



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1460 OF 2015

ANN GATORU WAWERU.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LTD.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 19th August, 2015 the claimant alleged that she was employed by the respondent on 7th August, 1993 as a clerk at its Karatina Branch. The claimant worked faithfully for the respondent in various capacities and in other branches for 22 years earning various recognitions and promotions as detailed in the statement of claim.

2. By a letter dated 7th April, 2015 the respondent terminated the claimants employment following investigation and a disciplinary hearing conducted on 18th March, 2015 regarding a disputed cash withdrawal of Kshs 800,000/=, ATM cash shortage of Kshs 1,056,000/= and cashier till shortage of Kshs 234, 211.75. The claimant was accused of negligence in the performance of her duties by failing to exercise proper management oversight and failure to institute effective snap checks and controls which could have mitigated loss of funds.

3. In reaching the decision to terminate the claimant's employment the respondent relied on a forensic investigation report dated 6th March, 2015 which report did not state that the claimant as branch manager played or failed to play any role in the disputed cash withdrawal or Kshs 800,000/=, the report did not link the claimant to the ATM cash shortage and that the report identified the staff/officers responsible and recommended disciplinary action against them. The claimant was not one of the officers against whom disciplinary action was recommended. The claimant therefore alleged that by reason of the alleged wrongful dismissal she suffered loss and damage and seeks compensation in the sum of Kshs 5,639,657.30 details of which are set out in the memorandum of claim.

4. The respondent on its part pleaded that it denied the allegations by the claimant contained in paragraph 3 to 15 of the claimant's statement of claim. The respondent further averred that on 16th October, 2014 the claimant was issued with a warning letter for insufficiently supervising her branch leading to RED audit outcome. In the letter the claimant was advised that if she committed any further acts of misconduct, the warning letter would be considered in deciding the level of disciplinary action to be taken.

5. On 4th February, 2015 the respondent's forensic investigation department received a request to investigate a case where a customer had disputed a counter withdrawal of Kshs 800,000/= from his account at Haile Selassie Branch. The investigations revealed that two bank officials working in the Branch as custodians were involved in the criminal activity of making fake money and that they were using the bank money as investment capital in their illegal business. The investigation revealed that they would irregularly withdraw cash from the cashier tills, the ATMs and customer accounts.

6. The investigations further revealed that branch controls such as dual controls, snap checks and management oversight were not properly utilized. Cash shortages existed on ATMs from July 2013 but no snap checks picked the irregularity, ATM password combinations were also not being changed during hand over. On 4th February, 2015 during the course of investigations the claimant was called by Regional Manager to report to the Branch the following day and organize a replacement for the custodian who was going on suspension. She informed the Branch Operations Officer to make arrangements for the replacement.

7. The investigation report concluded that the snap checks being done were ineffective since they did not have a surprise element. Further the report concluded that the management oversight was a cardinal requirement in preventing and detecting occupation fraud as required by branch policies and procedures. On 10th February, 2015 the claimant was issued with a suspension letter pending disciplinary investigation. This was extended by a further 30 days.

8. On 11th March, 2015 the claimant was invited to attend a disciplinary hearing scheduled for 18th March 2015. In the invitation the claimant was informed the investigations had revealed a disputed cash withdrawal of Kshs 800,002, ATM cash shortage of Kshs 1.056 million and cashier teller of Kshs 234,211.75 which occurred under her management. On 18th March 2015 a disciplinary hearing was held during which the claimant confirmed that part of her role as branch manager entailed oversight.

9. On 7th April, 2015 the claimants employment was terminate for negligent performance of her duties and failure to exercise proper management oversight and responsibility. Further, the claimant was informed that she failed to institute effective snap checks and controls which could have mitigated the loss of funds to the bank. On 21st April, 2015 the claimant appealed against the termination on grounds inter alia that the findings of the disciplinary hearing were inconsistent with the results of the investigation and that the sanction against her was too harsh. On 5th May, 2015 the appeal hearing was held and the claimant was given an opportunity to make representations. On 8th May, 2015 the respondent wrote to the claimant informing her that the decision to terminate her service has been upheld.

10. In her oral evidence the claimant adopted her witness statement dated 8th May, 2018 and documents filed with the claim as her evidence. The claimant further stated that her employment was terminated on 7th April, 2015 and her termination was on account of negligence in performance of her duties. It was her evidence that there was as disputed cash withdrawal, ATM cash shortage and cashier till shortage.. The claimant was accused of being responsible. According to her, a withdrawal of Kshs 800,000/= was beyond the tellers limit and the client was referred to a section head. The transaction was authorized and payment made. The customer later complained about the withdrawal. He said he never made the withdrawal.

