



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NUMBER 254 OF 2018

BETWEEN

EDWIN KIBET KIPYEGOMEN.....CLAIMANT

VERSUS

KENYA POST OFFICE SAVINGS BANK.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

C.O. Tolo & Company Advocates for the Claimant

C.A. Akumu & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 11th March 2020. He avers, he was employed by the Respondent Bank on 3rd January 2000 as a Clerical Officer. He later became Cashier/Customer Relations Officer, earning a monthly salary of Kshs. 86,723.

2. On 9th October 2015, he was on duty at his Mombasa Moi Avenue Branch, when his colleague, Purity Mbusya, alleged that the Claimant used her computer, to fraudulently transfer Kshs. 40,000 from account number 0731010133070 to account number 0100040026340. He was dismissed on this ground, on 22nd April 2016. He appealed against dismissal on 19th May 2016. His appeal was not considered. He avers, he was not fairly heard, and seeks Judgment against the Respondent for:

- a. 1 month salary in lieu of notice at Kshs. 86,723.
- b. Salary for 26 days worked in April 2016 at Kshs. 70,045.
- c. 14 days of annual leave for the year 2015 at Kshs. 46,697.
- d. Salary for 22 years remaining of service, between 2016 and 2038 at Kshs. 22,894,872.
- e. 12 months' salary in compensation for unfair termination at Kshs. 1,040,676.
- Total.....Kshs. 24,139,013.
- f. Costs.
- g. Declaration that termination was unfair.

h. Any other relief.

3. The Respondent filed its Statement of Response on 18th May 2018. It is conceded that the Claimant was an Employee of the Respondent. It was reported on 10th October 2015 that the Claimant had carried out a fraudulent transaction involving movement of funds from and to the account numbers stated by the Claimant. The sum was Kshs. 40,000. The Claimant used Branch Teller [BT] credentials of Senior Cashier, Purity Mbusya. He was seen through the CCTV at Mbusya's counter, using her computer during her brief absence. The matter was investigated; Claimant issued letter to show cause; he was called to a disciplinary hearing and heard in the presence of his Trade Union Representative; and was subsequently dismissed on 22nd April 2016. He is not entitled to the prayers sought. He was paid pension amounting to Kshs. 1,111,080, upon dismissal. The Respondent asks the Court to find that termination was fair, and that the Claim lacks merits, warranting dismissal with costs to the Respondent.

4. The Claimant gave evidence and closed his case, on 2nd October 2019. The Respondent gave evidence through its Branch Manager Boniface Munyao Mutuku, Assistant Security Manager George Odiwuor Onyango, and Head of Human Resource Thomas K. Bett. All gave evidence on 24th February 2020, bringing the hearing to a close.

Claimant's position.

5. The Claimant adopted as his evidence, his Witness Statement and Bundle of Documents on record. He was asked by the Respondent, on 23rd October 2015, to explain a transaction involving his colleague Purity Mbusya. He replied on 24th October 2015. He was interdicted on 25th November 2016. He was asked also, to explain another transaction involving a customer named Ahmed. The Claimant explained himself fully in either case. He was summoned to a disciplinary hearing at Respondent's Nairobi Head Office. He was not accompanied by his Trade Union Representative. He received the letter of summary dismissal on 6th May 2016. There was no notice. He was not paid for days worked.

6. Cross-examined, the Claimant told the Court he worked for 13 years, and had a wealth of experience in banking. He did not transact from Purity's desk. It was alleged he used her desk to fraudulently move Kshs. 40,000. In 2004, he had another case where he lost a key to the cash safe. A third case involved the Claimant leaving a meeting called by the Managing Director inappropriately. He received a letter to show cause in the case concerning Purity. He was shown CCTV footage in the course of internal investigation. He gave his explanation to the Investigator. He received pension dues. No other payment was made.

7. Redirected, the Claimant told the Court he did not share a password with Purity. He could not access her computer without her password. Ahmed was a regular customer. He confirmed he had authorized transaction relating to his account. The Claimant was a member of Banking, Insurance and Finance Union [BIFU]. His Union was not involved in the disciplinary process.

Respondent's position.

8. Branch Manager Munyao explained that the Claimant was a Teller at Moi Avenue Branch, Mombasa. There were complaints from customers against the Claimant. A customer left her ATM card at the Branch. When she returned to retrieve the card, she found it had been used to make withdrawals. Another Teller noticed there was a transaction made through her computer, which she said, did not involve her. Her credentials were used by someone else. The Manager asked to see CCTV footage. The Claimant was captured sitting at Purity's desk. It was at the time the fraudulent transaction unfolded. The Claimant was issued letter to show cause. Tellers have their own passwords. They are not shared. CCTV cameras are located at different places in the Bank.

