



IN THE HIGH COURT OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO 2005 OF 2015

JAMES ODHIAMBO KAYE.....CLAIMANT

-VERSUS-

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the respondent as a teller until 4.8.2015 when he was summarily dismissed. He thereafter brought this suit on 11.11.2015 seeking the following reliefs:

- a. A declaration that the decision of the Respondent to summarily dismiss the claimant from employment was unjustified unlawful.
- b. Reinstatement of the claimant back into employment of the respondent
- c. Damages for unlawful dismissal.
- d. Payment of overtime hours worked
- e. Certificate of service
- f. Costs of this suit
- g. The Respondent filed defence on 6.1.2016 denying liability for unjustified and unlawful dismissal of the claimant. She averred that the claimant was lawfully dismissed for gross misconduct and after being accorded a hearing.

3. The suit was heard on 16.10.2019 when each party gave evidence and thereafter filed written submissions.

Claimant's case

4. The Claimant testified as CW1 and basically adopted his written statement dated 7.3.2018 and 5 documents as his evidence. His brief testimony was that he joined the respondent in 2011 as a Rider until November 2014 when he was promoted to the position of a cashier after undergoing internal training. The training was about dealing with cash, cheques and handling of customers. As regards cash withdrawal, he was trained on the procedure including, checking of customer's identification card, checking facial appearance of the customer and the signature.

5. On 18.3.2015 a customer who was in the queue presented a cash withdrawal voucher already approved by the Operations Manager. The customer also presented an original national identity card. He compared the customer's identity card and his facial appearance and the particulars in the system. Thereafter he asked the customer to sign again on the voucher to confirm that he was the one who signed it and upon being satisfied with the same he paid him Kshs. 250,000.

6. Again on 19.3.2015, the same customer presented a withdrawal voucher for Kshs. 280,000 already approved by the Operations Manager who was in the banking hall. Customer also presented his original identify card. After checking the details, he paid the said Kshs. 280,000. He trusted the transaction because at times the Branch Operations Manager did meet customers. She knew and authorized for them whichever transactions they wanted done for them.

7. After three (3) days of the said transactions, he received a suspension letter dated 24.3.2015 after being called by the HR Manager to explain what happened on 18.3.2015. He denied ever being accorded any disciplinary hearing before the dismissal. He contended that he never knew that the customer he was serving was a fraudster.

8. He further contended the said dismissal affected him financially because he had taken a mortgage for a house which was eventually auctioned. He also stated that he was working overtime for 7.30 am to 8 p.m. but he was never paid for the extra hours worked. He contended that he could not leave the bank until his bosses counterchecked his transactions. He claimed his salary for all the days worked before the termination. He also prayed for compensation because he was dismissed for no valid reason. Finally, he prayed for certificate of service.

9. On cross-examination, he admitted that he was trained before being appointed cashier/teller. He further admitted that he paid Kshs. 250,000/- and Kshs. 280,000/- on 18.3.2015 and 19.3.2015 respectively to a customer but later it was found out that the person was not the owner of the debited account. He, however, maintained that he paid the person after confirming that the account belonged to him and on the basis of the approval signed by the Operations Manager.

10. He contended that it was normal for a customer to present a withdrawal voucher already signed by the Operations Manager. He, however, admitted that he never verified with the Operations Manager whether she is the one who signed approval on the voucher before paying the customer.

11. He admitted further that he was served with a suspension letter requiring him to tender a written statement, and thereafter he was called by the legal department to give a written explanation of what happened about the said payment. He also admitted that he was thereafter called by the Human Resource Manager to give his oral defence before five (5) members of the committee. The committee asked him to explain what happened on 13.3.2015 and after explaining he was told to go home and wait.

12. As regards the reliefs sought he admitted that he was never given any letter or email requiring him to work overtime. He however contended that he stayed on because there was duty to do. He admitted that he was paid salary for the days worked in March 2015. He explained that after deductions, he received Kshs. 80,000.

