



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 43 OF 2016**

*(Before Hon. Justice Mathews N. Nduma)*

**ORWA JAMES OJWANG'.....CLAIMANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The Claimant was employed by the Respondent as a graduate clerk on the 6<sup>th</sup> May, 2003 and he rose through the ranks until 17<sup>th</sup> May, 2013 when he was summarily dismissed for gross misconduct. The claimant was operations manager at Mumias Branch at the time of dismissal following theft of Kshs.26 Million from the vault of the Mumias Branch.

2. On 25<sup>th</sup> March, 2013 the Claimant received a letter of suspension pending disciplinary investigations. The Claimant was alleged to have irregularly removed Kshs.32,701,093.00 from the banks vault

and irregularly paid it out to an accomplice. The money was allegedly posted to a cash account 015000000034 of one of the Bank's teller – Selline Indara to give impression that the funds had been given to the teller.

3. On 18<sup>th</sup> April 2013, the Claimant made a response on the notice to show cause denying the charges in which the Claimant explained that his co-custodian David Watila, between 2<sup>nd</sup> March, 2013 and 12<sup>th</sup> March, 2013, whilst the bank was facing system challenges that were offline, took advantage in his position as a branch audit person, custodian and referral person to execute the fraud by confusing the teller transactions alleging that they were reserved transactions.

4. The Claimant stated further that the bank manager Mr. Emmajejan Lutta did not put the time lock on daily basis and in particular on the 20<sup>th</sup> March 2013, she did not put the time lock. Mr. David Watila schemed the theft alone and Claimant did not collude with him at all, hence the long method he used to execute the theft.

5. Furthermore, except the 3 million order allegedly made to Hon. Oparanya, the other transactions as revealed in the camera were not necessarily from the strong room.

6. The Claimant concluded that Mr. Watila explained the new system errors to execute the fraud.

7. The Claimant denied the charges completely. Mr. David Watila disappeared from the bank and a notice was placed on the daily nation of 7<sup>th</sup> June, 2013 to alert the public that he was a wanted person for bank fraud charges. A warrant of Arrest had been issued against him. The Claimant adds that the Branch Manager Emmajejan Chepkemoyi Lutta and Mr. David Watila, accessed the strong room to conduct a surprise check, contrary to banks guidelines and rules since not all the 3 banks strong room key custodians were present. The branch auditor/checker, Mr. David Watila contrary to bank rules prepared a certificate to certify that cash was intact at the strong room. A certificate according to the rules is done by the branch manager. The branch manager approved the certificate confirming money in the strong room was intact only to be revealed later that 32,701,09 was missing. The fact that Mr. David Watila fled from the bank immediately thereafter is evidence of his guilt in the matter, the Claimant stated.

8. The Claimant states that the Respondent had no reason at all to terminate his employment. That this was just a scheme to get rid of the Claimant. A decision that unlawfully and unfairly caused the Claimant great hardship, embarrassment, anguish and humiliation. The Claimant prays the court to declare the termination was

unlawful and reinstate the Claimant back to work without loss of salary or benefits and in the alternative, the court to award the Claimant equivalent of 12 months' salary in compensation; 3 months' salary in lieu of notice; grant claimant certificate of all statutory contribution and pension scheme as at the date of termination; costs and interest.

9. The Claimant testified under oath in support of these particulars of claim and adopted the witness statement dated 10<sup>th</sup> September, 2015 and filed on 16<sup>th</sup> February, 2016 as part of his evidence in chief. The Claimant further relied on all the annexures to the statement of claim marked 1-9 and all were admitted as exhibits in the suit.

### **Response**

10. The Respondent filed a Memorandum of Response on 28<sup>th</sup> June, 2016 in which the particulars of employment and promotion of the Claimant by the Respondent are admitted.

11. The Respondent states that the Claimant was summarily dismissed by a letter dated 17<sup>th</sup> May 2013 in accordance with the provision of Appendix 14 of the Staff manual. The reason for dismissal was not expressly stated in the letter, though the letter of dismissal was captioned, loss of Kshs.32,701,093, at Mumias Branch.