9. Cross-examined, the Branch Manager told the Court he was employed in 2001. He was not aware if disciplinary action followed, against the Claimant, after a customer claimed her ATM card was used to withdraw money from her account fraudulently. Tellers have passwords. They do not share. One could log in from any computer, using his credentials. Purity's password was used. She did not share a password with the Claimant. Transaction Reports were generated by the Tellers at the end of each day. The Manager did not bring any such Report to Court. Purity is still working for the Respondent. She was not called as a Witness in this Claim, by the Respondent. The Branch Manager did not have bank statements of customers who had complained. He was not involved with the disciplinary process, after he issued the letter to show cause. He explained on redirection that his role ended after he issued letter to show cause. He would forward the matter to his Supervisor or the Investigations Department.

10. Odiwuor Onyango, Assistant Manager Security told the Court Kshs. 40,000 was found to have been transferred to the account of one Moses Cheptoo. No request for transfer had been made. Tellers were questioned. All denied having effected transfer. The Security Officers checked CCTV and the timing of the transaction. They found Purity had gone to the Ladies. The Claimant went to her workstation. He was captured transacting. He was asked what he was doing at Purity's workstation. He said he could not recall. The account from which money was transferred belonged to Mohammed Riziki. The beneficiary Cheptoo, was found to hail from the same locality, Kabartonjo, as the Claimant. Cheptoo alleged, on opening his account that he worked for Teachers Service Commission in Baringo. This was untrue. It was discovered that Cheptoo last worked for Boresha Sacco in Baringo. He was discovered to have been hanging around Mombasa, at the time Kshs. 40,000 was fraudulently transferred to his account. Odiwuor supplied the Court with CCTV footage.

11. On cross-examination, Odiwuor told the Court he was at the Head Office when the transaction happened. He recorded statements from the Claimant and Purity. They were not attached to his Report. The Report mentions Transaction Reports, which again were not attached to the Investigation Report. CCTV footage did not show that Claimant's password was used. Transaction Report would have corroborated CCTV footage. Cheptoo could not be traced. The amount transferred from Riziki's account, was restored to him by the Respondent. Riziki had not complained. The Respondent informed him about the fraud, and apologized. The Respondent did not pursue criminal proceedings. Tellers have their passwords and are not allowed to share them. Redirected, Odiwuor told the Court complaints can emanate from different sources. In this case, they arose from day's transactions.

12. Thomas Kandie Bett told the Court that the Respondent has an Employee Code of Conduct. The incident was regularly investigated, and

the Claimant taken through the disciplinary process. He was heard in the company of his Trade Union Representative. It was recommended he is summarily dismissed. He did not submit an appeal within the allowable 14 days. The Respondent received an appeal from his Union BIFU much later. This was not pursued, because it was confirmed that irregularity took place. The Claimant was paid his pension benefits.

13. Cross-examined, Bett told the Court it was not disclosed at what time the disciplinary hearing started and closed. On record is the agenda of the meeting, not the actual minutes. Union Representative joined the proceedings much later. The minutes were submitted to the Director. Redirected, Bett told the Court participants of the disciplinary hearing signed attendance register. The Claimant signed.

14. The issues as traditionally is, in a majority of unfair termination claims, are: whether termination was based on valid ground; whether it was fair in its execution; and whether the Claimant merits the remedies sought.

The Court Finds: -

15. The employment history, terms and conditions of employment of the Claimant are not contested. It is not contested that he was summarily dismissed by the Respondent on account of fraudulent transfer of Kshs. 40,000, to the account of one Cheptoo, from the account of an unknowing Mohammed Riziki. It is not in dispute that the Claimant received pension dues upon termination.

Validity of Termination.

16. CCTV footage shown to the Court, in the presence of Parties and their Advocates, show a Lady rise up from her work desk and move to some undisclosed destination. Almost immediately a Gentleman moves in, occupying the Lady's desk, and is seen busy working on the computer left unattended by the Lady.

17. It is not disputed that the Lady is Purity Mbusya, a Senior Teller working for the Respondent, and the Gentleman is Edwin Kibet Kipyegomen, the Claimant herein.

18. The Court has not seen any evidence, to contradict that of the Respondent on the timing. At the precise moment the Gentleman moved to the Lady's desk, Kshs 40,000 moved from the account of Mohammed Riziki to one of Cheptoo.

19. The Claimant did not attempt to explain what he was doing at Purity's desk.

20. Section 43 sets the standards an Employer is required to meet, in establishing validity of reason, justifying termination. Subsection 2, states:

‘ The reason or reasons for termination of a contract, are matters that the Employer, at the time of termination of the contract, genuinely believed to exist, and which caused the Employer to terminate the services of the Employee.’

