REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 568 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

EMILY WAMBUI NGUURA...CLAIMANT

VERSUS

SAFARICOM KENYA LIMITED..RESPONDENT

JUDGMENT

The claimant was employed by the respondent on 19th October 2013. Her salary was Kshs.50,000.00 per month. She was dismissed from employment on 28th April 2014 on grounds of accessing a subscriber's details without following due process. She avers that the access occurred two weeks into her engagements when she had no notice that such access was not allowed and that she used her own line which was however not registered in hr name.

In her memorandum of claim dated 22nd March 2012 and filed on the 23rd March 2017, she prays for the following remedies –

a. A declaration that the Claimants termination was unfair.

b. 12 month's salary being damages for unfair termination Kshs.600,000.00

c. House allowance at the rate of 15% of basic salary for the period of employment. (Kshs.7,500.00 x 7 months) = Kshs.52,500.00

d. I month's Salary in lieu of notice Kshs.50,000.00

e. Certificate of Service

f. Cost of this Suit.

g. Interest on b, c and d at Court rates from the date each sum fell due and payable to payment in full.

The respondent filed a response to the claim on 5th June 2017 denying the averments of the claimant. It avers that during training the claimant was informed to only use her personal number that was registered in her name but in blatant disobedience of the instructions and in breach of the respondent's procedures, the claimant accessed the system with a number that was not registered under her name and used the number to access the SIEBEL portal. That during the training the claimant was taken through customer information, confidentiality and the consequences of breaking such policy. That the claimant admitted to accessing the number contrary to laid down procedures as communicated during training.

On the prayer for house allowance, the respondent pleaded that it paid the claimant a consolidated salary.

The respondent prays that the claim be dismissed.

Evidence and Submissions

It is the claimant's evidence as adduced in her witness statement, testimony and submissions, that at the time of the unprocedural access, she was not aware of customer confidentiality and the consequences of her actions as she was still in training and had not been made aware of the

same. That she did not access the customer information after the restrictions were brought to her knowledge. It is further the claimant's case that she intended no malice or harm upon the customer, and the respondent suffered no harm as a consequence thereof.

She relies on the decision in **Cornel Otieno Otieno and Another v Midland Energy Limited (2017) eKLR**, where the Claimants were dismissed for stealing two gas cylinders, while in fact they had only misplaced them with no intention of stealing. The court held –

> On the issue No. 1 above, the reasons given for dismissal of Claimants was theft of 2 cylinders. The Claimants explained the circumstances under which the 2 cylinders were found in the truck and their evidence is that it was an honest mistake and in any case the cylinders were to be recounted at an exit gate and so this mistake would still have been detected.
>
> 50. There is no proof that these cylinders were intended to be stolen as the recounting would have detected the miscount.
>
> 51. Under Section 43 (1) of Employment Act:
>
> > **"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45."**
>
> 52. The Respondents failed to prove this reason of theft and I find there was no valid reason to warrant termination.

For the respondent it is submitted that the claimant admitted during cross examination that she accessed the SIEBEL Portal using a number that was not registered in her name.

Determination

In her email dated 2nd May 2014 by way of appeal against dismissal, the claimant states as follows –

> "Emily Wambui Nguura
>
> P. O BOS 1735
>
> THIKA
>
> CELL: 0721643427/0724951774
>
> Good Morning Mr. Roy
>
> I hope this finds you well.
>
> My name is Emily Wambui, formerly a CEE at JCC, I would like to take this chance to appeal over my dismissal ruling last week.
>
> I joined Safaricom last year October with a lot of joy an enthusiasm after long struggle for a job, during training and the first days of introduction to SIEBEL in November, I accessed a number that not registered under my names, however with no malicious intention but for the training purpose. I accessed generally all the Siebel portal continuously while in class. Our trainer had told us to use our number and not other people's numbers and having been using the line previously as my own, I did not realize that the only recognized number was the one registered under my names and not any other that I use freely to call.
>
> Soon after I had already accessed the number in training, with absolutely on understanding of the implications befalling my actions, out trainer coached us about customer information confidentiality and hence stressed the consequences of breaking the policy. Sadly, I had already accessed the number before this came to my understanding, 7 times, 3 consecutive days. We had not been taught about putting interactions as that was the last topic we learnt in Siebel. On learning that I seized completely using that number and continuously used the line registered under my names. Evidently, there is no record of repeat of that action on that number or any other from me after that up to the day of my dismissal.
>
> Much later we had different Managers who came to give us talks about Safaricom way, and other company policies and the implications tagged if not observed and hence maintained the principles. We also were taken through the staff manual and what was expected of us although the damage was already done.
>
> If maybe I had a clear understanding of customer confidentiality, and that the line with my details is the only one recognized as my own, I would not have used a line with another person's details, regardless of whether I use the line as my own or not.
>
> I was in training and believe it was a chance I had been given to learn and understand Safaricom business, I feel that if the incident happened after the training, where I would have had a clear understanding of TRUST, CUSTOMER CONFIDENTIALITY AND PUTTING INTERACTIONS, I would have a good reason to suffer the consequences for my actions, but sadly, it happened during my first three days of access to the system when I was still being trained about the system.

