



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2093 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**HELLEN MBELA OUKO.....CLAIMANT**

**VERSUS**

**KENYA POST OFFICE SAVINGS BANK.....RESPONDENT**

**JUDGMENT**

The Claimant was initially engaged by the Respondent as a clerical officer vide the letter dated 4<sup>th</sup> October 1988. Her employment was confirmed with effect from 10<sup>th</sup> October 1989. Over the years, she was promoted to various ranks, worked at various positions in acting capacity and received several commendations for her stellar performance. At the time of termination, she was the Respondent’s Branch Manager, Kenyatta Avenue Branch.

In the months of October, there was fraudulent activation of Pata cash in two customers’ accounts which were later used to withdraw a total of Kshs.1,222,410 from one account and Kshs.905,490 from the other. Pata cash was a newly introduced system to allow the respondent’s account holders to withdraw cash from Automated Teller Machines (ATM). The fraudulent activation was initiated by a Sales Executive because the Customer Relations Officer who was supposed to do the same was on annual leave.

Vide a letter of 13<sup>th</sup> August 2013, the Claimant was asked to show cause why disciplinary action should not be taken against her for failure to exercise due diligence and for allowing a Sales Executive to perform the duties of a Customer Relations Officer (CRO) which led to the loss of Kshs.2,132,900.00 on account of fraud.

The Claimant responded to the letter detailing the actions she took. She was thereafter interdicted and placed on half salary. She was summoned to a disciplinary hearing and was later dismissed from employment with effect from 10<sup>th</sup> February 2014. She appealed against her dismissal but the decision of the disciplinary committee was upheld. Consequently, she instituted this suit seeking the following reliefs–

- a. A declaration that the dismissal of employment services of the Claimant herein was without lawful cause, unfair, wrong hence null and void *ab initio*.
- b. An order directing the Respondent to reinstate or re-engage the Claimant back to her previous job and position without any loss of salary, allowances and any other emoluments and entitlements including back pay.
- c. In the alternative and without prejudice to the foregoing, an order directing the Respondent to pay the Claimant the sum of Kshs.4,493,929.90 as tabulated below-
  - i. 10 days worked in February 2014 Kshs.56,210.95 (10 days  
 x 8 hours x [107,537.00 x 14,230.0])

173.3

- ii. 7 months half salary of Kshs.376,379.00 (7 months x 53,768.50).
- iii. Annual leave days not taken of Kshs.168,639.90

(30 days x 8 hours x [107,537 + 14,230])

173.3

iv. Leave travel allowance of Kshs.14,230.00.

v. 3 months' pay in lieu of notice of Kshs.365,301.00

(3 months' x [107,537.00 + 14,230])

173.3

vi. 12 months' compensation for wrongful dismissal of Kshs.1,461,204.00 (12 months x [107,537 + 13,230])

vii. General damages emoluments/contingencies at the discount of 15% of the total discount of Kshs.2,064,778.60 (2,429,151.30 x 0.85).

d. An order directing the Respondent to pay the Claimant herein compensation for the lost income at the rate of Kshs.127,767.00 per month, respectively from 10<sup>th</sup> February 2014, the effective date of her wrongful dismissal to the date of judgment of this suit.

e. An order directing the Respondent to issue the Claimant herein with her certificate of service.

f. The costs of this suit be borne by the Respondent herein.

g. An order directing the Respondent herein to pay interest on the total amount at court rates.

The Respondent filed a Memorandum of Response on 7<sup>th</sup> April 2016 contending that the Claimant's dismissal was conducted fairly, lawfully and according to the provisions of the Employment Act. It prayed that the claim to be dismissed.

#### **The Claimant's Case**

It is the Claimant's case that the Respondent did not furnish her with all the reasons for charges that she had been accused of and that the respondent failed to follow its own procedures. She avers that she has been unable to secure employment since her dismissal.

During trial, the Claimant testified as CW1. It was her testimony that as a manager her role involved approving documents whose details were verified by the cashier. She contended that she was not required to verify the date of birth, signature and handwriting. She testified that there were no guidelines on the verification but which were formulated after the incident.

She denied instructing the sales officer to work as the CRO. She testified that she was subjected to disciplinary proceedings with Rachel Abwao, a Cashier in the Branch but the Disciplinary Committee recommended Rachel's reinstatement. She contended that the loss occurred due to the loopholes in the bank systems and not her negligence.

Upon cross examination, she admitted that the concerns raised at the disciplinary hearing had not been addressed in her response to the show cause letter. She conceded that her job as the branch manager involved overseeing all branch activities. It was her testimony that as a checker, she approved what the CRO or cashier had passed on to her. She contended that the system did not show the handwriting, date of birth or the ID number.

She admitted that she had access to the Document Management System (DMS) and conceded that she never verified with the system when Rachel brought her all the transactions she had done for the day as she presumed that Rachel had done her job.

