



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 336 OF 2019

RACHAEL WAMBERE MWANGI.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The Claimant brought this Claim on 23rd May, 2019 alleging that her employment with the Respondent was unfairly and unlawfully terminated on 1st April, 2019 and prayed for the following reliefs:

- a) The immediate reinstatement of the Claimant to work without loss of any benefits.
- b) An Order compelling the Respondent to pay the Claimant the balance of her salary not paid from the date of interdiction (8th October, 2018) till when she is reinstated to work with full salary.
- c) In the alternative to prayer a) above for reinstatement, this Court be pleased to declare that the dismissal of the Claimant
- d) amounted to unfair termination of her employment and she is entitled to maximum general damages for compensation.
- e) General and aggravated Damages.
- f) Such other relief that the Honourable Court may deem just and fit to grant.
- g) Costs of this Claim.

2. The Respondent filed defence on 24th October, 2019 admitting that she employed the Claimant but denied that she unfairly dismissed her from the employment. She averred that the claimant was lawfully dismissed for gross misconduct and after following a fair procedure. She therefore prayed for the suit to be dismissed with costs.

3. The facts of the case are that the Claimant was employed by the Respondent in November 1995 as a Data Machine Operator and worked in different capacities until 1st April, 2019 when she received a letter of dismissal dated 21st February, 2019. As at the time of the separation she was earning a gross monthly salary of Kshs. 115,431.00/-. In the claimant's view, the termination was unlawful and unfair as the Respondent failed to consider her submissions prior to arriving at the decision to terminate her employment, especially at the time when she was due for promotion and salary increment.

4. On the other hand, the respondent admits having engaged the Claimant and that she had been deployed as a senior ICT Officer at her headquarters in the Integrated Payroll and Personnel Database (IPPD) Division and was specifically assigned to work on teachers' files/transactions. According to her, the Claimant's employment was lawfully and procedurally terminated for gross misconduct contrary to the provisions of Regulation 112 (13) of the HR Policies and Procedures Manual and the TSC Code of Conduct and Ethics, by un-procedurally halting loan deductions for a colleague in the secretariat. Further, according to her the Claimant was accorded a fair hearing prior to the termination.

5. The matter proceeded for hearing on 9th October, 2019 to 27th November, 2019 when both parties tendered evidence and thereafter filed written submissions.

Claimant's Case

6. The Claimant testified as CW1 and basically adopted her witness statement dated 17th May, 2019 as her evidence in chief. She also produced the 22 documents filed in Court on 17th May, 2019 as her exhibits. The said written statement echoes the above facts and the averments made in her Memorandum of Claim. In brief, she stated that she was dismissed from her employment by the Respondent on 21st February, 2019 and that the reason given for her termination was not true. She contended that on the dates when the alleged illegal transactions were done, she was not on duty and could therefore not have authorised the alleged stoppage of the loan stoppage. She further contended that it was impossible for her to have accessed the Respondent's system by use of her password outside her premises.

7. She further stated that she was not given enough time to defend herself against the allegations levelled against her and that during her disciplinary hearing, she was not supplied with the IP Address where the alleged authorization was done. She insisted that her termination was unlawful and unfair and urged this Honourable Court to allow her Claim in terms of the reliefs sought therein.

8. On cross examination, she confirmed that she was deployed in the IPPD Section and part of her duties included capturing third party, deductions for teachers, coding for new schools and allocation of hardship allowances among others. She contended that her dismissal was in connection with an alleged non deduction of loans for a secretariat member of staff as opposed to a teaching staff and as such the transaction was not within her scope of duties. She maintained that on 27th November, 2017 and 5th December, 2017 she was away on leave and was therefore could not have authorized the instructions. She further stated that it was not possible to access the Respondent's system off its premises therefore absolving her of any wrongdoing. She insisted that, despite her request, the Respondent did not avail the IP address to ascertain the location of the device used to make the alleged approvals.

