



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 249 OF 2014**

**GEOFFREY SADAT OTANA.....CLAIMANT**

**VS**

**EQUITY BANK LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This action arises from a loss of Kshs. 1,232,000 incurred by the Respondent Bank, which led to the Claimant's dismissal from the Respondent's employment.
2. The Claimant states his claim in a Statement of Claim dated 30<sup>th</sup> May 2014 and amended on 1<sup>st</sup> December 2014. The Respondent filed a Replying Memorandum and Counterclaim on 13<sup>th</sup> August 2014 to which the Claimant responded on 18<sup>th</sup> January 2018.
3. The matter went to full trial where the Claimant testified on his own behalf. The Respondent called a Fraud Investigator, Joakim Ileri Thumbi and its Senior Officer-Employee Relations, Winfred Kyalo.

**The Claimant's Case**

4. By a letter of appointment dated 7<sup>th</sup> November 2006, the Respondent employed the Claimant as a Banking Clerk at an entry monthly salary of Kshs. 25,000 which was progressively reviewed to Kshs. 55,000 as at 6<sup>th</sup> May 2011.
5. The Claimant avers that sometime in the year 2014, owing to poor supervisory structures, the Bank lost Kshs. 1,232,000 or thereabout.
6. The Claimant states that although he was a stranger to the theft and was not involved in it in any way, he together with some of his colleagues, were arrested and arraigned in court at the behest of the Respondent.
7. The Claimant further states that while the matter was pending in court, he was summarily dismissed by letter dated 13<sup>th</sup> June 2011, without being afforded an opportunity to defend himself.
8. The Claimant points out that his dismissal was backdated to take effect from 30<sup>th</sup> May 2011.
9. The Claimant's case is that his dismissal was unjustified considering that:
  - a) The issue raised in the letter of dismissal was pending in court;
  - b) The Respondent did not follow due process and the dismissal was procedurally flawed;
  - c) The Claimant was not afforded a chance to defend himself thus rendering the dismissal arbitrary;
  - d) The Respondent failed to observe the rules of natural justice and in the process handled the Claimant in an oppressive and callous manner;
  - e) There was no reason that justified the dismissal.

10. The Claimant thus avers that the resultant dismissal, being unjustified and lacking any legal basis, was illegal.

11. The Claimant avers that the criminal proceedings in **Criminal Case No 1755 of 2011** ended on 8<sup>th</sup> January 2013, with his acquittal.

12. The Claimant therefore makes the following claim against the Respondent:

- a) General damages for unlawful termination.....Kshs. 660,000
- b) One month's salary in lieu of notice.....55,000
- c) Salary for the month of June 2011.....55,000
- d) Cost of defending criminal case.....150,000

### **The Respondent's Case**

13. In its Replying Memorandum and Counterclaim dated 12<sup>th</sup> August 2014 and filed in court on 13<sup>th</sup> August 2014, the Respondent admits having employed the Claimant on 7<sup>th</sup> November 2006, in the position of Banking Clerk, at a starting salary of Kshs. 25,000 which was progressively reviewed to Kshs. 55,000 by the time of his termination in May 2011.

14. The Respondent states that at all material times to this suit, the Claimant was working as an Accountant at the Respondent's Changamwe Branch. The Respondent adds that by virtue of his duties, the Claimant was the custodian of the Strong Room (Reserve) and the ATMs at the Branch.

15. On 26<sup>th</sup> May 2011, the Respondent's Manager at Changamwe Branch was informed of shortage of funds amounting to Kshs. 833,000 from ATM2 which was under the custody of the Claimant and one Joseph Kimani.

16. Upon receipt of the complaint, the Manager instructed the Claimant and the Respondent's other personnel to carry out a detailed cash count in the Strong Room which was under the care of the Claimant. The detailed cash count revealed that:

- a) 3 bundles of Kshs. 1,000,000 of 1000 notes had a shortage of Kshs. 100,000 each, totalling to Kshs. 300,000;
- b) The Kshs. 200 bundles were found to have an average of 2 notes missing;
- c) The Kshs. 100 bundles had an average of 3 notes missing;
- d) The Kshs. 50 bundles had an average of 11 notes missing.

17. The Respondent immediately instituted investigations and disciplinary proceedings. This included interviewing and hearing the Claimant and other personnel suspected to have participated in the scam. The Claimant is said to have been informed of the allegations of theft and fraud levelled against him.