Upon re-examination, it was her testimony that she raised concerns that the accountant should have monitored the withdrawals to ensure it does not reach a million. She contended that it was impossible to see a customer as she was stationed in the back office. She maintained that the signature was never captured in the system.

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

The Respondent avers that the Claimant should have noted the disparities in the customer's handwriting, signature and date of birth had she compared the details in the DMS and the account opening forms presented for her approval. Further, that such failure led to the loss of Kshs.1,227,410.00 from account number 0416010796764 and Kshs.905,490.00 from account number 0116050012835 on account of fraudulent withdrawal.

The Respondent avers that the Claimant's response failed to state the verification exercise she undertook before approving the Pata cash transactions, to safeguard the Respondent from any adverse exposures. She also failed to explain the steps she undertook to ensure that the person performing the CRO duties while the actual CRO was on leave was competent.

The Respondent contends that it adhered to the provisions of Section 41 of the Employment Act and its disciplinary procedures before

terminating the Claimant's employment. It is further contended that the Claimant was informed of the specific reasons for which she was to show cause.

It is averred that the Claimant was paid all the benefits due to her at the time of her dismissal hence is not entitled to the reliefs sought. The Respondent further avers that the Claimant's certificate of service was prepared but the Claimant has failed to collect the same.

GEORGE ODIWUOR ONYANGO testified as RW1 and adopted his witness statement. It was his testimony that he did the review to the investigations that were conducted and whose findings were that no customer due diligence through verification of details was conducted during the activation of Pata cash. Further, that a sales executive had been assigned the duty of customer identification by the Claimant yet his job in the bank had been temporary and he had no access to the system. He contended that client information had been uploaded to the system.

Upon cross examination, he conceded that he did not have the investigations report in Court. He rejected the assertion that policy procedures were only developed after the fraud had been committed. It was his testimony that it was the CRO's job to meet the client, give them a form to fill, verify the information from the system before referring them to the branch manager. He contended that the Branch Manager took over this duty in the absence of the CRC. He conceded that the manager did not have any face to face interaction with the client like in the case of a CRO but contended that a CRO was supposed to be replaced by someone knowledgeable, not a sales executive.

It was his testimony that one was required to verify a client's ID number and their date of birth but conceded that there was no document in existence requiring one to verify the date of birth. He testified that one was required to verify the information provided by the applicant against the static data in the bank.

It was his testimony that the information contained in the system regarding the two accounts was in the report but the forms were not in the report or in Court.

On re-examination, he maintained that the fraud occurred due to the Claimant's failure to verify information.

JOSEPHINE MORAA ABUYA testified as RW2 and adopted her witness statement. It was her testimony that sales executives were employed on commission and were not employees of the bank. She contended that the Claimant never stated that she did her due diligence.

It was her testimony that the Claimant lodged an appeal with the managing director who considered the appeal and made a decision after consulting the disciplinary committee chairman, HUMAN RESOURCE and security. She stated that the delay in making a decision on the appeal was because information was being gathered.

On cross examination, she contended that the Claimant never raised the issue of the unavailability of procedures regarding the product. She conceded that an appeal was supposed to be concluded in the shortest time possible. She testified that the duty of the CRO could only be conducted by someone who has the rights to access the DMS and capabilities. The witness was not re-examined.

### **The Claimant's Submissions**

The Claimant submits that the process followed to terminate her employment was legally flawed hence unprocedural. She further submits that no lawful reasons were given for the termination of her employment. The Claimant relies on the cases of **Frederick Were v MK Jeffrey's Hauliers [2013] eKLR** and **Michael Aloyo Ulage v Gitonga Stanley [2013] eKLR** to fortify her position.

It is the Claimant's submissions that she is entitled to the reliefs sought as she has established a case to warrant an award of the same.

### **The Respondent's Submissions**

The Respondent submits that the termination of the Claimant's employment was based on valid reasons being her failure to exercise due diligence regarding the transactions in question. That due procedure was followed as the Claimant was issued with a letter to show cause, responded to the same and was subjected to disciplinary proceedings before the termination of her employment. The Respondent relies on the case of **Bett Francis Barngetuny & Another v Teachers Service Commission & Another [2015] eKLR** and the Court of Appeal decision of **Bamburi Cement Limited v Farid Aboud Mohammed [2016] eKLR** to buttress this position.

It is the Respondent's submissions that the Claimant is not entitled to any of the reliefs sought.

### **Analysis and Determination**

I have carefully considered the pleadings filed by the parties, the evidence adduced before this Court as well as the submissions. The issues for determination are whether the termination of the Claimant's employment was lawful and for a justified cause, and whether she is entitled to the reliefs sought.

### **Termination of Employment**

Section 45(1) of the Employment Act prohibits an employer from terminating the services of an employee unfairly. Under subsection (2) termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, is a fair reason related to the employee's conduct, capacity, compatibility or based on an employer's operational requirements and that the employment was terminated in accordance with fair procedure.

