



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

Cause 1658 of 2014

**ANTONY CHELIMO.....CLAIMANT
-VERSUS -
KENYA COMMERCIAL BANK LTDRESPONDENT**

JUDGMENT

Introduction

1. The claimant brought this suit on 19/9/2012 contending that he was unfairly dismissed from his employment by the respondent on 30/5/2012. He therefore prayed for the following reliefs:

a) A declaration that the termination of the claimant’s employment was unlawful, wrongful and unfair.

b) Terminal dues and compensation for unfair termination:

| | | | | | | | |
|------|---------------------|-----------------|----|-------------------|-------------|--------|--------------|
| i. | Gratuity | 25% | x | 199,961x17 | x12 | kshs | 10,198,011 |
| ii. | 3 month’s | salary | in | lieu | of | notice | kshs 171,243 |
| iii. | Severance | pay | | 15%x199,961x17x12 | | kshs | 6,118,806.60 |
| iv. | Compensation | for | | unfair | termination | kshs | 1000,000 |
| v. | Loss | of | | salary | | before | retirement |
| | kshs. 199,961x10x12 | kshs 23,995,320 | | | | | |
| vi. | Costs and interest | | | | | | |

2. The respondent filed defence on 23.10.2014 denying the alleged unfair and unlawful termination of the claimant’s services and averred that the termination was fairly done on ground of gross misconduct and after being accorded an opportunity to defend himself. She further denied claimant’s entitlement to the reliefs sought and prayed for the suit to be dismissed with.

3. The suit was heard on 16.4.2018 and 8.10.2018 when the claimant testified as Cw1 and the respondent called her Head of Employee Relations and Wellness Mr. Robin Ngoje as Rw1. Thereafter both parties filed written submission which I have carefully considered alongside the evidence tendered.

Claimant’s case

4. The claimants testified that she was employed by the respondent as a as Clerical Officer on 1.10.1985 and rose through the ranks to the position of Assistant Manager Service Quality and Compliance (SQC) earning kshs. 199,961 per month.

5. On 1.4.2014 he sought leave to be away on 2.4.2014 and report back on 3.4.2014. He further testified that on 1.4.2014, he handed over the strongroom keys/ combination to his custodian alternate in the bank, Mr. Lusweti. When he reported back on 3.4.2014 at 8.15 am, the Manager (SQC), Mr. Nyabasia called him to the Manager’s and asked him to take 2 more leave days but he declined because he did not ask for the same and that his planned farming activities had been frustrated. He therefore proceeded with his work but he did not take over the Strongroom keys immediately because he found Mr. Nyabasia and Mr. Lussweti had already opened the strongroom meaning that Mr. Lusweti continued with role of controlling the strongroom and movement of money.

6. Cw1 further testified that on the said day, he went for his lunch at 3pm and returned at 4pm but his effort to take over the strongroom role from Mr. Lusweti were frustrated by Mr. Nyabasia who said he had time-locked the Vault until 8am the following. Never the less, cw1 signed the tellers' cross entries without verification on the understanding that he will do the same the following day after accessing the money.

7. Cw1 further stated that on 4.4.2014 at 7.30am, Mr. Nyabasia notified him by phone that he was sick and he was going to hospital in Eldoret. He further notified him that he had handed over his keys to his alternate Mr. Chirchir. Cw1 further stated that on that day, the strong room was opened in his presence by Mr. Chirchir and Mr. Lusweti, who was still having the keys. That upon checking the cash summary and the cash in the safe, they discovered a deficit of kshs.3.2 million from the reserve and kshs. 800,000 from the ATM on 3.4.2014 and a further kshs.500,000 from ATM on 2.4.2014. He then reported the matter to the Branch Manager who called the police and Mr. Nyabasi was arrested and charged in court. That he later learned that Mr. Nyabasi paid kshs.2 million to the bank.

8. Cw1 further testified that, on 17.7.2014, he received a letter inviting him to a disciplinary meeting on 23.7.2014 at the Head Office and he complied. He appeared before 4 managers but his request to call his advocate was declined. That after the hearing he signed the minutes and on 28.7.2014 he was terminated for loss of confidence, a reason that in his view did not related to the theft of money on 3.4.2014. He therefore prayed for the reliefs set out in his claim.

