



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1300 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th July, 2020)

BANKING INSURANCE AND

FINANCE UNION KENYA.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant Union filed a Memorandum of Claim of on 1/7/2016 on behalf of the Esther Wanjiku Kiunyu, the grievant herein. It alleges that the grievant's termination was unfair and unlawful within the meaning of Section 43 (1) (2), 44 and 45 of the Employment Act. It avers that the grievant was not grossly negligent in the authorisation of Kshs.4 Million that was taken away by one of the Bank's Cashiers, Nicholas Mulei.

2. The Claimant seeks the following reliefs:-

- a) The Honourable Court do find and order that the termination of employment of Esther Wanjiku Kiunyu was unfair, unlawful, lacks merit and therefore invalid.*
- b) The Honourable Court to order for the immediate reinstatement of Esther Wanjiku Kiunyu back to her former position in the bank without loss of all employment benefits and seniority in service and status.*
- c) Notice pay of Kshs. 175, 057.35.*
- d) The Honourable Court should also order for compensation of twelve (12) months' salary of Kshs. 2,232,688.20 to be paid to the grievant for having suffered unfair and unlawful loss of employment.*
- e) All the salaries/allowances of Kshs. 1,302,401.45 which the grievant has lost as a result of the unfair/unlawful loss of employment should be computed and paid to her in full from the date of the termination to the date of Judgment of this claim.*
- f) Leave pay and leave allowance due for the year 2015.*
- g) Costs of this suit.*

3. The Respondent filed a Memorandum of Defence on 13/9/2017. It avers that there was a theft of Kshs. 6,341,541.00 at the Bank's Thika Branch. It avers that investigations by the Bank's Forensic Investigations Department revealed that Nicholas Mulei bought Kshs. 4 Million cash vault and the grievant remotely authorised the cash in the system in spite of not being a custodian.

4. It contends that the grievant was invited to a disciplinary hearing where she admitted that she had acted out of procedure by authorising vault transactions. It avers that it accorded the grievant a fair procedure in arriving at the decision to terminate her employment and followed the procedure under section 41 of the Employment Act.

5. It avers that it offset the grievant's notice pay against her outstanding liabilities. It avers that the Court should uphold the decision to terminate her and the suit be dismissed for lack of merit.

Claimant's case

6. The grievant, Esther Wanjiku Kiunyu, testified as Cw1. She testified that she working at Barclays Bank Thika Branch for 9 years until 2015. She testified that she earned a promotion from B1 to B2 from clerical to supervisory cadre. She testified that she would authorise cashier work, check cashier journals and do administrative jobs in the branch.

7. She testified that her authorisation had limits. She testified that the first authorisation was physical and that system authorisation was done on the system. She testified that if the cashier wanted the vault to withdraw money he was to fill out a Treasury Out Form. She testified that Nicholas wanted 4 Million from the strong room thus he filed and stamped the form and took it to Anthony Muli, the custodian. She testified that she was given the form by Muli and she updated the system to indicate the movement of the 4 Million from the vault to the cashier.

8. She testified that after 4 hours, they found out that Nicholas had disappeared from the branch. He had taken off with Kshs. 6.3 Million. She testified that she did not know where he got the additional Kshs. 2.3 Million. According to her, this amount could have been money received from customers.

9. She testified that she had been accused of not following cash handling procedures but she was aware of all the procedures and had followed them. She testified that there was 4 authorisers within the Branch, herself included. She testified that she was invited for a disciplinary hearing 5/8/2015.

10. She testified that she did not agree with the accusations set out in her termination letter dated 30/9/2015 that she was grossly negligent and did not adhere to cash handling procedure leading to loss of the 6.3 Million. She testified that she appealed the termination on 9/10/2015 but her appeal was dismissed.

11. In cross-examination, she testified that she was promoted to the rank of B2 in 2008 and had won a total of 9 awards while working for the Respondent. She testified that she was an authoriser and was therefore able to authorise the money to Nicholas. She testified that she did not know why the custodian did not authorise the transaction.

12. She testified that she was interviewed by the investigators and that the investigations report indicated that there were lapses. She testified that she was not a custodian and that custodians did the physical authorisation. She testified that the minutes of the disciplinary hearing indicate that she stated that she was not supposed to authorise from the vault. She testified that she was aware that there was a dual control from the vault.

13. She testified that she verified the transaction, had a slip and that the money had also been verified by the custodian. She testified that she was not aware that the custodian did not escort the cash to the cashier and that she was verifying a fraudulent transaction. She testified that she did not always authorise transactions from the vault but had previously authorised money like 10 times including Kshs. 500,000 in August 2015.