## 1. Reason for Termination

The Claimant submitted that the Respondent lacked lawful reasons for terminating her employment. The Claimant's letter of 13<sup>th</sup> August 2013, required her to show cause why disciplinary action should not be taken against her for allowing a sales executive to perform the duties of a CRO and her failure to exercise diligence during the approval of registration of Pata cash, in her capacity as a checker.

In her response of 15<sup>th</sup> August 2013, she admitted requesting the sales executive, Mr. Samuel Nzau, to sit at the CRO desk as there had been no personnel to stand in for the CRO who was on annual leave and the desk could not be left unmanned. She stated that it had been the right thing to do at the time and that the work of the Sales Executive had only been to direct customers to the right counter. As regards her lack of due diligence, she stated that she only confirmed whether the accounts were active as she believed that she was approving genuine customers' registration, having lacked the benefit of seeing the customers.

She testified that she was never issued with guidelines on the verification of Pata cash transaction but admitted in cross examination that she had not verified the details in the application forms presented to her because she had presumed that Rachel, the Cashier who entered the details in the system had done her job. She conceded that her role as a branch manager required her to oversee everything in the branch and that as a checker, she approved what the CRO or the cashier had done.

In light of the foregoing, it is my finding that the Claimant ought to have verified the details in the applications before approving them even in the absence of guidelines as she was the overall authority at the branch.

Further, the Claimant ought to have ensured that the person she appointed to stand in for the CRO was knowledgeable and understood the duties of a CRO. The Claimant's own admission in her response and during her disciplinary hearing that the sales executive was only required to direct customers to the right counter showed how casually she managed that role yet it was a very crucial role in the Pata cash registration. Additionally, the sales executive did not have access to the DMS system hence had no way of verifying the information given to him.

Clause 6.1.1.4 of the Respondent's Human Resource Manual states that the failure to perform properly and carefully any work that is assigned is misconduct. Further, section 44 (4) of the Employment Act provides that wilful neglect to perform any work which was one's duty to perform, or carelessly and improperly performing any work which from its nature was one's duty, under his contract, to have performed carefully and properly, is a justifiable ground for summary dismissal. It is my finding that the Respondent has proved the validity and provided a justification for terminating the Claimant's employment.

### The Procedure Adopted before the Claimant's Dismissal

The Claimant has submitted that the Respondent failed to follow its own procedures. The Claimant was issued with a letter to show cause, responded to the same and was subjected to disciplinary proceedings as outlined in Section 41 of the Employment Act, before the decision to summarily dismiss her was made. I find that procedure for terminating the Claimant's employment was complied with. However, her appeal was not handled in accordance with the respondent's manual.

### Reliefs Sought

The Claimant has sought a declaration that her summary dismissal was without lawful cause, unfair, wrong hence null and void *ab initio*. As I have already found, the summary dismissal was not unlawful as the claimant was taken through a fair procedure and there was valid reason for dismissal. The prayer for reinstatement fails as the claimant did not prove unfair dismissal and it is more than three years since the dismissal as the remedy is only available within 3 years of termination.

The claim for 7 months' half salary fails as an employee who is under interdiction was entitled to payment of half his basic salary and full allowance by dint of clause 10.1.3 of the Human Resource manual which provides that an employee is only entitled to the withheld salary upon acquittal of the charges against the employee.

The claimant's prayer for compensation fails as the termination of her employment was justified substantively and procedurally undertaken.

The claim for 3 months' pay in lieu of notice fails as the dismissal has not been reversed by this court.

The prayer for leave travel allowance is awarded as prayed in the sum of **Kshs.14,230**. The Respondent did not adduce any evidence to show that the same was paid to the Claimant, did not deny her entitlement to the same and did not provide evidence to controvert the Claimant's entitlement to the same under her appointment letter of 4<sup>th</sup> October 1988.

The Claimant is also awarded salary for the 10 days worked in February 2014 as prayed in the sum of **Kshs.56,210.95**, since no evidence was adduced by the Respondent to prove that she had been paid the same.

The Claimant is awarded 26 untaken annual leave days as it is what

she is entitled to under her appointment letter. Further, the Respondent did not provide the claimant's leave records to prove that she took the same or evidence to show that the Claimant was paid salary in lieu of leave. The same is awarded as prayed in the sum of **Kshs.168,639.90**.

The claim for general damages emoluments/contingencies at the discount of 15% of the total amount fails as the Claimant has not proved her case regarding the same on a balance of probability, to warrant an award of the same. The claim for compensation for the income lost suffers

the same fate as it has not been justified in law and in contract or proved on a balance of probability.

The Respondent is directed to issue the Claimant with a certificate

of service whose particulars are in line with the provisions of Section 51(2) of the Employment Act.

**In the end judgment is entered for the claimant against the respondent in the sum of Kshs.239,080.85.**

The respondent shall pay the claimant's costs and interest shall accrue at court rates from date of judgment.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JULY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**