



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**CAUSE NO.495 OF 2016**

**DORCAS NYAMBURA NJUGUNA .....CLAIMANT**

**VERSUS**

**SPIRE BANK.....RESPONDENT**

**JUDGEMENT**

The claim is on the facts that the claimant was employed by the respondent as the Service Manager (Officer i) at the Nakuru branch. On 18<sup>th</sup> July, 2016 two officers from Nairobi head office visited the branch and called the claimant for a meeting to explain an expense of Ksh.2, 000 and also to explain why the cash vault management system was not up to date and some teller cash management.

The claim is also that on 18<sup>th</sup> July, 2016 the claimant received an email directing her to attend disciplinary hearing at Nairobi the next day and later in the evening she was served with notice terminating her employment with the respondent.

The claim is that there was unfair processes leading to termination of employment, the allegations made against her had no particulars and there was no sufficient time to prepare defence. The reasons given and leading to termination of employment were substantively unfair after working for the respondent for over ten years without any bad record.

The claimant is seeking judgement against the respondent on the basis that there was unfair termination of employment and should be paid the following dues;

- a) Salary for July, Ksh.70,000;
- b) Notice pay for 3 months Ksh.210,000;
- c) Service gratuity for 10 years Ksh.233,333;
- d) Unpaid leave days 000; and
- e) Statutory damages Ksh.840, 000.

The claimant also testified that she was employed by Southern Bank which merged with Diamond bank and later merged with the respondent where she worked for 10 years until 25<sup>th</sup> July, 2016 when her employment was unfairly terminated. The claimant was accused of signing for Ksh.2, 000 for an ex-employee due to operational challenges. The ex-employee had been sent to Nairobi and claimed ksh.2, 000 for use of a taxi refund and travel back at ksh.2, 000 which was the existing practice at the branch when one travelled to Nairobi.

The claimant also testified that on 15<sup>th</sup> July, 2016 she was served with a notice to show cause why her employment should not be terminated and to explain the circumstances leading to the use of Ksh.2, 000 and if she had seen any receipts but there were none since the practice was to give such amount to any staff traveling to Nairobi. Upon her response two officers came from the head office to the branch and asked questions. Later on 21<sup>st</sup> July, 2016 the claimant was issued with another notice to show cause to which she replied and noted the operational lapses. On 25<sup>th</sup> July, 2016 she was invited for a disciplinary hearing at the head office for 26<sup>th</sup> July, 2016 and the hearing ended at 6pm and by 7pm she received letter terminating employment on alleged operational lapses.

The allegations made related to a misconduct which did not warrant termination of employment but a warning. The claimant was alleged to have failed to keep records. There was no loss of any cash. The human resource manual classified the matter as minor offence. The procedure adopted and leading to termination of employment was grossly unfair.

The claimant also testified that the termination of employment by the respondent has caused her loss and damage and is unable to secure new

employment. Salary due for July, 2016 was not paid save notice was paid. For the 10 years there was no gratuity paid. Leave days owing were paid for. Claims for damages for unfair termination of employment.

The claimant also testified that she worked for the respondent under fixed term contracts. Contract dated 16<sup>th</sup> March, 2007 commencing 1<sup>st</sup> February, 2007 to 31<sup>st</sup> January, 2009. The contract was renewed to a permanent and pensionable term contract from the year 2009 from 14<sup>th</sup> January, 2014.

The claimant also testified that for travel to Nairobi she approved use of Ksh.2, 000 but made a mistake for not asking for the receipts. She had not seen the receipts and therefore made an apology. Under the human resource manual, all claims for reimbursement had to be supported and in her case the receipts were only attached after she had signed. The reason was that this was the practice to pay ksh.2, 000 for travel to Nairobi.

The claimant also testified that she was issued with a notice to show cause and was called to a disciplinary hearing to explain in her defence and a verdict was arrived at.

The defence is that the claimant was an employee last working at Nakuru branch and where on 4<sup>th</sup> July, 2016 without following due process authorised an illegal expenditure of ksh.2, 000 to one Catherine Kanini Ndunda from the respondent's funds thereby occasioning loss of funds. The amount of Ksh.2, 000 was approved for travel from Nakuru to Nairobi at Ksh.1, 000 receipt Number 136979 and travel from Nairobi to Nakuru at ksh.1, 000 receipt numbers 137196. These amounts were supported by forged receipts thus contravening the bank procedures for travel and reimbursement for staff.

