



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 832 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

RAEL MWIYATHI MUTINDA.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

JUDGMENT

The Claimant through the firm of J. A Guserwa and Company Advocates filed the Memorandum of Claim herein alleging unlawful and wrongful termination of her employment by the Respondent. The Claimant seeks the following reliefs:

- a) A declaration that the Claimant's termination was unlawful and wrongful.
- b) Reinstatement to her previous job without loss of benefits
- c) In the alternative payment of damages
- d) Full compensation for wrongful and unlawful termination
- e) Costs for this suit with interest thereon.

The Respondent filed its Memorandum of Response denying the claimant's allegations. It avers that the Claimant was grossly negligent in the conduct of her duties.

Claimant's Case

The Claimant avers that the termination of her employment was malicious and without any justifiable cause. The Claimant testified that she worked for the Respondent as a clerk typist from 22nd February 1992 until November 2007. She testified that on 5th July 2007 she was posted to South Sudan where she also worked as a clerk.

She testified that she was terminated on 10th June 2010 while serving as the acting manager. It is her case that the Branch received a Swift Transfer Payment instruction which she effected but she had no instructions on the account she was to transfer the money from. The Claimant testified that she was later told that the transfer was fraudulent. She was required to explain the incident which she did but was served with a letter of suspension and later a termination letter.

She testified that she was never issued with any show cause letter; that she was accused of failure to perform duties as required. She testified that she did not get any report demonstrating her negligence. She testified that she served the bank for 18 years and had no history of discipline.

In cross-examination the Claimant testified that she was in the Swift Department and that she had never encountered such an incident. She testified that she blamed the system, that had proper systems been put in place no one would have debited the account.

Respondent's Case

RW1, **Juma Amimo** Tom testified that he works as a Fraud Examiner with KCB Bank and is a Senior Manager in Forensic Services.

He testified that he prepared a report dated 5th May 2010 relating to an investigation he carried out in South Sudan regarding alleged fraudulent transfer of funds from Euro Health account to a Bank of Africa Account. He testified that he reviewed the execution of the instructions and noted that by the time transfers were being done there was a freeze of funds to the tune of 1,374,820. He testified that in posting the transactions right from remittances to branch Manager who authorised the limit, there was an override which stated @Account 550021648 balance will below locked amount, SDG 1,374,820 from 20100390@ meaning 9th March 2010.

He testified that the initiation of remittance started with the acting Manager. That the Claimant gave instructions for capture for remittance purposes to the remittance clerks. He testified he interviewed the Claimant and her explanation was that she did not see the override. He testified that it could not be true since the Claimant informed him during the interview that she had undergone a simulation and hence the override could be seen.

In cross examination RW1 stated that there were 4 people who were concerned with the transfer of the funds to Bank of Africa. He testified that because there was an override, they ought not to have authorised the transfer.

RW2, **Robley Ngoje** testified that he is Human Resource Manager, Head of Employment Relations and Policy. He testified that the Claimant was deployed to KCB South Sudan in 2007 and in 2009 she was appointed the Head of Remittance. It was his evidence that the Claimant was issued with a show cause letter requiring her to explain the 2 transactions that were effected on 9th March 2010 and 12th March 2010.

He testified that the Claimant responded to the show cause letter and later suspended. He further testified that during the Claimant's suspension forensic investigations were carried. The findings of the investigations were that the Claimant was grossly negligent. He testified that based on the finding the bank constituted a disciplinary committee in South Sudan which reviewed the Claimant's statement and recommended her termination.

He testified that the Claimant appealed the disciplinary committee's decision but the decision was upheld. He testified that the Claimant was paid one month salary in lieu of notice, accrued leave of 59 days, leave allowances, withheld salary and salary arrears which amounted to Kshs.527,651.56.

In cross-examination he testified that once the investigations were completed in June 2010 the Claimant was not given a report on the investigations. That a meeting was held in May to hear the Claimant but the minutes of the disciplinary meeting were not produced in court. He further testified that the minutes produced in Court were of a meeting held in June 2010 at which the Claimant was not present as there was no requirement for her to be heard in Sudan. In re-examination he testified that the Claimant was given an opportunity to respond to the issues.