9. She admitted that she was invited for a disciplinary hearing on 21st February, 2019 but maintained that the Respondent failed to avail any evidence confirming that she had committed any offence despite her request. She testified that on the same day the Respondent proceeded to terminate her employment vide her letter dated 21st February, 2019 for alleged breach of regulation 112 (13) of the Respondent's Human Resource Policies and Procedures for Secretariat staff and Part II 6(1) and Part III 9 (a) of the TSC Code of Conduct and Ethics, which letter she received on 1st April 2019. According to her, the hearing was not fair because she was not asked to attend the hearing with any witness despite having a witness to call.

10. On re-examination CW1 maintained that on the dates of the alleged fraud she was not on duty and could not access the Respondent's system from a remote location. She further maintained that she did not authorize any fraudulent transaction as alleged by the Respondent. On the other hand, she contended that she was not aware that she even had the rights to make any approvals on secretarial staff as she was only informed that her rights were in relation to teaching staff only.

The Respondent's Case

11. The Respondent called two witnesses to testify on her behalf. **ZACHARY AUDI**, a Respondent's Payroll Accountant in Charge of the Integrated Payroll and Personnel Database (IPPD) Division, testified as Rw1. He adopted his witness statement dated 8th November, 2019 as his evidence in chief and stated that in late December 2017, the Respondent received complaints from financial institutions alleging fraudulent transactions from her secretariat offices that officers presented false clearance letters on loan accounts which had outstanding loans.

12. He further stated that as a result of the said complaints, the respondent conducted investigations which revealed that there were officers deployed at the IPPD Division who were stopping existing loans for colleagues to facilitate them obtain loans from different financial institutions. He checked the system and confirmed that indeed on 27.11.2017, a loan for Grace Nyakanini, a secretariat staff at the Headquarters from Equity Bank had been stopped. He contended that using the ICT personnel, it was revealed that the claimant's password was the one used to stop Nyakanini's loan from Equity Bank and thereby enabled her to obtain another loan from the Standard Chartered Bank. Therefore, according to him the Claimant's dismissal was grounded on a valid reason

13. He further testified that a fair procedure was followed because the claimant was served with a show cause letter which she responded thereto and thereafter she was accorded a fair hearing before the termination. He further contended that the claimant appealed against the dismissal and the respondent is in the process of constituting a committee to hear it.

14. On cross examination, Rw1 stated that the Claimant was working for IPPD division for teachers and not for secretariat staff. He further stated that the Claimant had two passwords one for T-pay system and the other for IPPD and that the one used in the fraudulent transactions was the T-pay password. He also contended that the claimant's password could access both teaching and secretariat staff. He further explained that anyone with access to the Respondent's T-pay system can do transactions on both teachers and secretariat staff platforms. However, he clarified that the password for each staff member in the division is defined by job description and they are of different levels.

15. He contended that the system could tell when the transaction was done and by whom but it could not tell the location from where the transaction was done and the identity of the device used to do the transaction. However, he contended that the system can be accessed from any location provided one has a device and the password. He denied being aware of any other fraudulent transactions done using the Claimant's password but admitted that another employee was previously dismissed for being involved in the fraudulent use of password.

16. He told the court that after the investigations, all the passwords were disabled by the respondent and all the employees were instructed to change passwords. He contended that the System Administrator is not able to view or identify passwords online.

17. He admitted that he did not attend the disciplinary hearing for the Claimant. He further admitted that the Appeal committee has not yet been constituted to hear the claimant's appeal and stated that he did not know how long it takes for an appeal to be heard.

18. **JOSHUA MUTHANGYA**, an Information and Communication Technology (ICT) professional employed by the respondent at her ICT Division at the headquarters testified as Rw2. He told the court that he is pursuing a PHD in IT. He adopted his witness statement dated and filed on 8th November, 2019 as his evidence in chief. In brief, he stated that he extracted logs from the Respondent's systems which revealed that on 27th November, 2017, the Claimant stopped deductions of Kshs. 33,382 towards Grace Nyakanini's TSC No. 600509 loan which had a balance of Kshs. 2,236,594/- from Equity Bank at 1435hrs using her password number TSC 600664; that on 5th December, 2017 at 14.35 hours she again stopped deduction of Kshs. 5,715/- towards Nyakanini's loan with a balance of Kshs. 394,335/- from Mwalimu Sacco; and finally, she stopped deduction of Kshs 1,955/- towards Nyakanini's loan with a balance of kshs. 109,490.

