



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1376 OF 2015

PAUL OTIENO OKEYO.....CLAIMANT

-VERSUS-

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant brought this suit on 7th August, 2015 alleging that he was dismissed from employment unfairly and unlawfully and prayed for the following reliefs:

- (a) Compensation for the sum of Kshs. 1,699,860.00 for the loss and damage sustained as a result of unlawful termination of his Employment equivalent to 12 months salary.
- (b) The sum of Kshs. 1,699,860.00 as damages for loss of career and unfair labour practice equivalent to one year salary.
- (c) Service pay of Kshs. 424,965.00 equivalent to 15 days for every completed years of service.
- (d) An order that the claimant be paid Kshs. 141,655.00 in lieu of Notice.
- (e) In the alternative, the claimant be reinstated in employment.
- (f) In the event that court determines that the respondent unfairly terminated the claimant employment, the respondent be compelled to issue the claimant with an apology letter and a proper recommendation letter.
- (g) Costs of this suit.

2. The Respondent denied the alleged unlawful dismissal and averred that the dismissal was on grounds of gross misconduct and the claimant was accorded a hearing before the dismissal.

3. Both parties tendered evidence during the hearing and thereafter filed written submissions.

Claimant's Case

4. The Claimant testified as Cw1. He told the court that he joined the respondent on 23.1.2007 as a Graduate Clerk and rose the ranks to become Branch Operations Manager (BOM) reporting to the Branch Manager. As BOM, his duties included supervision and monitoring of service delivery at the counters and front desk to ensure prompt service to customers; provide guidance to staff on issues and queries arising and advice staff how to handle them; implement audit recommendation relating to controls of documents, records and assets of the bank; ensuring smooth people management and overseeing operational efficiency amongst others.

5. He testified that on 15.3.2013, Mr. Mark Ogolla Nyamita T/a. Horizon Media Investments opened Account No. 0120290099600 at Embakasi Branch after being introduced by his other personal A/c. No. 0120650957401 domiciled at Koinange Avenue Branch. He contended that the account was KYC compliant and it went through normal checks and balances to ensure compliance by various staff within the bank.

6. He further testified that on 22.3.2013 the customer, Mr. Nyamita visited the branch to enquire about an RTG of Kshs. 4,162.500 which was supposed to hit his account from Commercial Bank of Africa. Upon checking the account, the money had not yet been credited and he requested him to forward to him copies of the LPO, invoice and any other documents that was in his possession and he did so via email. Thereafter he went out of his way to verify the source of the money by talking to Priscilla Nthenga and Solomon Mwangi of Wananchi

Group Ltd who confirmed that they had paid the customer through Commercial Bank of Africa, Parkside Tower Branch.

7. He further testified that all the transactions thereafter were done by the customer in person at the Embakasi and Koinange Branches as authorized by the designated officers under the bank procedures until the account was blocked for investing when the credit balance was Kshs. 781,462.50. He stated that after the investigations and amicable settlement, between the customer and his partner, the account was unblocked. He contended that no money was lost and the bank did not lose its reputation.

8. He further denied that he paid any cash to customers or transacted in the customers account since that work was not part of his job description and he did not hold any system rights. He admitted that he did not charge interest for the daily charges and overdrawing of the account because that was not his duty as respondent's bank had in place an information technology (IT) system to do all that. He further contended that where a customer's cheque book was delayed by the bank or ATM failed, a counter cheque could be used at the expense of the bank.

9. He further testified that investigations were done on the said customer's account from the period between 15.3.2013 and 23.3.2013 in which all the transactions were done by the customer and authorised by various bank offices and staff but he was the only one picked for disciplinary action. He admitted that he was served with a show cause letter and thereafter he was invited to a disciplinary hearing on 22.7.2013. However, he contended that the notice was too short, and his request to the Human Resource Manager for relevant documents related to the charge of the alleged fraudulent RTGS transfer of Kshs. 4,162,500 was denied. He contended further that he was never served with the investigations report done by the security team. He complained that none of the members of the Panel hearing his case was equal to him in rank. He denied the alleged misconduct and contended that the RTGS was handled by the head office and he played no role. He stated that when he told the Panel that he was not able to defend himself without the requested documents he was told to go. Therefore, he contended that he was denied a fair hearing.