12. Minutes of disciplinary hearing proceedings were produced as App. '9'. According to the minutes, the Claimant was charged with willfully or by negligence allowed or facilitated loss of Bank property/cash and approved by either signing or facilitating approval of payments without following the established procedures in that:-

(i) On various occasions between 2<sup>nd</sup> March 2013 and 21<sup>st</sup> March 2013, irregularly removed cash amounting to Kshs.32,701,093 from the vault which was irregularly paid out to an accomplice by his co-custodian.

(ii) On 21<sup>st</sup> March 2013, he incurred a cash shortage of Kshs.2.0 million after obtaining Kshs.6.0 million from the vault but he transferred 4.0 million to the CBK suspense account. The cash shortage has never been accounted for or declared to date contrary to the provision of the operating manual.

The 2<sup>nd</sup> count was commission of an act of gross misconduct in that –

(i) He posted money so misappropriated to cash account 015000000034 of a Teller, Selline Indara in order to conceal the fraud and shortage of the vault to give the impression that the funds had been given to the teller. He gave instructions to the teller to post equivalent debit to the CBK account 0150800007200 as RTGS reversal to disguise the cash shortage in the vault and teller's cash account. The sectors were set out in a chart.

13. For the record, the Claimant made a lengthy explanation as to what transpired with respect to the two charges. He blamed the new system, the manager and Mr. Watila for the problems that enabled Mr. Watila to steal from the bank. He was primarily accused of allowing cash to be kept at teller's desk; allowing Watila to use his password and allowed Mr. Watila to keep money contrary to laid down procedures. In mitigation, the Claimant told the committee that he was sorry for what happened. He had served the bank for 10 years whole heartedly and was not aware that fraud was being perpetrated by his colleague and asked for leniency.

14. The committee found the Claimant guilty as charged and the penalty was dismissal as opposed to termination. This meant that the Claimant forfeited notice pay and other benefits affected by a dismissal as opposed to a normal termination.

### **Determination**

15. The issues for determination are:-

(a) Whether the summary dismissal of the Claimant was for a valid reason and done in terms of a fair procedure.

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

### **Issue (a)**

16. The totality of the evidence by both parties has led this court to a conclusion that though the Claimant was not directly involved in the theft of Kshs.32,701,093 from the Mumias branch of the Respondent at the time he served as the branch operations manager, his negligence conduct, as the operations manager gave opportunity to his co-custodian to steal the said money from the branch.

17. The Claimant was found guilty of negligence upon being granted a fair hearing and was summarily dismissed.

18. It cannot be denied that the Claimant had served the bank well in various capacities for a period of 10 years. It was not his fault that the Respondent employed a thieving person who had shared responsibilities with the Claimant. It should not be lost to our mind that the Claimant was serving under the Branch Manager Mr. Emmajean Chepkemioi who was the overall overseer at the Branch. The role of the Branch Manager leading to the theft by Mr. David Watila was evidently not above aboard and definitely bore a greater responsibility that did the Claimant.

19. Accordingly, the court has considered the mitigating circumstances presented by the Claimant in this matter and is of the considered view

and finding that this was a proper case for a normal termination as opposed to a summary dismissal and substitute the summary dismissal of the Claimant with a normal termination.

**Issue (b)**

20. Following the substitution of summary dismissal with a normal termination, the Claimant is entitled to payment in lieu of notice. The notice period applicable is three (3) months. The Claimant earned a gross monthly salary of Kshs. 165,733. The court awards the Claimant Kshs.497,199 in lieu of notice.

21. The Respondent is also to provide the relevant certificates to ensure the Claimant receives the full benefit of the statutory contribution and pension scheme as at the date of termination.

22. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:-

(a) Kshs.497,199 in lieu of three months' notice.

(b) Respondent to issue relevant certificates of all statutory contribution and pension scheme to the Claimant as at the date of termination.

(c) The award is payable with interest at court rates from date of filing suit till payment in full.

(d) The Claimant to get half (½) the costs of the suit.

**Judgment Dated, Signed and delivered this 24<sup>TH</sup> day of January, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Onsongo for the Claimant

D. M. Ouma for the Respondent

Chrispo – Court Clerk