11. According to the claimant she was never involved in the transaction and was not to authorize the same. It was her evidence that the ATM was run by two custodians and did not have the day to day management of ATM but there was random monthly checks of ATMs by staff not involved in day to day ATM running. She used to assign people to carry out the snap checks and receive reports from them. It was her evidence that she received no report on shortages in the ATM cash and further that she was not implicated in the forensic investigation report over the ATM shortage. The report stated that the snap checkers misled her.

12. The claimant further stated that she was not to physically check the actual cash by tellers. Checkers who were bank officials did this. She could not possible count personally all the money in the branch. It was her evidence that the disciplinary panel did not recommend any disciplinary action against her. It was further her evidence that she went through all steps of the disciplinary process.

13. In cross-examination she stated that she remembered her job profile and responsibilities. She used to look at controls and was the overall supervisor. As branch manager she was the one in charge of the Branch. She further stated that there was snap checks at different times. They could be weekly, quarterly etc. the snap checks were allocated by Branch Operations Officers to different staff members and that she was aware of them. The snap checks were supposed to be a surprise but was aware when they would occur. The claimant further stated that once in a while she could conduct snap checks.

14. The claimant stated that she used to look at the reviews to ensure officers under her worked as required. She further stated that there were cases of theft and money lost during the period she worked for the respondent although there were controls

15. Regarding the withdrawal of Kshs 800,000/= she stated that there was a customer complaint in July 2014 and that she knew about it from the Regional Manager. The complaint was not lodged directly with the Branch though the account was at the Branch. When she learnt of the incident she asked for the voucher to know which cashier handled the transaction. The matter was forwarded to the investigation officers who unearthed other incidents of fraud. It was the claimant's evidence that the snap checks were not effective in this particular case and the respondent lost about 1.9 million. There was a cashier who had a cash shortage of Kshs 230,000/= and she demanded an explanation and with authority of the Regional Manager she made the cashier concerned to pay back the amount.

16. According to the claimant there was no lack of oversight on her part. It was further her evidence that snap checks were done by trusted staff but they may have been compromised. She was not to do the snap checks personally. Her role was oversight.

17. The respondent's witness Mr Vislas Odhiambo stated that he worked for the respondent as Head of Employee Relations. He adopted his witness statement filed on 10th April, 2018 as his evidence in chief. According to him, the claimant had the responsibility over accountability and controls. The oversight responsibility was to ensure snap checks were effective. It was however his evidence that the claimant was not implicated in the theft or fraud. The observations were primarily focused on theft and ineffectiveness of snap checks. The disciplinary action against those implicated was left open to the respondent. The claimant was terminated for failing in her oversight role. The report observed that the claimant's managerial oversight was lacking and the decision rested with the HR –Director.

18. In cross-examination he stated that the transaction for Kshs 800,000/= was never referred to the manager for authorization and that the investigation report stated that there was compromise on the integrity of the staff. In re-examination he stated that the claimant was not involved in fraudulent transactions and that Branch controls were ineffective.

19. In a termination of employment claim the burden of proof that the termination was unfair is on the claimant while the burden of proof of reasons for termination is cast upon the employer.

20. The claimant disputed the reasons for termination of her service contending that she did what was expected of her but the staff she worked with were compromised. It was her evidence that as the Branch Manager, her role was oversight and relied on reports filed by officers under her on whom she assigned responsibilities. The claimant stated that she could not possibly count personally all the money in the Branch and that she had to rely on the officers that she worked with.

21. According to the claimant and this was confirmed by the respondents witness Mr Odhiambo, the cash withdrawal of Kshs 800,000/= was not referred to her for authorization and further that when she discovered that one of the cashiers had a cash shortage of Kshs 230,000/= she demanded explanation and with the authority of the Regional Manager she made the cashier concerned pay back the amount. The claimant further stated that the forensic investigation report mentioned by name the staff implicated in the fraud and recommended disciplinary action against them. She was not among those adversely mentioned and no disciplinary action was recommended against her. It was for foregoing reasons that the claimant disputed the validity and fairness of the termination of her service. The respondent on its part however justified the termination of service on grounds that the claimant had responsibility over accountability and controls. The oversight responsibility was to ensure snap checks were effective.