10. He told the court that on 23.8.2013 he was summarily dismissed and he appealed on 29.8.2013 to the respondent's CEO through the Branch Manager but he received no response to the same and his subsequent reminder. He contended that throughout his 7 years service at the bank he had no disciplinary issues.

11. On cross examination he stated that he confirmed that he responded to the Branch Manager's show cause mail by his memo dated 25.4.2013. He admitted that there are bank procedures for payment of money and the authorization is normally done by the Branch Manager, Branch Operations Manager, Branch Credit Officer and Branch Operations Officer. He further admitted that there are bank charges for transactions.

12. He confirmed that he knew Mr. Ogola Nyamiita, the proprietors of Horizon Media Investments. He contended that once a customer opens an account, he or she can do transactions the same day. He admitted that the bank has internal controls but maintained that they don't bar a customer from operating the account immediately after opening it. He further contended that he wrote an email on 18.3.2013 requesting for the unblocking of the customer's accounts and it was unblocked the same day according to the memo filed in the bundle of defence by the respondent.

13. He reiterated that he objected to the hearing because the documents he had requested for were not provided. He contended that during the hearing, other issues were discussed other than the alleged RTGS fraud. He contended that the dismissal letter did not mention the issue of the RTGS fraud but other issues which he was not invited to defend himself at the hearing.

14. He contended that after his response to the Branch Manager's (his supervisor) queries, the HR policy required that the supervisor should respond to him within 7 days. However, after his response on 25.4.2013, the Branch Manager never responded to his explanations within 7 days and as such the silence meant that he was satisfied with the explanation.

Defence Case

15. Ms. Rose Mkoba is the respondent's HR Manager and she testified as RW1. She told the court that she was still the HR Manager on 23.8.2013 when the claimant was dismissed by the bank. She confirmed that she did not attend the claimant's disciplinary hearing as she was away on maternity leave. However, she relied on the minutes of the disciplinary panel to state that eleven issues were discussed in the meeting. She contended that the minutes did not show that the claimant requested for any documents before the hearing.

16. RW1 further testified that the reason cited warranted summary dismissal. She confirmed that the claimant appealed against the dismissal and the CEO acted on the appeal and notified the claimant that the dismissal had been upheld by the letter dated 1.10.2013.

17. On cross-examination, RW1 contended that the HR Manual was followed before the dismissal of the claimant. She admitted that clause 10.3.2 of the manual requires the supervisor to respond within 5 days after receiving response to his query from an accused employee. She further admitted that the dismissal letter for managerial staff is signed by the CEO while the Head of HR signs for unionisable staff. She denied that the bank transacts RTGS on Sundays. She admitted that she did not know who authorised the RTGS transactions but contended that the transaction was discussed during the disciplinary hearing. She further admitted that she had no documents to prove that the transactions were authorized by the claimant. She however contended that the Branch Manager noted that there were lapses and recommended for a written warning to be given to the claimant.

18. RW1 confirmed that the email dated 20.7.2013 which invited the claimant to the disciplinary hearing contained only one charge. Fraudulent RTGS transfer for Horizon Media Investment involving Kshs. 4,162,000. She admitted that the account opening documents for Horizon Media Investment did not reveal any anomaly. He contended that a case of fraud is grave and warrants summary dismissal and not warning. She further contended that the claimant's appeal was dismissed by the CEO.

19. She testified that all the issues discussed at the disciplinary hearing were within the claimant's knowledge. She stated that the query

served on him was on authorization done from 15.3.2013 to 23.3.2013.

