



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1599 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

BANKING, INSURANCE AND FINANCE UNION (KENYA)....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

JUDGMENT

The Claimant herein is a duly registered trade union within the provisions of the Labour Relations Act, 2007 whose mandate is to represent the interests of employees working in the Banking industry within the Republic of Kenya while the Respondent is a commercial bank registered under the Banking Act and carrying on banking business within the Republic of Kenya. The claimant filed this suit on behalf of its member Justus Muli Nzuki who was previously and employee of the respondent.

The Claimant avers that the grievant, Justus Muli Nzuki was employed by the Respondent on 19th April, 2010 in the position of a Direct Sales Representative (DSR) and attached to the Respondent's Card Centre. The Claimant further avers that the grievant was engaged on yearly contracts that were renewable subject to good performance.

The Claimant further avers that the grievant was on 30th December, 2011, issued with a one year contract as micro banker and was posted to work at the Respondent's Tom Mboya Street Branch, which contract was to commence on the 3rd January 2012 and lapse on 3rd January 2013 at a monthly salary of Kshs.38,000/-.

The Claimant contends that immediately upon the completion of the one year contract the grievant was placed on a six months' probation with effect from 4th January, 2013 in line with the Collective Bargaining Agreement and his salary enhanced to Kshs.55,860/-.

The Claimant further contends that on 4th April, 2013 while the grievant was in the course of his duties, he served a customer of the bank, accessed her account and offered the required service to the customer's satisfaction. That on 5th and 6th April, 2013 a fraudster visited the Respondent's Kimathi Street Branch and accessed the same account withdrawing Kshs.700,000/- and Kshs.1,400,000/- respectively.

As a result, the grievant was issued with a show cause letter dated 10th May, 2013 requiring him to show cause why disciplinary action should not be taken against him for:

- a. Unauthorised access into account number 1108061451 account name Florence Mbula Wambua on 4th April, 2013.
- b. Cash withdrawals aggregating to Kshs.2,100,000/- on account number 1108061451 account name Florence Mbula Wambua.

The Claimant avers that the grievant did respond to the show cause letter and a disciplinary hearing was convened on 7th November, 2013. It however maintained that the Respondent ignored all the representations and mitigations by the grievant and proceeded to unfairly and unlawfully terminate his employment without justifiable reasons on 13th November 2013.

The Claimant further avers that the grievant appealed the decision to unfairly terminate his employment vide his letter dated 21st November, 2013, which appeal was heard and the decision to terminate the employment of the grievant upheld.

The Claimant maintains that the grievant's termination was unfair and unlawful as the Respondent failed to adhere to the mandatory provisions of Sections 43, 44 and 45 of the Employment Act, 2007. In the Memorandum of Claim the Claimant seeks the following reliefs:

1. A declaration that Mr. Justus Nzuki suffered an unfair, invalid and unlawful termination of employment.
2. An order for reinstatement of Mr. Justus Muli Nzuki back to his former position in the bank without any loss of employment benefits and seniority in service as provided for in Section 12(3) of the Industrial Court Act No. 20 of 2011 since there were no valid reasons to warrant termination of employment.
3. Orders that the grievant Mr. Muli be paid all his salaries and allowances (all employment benefits) of Kshs.1,376,320/- (as at the date of filing this suit) which he has lost as a result of this unfair, invalid and unlawful termination of employment from the very date of termination to the date of the judgment.

In the absence of re-instatement and without prejudice to prayers 1, 2 and 3 above and in the opinion of the Court, the Claimant prays for the following orders:-

4. The Claimants pray to the Court to Order for re-engagement of Mr. Justus Muli Nzuki in line with Section 49(3)(b) read together with Section 50 of the Employment Act No. 11 of 2007.
5. The Claimants further pray to the Court to Order for compensation of twelve (12) months' salary of Kshs.750,720/- to Mr. Nzuki for having suffered unfair and unlawful termination of employment.
6. The Claimant further prays to the Court to make any other Orders that the Court may deem justifiable and expedient to grant.
7. Costs of the suit.

The Respondent in its Memorandum of Response dated 11th January, 2016 and filed in Court on 18th January, 2016 admitted having engaged the grievant. It however maintained that the grievant only became its employee after successful completion of the probation period in June 2013.

The Respondent further averred that the grievant did access account number 1108061451 belonging to Florence Mbula Wambua via terminal 172.17.52.28 between 14.11.15 and 14.14.41, on 4th April, 2013.

The Respondent further alleges that on 5th and 6th April 2013 the said account was accessed by a fraudster impersonating the account holder and the sums of Kshs.700,000/- and Kshs.1,400,000/- were withdrawn, as a result of which the grievant was served with a notice to show cause.

The Respondent avers that it did accord the grievant a fair hearing and that his employment was legally terminated in accordance with the provisions of Section 45 of the Employment Act, 2007. The Respondent further maintained that the grievant's actions breached clause A5(iv) (1) of the collective bargaining agreement and Clause 11 of his letter of appointment.

The Respondent submitted that the Claim filed herein is therefore bad in law and that the same ought to be dismissed with costs to the Respondent.