21. The Court does not think the Respondent can be faulted for genuinely believing the Claimant was at the centre of fraudulent transfer of cash from one account to the other. The Claimant was captured at the computer desk from which the transaction took place. He was up to no good. He took over the desk in stealthily, as soon as the rightful occupant took a break to have a glass of water. The Claimant did not dispute the identity of the Gentleman captured live, at Purity's computer desk. It is not disputed that the fraudulent transaction took place. There is no contestation on the timing of the fraud.

22. Issues raised by the Claimant such as the exclusive use of passwords by Tellers, and non-availability of daily Transaction Reports, are details which could probably create reasonable doubt about his guilt in a criminal trial; but these are non-issues in considering whether the Employer genuinely believed the Claimant was the force behind the fraud, at the time the Employer made a decision to terminate the Claimant's contract. It is not unusual for an Employee to engage in identity theft of a colleague's credentials, or even collude with a colleague, to advance an illegality against the Employer. How the Claimant accessed Purity's credentials is not important in considering whether the Respondent had genuine ground to believe the Claimant was involved in the fraud.

23. There were other pieces of evidence, collected through the investigation carried out by Odiwuor, which would firm the Respondent's belief. Tellingly, the beneficiary of the heist was one Cheptoo, a Kabartonjo village-mate of the Claimant, and who was said to be hanging around Mombasa when the fraud unfolded.

24. In the view of the Court, the Claimant colluded with an outsider to cause mayhem to an innocent bank account-holder, occasioning the Respondent financial and reputational damage. The Banking industry has an obligation to protect bank customers and the banks themselves, from thieves working in their midst.

25. There was valid reason in terminating the Claimant's contract.

Fairness of Procedure.

26. The record shows the incident took place on 9th October 2015. The Respondent did not rush into making conclusions. The matter was investigated. The Claimant was asked to explain himself through a letter to show cause, dated 23rd October 2015. He replied on 24th October 2015. He was interdicted on 25th November 2015. He was called to a disciplinary hearing on 23rd February 2016. He was heard. A decision was taken to dismiss him. He appealed. It is not clear from the record how the appeal was handled.

27. The participation of Claimant's Trade Union Representatives in the disciplinary process is disputed. The Respondent unfortunately did

not avail the minutes of the disciplinary process to the Court. It is not possible to agree with the Respondent that Claimant's Trade Union BIFU, was engaged in the process. Section 41 of the Employment Act demands that an Employee shall, be entitled to have another Employee or Shop Floor Union Representative of his choice, present during the hearing.

28. There are two identifiable flaws in the procedure- lack of involvement of Claimant's Trade Union; and lack of clarity on the process and outcome of the appeal filed by the Claimant.

Remedies.

29. To this extent, procedure was not perfect, and ***the Claimant merits compensation, which the Court grants at the equivalent of his 15 days' salary, at Kshs. 43,361.***

30. He worked for 21 days in April 2016. He is not shown to have been paid salary for these days worked. ***He is granted salary for 21 days worked at Kshs. 70,045.***

31. There was no evidence presented of 14 days of annual leave. The Claimant said nothing about annual leave in his oral evidence and witness statement. The prayer is declined.

32. The prayer for compensation equivalent of 12 months' salary is declined. Termination was based on valid ground. Flaws in procedure have been identified and compensated appropriately at paragraph 29 above.

33. Salary for 22 years remaining at a staggering Kshs. 22.8 million? For what? The Claimant did not establish that he was to retire at any specific age. He did not have a clean employment record. Termination of his contract was always a likelihood. He has not justified the prayer for anticipatory salaries. He would have been enriched by the Court unjustly, if the Court granted him Kshs. 22.8 million without him having rendered any service to the Respondent. It is unlikely that any Court, would order an Employer, to pay an Employee who leaves employment under a cloud of fraudulent activities, anticipatory salary such as is sought by the Claimant herein. The prayer is misconceived and is declined.

34. Lastly, it is the view of the Court that the Claimant should meet the costs of this Claim. He hauled the Respondent to Court, while clearly, he was captured live on camera, engineering fraud against the Respondent. He claims highly unlikely and exaggerated remedies. The Respondent has incurred legal costs, which are normally charged based on the monetary value of the Claim. That value has been set by the Claimant. The Claimant shall pay costs to the Respondent.

IN SUM, IT IS ORDERED: -

a. Termination was based on valid reason, but minimally flawed on procedure.

b. The Respondent shall pay to the Claimant compensation for unfair termination equivalent of 15 days' salary at Kshs. 43,361 and salary for 21 days worked in April 2016 at Kshs. 70,045 – total Kshs. 113,406.

c. Costs of the Claim shall be paid by the Claimant to the Respondent.

Dated, signed and delivered at Chaka, Nyeri County under Judiciary Covid-19 Guidelines and Rule 38 of the E&LRC [Procedure] Rules, 2016, this 29th day of June 2020.

James Rika

Judge