18. The Respondent avers that upon being informed of the allegations, the Claimant gave a blanket denial and did not offer a satisfactory explanation. According to the Respondent, the Claimant failed to explain *inter alia* why he and Joseph Kimani:

- a) Loaded ATM2 with Kshs. 1,000,000 when it already had a balance of Kshs. 3,558,200;
- b) Stayed with a sum of Kshs. 1,000,000 for more than one hour after removing the money from the Strong Room.

19. The Claimant was summarily dismissed by letter dated 13<sup>th</sup> June 2011. The dismissal was backdated to 30<sup>th</sup> May 2011, when the theft and fraud is said to have been committed.

20. The Respondent maintains that there were genuine and justifiable grounds for the Claimant's dismissal.

21. The Respondent states that during and after the investigations, the Claimant was duly informed of the accusations against him. The Claimant was also informed of how huge sums of money mysteriously disappeared under his care.

22. Regarding the criminal trial, the Respondent avers that upon suspecting that the Claimant had engaged in a serious fraud, it reported the matter to the Police who, after conducting their own independent investigations, charged the Claimant with theft by servant. The Respondent takes the position that it cannot be held liable for the criminal proceedings against the Claimant.

23. The Respondent submits that an acquittal in a criminal case does not render an employee immune to disciplinary action by an employer for the reason that a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements.

24. In its Counterclaim, the Respondent states that the Claimant, as a senior employee of the Respondent, owed a fiduciary duty of loyalty, trustworthiness and good faith.

25. The Respondent further states that between January 2011 and May 2011, the Claimant and Joseph Kimani were custodians of the ATMs and the Strong Room at the Changamwe Branch.

26. The Respondent adds that on 24<sup>th</sup> May 2011, the Claimant, with the intention to defraud the Respondent, conspired with Joseph Kimani to approve the collection of the sum of Kshs. 1,000,000 into ATM2 of the Changamwe Branch, while knowing or being expected to know that the ATM already had a balance of Kshs. 3,558,200.

27. During the time when the aforesaid transaction was done, the Respondent also found that the bundles of notes in the Strong Room had been tampered with. As a result, a detailed cash count was done which revealed that 300 notes of Kshs. 1,000; 2 notes of Kshs. 200; 2 notes of Kshs. 100 and 11 notes of Kshs. 50 making a total of Kshs. 301,150 had been stolen.

28. In the alternative, the Respondent states that even if fraud, conspiracy and theft cannot be proved, the Claimant breached his contract of employment in one or more or all of the following ways:

- a) By failing to perform his services diligently and in exercise of due care;
- b) By failing to act in the best interests of the Respondent;
- c) By failing to comply with the Respondent's employment rules and regulations;
- d) By failing to act in good faith; and
- e) By acting in collusion with other employees to defraud the Respondent.

29. The Respondent therefore holds the Claimant liable for the loss of Kshs. 516,437.50 being his portion of the total loss incurred by the Respondent.

30. In addition, the Respondent states that during his employment, the Claimant was advanced a staff loan in the sum of Kshs. 43,937.28 which is still outstanding and continues to accrue interest and penalties.

31. The Respondent therefore counterclaims against the Claimant, a sum of Kshs. 560,372.78 together with interest until payment in full.

### **Findings and Determination**

32. There are three (3) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has proved a proper counterclaim against the Claimant.

### **The Dismissal**

33. The Claimant's dismissal was communicated by letter dated 13<sup>th</sup> June 2011 stating thus:

*"Dear Mr. Otana,*

#### **RE: SUMMARY DISMISSAL**

*This is to inform you that you have been summarily dismissed from Equity Bank Ltd with effect from 30<sup>th</sup> May, 2011 as a result of theft, whose details you are well aware of. You were one of the dual custodians at Changamwe Branch where Kshs. 1,232,000/= was stolen from the Branch's ATM cassettes, which led to your arrest and subsequent arraignment in court to answer to these charges. This calls to question your integrity and credibility and as a result of this, Equity Bank Limited has lost confidence in you as an employee. The decision to dismiss you is in accordance to (sic) the Employment Act, 2007.*

*You will be paid up to and including 30<sup>th</sup> May 2011, which was your last date of service.*

*Please organize to hand over any company property in your possession to the Business Growth & Development Manager – Changamwe. In addition, ensure that you have cleared with all the departments and hand over the duly completed clearance form to the Payroll Accountant, after which your final dues will be payable on the next payroll date.*

Please note that you are liable to pay back part of the total loss amounting to **Kes. 516,437.50/=**, as part of your clearance from the Bank.