19. RW2 testified that he gave the Claimant rights to capture 3rd Party transaction which is basically to add and delete loan transactions in the T-Pay system. He further confirmed that once the privilege is given, the user is assigned to work on either the teachers or secretariat staff. He contended that once a password has been issued the same cannot be hacked. He further stated that the T-pay system is an online system that can be accessed from anywhere by the staff and all financial institutions that advance loans to the staff of the respondent. However, he admitted that at the time of the fraudulent transactions the Respondent had not enabled the T-Pay system to pick the IP address and therefore the same was not detected. He explained that IP address is a unique network identity of any device once connected to the network.

20. On cross examination, he stated that he holds a Master in IT with 10 years' experience and currently pursuing PHD in the same field. He further testified that he is the Project Head and the developer of the T-pay System but denied that the system was his brain-child. He admitted that there is another Administrator of the IPPD separate from the T-pay system but contended that he is the one who issues privileges and rights to the Head of the IPPD. He admitted that he is the one who gave the claimant privileges to capture 3rd party transactions, that is, to add or delete loan transactions in the T-pay system. He further contended that the password he gave to the claimant could work for both teachers and secretariat staff.

21. He admitted that in 2017, the system was young and there was no instruction to the user to use it for either teachers or the secretariat staff. He denied that the password could be hacked and contended that the password could only be used by other people if the owner was careless in handling the same by revealing it, or by failing to terminate the transactions. He admitted that all the respondent's machines have IP addresses but maintained that the T-pay system is still not able to tell the location and the gadget if you log into the system. He further admitted that he never checked whether the illegal transactions were done within the respondent's premises. He admitted that with advanced tools like the Media Access Control (MAC), it is possible to identify the devices that log into the system. He admitted that there can be no two gadgets with similar IP address.

22. He denied that he was the investigator of the matters and contended that he was only asked to provide the logs which stopped the loans. He also admitted that he was not called as a witness during the disciplinary hearing and he did not know whether the claimant was shown the document produced as exhibits herein. He maintained that the system was not hacked but admitted that he did not have any certificate to prove that the computer system was able to process competent information as required under the Evidence Act. He contended that all the system access passwords are sealed and kept in a safe by the IT Director and that in case the system was hacked investigations can be done using multi-agencies including the police.

Claimant's Submissions

23. It was submitted by the Claimant that his dismissal was contrary to the provisions of Sections 43 and 45 of the Employment Act, 2007. The Claimant contended that the Respondent failed to produce any evidence to prove her involvement in the fraudulent transactions yet it proceeded to anchor the termination on the said transaction. She contended that due to the said unfair termination, she is entitled to the reinstatement to her job by dint of Section 49 of the Employment Act, 2007 and therefore urged this Honourable Court to allow the same. To buttress this argument, the Claimant cited and relied on the case of **Jadiah M. Mwarania Vs Kenya Reinsurance Corporation Limited (2018) eKLR** where the Court ordered for reinstatement of the Claimant having found that his termination was unfair, unjustified, illegal, null and void.

24. She further submitted that there was no proper enquiry and/or investigations prior to her dismissal since the Respondent failed to avail any evidence of the IP address and cameras of the office where the fraudulent transactions were carried out from. She maintained that her termination was unlawful, unfair and wrongful for want of procedural fairness. For emphasis she relied on **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR** where the Court equally ordered the reinstatement of the Claimant to her position or an equally suitable position with the Respondent, with all her back salary, allowances, benefits, and any other legal dues.