Claimant's Submissions

In the submissions file on behalf of the Claimant it was submitted that the Respondent did not present the minutes of any disciplinary meeting at which the Claimant was present. It is submitted that the Respondent did not prove that a show cause letter was issued to the claimant and that she was invited to a disciplinary hearing. It is submitted the Respondent's actions violated the Claimant's rights under Article 47 and Sections 41, 43 and 45 of the Employment Act.

The Claimant submitted that the reasons for termination relating to the irregular remittance of funds to another bank were not only not valid but totally unproven given the fact that the Claimant carried out the instructions as directed from the Head office. The Claimant therefore submitted that there being no valid reason for her termination the Respondent violated Sections 43 and 45 of the Employment Act.

The Claimant relied on the cases of **Josephine Ngatia V The Executive Director of The Non-Governmental Organisation Co-ordination And Another** where the court awarded 12 months compensation for unfair termination. The Claimant also relied on the decision in **Henry Musemate Murwa V The Public Service Commission & Another** where the Court awarded Kshs.5 million as general damages for premature termination of employment.

Respondent's Submissions

The Respondent submitted that there is no competent suit before the Court in view of the fact that the verifying affidavit was not dated. The Respondent submitted that since the claim was filed in 2013, Rule 5(1) of the Industrial Court Rules apply which provided that a Claim was to be accompanied by a verifying Affidavit. The Respondent also relied on Rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 and the decision in **Nyabuto Arambe Abusa v Kenya Power and Lighting Company Ltd [2015]** where the court held:

“These are not just mere technicalities that can be omitted and left to be addressed literally...To thus fail to state when the affidavit was made removes a very vital aspect of the same from the document, making it valueless and cannot be relied upon.”

The Respondent submitted that the Claimant was summarily dismissed for loss of funds which occurred at KCB Juba Branch. It submitted that under Section 44 of the Employment Act it is a ground for summary dismissal if an employee carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully. The Respondent submitted that the Claimant was expected to exercise due diligence in undertaking her duties.

The Respondent submitted that the Claimant was invited to a disciplinary hearing whose outcome she appealed against. Therefore, the Claimant cannot allege that she was not given an opportunity to be heard.

On the remedies the Respondent submitted that the Claimant cannot be reinstated since an order for reinstatement can only be made within 3

years as provided under section 12 of the Employment and Labour Relations Court Act and Section 49 of the Employment Act. The Respondent further submitted that the Claimant was paid compensation of Kshs.527,691 any compensation granted by the court would amount to double compensation.

Determination

The issues for determination are the following –

1. The applicable law
2. Whether the termination was unfair
3. Whether the claimant is entitled to the prayers sought.

Applicable Law

The claimant was employed by the respondent in Kenya and seconded to the respondent's sister company in South Sudan. Her letter of assignment states as follows –

“Our Ref:8953 8th November 2007

*Rael
Thro'*

Mutnda

Bank Manager

KCB SUDAN, JUBA

Dear Rael,

LETTER OF ASSIGNMENT

*We are pleased to advise that, **you have been seconded to KCB Sudan Ltd., Juba Branch to undertake Swift Operations work for a period of two years with effect from 5th July 2007.***

*Your assignment will be on your current Grade and **you will continue on your current gross salary.***

As a result of your assignment to KCB Sudan Limited the following benefits will apply while you are in Sudan:-

1. *You will be paid a foreign allowance equivalent to 20% of your monthly basic salary,*
2. *You will be paid a cost of living adjustment allowance to 10% of /our monthly basic salary.*
3. *You will be paid a daily subsistence allowance of \$50 Dollars per day. This is inclusive of incidentals, and is payable monthly in advance.*
4. *The Bank will provide you with return air tickets to Nairobi every 90 days, in addition to the inward and outward passage.*
5. *Cost of transporting personal belongings will be met by the bank as well as the cost of transporting such personal belongings to Nairobi at the end of the assignment, subject to an excess luggage limit of 500 kilograms.*
6. *A performance bonus will be paid to you as stipulated in the bank's Performance Bonus Scheme.*
7. *The Bank will provide you with food board accommodation (breakfast, lunch and dinner).*
8. *Drinking water will be provided by the Bank.*
9. *You will be entitled to annual leave at the rate of 32 working days per annum as well as rest and recuperation of 8 days, bringing the total to 40 days per annum.*
10. ***You will continue on the current Medical Scheme for self and family.** In addition you will be entitled to full local medical cover whilst in Sudan including an evacuation cover in case of emergencies.*
11. *You will be entitled to compensation of tax differential between Kenya and Sudan tax systems. The compensation (if any) is paid in Kenya Shillings subject to production of the necessary tax assessments.*

Other terms and conditions of service for unionisable members of staff as stipulated in the CBA, will apply.