Yours faithfully,

EQUITY BANK LIMITED

(signed)

John N. Wamwati

**Human Resources Manager**

34. According to this letter, the Claimant was dismissed following the loss of Kshs. 1,232,000 from the Automated Teller Machine (ATM) cassettes at the Respondent's Changamwe Branch where the Claimant was a co-custodian with one Joseph Kimani.
35. While admitting the loss, the Claimant pleads his innocence and blames what he refers to as 'poor supervisory structures'.
36. In his detailed witness statement filed in court on 18<sup>th</sup> January 2018, the Claimant states that on 24<sup>th</sup> May 2011, at 13.05 Hours a transfer of Kshs. 1 Million was initiated using his password. Significantly, this amount was above the Claimant's limit and was therefore supervised by his colleague Joseph Kimani.
37. The Claimant concedes that this transaction was not necessary as it would have burst the cash limit for ATM2.
38. The Claimant denies initiating the subject transaction and states that his password was used without his knowledge.
39. The Claimant also denies holding on to the sum of Kshs. 1 Million removed from the vault.
40. Being a banker of many years, the Claimant was aware or ought to have been aware that banks and their employees operate in a highly sensitive environment where trust is a core value. The fact that his password had been used to defraud the Respondent Bank should have concerned the Claimant and he should have pulled all stops to prove his innocence.
41. The Claimant told the Court that he was called by the Branch Manager, Ms. Wangari who informed him that he was required at the Respondent's Head Office to meet with the Human Resources Manager, John Wamwati.
42. The Claimant avers that he did not go to the Head Office to meet Wamwati because there was no formal communication and the criminal case was still pending. He accused the Respondent of violating its own Procedures Manual in this regard. He added that the outcome of the criminal case would have had an impact on the internal disciplinary case.
43. If indeed his password had been stolen as he claims, the Claimant ought to have presented himself at the Respondent's Head Office to state his case. Instead, he ignored proper instructions from his employer, citing some provision of the Procedures Manual.
44. In its decision in **Agnes Murugi Mwangi v Barclays Bank of Kenya Limited [2013] eKLR** this Court stated the following:
- “Banks are in the business of handling other people's money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face.”***
45. Furthermore, the law as it stands, is that there is no necessary nexus between internal disciplinary proceedings and criminal proceedings, even on the same set of facts. This position was affirmed by the Court of Appeal in **Geoffrey Kiragu Njogu v Public Service Commission & 2 others [2015] eKLR** and **Clement Karuri v Kenya Ports Authority [2018] eKLR**.
46. Overall, it seems to me that the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act.
47. Additionally, by failing to present himself at his employer's Head Office as instructed, the Claimant effectively locked himself out of the procedural fairness safeguards provided by the law and he cannot therefore now complain that he was not heard.
48. The claims for general damages and salary in lieu of notice are therefore without basis and are dismissed.
49. Regarding the claim for salary for the month of June 2011 I have this to say; the Claimant was an employee of the Respondent until the date of the letter of summary dismissal, being 13<sup>th</sup> June 2011. There was therefore no basis for the Respondent to backdate the dismissal to 30<sup>th</sup> May 2011. I will therefore award salary for 13 days in June 2011.
50. No evidence was led to support the claim for cost of defending the criminal case which therefore fails.

### **The Respondent's Counterclaim**

51. By way of counterclaim against the Claimant, the Respondent seeks the sum of Kshs. 516,437.50 being the portion of loss assigned to the Claimant.

52. In addition, the Respondent seeks the sum of Kshs. 43,937.28 being outstanding staff loan advanced to the Claimant in the course of employment.

53. No evidence was led to support the counterclaim on account of the loss. The Claimant however admitted owing the staff loan. I therefore allow the Respondent's counterclaim to the extent of this admission only.

### **Final Orders**

54. Finally, I enter judgment as follows:

- a) In favour of the Claimant in the sum of **Kshs. 23,833** being salary for 13 days in June 2011;
- b) In favour of the Respondent in the sum of **Kshs. 43,937.28** being outstanding loan balance.

55. Each party will bear their own costs.

56. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Wameyo for the Claimant

Mr. Ireri h/b for Mr. Kithi for the Respondent