20. Mr. Muhamed Nzalla, testified as RW2. He told the court that in 2013, he was in charge of KYC at the Operations Department Head Office. He stated that the claimant authorized payment of Kshs. 200,000 before the KYC (know your customer) process was completed. He contended that the payment was made using a counter cheque in a new account before verification of the company search at the companies registry was completed and before a cheque book was issued to the customer.

21. He testified that the KYC was completed on 20.3.2013 when the bank received a search report from her advocate after which the account became active. He contended that the bank has written procedure for payment in her policies and procedures and the claimant flouted the same by authorising a premature payment before the account was activated. He confirmed that the claimant wrote an email seeking authority to pay and also that the Head of Operations Mr. Nthuli called him, but he told him to wait until 19.3.2018 for the search report to reach him.

22. RW2 testified that the account became operational on 20.3.2013 and on 23.3.2013 a cheque of Kshs. 250000 was paid before an incoming cheque was cleared. He confirmed that the first payment to the customer of Kshs. 200,000 was made from the suspense account because the account had not become operational. However, he testified that the second payment was made from the customer's account which had an insufficient credit balance.

23. He contended that according the bank policies and procedures, before payment is made in respect of uncleared effects, prior consent is required from a superior office in charge of Operations because the money advanced is like a loan. He contended that the payment of the said Kshs. 200,000 and Kshs. 250,000 was done without prior authority. He further contended that the payment of the Kshs. 200,000 and Kshs. 200,000 was done through counter cheques and no bank commission was charge to the customer. Finally, he contended that the issue of the failure to follow procedure and KYC were considered during the disciplinary hearing on 22.7.2013.

24. On cross-examination, he explained that the procedure of KYC in Business Accounts is that the information is forwarded to him at the Head Office and then he does a search. In this case, he maintained that the account become operational on 20.3.2013 after he received the search report. However, he admitted that there was an unblocking stamp affixed on 18.3.2013 but contended that the unblocking stamp was mischievous because it was done the same day the account opening information was forwarded to the Head Office and before the search report was received.

25. He contended that the unblocking was premature and strange to him. He further contended that the payments were authorised by the claimant as the Branch Operations Manager. He admitted that the payment by counter cheque was okey if the customer was yet to receive a cheque book. He further admitted that the payment was done by a teller. However, he contended that the payment must be approved by a manager and there must be sufficient money in the account.

26. He reiterated that on 18.3.2012 and 23.3.2013 the claimant authorized payment of Kshs 200,000 and 250,000 respectively and explained that the two transactions could not be reflected on the claimant's account statement because the payment was made from the suspense account when his account was blocked for KYC process which ended on 20.3.2013. He admitted that the claimant's supervisor wrote a letter dated 30.4.2013 stating that the issue about the fraudulent RTGS was not serious and recommended no disciplinary action against the claimant.

27. In re-examination, RW2 contended that the transaction of Kshs. 200,000 from the suspense account was transferred to his account on 21.3.2013 after the unblocking of his account on 20.3.2013. He further contended that the stamp for unblocking the account is not done on the form forwarding the information for KYC. He stated that the claimant admitted that he knew the customer from his school days and never denied authorising the account opening and payment. Finally, he contended that the recommendation by the Branch Manager was not binding on the bank.

28. Mr. Emmanuel Tenderet the respondent's security officer testified as RW3. He told the court that he became aware of the facts of this case when he was briefed by his predecessor during the handing over. He referred to the respondent's polices and procedures and he stated that the claimant as the Branch Operations Manager was bound to implemet and comply with at his branch.

29. RW3 further testified that investigations were done on the payment of Kshs. 4,162,000 from Commercial Bank of Africa by Wanainchi Group to account number 012090099600 for Horizon Media Investment. He further testified that the clerk who handled the transaction satisfied the management with his explanation that he had made an honest mistake that had led to discrepancies. However, he told the court that investigations into the account opened on 15.3.2013 by Horizon Media Investment revealed transactions were marred with irregularities and contrary to bank polices on credit facilities as well as operations of client accounts.