On completion of your assignment, you will return to your current role in your current terms and we wish you every success in your career in the bank.

Yours Sincerely

SIGNED

LYN MENGICH

DIVISIONAL DIRECTOR, HUMAN RECOURSES

Cc Managing Director, KCB Sudan

HR Administration”

(Emphasis added)

From the letter it is clear that the claimant remained on her terms of employment in Kenya with the additional benefits pegged to her assignment in South Sudan. She was therefore subject to the terms of the Employment Act, 2007 while in South Sudan.

Whether the termination was unfair

The claimant's letter of termination states the reasons for termination as failure and/or neglect to perform duties leading to loss of confidence. The letter does not make any reference to the claimant having been subjected to any disciplinary process.

The meeting whose minutes are attached to the respondent's bundle of documents in respect of a meeting of the Human Resource Compensation Committee was not attended by the claimant. The meeting only discussed the recommendations of the Staff Disciplinary Committee. Those recommendations of the Staff Disciplinary Committee were not produced. No reference is made to the process undertaken by the Staff Disciplinary Committee before arriving at the decision.

The minutes states that the meeting rejected the “*apparently lenient disciplinary action recommended by the Staff Disciplinary Committee*”. This, and, without hearing the claimant and her colleagues, enhanced the disciplinary action to a dismissal.

From the evidence on record, the claimant was transferred to Juba Branch at the same time when the loss occurred, by the letter dated 4th March 2010. She

was to report on 8th March 2010.

The investigation report by Juma Amimo – Forensic Investigator who testified as RW1 states in the executive summary that the loss occurred on 9th and 12th March 2010. The claimant had only just reported to the Branch. The report further states that the freezing orders was received on 9th March 2010, the very day that the first fraudulent transaction of SDG 1,274,000 was transferred from the client account.

In order to appreciate the circumstances under which the fraudulent transfers occurred and the role of the claimant therein, I reproduce excerpts of the report. –

*“That on the 9th of March, 2010 at around 16.00 hours the then acting Manager Remittances of KCB Juba Branch Rael Mwiyaathi printed the funds transfer Instructions received from the Liaison office, Nairobi and assigned the same to capture clerk user SD40048 Jimmy Lodule to key in the T24 system. Lodule obtained the applicable FX rate from Treasury and inputted the instructions in the system to debit the account with SDG 1,274,000- and noted the override message indicating “Account 5500021648 Balance will fall below Locked 1,374,820.00 from 20100309”, which he accepted after allegedly confirming the account balance as SDG. 1,375,103.95 from the T24 statement of account option. **When interviewed further, he explained that he forwarded the physical documents to the acting Manager Remittances after accepting the override. The clerk also confirmed that he did not alert the Manager about the override as he knew that the Manager would be able to see the overrides before authorizing the transaction.***

That the then acting Manager Remittances, user KE8953 Rael Mwiyaathi is captured as having authorised the said transaction for the transfer of SDG 1,274,000-, though in reality she could only authorise the capture of the SWIFT message in the system, that is MT103 as the transaction was above her limit. When interviewed, she explained that she neither saw nor was she notified of the override and added that she was not aware of her authorization limit in the system as she had not been advised of the same. On further questioning to establish her understanding of the T24 system and training, she explained that she only checked the MT103 details and that she was not aware of the details contained under Inward SWIFT Details and Audit Details. The transaction process was simulated by the KCB Sudan T24 support team and from the said simulation it is clear that the said user would have seen the overrides had she accessed the Audit Details button in the authorization window. It is therefore our finding that the said member of staff did not examine the transaction fully before authorizing the same. This review also noted apparent system apathy on the part of the said acting Manager, which is clearly explained by her ignorance as to her authorization rights in the system. This in our considered view is unacceptable particularly for a person operating in such a sensitive and busy environment.