9. On cross examination he admitted that he held a managerial position and a custodian of the safe keys. He maintained that on 2.4.2014 he was on an authorized sick leave and on 3.4.2014 he was not able to take over the keys from Mr. Lusweti. He further stated that when he discovered the deficit for 3.4.2014 he also checked the documents for 2.4.2014 and noted a further deficit of kshs.500,000. He admitted that he was served with a cautionary letter dated 28.6.2013. He further admitted that the letter inviting him the disciplinary hearing gave him the right to be accompanied by another employee to the hearing. Finally he admitted that he gave his defence freely at the hearing. He however denied having been paid his dues after the termination.

Defence case

10. Rw1 testified that the claimant was employed by the respondent vide the letter dated 19.9.1985 and rose through the ranks to become Assistant Manager SQC based in Kimilili from 25.10.2012. He however contended that the said promotion was through leniency because the claimant had on diverse dates breached the law, contract of employment and/ or bank policies including overdrawing his card account and perpetrating fraud, for which he was served with warning letters.

11. Rw1 further testified that the claimant failed or neglected to heed to the said warnings and on 3rd and 4th April 2014 the claimant was suspected to have been involved in theft of kshs.4.5 million from ATM and reserve. An investigation was done and a Forensic Report prepared which showed that fraud had been committed and the claimant was invited to a disciplinary hearing vide the letter dated 17.7.2014 where he was given the charges. That the claimant waived the right to be accompanied by a fellow employee to the hearing on 23.7.2014 and on 28.7.2014, he was terminated after being found guilty of gross misconduct. Thereafter the claimant was issued with a Certificate of Service.

12. Rw1 contended that the termination of the claimant's services was fairly done for said gross misconduct and after following due process. He therefore prayed for the suit to be dismissed with costs.

13. On cross examination, Rw1 admitted that he never participated in the termination of the claimant and that his evidence was from the reports and the correspondences he received including the disciplinary proceedings. He stated that the forensic report stated that the claimant went to the Vault with the Manager SQC to collect kshs 2,000,000 and left him there alone. He maintained that by the claimant leaving the manager SQC alone gave him the opportunity to steal from the Vault.

14. Rw1 however admitted that Mr. Lusweti signed for the keys to the outer strong room grill and the Safe on 2.4.2014 and 3.4.2014 while the claimant signed for the keys on 1.4.2014 and 4.4.2014. He further admitted that the email date 15.17.2014 by Aura Jacob showed that on 3.4.2014, only Mr. Nyabasia signed the key Register and at the close of the day, Mr. Nyabasia and Mr. Everton Lukorito signed the Cash Management Register. Rw1 further admitted that page 8 of the Forensic Report found that Mr., Nyabasia was liable for the theft of Kshs 4.5 million.

15. Rw1 however stated that the report found the claimant guilty of negligence of duty by giving the SQC manager the opportunity to steal for which a severe reprimand was recommended against the claimant. He contended that there was evidence to prove that the claimant accessed the Safe on 3.4.2014 and drew kshs.15 million and failed to record in the Cash Management Register. That on the said day the claimant and Mr. Nyabasia removed kshs.1 million from the safe for loading to the ATM and proceeded to lunch without ensuring that the money was actually loaded to the ATM and that even after the lunch he never verified the loading to the ATM. That further on the same day the claimant signed to confirm that he received kshs 1.4 million from the tellers which was never taken to the safe. Finally, on the same day the claimant signed the ATM Journal indicating that there was a deficit of kshs.500,000 which was admitted by the SQC manager, and failed to escalate the matter to the branch Manager.

Analysis and Determination

16. There is no dispute that the claimant was employed by respondent until 28.7.2014 when he was terminated with immediate effect. The issues for determination are:-

- a) Whether the termination was unfair and unlawful.
- b) Whether the reliefs sought should be granted.

