existed.

(k) The court is equally satisfied that the loss to the bank was a result of one thief by the name Pauline, whom the bank had employed as a teller and gave her opportunity to test and execute her thieving skills.

(l) The fact that the theft was discovered within a period of about a month spoke well on the oversight exercised by CW1 in particular which led to the discovery of a major loophole in a system that was new and had just been imported from South Africa and installed. If the two managers were to blame for the systemic loophole, the Branch Manager and the entire management of the Bank that procured and installed the T24 system were equally to blame.

28. There is no way CW1 and CW2 could be held culpable for a failure they had no idea of nor anticipated. To the contrary the bank ought to have rewarded CW1 in particular for detecting the system failure and the theft by a particular person before she could cause any further loss.

29. It is without doubt that the bank was compensated for the loss by the insurance company. These are system failures that are foreseeable in a banking environment.

30. It is true that persons are trained; Rules developed and systems put in place to minimize and/or avoid such losses all together.

31. It has been established on a balance of probabilities that the "overriding" loophole was completely new and unknown to anyone in the bank. The bank could not hold a different and higher, unknown standard on the two claimants.

32. By doing so, the respondents relied on an unlawful and invalid reason and standard to judge CW1 and CW2.

33. The finding by the disciplinary committee that found the claimants grossly negligent was wrongfully and unfairly arrived at therefore.

34. The court therefore finds that the termination of employment of the two claimants was in violation of *Sections 43 and 45 of the Employment Act*.

Issue (b)

35. In terms of *Section 49(1) (c) and (4)*, the claimants are entitled to compensation for the wrongful and unfair termination of employment.

36. The claimants' were paid their full benefits upon termination. The claimants were used as scapegoats for a system failure that was new and unknown to anyone in the bank. The thief who had detected the loophole and used it to steal Kshs. 2 Million was found courtesy of the effort of CW1. The loss was compensated by the insurance company and the thief was dismissed from employment. In our view the claimants did not contribute to their termination from employment. The claimants were both senior managers of the bank and had served for many years. The claimants had clean records before this happening. The two lost very brilliant career growth in their twilight years of banking. The claimants were unable to get alternative jobs after the termination. This is a difficult feat in the banking industry. The claimants suffered loss and damage.

37. The court was referred to the case of *Banking Insurance and Finance Union (Kenya) vs Namini Sacco Society Ltd (2014) eKLR* in which Ongaya – J. reinstated the claimant without loss of benefits upon a finding of unlawful and unfair dismissal.

38. The court has also referred to the case of *Peterson Ndungu and 5 others vs Kenya Power and Lighting Company Ltd (2014) eKLR* in which Rika J. awarded the claimants equivalent of 6 months salary in compensation.

39. In the present case, CW1, Julius Kipyegon Bati had served the respondent for 19 years unblemished. The claimant earned a gross salary of Kshs. 149,184 per month. This is the income the claimant suddenly lost upon the unlawful termination.

40. The 2nd claimant served the respondent from 1980 in various capacities until the year 2007 when he was posted to Kakamega Branch as Service Quality and Compliance Manager answerable to the branch Manager. He had served about 21 years at the time of the unlawful termination. Both were advanced in age and were destined to the helm of their career.

41. In addition the claimants testified that they suffered mental torture, anguish and humiliation as a result of the unwarranted scapegoating a year after the events for which the culprit had been punished.

42. It is the considered finding by the court that both claimants deserved and are awarded maximum compensation, which is equivalent of 12 months salary in compensation. CW2 earned Kshs. 203,000 per month. This is the permissible remedy by statute and therefore other reliefs sought are refused.

43. In the final analysis judgment is entered in favour of the claimants as against the respondent as follows:

- (a) Julius Bii Kipyegon Bati $(149,184 \times 12) = 1,790,208$.
- (b) Robert Watila $(203,000 \times 12) = 2,436,000$.
- (c) Interest at court rates from date of judgment till payment in full.
- (d) Costs of the suit.

Judgment Dated, Signed and delivered this 20th day of January, 2020

Mathews N. Nduma

Judge

Appearances

Mr. Kubai for the claimants.

Mr. Kimani for the respondent.

Chrispo – Court Clerk