Defence case

13. The respondent called her Employee Relations Advisor, M/s. Tabith Mutwa as RW1. She adopted her written statement dated 7.12.2018 as her testimony and produced eight (8) documents as defence exhibits. In brief she confirmed that the claimant was employed by the respondent as a motor bike rider under the letter dated 8.6.2011. After undergoing training, the claimant was promoted to the position of Teller vide the letter dated 13.11.2014. As a Teller the claimant's duty included receiving and making payment to customers and as such he owed a duty to the respondent to exercise due care and diligence when carrying out his duties.

14. She further stated that on 18.3.2015, the claimant performed his duties negligently and breached the said duty of care by paying out Kshs. 250,000 to a wrong person and thereby occasioned loss to the respondent to the extent of the said amount.

15. She explained the procedure of payment to include Teller receiving at the counter cash withdrawal voucher from customer duly signed by the customer plus original national ID or passport; then the Teller verifies account balance, signature in the voucher and system image of the customer in the system, the ID presented and the customer present; thereafter the teller can pay up to Kshs. 300,000/- without any authorization from Operations Manager; but if the amount is above Kshs. 300,000, the teller must seek approval from the Supervisor, that is, Cash Team Leader or the Branch Operations Manager.

16. She contended that it is incorrect for a customer to present a cash withdrawal voucher already approved by the Branch Operations Manager's signature. She further indicated that the first contact between the bank and a customer is the Teller who then presents the voucher to the Branch Operations Manager if the need arises.

17. She further stated that on 18.3.2015, the customer presented to the claimant a cash withdrawal voucher already signed by the Branch Operations Manager yet, a voucher for Kshs. 250,000 did not require a signature from the said manager. Such voucher was abnormal and he should have consulted with the Branch Operations Manager, about the voucher before paying it.

18. On cross-examination RW1 stated that the Bank has a Training School where the claimant was trained fully. She reiterated the procedure for payment as including presentation of a cash withdrawal voucher and original identity card followed by verification of the identity by the Teller from the system. She contended that the reason for dismissing the claimant was negligence which led to the loss of Kshs. 250,000/-. Finally, she contended that the claimant is not entitled to payment for overtime worked.

Claimants submission

19. The Claimant submitted that his dismissal was unfair because it was done without prior notice and without according him a hearing as required under section 41 of the Employment Act. He further contended that reason for the dismissal was not justifiable because he was punished for doing his duty carefully and diligently. He reiterated that he followed the laid down procedure before paying the Kshs. 250,000 on 18.3.2015 by verifying the customer's details from the system and also on the strength of the approval signed by the Branch Operations Manager.

20. He relied on **Gilbert Mariera Makori vs Equity Bank Limited [2016] e KLR and Standard Group Limited v Jenny Luesby[2018]eKLR** where the courts unanimously held that termination of contract of services without according fair hearing renders the termination unfair. Accordingly, the claimant contended that his dismissal was unfair and he is entitled to the reliefs sought.

Respondent's submissions

21. The Respondent submitted that the burden of proving unfair termination lies with the employee, while the burden of justifying the

grounds for the termination lies with the employer. She further submitted that, she discharged her burden of proving the dismissal of the claimant was substantively and procedurally fair.

22. She explained that the claimant paid out Kshs. 250000/- to an individual on 18.3.2015 and 19.3.2015 respectively without proper verification that he was the right customer. She contended that it was negligent performance of duty for the claimant to receive and pay against a voucher that was already approved by the Branch Operations Manager, before consulting with the said Manager.

23. She further submitted that the conduct by the claimant constituted gross misconduct under Clause 7.2.1 of the respondent's Human Resource Manual and section 44(4) (c) of the Employment Act which justified summary dismissal. For emphasis, she relied on **Mutua Musau vs Barclays Bank of Kenya Ltd [2016] e KLR** where the court found that failure to follow the required procedure/internal guidelines which led to loss of a substantial amount by the bank was a just reason for summary dismissal of the employee.

24. As regards, the claim for overtime, the respondent submitted that the claimant did not prove that he was called upon to work overtime, and that he indeed worked for extra time. For emphasis she relied on **Julius Arisi & 90 Others v Research International East Africa [2019] eKLR** where the court held that the employee has the burden of proving that he is entitled to payment for overtime and show how the amount sought is calculated. She further relied on **Frank N. Kamau vs Tusker Mattresses Ltd [2018] eKLR** where the court held that it was not possible to ascertain whether the employee worked overtime because he was not clocking in and out. Consequently, the respondent urged the court to dismiss the suit with costs.

