

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 10 OF 2018

(Formerly Nyeri ELRC Cause No. 481 of 2017)

CATHERINE MBUTHU BERNARD.....CLAIMANT

VERSUS

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

JUDGMENT

1. The Claimant sued her erstwhile employer seeking to recover for the termination of employment while working at the Isiolo Branch. The Claimant was a Service (Operations) Manager and was employed on 25th February 2003 as a clerk and rose through the ranks. She was earning the sum of Kshs. 241,880/- exclusive of leave allowance at the time of dismissal. She was entitled to 32 leave days per year and was dismissed on 7th June 2017 precipitating the suit. She averred that the Respondent alleged negligence against her thereby making her lose any prospects of any other employment in the banking or financial sector generally. The Claimant averred that the dismissal was unfair and unlawful amounting to unfair trade practices. She sought unconditional reinstatement to her employment in the same position, the removal of the penalties and rates of interest levied on her loan. In the alternative she sought compensation for loss of earnings from the date of dismissal to the expected date of retirement, damages for her unfair dismissal in the sum of Kshs. 2,913,810/-, damages for unfair trade practices in the sum of Kshs. 2,913,810/-, all terminal benefits accrued to the date of dismissal at the rate of 3 months salary for each completed year of service – Kshs. 10,158,960/-, all accrued interest and penalties on the loans in the sum of Kshs. 2,287,275/- from the date of dismissal to the date of payment of the awards herein to reinstate the total loan balance of Kshs. 2,287,275/- on the date of payment, costs of the suit plus interest.

2. The Respondent in its defence averred that the Claimant served as Operations Manager and acted as Branch Manager during her stint at Isiolo Branch. It was averred that on 18th October 2016 she was issued with a cautionary letter for failing to adhere to the Respondent's handing over procedures and on 19th January 2017 issued with a first warning letter for operational control lapses highlighted by an internal audit carried out at the Branch among them mishandling of bank keys. The Respondent averred that on 20th March 2017 robbers assisted by the Respondent's employee Willy Mwangi staged a robbery at the Isiolo branch and stole Kshs. 24 million from the vault. She was suspended on 22nd March 2017 to pave way for investigations and the investigations revealed that the mastermind who was the Respondent's employee obtained the keys to the rear door and emergency exit from the Claimant who had negligently handed over the keys to Willy Mwangi and never confirmed that all the keys were returned to her. The Respondent averred that the Claimant allowed Willy Mwangi to access her keys in order for him to exit through the emergency door to go smoke which permitted him to successfully plan a robbery at the branch occasioning the Respondent a loss of Kshs. 24 million and the endangerment of all staff at the branch who were commandeered at gunpoint by the robbers. The Respondent averred that the Claimant admitted to giving the keys to Willy Mwangi and further that the Claimant had allowed excess money to be in the vault contrary to the vault regulations. The Respondent averred that the Claimant was issued with a show cause letter and was invited to a disciplinary hearing where she was given an opportunity to be accompanied by a representative of her choice and she declined to exercise this right. The Respondent averred that it her given a fair hearing and the disciplinary panel found the Claimant grossly negligent and she was terminated summarily.

3. The Claimant and the Respondent's witness Paul Kabura, a fraud analyst for the Respondent, testified. The evidence was to the effect that the Claimant was a custodian of keys which she stated were properly handled and which the Respondent asserts were not properly handled permitting the theft to take place. Evidence was led as to the CCTV footage and images from the cameras captured during raid. The investigation report and the statements made were delved into with the Claimant asserting that the statements she made were coerced while the Respondent argued that the statements made to the Police and the investigators from the Respondent were made freely and without any undue influence or coercion. The statements were signed off by the Claimant. The Claimant testified that the execution of the theft was not her fault and that she did not breach the cash limit threshold at the bank.