> I did not access the line maliciously or to harm the customer, but to see things in reality on the system. I did the mistake subconsciously that it was doing me more harm than helping me learn. I had just completed my probation with a score of 2.4 and I was looking forward for my confirmation when the incidence occurred, having put a lot of effort in my work, I feel that I have been costed a lot by a mistake I did when I was under instruction and during the period of learning.
>
> I am appealing for your consideration and a for second chance, where should such or any other of that kind of mistakes occur again, that then I shall own up consequences with no defense since am fully aware of the Safaricom business, policies and rules. I have learnt a lot and I regret having lost it when I had little understanding of company policies and the weight they carry. Safaricom has been my dream company and I had just realized my dream, when I made a mistake trying to make the best out of my work. I would not mind a transfer to any other call center or to a retail shop, should u find kindness to my plea.
>
> Thank you and hoping to hear from you.
>
> Yours Sincerely
>
> Emily."

From the email, it is evident that the claimant accessed the system during training, when she did to understand the customer confidentiality or the consequences of such access.

It is apparent from the email that the number the claimant used was the one she was using as her number. She states in the email *"...our trainer had told us to use our numbers and having been using the line previously as my own, I did not realise that the only recognised number was the one registered under my names and not any other that I use freely to call."*

I find that the claimant actually used her number, only the number was not registered in her name. The respondent did not prove that at the time the claimant accessed SIEBEL portal she had been trained on confidentiality and use of numbers registered in the employee's names only, and not the numbers that are theirs, but registered under different names.

The claimant again repeated this in her appeal letter dated 10th September 2015 wherein she states –

> "I thought it was unfair ruling, since I had not been taught on how to put the interactions and hence the reason why it was red flagged."

She further states –

> "My trainer confessed and showed evidence that he had not trained us about interactions at the time, yet in the dismissal letter, that seems to be the main contributing reason that I was fired on.
>
> I did not put interactions because I had not been trained about it, and that incidence was never repeated any time after that."

From the foregoing, I find that the reasons for dismissal, that the claimant in blatant disobedience of the respondent's instruction accessed the SIEBEL portal using a number not registered under her name after training against doing so is not proved.

I thus find no valid reason for dismissal of the claimant.

The claimant did not raise any issues with the procedure for her dismissal.

Having found the dismissal unfair for want of valid reasons, the claimant is entitled to one month's salary for unfair termination. She is also entitled to compensation.

The respondent submitted that the claimant was on a probationary contract. However, the contact has not been availed to court by either party.

Section 42 of the Employment Act provides that a probationary contract is one which states so and is not to extend beyond 6 months. The Section provides as follows –

> **42. Termination of probationary contracts**
>
> **1. The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.**
>
> **2. A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.**
>
> **3. No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).**
>
> **4. A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of**

termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

The claimant's contract was beyond 6 months, having commenced on 19th October 2013 and terminated on 28th April 2014. In the absence of an extension thereof, she was no longer on a probationary contract at the time of termination of her employment.

Taking into account the very short period that the claimant worked for the respondent but recognising that the termination was for a reason that was not valid, taking into account all the circumstances of her case, I award the claimant 5 months' salary as compensation.

The claimant prayed for house allowance at 15%. She has not proved that her contact provided for house allowance separately from the salary she had been receiving for 6 months. I also agree with the respondent that this would be in the nature of a continuous injury, having been a recurrent issue, which the claimant did not claim within 12 months from the date of cessation thereof. **Abigael A. Karie v Aggreko International Company Limited and Another (2018) eKLR**.

In summary therefore, judgment is entered for the claimant against the respondent in the total sum of Kshs.300,000. The respondent shall pay the claimant's costs. The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court 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, the 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 the 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