That our review has further established that the said acting Manager Remittances, Rael Mwiyaithi received the instructions to transfer SDG 89,000- from the said Euro Health account on the 12th of March 2010 and handed over the same to SD40079 Poni Josephine to key in the same in T24 system. Poni keyed in the information as required and went ahead to accept the same override, "Account 5500021648 Balance will fall below Locked 1,374,820.00 from 20100309". Interviewed further, Poni explained that from the training she received on T24 system, which covered keying in customer instructions in the system, viewing and validating messages among others it was her understanding that at her level she would accept override messages, which action would then move the transaction to the authoriser. The said clerk added that to date she neither understands what an override message is nor does she know the effect of not accepting such a message during transaction processing.

That the review has also established that the transfer transaction for the said SDG. 89,000 was similarly authorised by the Branch Manager, user KE4354 John Njane Ndungu on 12th of March 2010 at 19.32 Hrs. We noted that this was considerably late after normal banking hours but on further examination confirmed that the processes used to continue sometimes up to 7 pm. As for the transaction under review, the acting Section Head Dominic Alule stated that he took the transfer instructions to the Branch Manager at around 6.50 PM. As regards authorization, the said Branch Manager explained that he reviewed the instructions and noted that the cheque had been properly drawn and the signature verified by the said acting Section Head, Dominic Alule, countersigned by acting Manager Remittances, Rael Mwiyaithi and authorized by the Manager Operations, Samson Maluei as it was within his limit. He added that the transaction was passed to him for verification and authorization of the SWIFT message, MT103. As was in the case explained herein before, he stated that he did not see the said override message and therefore authorised the transaction after noting that all the MT103 fields had been completed correctly. However, contrary to the said Branch Manager's explanation, it is our finding that the Manager Operations only endorsed the cheque, which indicates that he did review the transaction and approved it before the same was forwarded to the Branch Manager, however, there is no evidence in the system that he authorised the transaction as alleged. Further, from the Branch Manager's profile he can view override messages by clicking the "Audit Details" button, which he admitted to be unaware of. He added that from the T24 training he understood that whenever there is an override, a red window appears on the screen to alert the authoriser of such overrides. This did not happen during either of the transactions under review.

That the claims by the two clerks regarding acceptance of overrides and that of the acting Manager Remittances and Branch Manager on their understanding about review of transactions before authorization led to further review of the general training of staff on T24. Information obtained in this regard shows that the staff were duly trained though the requirement to accept overrides in the manner alluded to by the two input clerks was limited to the training environment and the trainer asserted that she always advised them to be checking the details of the override message before accepting the same. Further, the Branch Management was required to confirm the level of comfort among staff in every branch and advice KCB Sudan Head office, which to our information was done before Go-Live. Further, apart from being trained by the T24 Support staff who was not necessarily proficient in Swift as a product, Remittances team were further trained by another staff with a better understanding of Swift processing in T24. Further interview with the T24 support team revealed that the various groups were trained on input with authorizes being trained on both input and authorization. Training of authorizers on input was meant to enable them understand what happens at in-put level and the expectations thereto. Further intelligence gathered also revealed that there were those members of staff who failed to attend the in-putter and/or authorization training. It is therefore our finding that training was carried out as required but as at the time of processing the transactions the users appear not to have fully appreciated the various options within the system, which in our considered view is consistent with challenges of learning new systems. However, this does not in any way justify the failure by the authorizers to fully review the transaction details and related account history before authorizing the same. Review of transaction details is a basic requirement for any authorizer and one would not say they are trained and ready to Go-Live with a new system when they cannot even access transaction details in a system.

This review has so far not come across evidence to suggest that those members of staff who processed the transactions directly, deliberately and criminally facilitated the fraud, though it goes without saying that they were grossly negligent in their handling of the transactions under review.

(Emphasis added)

From the foregoing it is evident that the claimant did not authorize the transaction as she had not been notified of her limit. It is also apparent that the cheque paid out was regular, as it had been properly drawn and signed, and that the training of staff on the system of authorization was wanting. There is no evidence of negligence on the part of the claimant, just ignorance due to lack of proper training. It is evident that all the staff who handled the two transactions did not check the system under "Audit Details" through which the override in the accounts was accessible. They therefore did not see the override.

The totality of the evidence on record would therefor perhaps explain what the Human Resource Compensation Committee meeting held on 10th June 2010 referred to as "apparently lenient disciplinary action recommended by the Staff Disciplinary Committee."