Unfair termination

17. Under Section 45(2) of the Employment Act, termination of employee's employment contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid and fair reasons is one that relates to the employees conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refers to the process of according the employee a hearing before termination of his contract of service and post termination process including right to appeal, payment of terminal dues and issuance of certificate of service.

Reasons for termination

18. The reasons cited in the termination letter was indicated as follows:

“ After due investigations, it has been established that you committed acts of gross misconduct where you failed to ensure proper management and handling of safe keys leading to theft of kes.4.5 million between 2nd and 3rd of April,2014. You also removed Kes.1million for the ATM and never bothered to ensure that the same was recorded and loaded into the ATM but you simply walked away for lunch. You also received kes.15 million and failed to ensure that the same was recording the Safe Cash Register as is required. In another instance, you signed a cross entry of kes.1.4million meant for the safe without seeing the actual cash. Your action is contrary to the provisions of the bank's Operational Manual on handling of safe keys and cash management.

As a consequence, the bank has lost confidence in you and your service with the bank is hereby terminated with effect from today's date in accordance with the manager's Terms of service. All monies due to you including one month's salary in lieu of notice will be paid to you in due course.”

19. According to the claimant the said reason for his termination did not relate to the theft that occurred on 2nd and 3rd April 2014. However in my view the reason cited in the termination letter related to the claimant's conduct *vis a vis* the said theft. He admitted that he reported back to work on 3.4.2014 and failed to take over the strong room keys and the duty of controlling movement of money; he participated in removing money from the safe for loading into the ATM on the same day but failed to ensure that Mr. Nyabasia loaded the money. Finally he admitted that on the same day he returned from lunch at 4pm and found a cross entry of kes.1.4million meant for the safe without seeing the actual cash.

20. According to the respondent the claimant's action is contrary to the provisions of the bank's Operational Manual on handling of safe keys and cash management. In particular the claimant was found to have acted in gross negligence by breaching the dual custody principle whilst undertaking the vault and ATM functions and thereby provided for an opportunity to the Manager SQC to steal kshs.4.5 million from the Vault. Consequently, I return that the respondent has proved on a balance of probability that there was a valid reason for terminating the claimant's service.

21. Under section 44(4) (c) of the Employment Act entitles the employer to summarily dismiss an employee who neglects or performs the duty in a negligent manner like in this case. That was not the first time the claimant had breached the employer's policies as demonstrated by the warning letters produced as exhibits. I therefore find that the respondent was entitled to terminate the claimant after losing confidence in him and his services due to the repeated gross negligence in the performance of his duties.

Procedure followed

22. The claimant admitted that he was invited to a disciplinary hearing on 23.7.2014 by the letter dated 17.7.2014, which give him the right to be accompanied by another employee of his choice, but he waived that right. He further admitted that he gave his defence freely and thereafter signed the proceedings. After considering the evidence adduced *vis a vis* the mandatory procedure provided by section 41 of the Act, I return that the respondent has proved on a balance of probability that she followed a fair procedure before terminating the claimant's services.

23. Section 41 of the Employment Act provides that, before terminating an employee on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of another employee of his choice or shop floor union official, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

Reliefs

24. Flowing from the foregoing finding, I decline to make declaration that the termination of the claimant's contract of service was unfair as prayed. For the same reason, I dismiss the prayer for compensation for unfair termination.

25. The claim for severance pay is also dismissed because the termination was not on account of redundancy. Likewise the claim for gratuity is not founded on the contract or the law and as such it must fail. The claim for lost salary due to the termination before retirement date is also dismissed for lack of merits because the employer was entitled, under section 44 of the Employment Act, to terminate the employment on account of gross misconduct.

26. Finally the claim for certificate of service is dismissed because the same was granted after service of demand letter.

Conclusion and disposition

27. I have found that the termination of the claimant's contract of service was both substantively and procedurally fair. Consequently, I dismiss the suit with no order as to costs. However the clamant will be paid the terminal dues stated in the termination letter including salary in lieu of notice.

Signed, dated and delivered at Nairobi this 31st day of January , 2019

ONESMUS N. MAKAU

JUDGE