4. The parties were to file submissions but at the time of penning the judgment, only the Respondent's submissions were on the file. The file was dispatched from Meru to Nyeri on 18th December 2017 and received at the Nyeri ELRC Registry on 20th December 2017. The Respondent submitted that the issues for determination were whether the termination was fair and whether the Claimant was entitled to the remedies sought. The Respondent submitted that the Claimant had admitted to letting Willy Mwangi to have access to keys she was solely meant to have to his exclusion and that the insistence that she allowed this to happen to save her job were proof that she was culpable. The Respondent submitted that there were valid reasons for termination and relied on the case of **Rueben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR**. On the issue of reinstatement, the Respondent submitted that the Claimant had admitted to receiving a show cause letter, that informed her of her right to be accompanied by a witness of her choice and to attending a disciplinary hearing where she was accorded a chance to be heard. The Respondent relied on the cases of **Abraham Nyambane Asiago v Barclays Bank of Kenya Limited [2015] eKLR** and **Cosmas Mwaniki Kipingazi v Barclays Bank of Kenya Limited [2018] eKLR**. The Respondent submitted the Claimant was not entitled to pay from the date of dismissal until the expected retirement date by dint of Section 17 of the Employment Act that obligates an employer to pay an employee in respect of work done pursuant to a contract of service and that the law does not anticipate payment for work not done. The Respondent cited the case of **John Benson Githinji v Attorney**

General & 4 Others [2014] eKLR where the court held that premature termination does not entitle one to payment of salaries that could have been earned had the employee been in employ till the retirement age. The Respondent also cited the cases of **Dorcas Kemunto Wainaina v IPAS [2018] eKLR** and **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** where Radido J. held that general damages are not available as the Employment Act provides for an award equivalent to a number of months wages not exceeding twelve months based on the gross monthly wages. The Respondent submitted that there was fairness in the summary dismissal of the Claimant and citing the two cases of **Abraham Asiago v Barclays Bank of Kenya Limited (supra)** and **Rueben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR** and **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K) [2017] eKLR** where the Court of Appeal held that the conduct of the respondent therein was questionable and his integrity and reliability suspect justifying the dismissal. The Respondent submitted that the Claimant's conduct made it such that dismissal was the only option.

5. The Claimant herein was dismissed after a raid on the bank premises left the Respondent some 24 million poorer. The dismissal followed internal investigations as well as Police investigations. The Claimant was not charged in the criminal trial with theft of the money but was dismissed as she was found to have been careless in the execution of her duties. The ramification of the dismissal was that her loans converted to commercial rates from the preferential staff rate she enjoyed hitherto the dismissal. The Claimant had been warned about her handling of the keys and she seemed not to heed the said warning. The mastermind of the theft exploited the Claimant's carelessness in handling of the keys. The assertion that there was cause to share the keys does not find merit as it was not logical that the handover and custody of the keys was to casual collection of the keys from the Claimant as opposed to the controls that were in place. The protocol for handling keys was set out in a manual that the Claimant was familiar with but she ignored the steps needed to ensure proper custody. Her conduct enabled the possibility of a theft as indeed happened at Isiolo. Regarding bursting the limits, it seems that the Respondent's protocols on this were not very clear as to the precise point at which the report would be made to headquarters. Given that the Claimant was not entirely blameless, the Respondent was entitled to initiate the removal of the Claimant from employment as it did. She was given a show cause and taken through the disciplinary process. In Section 41 of the Employment Act, there is the framework for procedural fairness and the Respondent adhered to them. The Claimant opted to attend alone and had the opportunity to defend herself. Unfortunately for her, the result of the process was her summary dismissal with the attendant loss of privileges she enjoyed as a staff member of the Respondent. The Respondent lost confidence in the Claimant as the Claimant's failure to apply controls in relation to the keys caused it to be exposed to the potential risk of theft as indeed happened. The Claimant was thus not unlawfully dismissed but procedurally dismissed. The fact she now has a monumental burden being the unpaid loan is sad but one for which there is no remedy in this court. The Claimant did not prove her case and therefore the suit is dismissed. As to costs each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 21st day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the original

DEPUTY REGISTRAR