The suit was heard on 5th April, 2019 and 2nd July, 2019 with the grievant testifying on behalf of the Claimant and the Respondent calling 2 witnesses to testify on its behalf. Both parties reiterated their positions as per pleadings.

Submissions by the Parties

It is submitted by the Claimant that the grievant was grossly underpaid by the Respondent Bank having been paid a salary that was below what was recommended under the CBA. The Claimant therefore urged this Court to allow their Claim under this head. The Claimant relied on the decision in the case of **Industrial Cause No. 158 of 2013, Said Ndege Vs Steel Makers Limited** where the Court decided that an employee can legally rely on the terms of a collective bargaining agreement to enforce or pursue his rights.

The Claimant further relied on the Court of Appeal decision in the case of **East Africa Portland Cement Co. Limited Vs Kenya Chemical & Allied Workers Union (2017) eKLR**.

It is further the Claimant's submission that the grievant's termination was unfair and unlawful as he was terminated for doing what was within his mandate. That the grievant's reason for accessing the account in question was to verify the identity of the customer so as to ensure that he was dealing with the real customer.

The Claimant further submitted that the grievant did not take part in any fraud as alleged by the Respondent as he was stationed at the Respondent's Tom Mboya branch and the withdrawal was done at Kimathi Street Branch.

The Claimant submitted that the audit report produced by the Respondent contained errors. For instance, that the report indicated that the grievant accessed the customer's account on 1st January, 2002, which the Claimant maintained was impossible as the grievant was not in the employment of the Respondent on the said date.

The Claimant maintained that the Respondent failed to adhere to the provisions of Section 45 of the Employment Act, 2007 thus making the grievant's termination unfair. The Claimant relied on the case of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014)**

eKLR where the Court found that the Claimant's termination was unfair, the Respondent having failed to prove reasons for such termination.

The Claimant urged this Court to be guided by the said decision and find in its favour.

On remedies the Claimant submitted that it is entitled to all the reliefs as sought in its Memorandum of Claim by dint of Section 12 of the Industrial Court Act and Sections 49 and 50 of the Employment Act, 2007 and therefore urged this Court to allow the Claim as prayed.

Respondent's Submissions

The Respondent submitted that it had a valid reason to terminate the grievant's employment and that in doing so it followed due process. The Respondent further submitted that the reason for the grievant's termination was communicated in the grievant's letter of termination dated 13th November, 2013.

The Respondent maintained that it did adhere to the provisions of Section 41, 43 and 47 of the Employment Act, 2007. It is further the Respondent's position that it suffered loss as a result of the grievant's acts of negligence as was confirmed by the Forensic Report produced at Page 74 of the Respondent's Bundle of Documents. The Respondent relied on the case of **Nicholas Otinyu Muruka Vs Equity Bank Limited (2013) eKLR** where the Court held that:

"Every employer has a right to discipline their employee on good reason or reasons where an employee is found to have committed any acts of gross misconduct or acted in a manner putting the employer into loss. However, such disciplinary action must follow due process as outlined under Section 44 of the Employment Act."

The Respondent submitted that the grievant failed to exercise good judgment thus occasioning it loss.

The Respondent maintained that the grievant was accorded a hearing on the 7th November, 2013 prior to being issued with a letter of termination on the 13th November, 2013. The Respondent further maintained that the grievant was accorded yet another hearing before the Appeal committee on 5th February, 2014 and the decision communicated to him on 4th March, 2014. The Respondent submitted that at both hearings the grievant was represented by two union officials.

With regards to specific reliefs, the Respondent submitted that the Claim for underpayment only arose at the hearing and was not pleaded. It was therefore the Respondent's submission that a party is bound by their proceedings and urged the Court to dismiss this prayer.

With regards to re-instatement and re-engagement the Respondent submitted that the Claimant is not entitled to this relief since a period of more than 5 years had lapsed since the grievant left employment. The Respondent relied on the case of **Loice Otieno Vs Kenya Commercial Bank Limited (2013) eKLR** where the Court decided that the relief of reinstatement would be appropriate remedy if three years have not lapsed since a Claimant's termination.

The Respondent submitted that the claim for salaries and allowances of Kshs.1,376,320/- being the amount from the date of termination to date of reinstatement cannot be granted for lack of proper basis. The Respondent further submitted that the claim is speculative in nature. The Respondent relied on the case of **Daniel Kamau Kariithi Vs Bamburi Cement (2016) eKLR** where the Court held that the claim for future earning lost due to lay off before retirement age must fail. The Court went on to say that salary is only payable for services rendered and not to ex-employees. The Respondent maintained that the grievant having not rendered any services is therefore not entitled to this relief.

The Respondent further submitted that the Claimant is not entitled to the Claim for damages for unfair termination as it suffered loss following the grievant's negligent access to a client's account that resulted in the loss of Kshs.2,100,000/- to the Respondent Bank. For emphasis the Respondent cited the case of **Francis Nyongesa Kweyu Vs Eldoret Water and Sanitation Company Limited (2017) eKLR**.

In conclusion it was the Respondent's submission that the Claimant is not entitled to the reliefs sought in its Memorandum of Claim and urged this Court to dismiss the same with costs to the Respondent.

Determination

Having considered the facts of this cause, evidence, submissions and authorities cited, the issues for determination are: -

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provided that the employer must prove valid reason.

The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is provide for in Section 47(5) of the Employment Act. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The reason for termination as cited in the grievant's letter of termination dated 13th November, 2013 was as follows:

"We have carefully considered the explanations you gave in writing and verbally and have concluded that you committed acts of gross misconduct by irregularly accessing a customer's account without a valid reason. We also note that soon thereafter i.e on the 5/4/2013 and 6/13/2013 a fraud was committed in the customer's account."

The Claimant on behalf of the grievant maintained that the grievant accessed the account in question during the course of his employment to verify the customer details and advise the customer appropriately. The Claimant discredited the Forensic Report produced by the Respondent stating that the same contained errors as it referred to date when the grievant was not under the Respondent's employment.

It was however the respondent's position that the grievant had no reason to access the account in question at the initial visit by the customer. It further maintained that by doing so the grievant was able to access information on the account and disclosed the same to fraudsters who used the information to withdraw a total of Kshs.2,100,000/- from the account in question.

According to the respondent, it reached the decision to terminate the grievant's employment for the following reasons that under the Micro-Banking Individual Lending Policy and Procedures Manual it provides as follows in Clause 3.1 (Initial Meeting) - The Initial meeting will consist of a preliminary discussion in which the Micro Banker verifies the customer's request and decides whether the Applicant should go forward and apply for the loan.

Further it provides that the Micro Banker must use his/her good judgement in deciding whether or not it is viable to proceed as not to waste the Bank's or Borrower's time. It is the Bank's submission that the grievant herein did not use his good judgment while dealing with a customer on the 4th April 2013. This is demonstrated by the following;

- i. The grievant in his own statement stated that he cannot recall the reasons which prompted him to access the customer's account number 1108061451 on the affected dates before the withdrawals of Kshs.2,100,000.
- ii. The grievant confirmed after viewing the CCTV camera that there were two people, a lady and gentleman who visited his work station on the 4th April 2013. He however did not recall seeing the man who was able to access the details.
- iii. The grievant stated that the lady who visited him sought an enquiry to borrow an amount of Kshs.200,000.00. Clearly proper judgment was not exercised by the Claimant who could have questioned why a customer with an excess of Kshs.2 Million in her account would wish to borrow only an amount of Kshs.200,000.00.
- iv. The grievant did not consider on what basis a customer with an account domiciled in Kibwezi would be applying for a loan at Nairobi, Tom Mboya Branch.
- v. The Bank lost an amount of Kshs.2,100,000.00 on the premise of the grievant's poor judgment in dealing with fraudsters on the 4th April 2013.

Upon being presented with the report, the Claimant was invited for a disciplinary hearing on the 7th November 2013 which he duly attended together with his appointed representative Mr. William Olochike and Pius Mtemwa. The grievant stated as follows; -

"I was informed of the fraud in May 2013. I had an opportunity to meet the genuine customer and confirmed that the lady I served was taller and skin colour was lighter than genuine customer."

These facts are not contested by the claimant or the grievant.

Having reviewed the evidence and documents on record, I agree with the respondent that the grievant's actions were highly suspicious. In the nature of business carried out by banks, they cannot afford to keep an employee against whom there is doubt on integrity. I thus find that there was valid reason to subject the grievant to a disciplinary hearing and to terminate his employment.

Both the claimant and respondent agree that the grievant was subjected to fair hearing and was represented by two shop stewards at both the initial hearing and the appeal.

In the circumstances I find that the claimant has not proved that the termination of the grievant's employment by the respondent was unfair.

Whether the Claimant is entitled to the reliefs sought

Having found that the grievant's termination was valid, he is not entitled to a declaration that he suffered an unfair, invalid and unlawful termination of employment. He is further not entitled to the prayer for reinstatement for the same reason and also for reason that the grievant was terminated in the year 2013 which is more than three six years from the date of termination.

In the case of **Benson N. Irungu Vs Total Kenya Limited (2015) eKLR** the Court dismissed a prayer for reinstatement as the termination took place more than 10 years prior to the date of judgment and as such a remedy was not available. Section 12(3) of the Employment Act provides that such a relief can only be awarded within 3 years of termination.

The same reasons, that is, that there was no proof of unfair termination, apply to the prayer for payment of Kshs.1,376,320/- being salaries

and allowance lost as a result of the termination of employment from the termination till the date of Judgment. Even had the court found the termination unfair, the grievant would still not be entitled to this relief as the same amounts to unjust enrichment as the grievant did not earn the salary. The prayer is also speculative as it related to future earnings. In the case of **D. K Njagi Marete Vs. Teachers Service Commission – Industrial Cause No 379 Of 2009** Rika J. held:

“What remedies are available to the Claimant “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

Compensation of 12 months’ salary for unlawful termination

Having found that the grievant’s termination was lawful and valid the grievant is not entitled to any compensation.

In conclusion I find that the Claim fails in its entirety and accordingly dismiss the same. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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 has 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.

MAUREEN ONYANGO

JUDGE