30. He further contended that the claimant unilaterally authorised the payment of Kshs. 200,000 on 21.3.2013 to Mark Ogolla Nyamiita without obtaining clearance and approval from his supervisor as required by the Bank Policies. He further contended that the claimant further authorised payment of Kshs. 180,000 and Kshs. 250,000 when there was no sufficient balance to meet the value of the cheques. Finally, he contended that the claimant was fairly dismissed because he was accorded a hearing on 22.7.2013 where he presented his defence before being dismissed. He therefore prayed for the suit to be dismissed with costs.

31. On cross-examination RW1 admitted that the clerk who effected the transaction in issue was not punished and she is still working for the bank. However, he contended that the claimant was chosen for disciplinary action because of other breaches, which exposed the bank to more serious risk. He admitted that the approval of the RTGS was done by the Trade Finance Unit of the bank and there was no fraud in the transaction. He reiterated that the claimant was dismissed for breaching procedures as set out in the dismissal letter.

Issues for determination and analysis

32. I have carefully considered the pleadings, evidence and the written submissions by both parties. The claimants case is that he was

unfairly dismissed and therefore entitled to compensatory damages and terminal dues. On the other hand the respondent contends that the dismissal of the claimant was justified by sufficient reasons and procedurally fair. The parties did not agree on the issues for determination but from the foregoing summary, the issues for determination are:

(a) Whether the dismissal of the claimant by the respondent was unfair and unlawful.

(b) Whether the claimant is entitled to the reliefs sought.

Unfair termination

33. Section 45(2) of the Employment Act provides that termination of an employee's employment contract is unfair if the employer fails to prove that the termination was grounded on valid and fair reason and that fair procedure was followed.

Reason for the dismissal

34. A Reason for termination of employment is fair if it relates to the employee's conduct, capacity and compatibility or based on operational requirement of the employer.

35. In this case the reason cited for dismissing the claimant is set out in the dismissal letter dated 23.8.2013 which was breach of the respondent's policies and procedures including procedure in KYC, Credit and Operations in the management of the Horizon Media Investment account; authorizing transactions in the said account prematurely before the KYC process at the Head Office, paying Kshs. 200,000 against uncleared effects without authority and approval from the Head of Credit; failure to charge Kshs. 500 as commission for the back on the said transaction; payment of Kshs. 250,000 when the account had only a credit balance of Kshs. 20,440 without the knowledge or authority from the branch manager, failure to charge interest from daily charges and overdrawing in the said account leading to loss of income to the bank, and finally authorising an RTGs of Kshs. 1.4 m from the account of Horizon Media Investment Limited to Mr. Nyamitta's account at Barclays Bank Moi Avenue without verifying that the details in the instructions tallied with those in the account opening documents.

36. I have carefully considered the evidence by both sides and it is clear that the respondent's Head of Operations asked the Branch Manager of Embakasi Branch to investigate a suspected fraudulent RTGS payment of Kshs. 4,162,000 into the account for Horizon Media Investment. It is also clear that the Branch Manager wrote a Memo to the claimant to explain the said fraudulent RTGS among other procedural breaches that were noted from the transactions done in the account including authorizing transactions while the account was blocked; authorizing cash payments for two cheques of Kshs. 180,000 and Kshs. 200,000 against uncleared effects without approval; authorising payment of cheques for Kshs. 250,000 when the account had no sufficient funds without prior approval from the Head of the Credit; and failure to charge bank commission on the said transactions leading to loss of income to the bank.

37. It is also clear from the evidence that the claimant responded to the said memo denying that the RTGS was fraudulent, contending that the payment of Kshs. 200,000 on 18.3.2013 was done after receiving confirmation from the Head Office that the registration documents were in order and KYC complaint; contending that failure to charge Kshs. 500 counter charge commission was due to delay in delivering a cheque book to the customer; and admitting that the failure to charge ENC commission was an oversight and an omission on his side at the branch and the same had been levied after the investigations. He regretted the failure to charge the commission and saw no reason for disciplinary action against him contending that he acted in good faith and no money was lost.