From the foregoing I find that both the grounds and procedure in the termination of employment of the claimant did not meet the threshold set out in Sections 41, 43 and 45(1) and (2) of the Employment Act.

In the case of ***CMC Aviation Limited v Mohammed Noor [2015] eKLR*** the

Court of Appeal held;

"In view of the foregoing, we find that the appellant's act of summarily dismissing the respondent from its employment without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the Employment Act. In Kenya Union of Commercial Food And Allied Workers V Meru North Farmers Sacco Limited, [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case for termination as well as in a case that

warrants summary dismissal. See also *Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eKLR*. We respectfully agree. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract."

I find that the termination of the claimant's employment by the respondent was unfair and declare accordingly.

The respondent faulted the competency of the claimant's suit on grounds that the verifying affidavit is not dated as provided in Rule 5(i) of The Industrial Court (Procedure) Rules 2010. The respondent relied on the case of *Nyabuto Arambe Abasa -V- Kenya Power and Lighting Company Limited (2015) eKLR* in which the court stated that

"The signing of an affidavit by the deponent, the affixing of a date and indication of the place where the deponent is situated are "not just mere technicalities that can be omitted and left to be addressed literally..."

To thus fail to state when the affidavit was made removes a very vital aspect of the same from the document, making it valueless and cannot be relied upon. The claim that has such affidavit that is undated is thus left exposed and without any verifying affidavit."

The issue of an unsigned verifying affidavit was not pleaded in the defence. It is important to take into account the fact that the respondent raised a preliminary objection on the validity of the suit which was dismissed. This is a matter that should therefore have been raised in the same preliminary objection together with the objection on the applicable law. The respondent cannot be allowed to raise matters which should have been handled at preliminary stage in installment.

The foregoing notwithstanding, this issue was not raised during the hearing either with the claimant or any of the witnesses.

Further, the claimant's verifying affidavit is signed, the only omission being on the date which should have been inserted by the Commissioner for Oaths.

This issue having been raised after the claimant had given evidence on oath and confirmed in person the averments in the claim that were intended to be verified by the affidavit, and the respondent not having raised the issue or complained of any prejudice it suffered by the lack of date on the verifying affidavit, I find this to be a moot issue.

Both Article 159 of the Constitution and Section 20 of the Employment and Labour Relations Court Act engender substantive justice without undue regard to technicalities. Unlike in the case of *Nyabuto Arambe Abusa* where the issue of the undated affidavit was raised in a preliminary objection and fully addressed by the parties, and where the suit was actually dismissed because it was time barred, the respondent has raised this issue in the submissions. The rules of this court require each party to put its entire case on the table and the courts must frown upon the practice of raising legal issues at the submissions stage without prior notification after the claimant had already filed her submissions. I find that the objection was raised irregularly and further that it does not affect the validity of the claimant's claim herein..

Remedies

Having found the termination of the claimant's employment unfair both substantively and procedurally, she is entitled to the relevant remedies as set out in Section 49 of the Employment Act and Section 12(3) of the Employment and Labour Relations Court Act.

She prayed for reinstatement. This is not available to her as it can only be granted within 3 years of termination and on exceptional circumstances. The claimant was dismissed more than 8 years ago and has not demonstrated any exceptional circumstances to qualify for the remedy of reinstatement.

She prayed in the alternative, for damages being 3 months' pay in lieu of notice, service pay at one month's salary for every completed year of service and damages for premature and unlawful termination.

RW2 testified that the claimant was paid one month's salary in lieu of notice in accordance with her letter of appointment and clause 14 of CBA, accrued leave days not taken together with leave travelling allowance and salary withheld during suspension. She was also paid salary arrears arising from CBA review. The money was deposited in her account. This was not rebutted or controverted by the claimant.

Under Section 35(6) the claimant is excluded from entitlement to service pay as she was a member of NSSF and has not demonstrated that her terms of employment provided for the same.

On the prayer for compensation for unfair termination, it is my opinion that taking into account all the circumstances of her case including the manner in which her services were terminated, the benefits paid to her, the length of service and the respondent's own contribution to the circumstances that led to the termination of her employment, she is entitled to maximum compensation. I award her 12 months' salary in the sum of Kshs.1,986,708.

The respondent shall bear claimant's costs for this suit and the same shall attract interest at court rates from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE