



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 424 OF 2015

(Consolidated with CAUSE 425 OF 2015)

MOURINE ACHIENG MADAGOW.....1ST CLAIMANT

PETER KIWASI MBELE.....2ND CLAIMANT

VERSUS

AFRICAN BANKING CORPORATION LTD.....RESPONDENT

JUDGMENT

1. The Claimants instituted separate suits against the Respondent on 19.3.2015 but on 31.5. 2018 the suits were consolidated. Both Claimants accused the Respondent of unfair and unlawful termination of their employment contracts and prayed for:

- a) A finding that the termination of the Claimants' contracts was unfair and unlawful.
- b) Compensation in the sum of Kshs. 777,000/= (1st Claimant) and Kshs. 1,867,824/= (2nd Claimant) as more particularly set out in paragraphs 38 and 43 of their Claims.
- c) Interest on (b) above at court rates from 1st November 2014 until payment in full.
- d) Certificates of service.
- e) Costs of these proceedings and interest thereon at court rates from the date of judgment until payment in full.

2. The facts of the case are that Claimants were employed on fixed term contracts by the Respondent before they were given employment permanent as Customer Service Representative and Cash Officer respectively. The 2nd Claimant was the 1st Claimant's supervisor. The 1st claimant served the Respondent for 3 years while the 2nd claimant served approximately 6 ½ years before they were summarily dismissed on 9.2.2015. The dismissal was in relation to an alleged fraudulent withdrawal of Kshs. 1,950,000/= on 28th July 2014 from a customer's account domiciled in the Respondent's Eldoret Branch. According to the claimants, they acted diligently and did nothing wrong in relation to the said transaction. They accused the employer of not following a fair procedure before dismissing them by abandoning the initial proceedings after hearing them and instituting fresh charges without any proper basis.

3. The respondent filed defence on 7.5.2015 admitting that she employed the claimant but denied that she dismissed them unfairly and unlawfully. According to her, the dismissal was fair and lawful because the claimant failed to followed the bank's payment procedure and thereby occasioned financial loss to the bank. She further averred that the claimants were served with show cause letters and thereafter invited to a fair hearing before the dismissal, but although they attended the first hearing, they declined to attend a second hearing. Finally, she averred that after the dismissal, she paid the claimants their rightful terminal dues.

4. The suit went to full hearing where both sides gave evidence and thereafter filed written submissions.

Evidence

5. Mourine Achieng joined the respondent bank in 2011. She testified as Cw1 and adopted on her witness statement dated 26/02/2018 as his evidence in chief, in which she narrated the details of the said transaction which is subject of this suit. She testified that on 29.7.2014, she received a transfer instruction form an account Holder by the name Oval Tower Systems Limited and she verified the signature in the system and find that it was okay. Thereafter, she sent an email to Eldoret Branch (domicile branch of the paying customer) attaching a scanned copy of the cheque number 152 plus the deposit slip for the branch to confirm if it was ok to effect because according to the bank procedure, any

amount above kshs. 250,000 cannot be paid without approval from the mother branch of the customer whose account is being debited.

6. She further testified that it is the duty of the mother branch to call its customer to him through a telephone call and verify whether he has issued the cheque to the payee. She further stated that after a while, she received email from Elizabeth Magut of the Eldoret branch confirming that the cheque was in order and based on that confirmation, she proceeded with the transaction. However, when she tried creating a transaction ID, she realised that the cheque had been used, and she took it to her supervisor, the 2nd Claimant, who advised her to use the voucher option since the cheque had been used but clearly narrate in the system that cheque number 152 had already been passed.

7. She stated that she complied with the advice from her supervisor by creating transaction ID DV1907 and indicated a narration that CHEQUE NO. 152 ALREADY PASSED on both the credit and debit side of the DC 1907 created. Thereafter, she scanned the cheque and the deposit slip and sent an email to the Central Back Office (CBO) for further verification and used the trail of email since it was above her transaction limit of Kshs. 50,000. After a while the Head of the CBO, Ms. Costa verified the DC1907. Thereafter she learned that the transaction was fraudulent.

8. The claimant went on to state that on 29.9.2014 past 5 pm she was served with a show cause letter from the HR Office requiring her to respond by 1.10.2014, 5.30pm and she complied denying the two charges which included failure to follow the payment procedure by failing to inform her supervisor or verifier that the material cheque had previously been passed; and misrepresenting the transaction details by narrating in the system that it was a voucher debit and not a cheque. On 28.10.2014, she received another letter inviting her to a disciplinary hearing on 30.10.2014 at 12.00 pm and she attended. She also responded to all the questions raised to the best of her knowledge but according to her the panel did not want to listen to her explanation about the narration she gave in the system but the verifier allegedly failed to see.

9. She testified further that, on 12.11.2014, she was summoned to the HR Office where she was served with a suspension letter stating that after the disciplinary hearing established that, first, she failed to avert a fraud by failing to alert the Eldoret Branch that the said cheque had been passed but rather opted to write a narration in the system; and secondly, she failed to query the system to establish the nature of error. The letter further informed her that she had been suspended without pay until 21.11.2014 or until she paid to the bank kshs. 650,000. Being dissatisfied she wrote a protest letter on 17.11.2014 and she was summoned to the bank on 24.11.2014 where she was kept waiting at the HR Office until left after no one talked to her.

10. Thereafter she was not paid any salary and kept making demands personally and through her lawyer until 3.12.2014, when she was summoned again to the HR Office where they recorded statements with Banking Fraud Unit (BFIU). At the end of December 2014, her staff account was credited with kshs. 13,587.87 and a payslip was sent to her. Thereafter, she received another letter from the bank, lifting the all previous charges and proceedings, but charging her afresh with similar charges, inviting her to another disciplinary hearing on 17.1.2015 and placing her on suspension afresh. However, she declined to the fresh disciplinary process and on 9.2.2015, she was dismissed from employment. Thereafter she appealed but the appeal was dismissed. on 9.3.2015, she cleared with the bank.

11. She maintained that her dismissal was wrongful and salary was withheld without any legal justification. She further argued that her reputation was lowered and her chances of securing future employment were minimized.

12. On cross-examination, she admitted that Kshs. 1,950,000 was lost in the said transaction which she processed. She maintained that the cheque involved had been used before and she reported the matter to her supervisor. She contended that a used cheque can be used again with the authority from the Supervisor. She admitted that she never reported to the Branch Manager because it was upon her supervisor to report to the said branch manager. She further admitted that she was served with a show cause letter and later attended a disciplinary hearing before being suspended and ordered to pay Kshs. 650,000.

13. She maintained that when she refused to pay the money she was summoned for questioning by the Anti-Fraud Unit Officers. Thereafter she received letter withdrawing the disciplinary proceedings and the suspension letter dated 12.11.2014 but charging her afresh and inviting her to a fresh disciplinary hearing. She maintained that the transaction leading to the said loss of money was handled by 4 people but only her and the 2nd claimant faced disciplinary process.

14. CW2, Peter Kiwasi Mbele relied on his filed witness statement plus his 24 documents as his evidence in chief. He explained that when a cheque received is above the branch limit, it is scanned and sent by email to the domicile branch for confirmation. He further explained that his branch had a transaction limit of kshs. 250,000 and as such when the cheque herein of kshs. 1,950,000 was received by Cw1, it was emailed to the Eldoret Branch Manager and copied to him as the Cash Supervisor, and the CBO. He contended that the said correspondences as a matter of procedure are fed into the Bank's System. After confirmation and approval by the domicile branch, the CBO approved and it was paid. He contended that verification by CBO is the final authority to pay.

15. He admitted that that he never informed the Branch Manager about the cheque contending that it was not his duty to inform the branch manager about the cheque since the branch manager does not deal with cash. He contended that the duty was on the teller to seek approval and verification and denied that he authorised the Cw1 to pay without verification of the cheque.

16. On cross-examination, CW2 admitted that was the Cash Officer, his roles were to supervise tellers and physically check whether transactions are genuine. He contended that he was reporting to the Operations Officer and not the Branch Manager. He further stated that he saw the said cheque and confirmed that it was genuine in every way only that its number had been used before. He explained that he could not make any payment above Kshs 250,000/= which was his limit. He contended that he saw the email which was sent to the domicile branch attaching scanned copy of the cheque. He contended that the operations Manager was absent on that day and as such he was sitting in for him.

17. He testified that he was aware that Cw1 passed the cheque as a debit voucher but denied that he advised her to do so. He stated that the matter was straight forward and it was not the first time a debit voucher was used contending that it used to happen whenever a customer went to the bank without his cheque or if presented a cheque that had been used before.

18. He denied that being given any chance to defend himself before termination and contended that although he was invited to a hearing vide the letter dated 13.11.2014, he was not given time to explain himself. He contended that his attempts to explain anything, it was brushed aside and rubbished. However, he confirmed that he went to sign for his pension dues and cleared with the bank.

19. In re-examination, CW2 reiterated that if a cheque bore a number of a cheque that had been already used, the procedure is that, if the sum involved is beyond the branch limit, it was forwarded to the domicile branch after which his branch could do nothing without approval from the domicile branch and the CBO. He maintained that the debit voucher was used after the required approval and verification by the domicile branch and the CBO.

20. RW1, Lucy Wariara Ngethe, the Respondent's Head of HR also adopted her two written witness statements dated 25/04/2019 as her evidence. She confirmed that the claimants were employed by the respondent until February 2015 when they were dismissed in connection with a fraudulent bank transaction which was done under their watch. She stated that in September 2014, the bank received a complaint from one of its customers, Elijah Kipchumba Rotich, holder of Account number 00xxxxxxxxxxxx domiciled in Eldoret Branch, to the effect that kshs. 1,950,000 was withdrawn from his account without his authority and paid to Account number 000xxxxxxxxxxxxx belonging to Ovaltower Business System.

21. She further testified that the respondent did investigations and found that on 28.7.2014, a cheque for the said amount belonging to the complainant was cleared in favour of account number 000xxxxxxxxxxxxx for Ovaltower Business Systems. She stated that it was further found that the number of the said cheque had been passed before and the 2nd claimants did not exercise due diligence and alert the CBO of the same but instead went ahead to authorise the teller to pass the cheque as a debit voucher against the respondent's policy. She explained that the respondent's policy provides that when the same cheque series is presented for payment for the second time, the cheque is retained for investigations.

22. She further testified that the claimant was served with a show cause letter and later attended a disciplinary hearing on 4.11.2014 where he admitted that he was alerted by Cw1 that the cheque in question had been presented earlier on for payment and honoured; that he relied on the that the confirmation email sent to Magut of Eldoret Brnch addressed the issue; that he knew his role as the Cash Officer was to confirm the genuineness of the cheque and stamp them after verification; that it was an oversight for him to fail to inform the Eldoret branch that the cheque had been presented earlier for payment; that he failed to escalate the matter to the Branch Manager because he felt it was within his mandate to handle the matter; and that it was a in issue for concern if a cheque is presented twice.

23. As regards the 1st claimant, Rw1 testified that the investigations revealed that when the claimant posted the cheque to the system, she received a notification that the cheque had earlier been presented for payment and was honoured; that the claimant had requested through email for confirmation from the domicile branch that the cheque was proper, but deliberately and in breach of the respondent's policy, she had failed to inform the domicile Branch Manager that the cheque had been presented for payment earlier on and passed; and that aAs a result of the said non-disclosure by the 1st claimant, the domicile branch confirmed that the cheque was in order.

24. Rw1 further testified that the in breach of the bank's policy, the 1st claimant failed to hold the cheque for investigations and instead processed and paid the duplicate cheque as a debit voucher. As a result of the said investigation, the 1st claimant was served with a show cause letter and later she was invited to a disciplinary hearing on 28.10.2014 where she defended herself. she contended that the claimant admitted that she processed the cheque despite knowledge that it had earlier been presented and honoured and assumed that the Branch manager had informed the customer of the transaction in question; that the Finance control system alerted her that the cheque had earlier been presented but thought that someone had fed another cheque erroneously; that she failed to query the system to establish the nature of the error and instead colluded with Cw2 to alter the instrument from cheque to debit voucher; and that she was aware that impersonator can use a person's number to commit a fraud.

25. She further contended that, the letter inviting the claimants to the hearing gave them the option of being accompanied a representative but they attended without any; that after the hearing the claimants were suspended until they to pay kshs 650,000 each to the bank; and that thereafter the claimants were invited to a second hearing and were offered adequate time to prepare for their defence but they declined. As a result, they were dismissed and paid their terminal dues being Kshs. 351,227.67 which was paid to him on 22/10/2015 to 2nd claimant and Kshs. 169,535.01 to the 1st claimant through their respective bank accounts.

26. On cross-examination she stated that the reason for dismissal was failure to follow banking procedures and that the Claimants had the final decision on whether or not to pay even if the Eldoret Branch had confirmed that the cheque was okay. She contended that Clause 17.0 of the BDP deals with clearance of cheques and 17.1 requires officers to handle presented cheques with due care. She further contended that the system in this case alerted Cw1 that the cheque had been presented earlier and honoured. She admitted that the teller herein was only allowed to pay upto kshs. 50,000.

27. She denied that Cw2 had a limit of Kshs 250000 and contended that he had no limit because he was in charge of all money in the Bank and he was reporting to the Operations Manager. She stated that the staff who confirmed the cheque from Eldoret Branch resigned after being served with a show cause. She further stated that the Claimants had committed themselves to offset their loans using their terminal dues.

28. In re-examination, Rw1 maintained that it was wrong to use debit voucher because the account only required cheques only and no other instruments.

Claimants' Submissions

29. The Claimants submitted that their testimonies were consistent with the claim and had corroborated each other. They further submitted that the Respondent has failed to shake their evidence that they diligently discharged their duties, and as such their dismissal was unfair and unlawful. They submitted that RW1 failed to produce evidence to prove that CW2 had no payment limits at the bank. Further, that RW1

produced a policy document that was not signed by the bank officers or the two Claimants. They further contended that there was no provision in the policy document stating that a cheque that had previously been passed ought not to be cleared but retained for investigations.

30. The Claimants submit that the Respondent did not follow the law and has failed to justify the Claimants' dismissal yet she the police did not institute charges against them. They relied on the case of **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** where the Court noted that Fair Procedure is provided for in section 41 of the Employment Act but under Section 26 of the Act parties are also bound by their internal terms and conditions of service provided they are not inferior to the law.

31. The upshot of the Claimants' submissions is that they have demonstrated that their contracts were unfairly and unlawfully terminated by the Respondent and urged this Court to find that they are entitled to their respective claims. They further contended that the Respondent also failed to produce documentary evidence to support its allegations that the Claimants owed her any money in form of loans and questioned the computation of the final dues presented by RW1 since it differed from the amount calculated in the Respondent's responses to the claims.

Respondent's submissions

32. The Respondent cites the case of **Walter Ogal Anuro vs. Teachers Service Commission (2013) eKLR** where the court held that substantial justice refers to establishing a valid reason for the termination of employment while procedural fairness refers to the procedure adopted by the employer in effecting the termination. She submitted that she followed a fair hearing by serving the Claimants with show cause letters and thereafter invited them to a hearing before its Disciplinary Committee. She also submitted that the invitation letters indicated the reasons for appearing before the disciplinary committee and accorded them an opportunity to call any employee as their witness.

33. The Respondent relied on **Cause 280 of 2013; Caliph O. Ogega v National Social Security Fund (unreported)** where the court held that before any employee is terminated or dismissed he must be taken through a fair procedure where such an employee must receive notice with an outline of the reasons for such termination and then accorded a hearing of the employee as required under 41 of the Employment Act.

34. The Respondent submitted that the termination letter set out the reasons for dismissing the claimants as required under **Section 43 of the Employment Act**. She relied on the case of **Paul Wachiuri Ndonga vs Keroche Breweries Limited [2018] eKLR**.

35. Finally, she submitted that she filed before this Court on the 25th of November 2019 and served upon the Claimants' advocates with the evidence that the Claimants owed her money. Further, she contended that she does not owe the claimants anything since their dues were tabulated, processed and paid out to them. She also contended that the Claimants have never requested for the certificate of service or bothered to get the same from her. Therefore, she asked this Court to find that the Claimants' claims are baseless and dismiss the suit with costs since she observed the necessary requirements for lawful termination of an employment contract.

Issues for determination and analysis

36. I have carefully considered the pleadings, evidence and submissions and found no dispute that the claimants were employed by the respondent until 9.2.2015 when they were dismissed for a cause by the respondent. The issues for determination are:

- i) Whether the dismissal of the Claimants was unfair and unlawful.
- ii) Whether the Claimants are entitled to the orders sought.

Whether the dismissal was unfair and unlawful termination

37. **Section 45 (1) and (2) of the Employment Act** provides that—

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

38. As regards the reason for termination, **Section 43(1) of the Employment Act**, requires the employer to prove the reason(s) for the termination and in default the termination is unfair within the meaning of section 45 of the Act. On the other hand, **Section 41 of the Act** provides in mandatory terms that before terminating employee's contract of employment on account of misconduct the employer must accord a fair hearing to the employee in the presence of another employee of his/her choice.

Was there valid reason for dismissing the claimants herein.

39. The termination letter to the 1st claimant dated 9.2.2015 set out the charges led to her summary dismissal

“1. Failure to follow the payment procedure as you did not inform your supervisor or verifier that the cheque had previously been passed as observed in the Finance System which facilitated the loss of money;

2. For mis-representing the transaction details by posting on the Finance System that it was a voucher debit and not cheque.”

40. I have carefully considered the email correspondences between the 1st claimant on the one hand, and the domicile branch and the CBO. It is a fact that the 1st claimant send a scanned copy of the subject cheque plus the banking slip to the Domicile branch and it was verified and confirmed for payment by Ms. Magut on the same day at 3.33 pm. It is also a fact that after the said approval, the 1st claimant forwarded scanned copy of the cheque as DC 1907 plus the banking slip to Ms Costa of the CBO by the email dated the same date at 3.44 PM. Again it is a fact that all the said emails were copied to the 2nd claimant who also admitted in evidence that the 1st claimant informed him that she had noted from the System that the subject cheque had been used earlier.

41. It follows therefore that the first reason for dismissing the 1st claimant as captured under the first charge was not valid because the supervisor admitted that she informed him about the used cheque, and also because she has demonstrated by the said email correspondences that she notified the verifier that the transaction was involving a cheque. Further, all the said officers had access to the same System which had indicated that the cheque had earlier been used but neither the supervisor nor the verifier queried or stopped the transaction. Under section 43 of the Employment Act, failure by the employer to prove a valid reason for dismissing an employee renders the dismissal unfair within the meaning of section 45 of the Act.

42. As regards the 2nd claimant, he admitted that he was the supervisor of the 1st claimant and that the claimant informed him of the said cheque which the system had alerted her that it had previously been presented and honoured. Although he denied that he advised the 1st claimant to treat the cheque as a Debit Voucher, he maintained without documentary proof, that the said used cheque was not the first to be used again, and that previously used cheque were dealt with as debit voucher in the bank. The employer has denied the said allegation and blamed the 2nd claimant for negligence for letting the transaction to go through without alerting his seniors.

43. Having considered the evidence presented, this Court is of the view that, without the authority of the 2nd claimant, the 1st claimant could not have proceeded with the transaction of processing a cheque which had previously been presented and honoured. He did not give reason as to why the 1st Claimant would falsely accuse him of having advised her to treat the subject cheque as a Debit Voucher. Therefore, I believe the evidence by Cw1 that the 2nd claimant, being her supervisor, is the one who advised her to treat the said cheque as a Debit Voucher.

44. He was the right person to have stopped the fraudulent transaction at the branch level, and then seek advice from the senior managers in the bank. I agree with the respondent that the 2nd claimant dealt with the transaction negligently and as a result a substantial amount of money was lost. Consequently, I find that the respondent has proved on a balance of probability that the reason for dismissing the 2nd claimant was valid under section 44(4) of the Employment Act.

The procedure followed

45. Section 41 of the Employment Act provides:

“(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 of 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.”

46. In this case the claimants have admitted that they were served with show cause letters and thereafter they were invited to a hearing in the company of fellow employee of their choice. Although they alleged that the notice given for the hearing was too short, they did not protest in writing or even ask for additional time. Again when the employer opted to withdrawal the proceedings and invited them for fresh hearing, they protest through their lawyer and asked the employer to determine their case on the basis of the earlier proceedings because in their view the process was fair and they did not have any new evidence to offer.

47. Accordingly, I agree with the respondent that the claimants are on record as admitting that they had been accorded a fair hearing, and consequently proceed to find that the respondent has proved by evidence that the dismissal of the claimants was in accordance with a fair procedure. Having found that the respondent a proved valid reason for dismissing the 2nd claimant and that a fair procedure was followed, it is my holding that the dismissal of the 2nd claimant was fair within the meaning of section 45 of the Act. However, as regards the 1st claimant, the termination of her employment contracted was unfair within the meaning of section 45 of the Employment Act because there was no valid reason to justify the same.

Reliefs

48. In view of the finding that the 1st Claimant was unfairly and unlawfully terminated by the Respondent for want of a valid and fair reason, I further find that she is entitled to compensation under **Section 49 of the Employment Act**. Considering that the 1st claimant had served for over 3 years without any warning letters, and the fact that she was not able to secure an alternative job after the dismissal, I award 6 months' gross salary as compensation for the unfair dismissal. According to the payslip for October 2014, the 1st claimant's gross pay was kshs. 37,000, hence she will get kshs, 222,000 as compensation.

49. As regards the other reliefs sought, I have considered the evidence presented including the appointment letters given to the claimants in addition to the computation of terminal dues paid to them after the separation and I find that the claimants are not entitled to the said reliefs save for Certificate of service under **Section 51 of the Employment Act**.

50. In the end, I enter judgment in favour of the claimants as follows:

1st claimant

Compensation Kshs. 222,000

Certificate of Service

Costs plus interest at court rates from the date hereof but the above award is subject statutory deductions.

2nd Claimant

Certificate of Service

No order as to costs.

Dated and delivered at Nairobi this 17th December, 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