22. The termination letter dated 7th April, 2015 signed by Zaid Mustafa, the respondent's Customer Banking Director stated that the respondent was satisfied that the claimant was negligent in the performance of her duties and failed to exercise proper management oversight and responsibility over overall in charge of the operations of the branch. According to the respondent, the claimant failed to institute effective snap checks and controls which could have mitigated the loss of funds to the bank.

23. The claimant went through a disciplinary hearing panel on 18th March, 2015. The panel in its report dated 31st March, 2015 observed as follows regarding the claimant:

a. Kshs 800,000/= was below Branch Operations Manager. The claimant only learnt after the customer concerned complained.

b. Monthly cash count was done by an independent party. The custodians had been misleading the BOM.

c. It was not a requirement for the manager to do a snap check herself.

d. There was staff collusion, it was difficult for Ann (the claimant) to detect the till and ATM differences. The staff responsible for snap check misled the branch manager who was not actually involved in physical counting of the cash but only reliant on reports from responsible staff.

24. From the foregoing, the disciplinary panel did not recommend any disciplinary action. These recommendations by the disciplinary panel were however unilaterally varied by the Employee Relations Manager Mr Odhiambo Ooko in his final report to HR-Director Legal. The variation was on grounds inter alia that as a Branch manager the claimant was responsible for the whole bank and as indicated in the investigation report, the claimant's management oversight was lacking. The cash shortages were in existence from 2013 and would have been captured in snap checks which was the responsibility of the Manager. The claimant did not oversee handover from one custodian to the other and instead appointed BOO to supervise the handover. Further the claimant as a branch manager did not ensure that controls and snap checks were working.

25. The forensic audit report which was attached as annexure 3 of the respondent documents stated at page 14 that the malpractices identified at the Branch appeared to have been engineered by the Branch Custodian Joseph Nderitu. The custodian was a close ally of many staff at the Branch and therefore exercised a lot of influence over them. The report further noted that the case was reported to the police and two lead perpetrators namely Nderitu Joseph and Julius Nderitu were charged in court.

26. The claimant by a letter dated 11th March 2015 was notified of interview arrangements to take place on 18th March, 2015. The interview according to the letter was as a result of investigations which revealed disputed cash withdrawal of Kshs 800,002/=-, ATM cash shortage of Kshs 1,056,000/=- and cashier till of 234,211.75 which occurred at the Branch which the claimant headed. The same letter further informed the claimant that the meeting would be chaired by one Joan Lose Mwangi and Erick Sila who was to assess the material provided and explanation the claimant was to make. The letter further stated that depending on the outcome of the meeting, the claimant would be subject to disciplinary action. The claimant was therefore advised to attend the meeting fully prepared to state her case.

27. This is the meeting the claimant attended, gave her explanation, the documents reviewed and report prepared in which the panelists did not recommend any disciplinary action against the claimant. The variation of the recommendations by the disciplinary panel by Mr Ooko cited additional factual allegations against the claimant yet there was no evidence that the claimant was given an additional opportunity to react to these allegations. Further the claimant in her evidence stated that she relied on a team to perform her duties and that regarding snap checks she relied on trusted respondent's staff. The claimant stated she could not personally count all the cash at the Branch hence had to rely on staff under her. It turned out that the staff concerned took advantage of her trust and committed acts of fraud against the respondent. The said staff were identified and disciplinary action as well as criminal prosecution commenced against them.

28. The claimant was therefore exonerated by the forensic investigators as well as the disciplinary panel. The question then was that; on what basis did Mr Ooko vary the report and recommend disciplinary action against the claimant? Further, even if there were additional factual evidence which the disciplinary panel did not consider, it was a legal requirement as supported by section 41(2) of the Employment Act that the claimant be accorded a chance to explain herself in view of the variation of recommendations of the disciplinary panel by Mr Ooko.

29. To this extent the court is persuaded that the respondent failed to prove to the required standards that there existed valid reasons for terminating the claimant's service. The court therefore returns a verdict of unfair termination. Regarding the quantum of termination, the court will take into account the long years of service the claimant rendered to the respondent. The court will further consider the opportunity accorded to the claimant by the respondent to advance her career in banking noting that by the time this matter came to trial the claimant was already working with another Bank. The court will therefore award the claimant six months' salary being Kshs 1,559,322 as compensation for unfair termination of service.

30. The court notes that the claimant was paid her other terminal benefits upon termination. The claimant shall further have costs of the suit.

31. It is so ordered.

Dated at Nairobi this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

Delivered this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge

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