14. She testified that her letter of termination indicated the reason for termination was not following procedure but that procedure was not followed. She testified that she was invited for an appeal hearing where she stated that the judgment was harsh but she did not admit that she was negligent.

15. She testified that her termination letter indicated that she had a personal loan and a house loan and that she only managed to clear one loan. She testified that her balance was Kshs. 3.2 Million. She testified that her terminal dues were used to offset her loan with the bank. She further testified that she received part of her pension. She testified that she was paid notice pay and leave and what remains is that the Court does find that her termination was unfair.

16. In re-examination, she testified if she had not authorised the transaction, the teller would not have failed to disappear with the money. She testified that there was no fraud on her part.

Respondent's case

17. Vaslus Odhiambo the Respondent's Head of Employee Relations testified as Rw1. He testified that the Respondent took the grievant through a disciplinary process after Kshs. 6, 341,541 was stolen by the cashier, Nicholas. It was his testimony that the grievant who was the Branch retail Support was involved in the authorisation of the money that left the bank unprocedurally.

18. He testified that the findings of the investigations report were that the grievant unprocedurally authorised the money and that she had no mandate to authorise the amount. He testified that the grievant had no responsibility in this transaction and she was only asked to offer support.

19. He testified that the custodian and the teller were to walk to the vault to bring out the money together. He testified that the cashier was to confirm the money and put it in the system. He testified that the custodian was also to confirm the money with the cashier but this was not done. He testified that the grievant said that she was asked to do so by the custodian. He testified that the teller walked out with money in boxes and also removed excess money from the till.

20. He confirmed that the grievant was invited to a disciplinary hearing on 24/9/2015. He testified that at the hearing, the grievant admitted that she had no authority to authorise money from the vault. He testified that the grievant was terminated for gross negligence and the failure to adhere to procedure.

21. He further testified that she was informed of her right to appeal. He testified after the hearing of the appeal the grievant admitted that she was negligent but the judgment was harsh. He testified that the grievant was paid all her terminal dues which paid the money owed to the bank.

22. Upon cross-examination, he testified that the grievant had no previous case of indiscipline. He testified that he did not have a copy of the bank procedure and processes. He testified that the grievant was allowed to authorise tellers and that she enabled the theft to have the money. He testified that there was no slip from any customer requesting the money.

23. He testified that the grievant took over the responsibility of the custodian and she should have followed the process. He testified that the investigations report concluded that there was non-adherence of cash handling procedure. He testified that the grievant was not a vault authoriser and that the authority was to be accompanied by a memo.

24. In re-examination, he testified that the grievant never indicated that she did not understand the procedures of the bank.

Claimant's submissions

25. The Claimant relied on Section 43 of the Employment Act and submitted that there was no valid reason to terminate the grievant because none of the terms and conditions prohibits the grievant from authorizing vault transactions. It submitted that whether the grievant authorized the transaction or not could not have stopped Nicholas Mulei from stealing Kshs. 6.3 million.

26. It submitted that the grievant suffered an unfair termination as she played no role in the theft of the Bank's money. It submitted that the Respondent has failed to justify the grounds for termination as required by Section 47 (5) of the Employment Act.

27. It relied on the case of **Banking Insurance & Finance Union v Nawiri Sacco Society Ltd [2014] eKLR** where the Court held that there was no evidence to show that the grievant was responsible for loss of Kshs. 22,467.00 and that the termination was unfair as provided under section 43 of the Employment Act because at the time the reason was no genuine.

28. It submitted that the Respondent has failed to advance any valid reason for termination thus it is entitled to the reliefs sought.

Respondent's submissions

29. The Respondent submitted that the grievant's termination was lawful and fair since she failed to follow its terms of engagement, policies and procedure which she admitted she was aware of. It submitted that during the disciplinary hearing, the grievant admitted that she was aware that she was the first line of defense and she knew the procedure to protect customer interests.

30. It submitted that Clause 12 of the grievant's terms and conditions of employment provided that she was required to observe and obey all the rules, regulations, policies and procedure which had been drawn by the bank. It submitted that during the appeal hearing, the grievant admitted that she was negligent.

31. It submitted that at the time of termination, it genuinely believed that the grievant was negligent and failed to adhere to the rules and regulations of the Bank. It relied on Section 44 (3) of the Employment Act and submitted that the grievant was in breach of her contractual obligations under Clause 12 of the Terms and Conditions of service.

32. It submitted that it was lenient with the grievant because instead of summarily dismissing her it terminated her with one month's salary in lieu of notice. It relied on the case of **Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (K) [2017] eKLR** where the Court of Appeal held that the burden of proving that the dismissal was wrongful rests on the employee and that a Court should not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction.

33. It submitted that the grievant was invited for a disciplinary hearing and afforded the opportunity to make representations accompanied by a fellow colleague or Union representative in accordance with Section 41 of the Employment Act. It submitted that the grievant was also afforded an opportunity to appeal and was invited for an appeal hearing. It submitted that it has proved that the reasons for termination were valid and due process was followed.

34. It submitted that the Court in **CMC Aviation Limited v Captain Mohammed Noor [2015] eKLR** considered the factors set out under section 49 (4) of the Employment Act in determining the complaint of wrongful dismissal or unfair termination and the remedies for compensation. It therefore submitted that the Court should consider the provisions of Section 49 (4) (b) & (k) of the Employment Act in determining the remedies for compensation.

35. It submitted that the Claimant is not entitled to the prayer for reinstatement is not tenable since the grievant was fairly terminated. It further submitted that the Court has no jurisdiction to grant reinstatement since the 3 years have lapsed from the date of dismissal as provided under Section 12(3) (vii) of the Employment and Labour Relations Court Act.

36. It submitted that grievant was already paid one month salary in lieu of notice. It argued that the Claimant is not entitled to damages for wrongful termination since she was lawfully terminated from employment in accordance with section 43, 44 (3) and 45 of the Employment Act. It submitted that the prayers for loss of salaries fur to loss of employment are unjustifiable and untenable.

37. It relied on the case of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa -Kenya [2013] eKLR** where the Court held that loss of earnings/ income is a damage which can be awarded by the Court but such damage is capped at the equivalent of 12 months gross wages irrespective of duration of a particular contract. It further relied on **Civil Appeal No. 38 of 2015 Kenya Ports Authority v Silas Obengele and Civil Appeal No. 108 of 2010 Kenya Revenue Authority v Menginya Salim Murgani**.

38. It denied the claim for leave pay and leave allowance and averred that the grievant was paid all her outstanding leave. It further submitted that the Claimant did not prove any outstanding leave.

39. It argued that the case is without merit and that the Claimant did not issue a notice of intention to sue thus the claimant is not entitled to costs. In conclusion, it urged the court to dismiss the claim with costs.

40. I have examined all evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1) Whether the Respondent had valid reasons to terminate the services of the Claimant.

2) Whether the Claimant was accorded a fair disciplinary process.

3) Whether the Claimant is entitled to the remedies she has sought.

41. On the 1st issue, the point of reference is the termination letter to the Claimant dated 13th September 2017, which indicate that "you breached the cash handling procedures and policies. That was thus grossly negligent in the performance of her duties and failed to adhere to the bank's laid down procedure, policies, BOPM and your terms and conditions of employment".

42. The Claimant has denied breaching the bank's laid down procedures and polices as averred by the Respondent. The Claimant testified that she was an authoriser for the bank and that is why she authorised the money to Nicholas. She also stated that she did not know why the custodian did not authorise the transactions.

43. The Respondent confirmed that the Claimant was indeed an authorizer but there were a number of controls that were not observed at the Thika Branch and this afforded a very condusive environment for the theft to be committed.

44. Some of the lapses included failure to observe dual control of cash movements into and out of the treasury and spot electronic authorization by custodians when selling cash to cashiers.

45. The Respondent averred that the grievant authorised the 4 million to one Nicholas Mulei but she was not expected to authorise transactions from the vault.

46. From the minutes of the disciplinary committee, the grievant admitted that she was not supposed to authorise from the vault. She indicated she authorised from the vault because she was sitting in for her colleague and bearing in mind all was properly authorised.

47. She also admitted that what she did was not the norm because the custodian must have explained to her and the cashier was to confirm first.

48. The evidence from the disciplinary meeting show that the Claimant indeed failed to follow the process and that there were lapses in the way the transition was carried out.

49. In the circumstances, it is my finding that there were valid reasons to warrant termination of the Claimant being negligence in the performance of her duties.

50. On the second issue, there was evidence that the Claimant was subjected to a fair disciplinary process. The minutes of that process were submitted in Court as evidence and there is no indication that the Claimant was condemned unheard.

51. Having found that there were valid reason to warrant termination of the grievant and that due process was followed, it is my finding that the Claim is therefore without merit.

52. I therefore dismiss this claim accordingly. There will be no order of costs.

Dated and delivered in Chambers via zoom this 30th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kanyiri for Respondent – Present

Odero for Claimant – Present