25. The Claimant further relied on the case of **Jadiah M. Mwarania Vs Kenya Reinsurance Corporation Limited (2018) eKLR** where the Court held that the Claimant's termination was unfair as he was not accorded a hearing on the allegations as envisaged in Section 41 of the Employment Act, 2007. The Court went on to find the termination as unfair the Respondent having failed to comply with the mandatory provisions of Sections 41, 43 and 45 of the Employment Act, 2007.

Respondent's Submissions

26. The Respondent submitted that she procedurally and lawfully dismissed the Claimant in conformity with the Employment Act, 2007 and the Teachers Service Commission Act. She further submitted that the dismissal was in compliance with Section 12 (2) (b) and (d) of the TSC Act and Regulation 114 of the HR Policies and Procedure Manual because it was done after receiving and investigating the allegations of her professional misconduct. She contended that she had a valid reason for terminating the Claimant's employment as required under the provisions of Section 43 of the Employment Act, 2007. In her view, she has discharged the burden of proof of the reason for dismissing the Claimant as required by the provision of Section 43 of the Employment Act, 2007.

27. For emphasis she relied on **Kenya Power and Lighting Company Limited Vs Aggrey Lukorito Wasike [2017] eKLR** where the Court of Appeal found that the employer had proved a reasonable cause for dismissing the employee and as such the termination was fair.

28. The Respondent maintained that she did accord the Claimant a fair hearing prior to her termination as evidenced by the minutes of the disciplinary hearing. To buttress this argument, she relied on the Court of Appeal decision in **Judicial Service Commission Vs Gladys Boss Shollei & Another** where the Court held that:

“Where an employer accuses her employee of misconduct by way of a query and allows them to respond to the same before a decision is taken satisfies the requirement of fair hearing or natural justice. The Court in that matter went on to find that the appellant was accorded a fair hearing on this basis.”

29. In conclusion, the Respondent urged for a finding that the evidence on record supports her case that the Claimant’s dismissal was within the law and that the same was procedural, and proceed to dismiss the suit with costs.

Issues for determination and analysis

30. Having considered the facts of this cause, evidence and the submissions by the two sides, it is common ground that the claimant was employed by the respondent until 1.4.2019 when she was summarily dismissed. The issues for determination are: -

- a) Whether the termination of the Claimant’s employment was unfair.
- b) Whether the Claimant is entitled to the reliefs sought

Unfair Termination

49. Section 45(2) of the Employment Act provides that termination of an employee’s contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or based on the employer’s operational requirements; and that a fair procedure was followed.

Reason for termination

50. The reason for the dismissal was cited in letter dated 21stFebruary, 2019 as follows:

“You breached Regulation 112 (13) of the Human Resource Policies and Procedures for the TSC Secretariat staff and Part II 6(1) and Part III 9(a) of the TSC Code of Conduct and ethics in that:

On 27.11.2017 and 5.12.17 you irregularly and unprocedurally used your password to stop remittances for mwalimu sacco and Equity Bank loans for TSC 60059 – Grace Nyakanini Muthangani so as to create a payslip for her to acquire a loan with Standard Chartered Bank.”

51. The Respondent’s case is that the Claimant was issued with a unique password and rights on her T-Pay and IPPD platforms that could allow her access the system and capture data and make entries therein including that which she was accused of. The password given to her enabled her to deal with both teachers and secretariat staff but her job description only restricted her to teachers’ section. However, the Respondent further maintained that in the year 2017 the system was new and that it was susceptible and as a result one could not detect the IP address that was used to access the system to make the changes. Nevertheless, Rw2 insisted that he retrieved the logs and confirmed that the claimant’s T-pay password TSC 600664 was used to make the illegal transaction in favour of Grace Nyakanini, a secretariat staff.

52. The Claimant maintained that the Respondent failed to avail evidence linking her to the irregular transactions insisting that she failed to indicate the IP address that was used to make the alleged changes. She contended that she was not on duty on the material days when the alleged misconduct occurred and as such she could not access the Respondent’s platform while away from the office. She further contended that her password could have been hacked and used to commit the fraud.