The defence is also that the claimant admitted to the acts of dishonesty and misconduct vide letter dated 18<sup>th</sup> July, 2016 and which letter has not been denied.

The defence is also that the claimant was involved in other serious violations of the work policy and ethics resulting in gross misconduct by being dishonest and which was in breach of section 44 of the Employment Act and the sanction of dismissal was justified. The claimant was full aware that her contract of employment required her to be honest and avoid fraudulent activities.

As the Service Operations Manager in Nakuru the claimant was required to adhere to the work policy in place. The policy on cash management required a teller not to hold cash exceeding ksh.2,000,000 intraday and not exceeding Ksh,100,000 overnight but on several occasions the claimant violated this policy where several tellers were found with more cash than required with no records as to the cash flow movement. The claimant had been cautioned about these lapses.

The claimant was called to show cause why she was negligent on her duties by letter dated 21<sup>st</sup> July, 2016 and where she admitted to negligence of duty and procedural

lapses. Such related to the core functions of her duties and the claimant failed to show good cause for her conduct at the hearing on 26<sup>th</sup> July, 2016 a decision was taken to terminate employment. The notice outlined the reasons leading to termination of employment.

The claimant was paid salary in lieu of notice at ksh.73, 910;

8 days of leave not taken Ksh.19, 439.34;

Gross total ksh.93, 349.34

Less tax Ksh.21, 939.20;

Net total Ksh.71, 412.14.

The claims made should be dismissed with costs.

The respondent called Eunice Salaton the human resource manager who testified that the claimant was employed on permanent and pensionable terms and gratuity claimed does not apply to her employment with the respondent. The respondent paid 5% to the claimant and with a contract with permanent and pensionable terms, gratuity is not applicable.

Ms Salaton also testified that in addressing the claimant's case, due process was followed. She was issued with a notice to show cause and in reply she apologised for her mistake. Such admission was in acknowledgement that there was a mistake and further the claimant was invited to attend before the disciplinary committee where a decision was taken to terminate employment and was paid in lieu of notice.

At the close of the hearing both parties filed written submissions.

### **Determination**

By letter dated 26<sup>th</sup> July, 2016 the claimant's employment with the respondent was terminated on the grounds that;

... the disciplinary hearing of 26<sup>th</sup> July, 2016 regarding irregular expense claim form and Operational lapses at the Branch, the

*full details which you are aware of.*

*After due investigations, the bank has conclude that as an Operations Manager, you failed and/or neglected to perform your duties as required. As a consequence thereof your employment contract has been terminated for gross negligence with effect from the date of this letter.*

*You will be paid one month's salary in lieu of notice and accrued leave days, if any. ...*

The notice terminating employment had been precipitated by notices to show cause for irregular expense claims dated 15<sup>th</sup> and 21<sup>st</sup> July, 2016.

In the first instance the claimant was alleged to have;

*... that on 4<sup>th</sup> July, 216 you authorised a claim for reimbursement of ksh.2000 from Catherine Kanini indicated as fare from Nakuru town to Nairobi and back.*

*However investigations have shown that the receipts are not genuine and are exaggerated. ...*

To the allegations above, the claimant replied on 18<sup>th</sup> July, 2016 and admitted that *to this I signed the claim without the taxi receipts, apologies for the mistake.*

The show cause notice dated 18<sup>th</sup> July, 2016 required the claimant to respond to allegations that;

*We have noted that during a visit to the branch on 18<sup>th</sup> July, 2016 a number of serious operational lapses were observed in a number of areas that included; Vault cash management, Teller cash management, attendance register, customer complaints register, daily reconciliation among others.*

In response, vide letter dated 21<sup>st</sup> July, 2016 the claimant noted that;

*I refer to letter dated 21<sup>st</sup> July, 2016 on the above and my response is am aware of three lapses which are Vault register, teller NOT filing cash transfer sheet & attendance register.*

The claimant has also given an explanation with regard to each noted lapse and admitting she did not attend to the vault register, that she had never come across a cash register sheet and despite the process and procedures indicating what to be done she had an oversight and offered to rectify. Also with regard to the attendance registered the claimant noted that *all staffs report before 8:00AM, we do our Morning Hurdles and meeting between 8:00AM and 8:20AM* but fails to answer as to why there was no attendance register as required.