38. The Branch Manager wrote a memo dated 30.4.2013 updating the Head of Operations on the claimant's response to the queries raised against him. He contended that the due diligence done on the RTGS for Kshs. 4,162,000 and subsequent authorisation of payments was insufficient; that payment of Kshs. 200,000 was made while the account was blocked though it was activated that day; that there was no express authority from the Branch Manager before the commission for Kshs. 500; that Kshs. 180,000 and Kshs. 200,000 against uncleared effects and failure to collect revenue (uncleared effects commission) was without prior approval from the manager; and finally authorizing of payment of Kshs. 250,000 on 23.3.2013 when there was insufficient funds and failure to collect revenue was done without prior approval from the Line Manager or Head of Credit contrary to policy. The manager concluded that though no actual loss was incurred, the lapses were unacceptable and in excusable and recommended for a written warning to be given to the claimant.

39. After considering the charges and the response by the claimant, the respondent was of the view that the reasons that the claimant breached the bank policies and procedures justified his summary dismissal. Section 44 (4) (c) entitles an employer to summarily dismiss his employee for wilfully neglecting to perform any work which is his duty to perform or if he carelessly and improperly performs any work which was his duty to have performed carefully and properly.

40. Considering the evidence tendered herein and especially the unequivocal admission of failure to comply with express bank policies and procedures, I find and hold that the respondent has proved on a balance of probability that there was valid and fair reason for summarily dismissing the claimant from employment.

Procedure followed

41. Section 41 of the Employment Act provides that, before dismissing an employee for misconduct, poor performance or physical incapacity, the employer shall first explain to the employee the reason in the presence of another employee or shopfloor union representative and thereafter invite the employee and his chosen companion to air their representations for consideration before the dismissal is decided.

42. In this case the claimant was invited for a hearing to answer the charge of the fraudulent RTGS of Kshs. 4,162,000.

43. According to the minutes of the disciplinary hearing dated 22.7.2013, other charges were raised which related to the breaches of policies and procedures contained in the memo to him by the Branch Manager dated 23.4.2013. It is further clear from the minutes that the claimant was given a chance to present his case in response to the said charges. Thereafter the committee considered the case and found that the claimant was guilty of gross misconduct and recommended for his summary dismissal under section 44(4) (c) and (e) of the Employment Act.

44. The minutes of the disciplinary proceedings were produced as exhibit herein without any objection. I therefore find that the respondent has again proved on a balance of probability that the claimant was accorded a hearing before the dismissal and as such the dismissal was done after following a fair procedure.

45. Having found that the respondent has proved that the dismissal of the claimant was ground on a valid and fair reason under section 44(4) (c) of the Employment Act and that a fair procedure was followed as required under section 41 of the Act, I now return that the dismissal of the claimant by the respondent was fair and lawful within the meaning of section 45 of the Act.

Reliefs

46. In view of the foregoing, I return that the claimant is not entitled to either reinstatement or compensatory damages for unlawful and unfair termination of his employment. I further dismiss the prayer for salary in lieu of notice for the same reason. Finally, the claim for service pay is dismissed because from the payslip produced by the claimant, he was a beneficiary of a pension scheme. Under section 35 (6) of the Employment Act, an employee who benefits from a pension scheme is disqualified from claiming service pay. Finally, the prayer for an apology from the respondent is declined for lack of merits and/or legal basis.

Conclusion

47. In view of the finding that the dismissal of the claimant was fair and lawful, I proceed to dismiss the suit with no costs considering the fact that the claimant has not secured any alternative employment.

Dated, signed and delivered in Nairobi this 16th day of July, 2020.

ONESMUS N. MAKAU

JUDGE