Issues for determination

25. There is no dispute that the claimant was employed by the respondent as a Teller until his dismissal on 4.8.2015. The issues for determination are:

- a. Whether the reason for the dismissal was valid.
- b. Whether a fair procedure was followed
- c. Whether he is entitled to the reliefs sought.

The reason for dismissal

26. The reason cited for the dismissal of the claimant was "gross negligence resulting the loss of Kshs. 250,000/-. The particulars of the said negligence included payment of Kshs. 250000/- without due care and diligence and thereby occasioned a loss to the tune of that amount. The claimant admitted that he paid the said amount but contended that he did so after due diligence of verifying the identity of the customer and also on the strength of approval signed on the withdrawal voucher by the Branch Operations Manager before presentation to the Teller's counter.

27. RW1 found the presentation of an already approved voucher abnormal and contended that the first contact between the customer and the bank is the Teller and stated that the claimant should have consulted with the Branch Operations Manager to confirm whether she is the one who approved the payment vouchers. It's therefore the defence case that the claimant's conduct amounted to gross negligence.

28. I have carefully considered the evidence and submissions presented to this court and I agree with Rw1 that when it comes to cash withdrawal like in the instant case, the first contact point between the bank and the customer is the Teller. That is the person who receives from the customer the withdrawal voucher and identification documents. It is also the Teller who does the verification of the customer both physically and in the bank system. If the Teller is satisfied with the security checks, he is the person to pay the sum requested but if it exceeds his authority, he then seeks approval from his superiors.

29. However, in this case the customer brought voucher already approved by the Operations Manager contrary to the procedure yet it was for an amount which the claimant could pay without seeking approval from his supervisor. In my view a reasonable Teller in the circumstances of this case should have questioned why the cart was placed before the horse and verify with the Operations Manager whether indeed, she had approved the payment by signing on the voucher.

30. The claimant never consulted but just relied on the approving signature to pay the money to a fraudster. I, therefore, return that the respondent has proved on a balance of probability that the claimant acted in gross negligence when he paid Kshs. 250,000 to a fraudster on 18.3.2015.

31. Under section 44(4)(c) of the Employment Act which is duplicated in Clause 7.2.1(viii) of the respondent's Human Resource Manual, the employer is entitled to summarily dismiss his employee:-

"If an employee willfully neglects to perform any work which it was his/her duty to perform, or if he/she carelessly and improperly performs any work which from its nature it was his/her duty, under his/her contract to have performed carefully and properly."

32. It follows that the respondent has discharged his burden of proof under section 43 of the Employment Act. The said section requires that in any legal proceeding challenging termination of employment the employer shall prove the reason for the termination and in default the termination is unfair within the meaning of section 45 of the Act.

Fair Procedure

33. The Claimant admitted in evidence that he was asked by the Human Resource Manager to explain orally what happened on 18.3.2015 after which he was served with a suspension letter asking him to explain the matter in writing. He further admitted that he was accorded an oral hearing before a panel of five (5) people before receiving termination letter.

34. After considering the foregoing admissions, I must return that the claimant was dismissed after following a fair procedure. Section 41 of the Employment Act requires that before dismissing an employee for misconduct, poor performance or physical incapacity, the employer must first explain the reason for which termination is being considered and thereafter accord the employee an opportunity to defend himself. That mandatory procedure was followed and as such I find and hold that the respondent has proved that she followed a fair procedure before dismissing the claimant.

Reliefs

35. In view of the finding that the respondent has proved a valid reason for dismissing the claimant and that she followed a fair procedure, I decline to declare the dismissal of the claimant unjustified and unlawful. I further decline to order his reinstatement because that relief is dependant on a finding of an unfair termination which is not available herein.

36. The claim for damages for unlawful dismissal lacks particulars and basis and it is declined. The claim for overtime must also fail because it was not substantiated by evidence. However, the prayer for certificate of service is however granted.

Conclusion

37. Save for the certificate of service the rest of the reliefs must fail because they lack merits since the termination was lawfully done.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N MAKAU

JUDGE