In this regard and despite the acknowledged lapses, the respondent issued the claimant with a disciplinary hearing notice for 26<sup>th</sup> July, 2016. Following the hearing, the claimant was issued with letter dismissing her form her employment with the respondent and duly paid in lieu of notice.

Is there a case of unfair termination of employment?

Are the remedies sought owing?

The claimant admitted that she has since been paid in lieu of notice and that her untaken leave days were paid.

On the matters facing the claimant with regard to her work duties, she admitted to signing a claim for taxi use of ksh.2, 000 without any receipts and for this was apologetic. Also that there were three lapses with regard to the Vault register, tellers not filing cash transfer sheet and attendance register.

The claimant as the Service Manager at the Nakuru branch had her letter of appointment dated 14<sup>th</sup> January, 2014 and to which there was a *detailed job description and performance score cards* issued under the branch manager. The duties are agreed upon and executed by either party on 2<sup>nd</sup> June, 2014. The claimant did not challenge these documents.

The claimant admitted to not undertaking her duties as required. Under section 44(3) of the Employment Act, 2007 such amounted to a fundamental breach of her terms and conditions of service and for which summary dismissal is permissible. She was however allowed to go through the motions of defending herself at a disciplinary hearing on 26<sup>th</sup> July, 2016 following which her employment was terminated and was paid in lieu of notice which pay is not available following such breach of the employment contract.

In the case of **Abraham Nyambane Asiago versus Barclays Bank of Kenya Limited [2019] eKLR** the court held that;

*Banks operate in an environment in which utmost trust and good faith are crucial. Their employees must therefore be held to these very virtues. ... the relationship between bankers and their employees is premised on a high degree of honesty and integrity and where these are put into question, then the employment relationship becomes untenable. This is as it should be since banks are held to the same values by their customers who hold the lifeline in banking business. This court must uphold those principles.*

This is reiterated in the case of **Esther Wambui Ndua versus National Bank of Kenya [2015] eKLR** that the relationship between bankers and their employers must be premised on utmost prudence, trust and good faith because banks are held to the same standards by their customers. See also **Banking Insurance & Finance Union versus Post Bank Ltd [2013] eKLR**

The claimant called to answer to her conduct with regard to approving travel claims without receipt(s) maintained in her response that it was a mistake and in her evidence in court asserted that there was an on-going practice to pay ksh.2,000 for travel to Nairobi and back. That she signed and approved the payment to Catherine Kanini without any receipts on this basis whereas it was in error. Also as Service manager she failed to keep registers which were part of her daily duties and this much she admitted to her failures.

In this regard, section 47(5) of the Employment Act, 2007 placed the burden on the claimant as the employee to prove there was unfair termination of her employment. On her evidence and admission to failing in her duties, section 43 of the Act allowed the respondent to terminate employment as of the responses given to the notices to show cause, there existed genuine invalid grounds to do so.

Section 43(2) provides that;

**(2)The reason or reasons for termination of a contract are the 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.**

The claimant was invited to show cause why her employment should not be terminated and further invited to a disciplinary hearing and hence the respondent duly complied with the statutory provisions of section 41, 43 and 45 of the Employment Act, 2007. These were substantive reasons leading to termination of employment and further there was due process.

Termination of employment is hereby found justified.

On the claims made for salary for July, the claimant does not state with regard to which year. Where such relates to July, 2016 the respondent having paid in lieu of notice and which amount was not legally due in view of termination of employment being justified, such is settled.

Notice pay is claimed at 3 months. This is not supported by any law or under the contract dated 14<sup>th</sup> January, 2014.

Service gratuity was not an agreed term of the contract of service.

On the finding that termination of employment was justified, no damages are payable.

**Accordingly, the claim herein is dismissed. Each party shall bear own costs.**

**Dated and delivered electronically this 25<sup>th</sup> June, 2020.**

**M. MBARU**

**JUDGE**