53. Rw2 denied that the claimant’s password could be hacked and contended that the only reason one could use the claimant’s password was if she acted carelessly by revealing it or if she failed to terminate transactions. He further contended that any user with a password could assess the T- pay system from anywhere provided he has an electronic device including a cellphone.

54. I have considered the evidence by all the witnesses and submissions by counsel. There is no denial that Rw2 is an IT expert holding Masters Degree in IT and currently pursuing PHD in the same field. Although he admitted that he was not the investigator of the misconduct herein, he confirmed that he picked the logs and verified that the password used to authorize the illegal transaction on the T-pay system belonged to the claimant. He further confirmed that he is the one who allocated the privileges to the claimant and although her job description was limited to teachers’ section, her password could deal with the secretariat staff as well. The evidence by Rw2 cannot be wished away. I would say that it was not rebutted at all. It is trite that official passwords are top secret and that it is upto the system users to safe guard their password by not revealing the same to other people or by leaving transactions in the system unterminated.

55. In addition, I find that the T-pay system was accessible from outside the respondent’s premises because it was intended to serve both the internal users and third parties including financial institutions. It is my view that the respondent has proved on a balance of probability that there was a valid and a fair reason related to the claimant’s conduct that justified the impugned summary dismissal by dint of section 44(4) (c) and (f) of the Employment Act. The said provisions entitle an employer to dismiss his employee for improper performance of his duty, and for committing a criminal offence which is punishable by imprisonment.

Procedure followed.

56. Section 41 of the Employment Act provides that: -

(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

(2) Notwithstanding any other provision on this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make."

57. A look at the interdiction letter from the Respondent dated 8th October, 2018 to the Claimant, clearly sets out the alleged offence committed by the Claimant and that she would be accorded an opportunity to make her representations before the case is determined. Upon being presented with the report of the investigations to the illegal transactions on the IPPD Payroll system and the T-Pay online system dated 11th July, 2018, the Claimant was issued with yet another show cause letter dated 24th July, 2018 which she responded to on 27th July, 2018.

58. After considering her response, the respondent constituted a Disciplinary Panel in line with her Human Resource Manual and a hearing was conducted on 4th September, 2018 that resulted in the Claimant's interdiction. The respondent produced the minutes of hearing as an exhibit and the Claimant did not dispute the same or its accuracy. She was further invited for yet another hearing on 21st February, 2019 which she also did not dispute. It is therefore clear as the day that in applying the provision of section 41 above to the facts of this case, the claimant was accorded a fair disciplinary hearing before the decision to terminate her employment was made.

In **Judicial Service Commission Vs Gladys Boss Shollei & Another [2014] e KLR** the Court of Appeal held that:

"Where an employer accuses her employee of misconduct by way of a query and allows them to respond to the same before a decision is taken satisfies the requirement of fair hearing or natural justice.

59 In the case of **Mary Chemweno Kiptui –v- Kenya Pipeline Company Limited [2014] eKLR** Mbaru J held:

"Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical Incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee."

59. Finally, in **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the

termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

60. Having found that the respondent has proved on a balance of probability that there was a valid and fair reason for dismissing the claimant and that fair procedure was followed, I must return that the dismissal was fair and lawful within the meaning of section 45 of the Employment Act.

Reliefs sought.

61. The primary relief sought is reinstatement to employment, but having found that the Claimant's dismissal was fair and lawful, the said relief is declined. For the same reason the alternative prayer for compensation is also declined because by didn't of section 49 of the Act, such reliefs are anchored on a finding of an unfair termination of a contract of service.

62. In addition, the claimant is not entitled to payment of the salary withheld during the period of interdiction as her interdiction letter clearly provided that she was only entitled to half salary during the period of her interdiction.

63. In the end the entire claim fails and the suit is dismissed. Each party shall bear her own costs considering the fact the claimant has lost half salary during the interdiction period.

Dated, signed and delivered at Nairobi this 21st day of August 2020.

ONESMUS N, MAKAU

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE