



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 523 OF 2014

(Before Hon. Justice Mathews N. Nduma)

WILSON MBITHI KITHEKA.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

J U D G M E N T

1. The Claimant was a Manager in the Respondent's Premier Banking Service at the Barclays Plaza Branch. The Claimant filed suit at the High Court on 21st May, 2004 and seeking the following reliefs:-

- (a) A declaration that the purported dismissal of the Plaintiff by the Defendant was wrongful.
- (b) Declaration that the Plaintiff is entitled to damages for wrongful dismissal and he be paid damages.
- (c) Interest and costs of the suit.

2. The suit is defended vide a statement of defence filed on 8th July, 2004.

Facts of the Case

3. The Claimant was employed as a Bank clerk on 3rd August 1992 at a monthly salary of Kshs.69,372.

4. The Claimant was promoted on merit and as at 1st October 2002, the Plaintiff was Manager Premier banking, Head Office at a consolidated salary of Kshs.1,250,004 per annum. The Claimant was a member of the Defendant's staff pension fund and enjoyed an out patient medical allowance of Kshs.100,000 per annum.

5. On 22nd September, 2003, the Claimant received a letter of suspension for 30 days pending disciplinary investigation. Suspension was extended by a letter dated 30th October, 2013 and again by a letter dated 22nd December, 2003.

6. A disciplinary hearing was held on 10th December, 2003 following charges preferred against the Claimant. The charges related to fraudulent cheque encashment of Kshs.27.6 million by a customer who had opened a new account at premier banking. It was alleged that the Claimant in facilitating the opening of the account did not adhere to the strict bank criteria applicable at the time of the opening of a premier account. The Claimant was at the time the Manager responsible for account opening at the premier branch.

7. The opening of the account by one Ramesh is not in dispute. What is in dispute is whether the Claimant followed the mandatory criteria of opening premier accounts in place at the time.

8. The Respondent accused him of gross negligence in allowing the opening of the said account by a person who intended to use it for fraudulent transactions.

9. The customer thereafter cashed Kshs.27.6 million in three instalments from Kenya Revenue Authority vide the said accounts.

10. The Claimant in his testimony stated that Mr. Ramesh Gupta was introduced by an existing premier customer, hence this elevated the level of trust he had in the new customer. Ramesh, a business man was accompanied by a lawyer named Gideon Meenye. The Claimant said that he determined the suitability of the customer and opened the account.

11. According to the Claimant, applicable criteria at the time was that the customer maintained a cash balance of Kshs.750,000; the customer had a net income of Kshs.250,000 per month; the customer was referred by an existing member of staff or premier customer or by invitation by premier manager. The Claimant also stated other criteria applicable was prove by customer of net worth assets of Kshs.10 million.
12. Claimant stated that he asked the customer for 6 months bank statements and that he was satisfied that the customer had assets in excess of Kshs.10 million and therefore he did not have to look for other evidence.
13. The Claimant confirmed he did not obtain the bank statements or a property valuation report of the assets owned by Mr. Ramesh Gupta at the time he opened the account for him. Mr. Ramesh promised to produce the statements in due course. The claimant emphasized the fact that Ramesh was introduced by an existing customer aided greatly in the opening of the account.
14. Further Gupta stated that he was a business man with two properties in Eastleigh, and intended to buy another two but the Government had cancelled that deal. He produced a cheque from central bank of Kenya to demonstrate the cancellation.
15. From the disciplinary hearing proceedings signed by the Claimant, Mr. Ramesh Gupta the customer did not produce any tangible documentation to prove his net worth at all.
16. The account took five (5) days to open and Mr. Gupta was to bank the cheque he showed in the new account yet he had indicated that he had an existing account at Dephis Bank, even though he did not bring any bank statements from the said account. The Claimant was in fact left with the cheque for depositing upon the opening of the new account. The customer produced an identity card.
17. Upon deposit of the cheque, quick successive withdrawals of the money were done by the customer. Claimant said that this did not raise any alarm because CBK had confirmed that the cheque was good for payment. Claimant stated further that he was not alarmed that the customer opted to take large cash payments instead of using other modes of bank transactions.
18. The minutes of disciplinary hearing show that the Claimant admitted in hind sight, he should not have lowered his guard even though he denied this admission under cross examination in court. Claimant put his whole trust on Mr. Isaack, the existing customer.
19. The Claimant received a letter of termination of employment dated 11th February, 2004. The disciplinary panel was satisfied that the Claimant had disregard bank's recruitment criteria for account operating for premier clientele and acted in gross derogation of duty. The Claimant was offered one month's salary in lieu of notice. Claimant was to be paid all his dues less the loan owed to the bank in the sum of Kshs.550,378.55 at the time. Same was to attract interest at 19.9% from date of termination till payment in full.
20. The Claimant was informed of right of appeal within 5 working days. Pension was to be paid upon attaining 60 years.
21. The Claimant prays that the suit be allowed with costs.

Defence

22. The Defendant called RW 1, Vaslas Odhiambo Ogola, head of employee Relations for Barclays Bank, Kenya to testify in support of the defence case. RW 1 relied on a witness statement dated 20th November, 2017 in which his sworn testimony is detailed. RW 1 relied also on the list of documents dated 29th October, 2019 and same were admitted as exhibits in the suit. RW 1 further relied on the amended statement of defence filed on 16th July, 2016.
23. RW 1 presented evidence that was largely not in dispute to the effect that, the Claimant facilitated opening of a premier account for one Mr. Ramesh Gupta at the premier Banking Service of the Barclays Plaza Branch. That immediately upon opening of the account, Mr. Ramesh Gupta, withdrew in quick succession cash amounting to Kshs.27.6 million upon deposit of a cheque in his favour from the Central Bank of Kenya in the sum of Ksh.27.6 million being Kenya Revenue Authority refund. It is not in dispute that shortly thereafter, it was discovered that Mr. Ramesh Gupta was an imposter and had fraudulently encashed the money.
24. The Respondent further testified that the Claimant flouted the Bank criteria for opening premier accounts and relied on the minutes of the disciplinary hearing and other documentary evidence presented to show that, the Claimant admitted that he had lowered his guard in opening the account because he had placed too much trust on an existing premier customer named Isaack.
25. RW 1 stated that it was not in dispute that Mr. Ramesh Gupta did not produce as required prove of his banking deposits by producing bank statements for the last six months indicating his banking was not less than 750,000 per month.
26. He was a business man and so did not produce any pay slip to show that he earned not less than Kshs.250,000 per month and that even though the Claimant believed Mr. Ramesh owned properties at Eastleigh worth not less than Kshs.10 million, Mr. Ramesh did not produce any valuation report to prove this fact. The Respondent further questioned the conduct by the Claimant to accept an explanation regarding the cheque from CBK in the sum of Ksh.27.6 million that it was in respect of cancelled property sale transaction by government without any documentation to prove that.
27. Further the Respondent emphasized that the Claimant ought to have raised eye brows regarding the large cash withdrawals in three (3) quick succession.
28. Respondent further testified and it is not in dispute that the Claimant was responsible for the opening of the account and authorized the quick cash withdrawals from the Premier, Bank at Barclays Plaza Branch. The Respondent testified that the Claimant was guilty of gross

deliction of duty and the termination of his employment was for a valid reason and the Respondent followed a fair procedure in termination of the Claimant's employment.

Determination

29. The issues for determination are:-

(a) Whether the termination of employment of the Claimant was for a valid reason and if fair procedure was followed in terminating the employment.

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

Issue (a)

30. The facts of this case are largely not in dispute. The Claimant, being a manager in Premier Banking Service at the Barclays Plaza Branch, facilitated one Ramesh Gupta to open a premier account. That at the time of opening the account Mr. Gupta presented the Claimant with a cheque for deposit in the said account once opened drawn by CBK in favour of Mr. Ramesh Gupta in the sum of Kshs.27.6 million. It is also not in dispute and has been proved to be the case that Mr. Gupta did not produce any bank statements to prove his banking record even though it was a requirement in premier banking that a customer shows that he has a record of banking at least Kshs.750,000 per month. It is also not in dispute and was proved to be so that Mr. Gupta was not an employee and so he had not produced salary slips showing that he earned at least Kshs.250,000 per month. This was the other criteria. It is also a fact that Mr. Gupta through claiming to own properties in Eastleigh worth over Kshs.10 million, he did not produce any documentary prove to that effect. This was the other permissible criteria, though contested by the Respondent. It is also a fact that the explanation given by Mr. Gupta for the payment made to him by the CBK cheque was not tested by the Claimant at the time of opening the account in that no documentary evidence was presented for the purported cancelled property sale by Mr. Gupta to the Government of Kenya. It is beyond presumption that the Claimant was completely taken in by the presence of the existing customer, Mr. Isaack, who had introduced Mr. Ramesh Gupta to the Claimant and the representations made by Mr. Gideon Meenye, Advocate for Mr. Ramesh Gupta in blindly opening the premier account for Mr. Ramesh Gupta who had in no way at all demonstrated his eligibility to have a premier account opened for him.

31. It is the court's considered view which was the view taken by the Respondent correctly that the Claimant was grossly negligent in lowering his guard and allowed a potential fraudster to open a premier account at Barclays plaza to facilitate his intended fraudulent transactions, which Mr. Ramesh proceeded to actualize in three (3) quick succession immediately upon opening of the premier account.

32. The court is fully satisfied that the Claimant's conduct amounted to gross delinction of duty and the Respondent was entitled in terms of its own policies and the existing Employment Act, Cap 226 Laws of Kenya to terminate the employment of the Claimant as it proceeded to do.

33. Indeed, the Respondent may have opted to summarily dismiss the Claimant from employment but it did not do so. Instead, the Respondent paid the Claimant one month salary in lieu of notice in terms of section 14(5) as read with section 16 thereof. The claim seeking declaration that the termination of the Claimant was unlawful, lack merit and is dismissed.

Issue (b)

34. The Claimant was not in terms of the Employment Act, Cap 226 Laws of Kenya entitled to an award of damages, beyond the contractual payment in lieu of notice at the time he was terminated in 2004. The case of **Luka Kimaiyo Chepkonge v Kenya Power and Lighting Co. Limited [2010] eKLR** illustrates the point clearly. Justice Radido stated:-

"...under the prevailing Legal framework then

, general damages was awardable only up to the equivalent of notice period or such reasonable notice period where the contract was silent."

35. This is the proper interpretation of the law as at 2004, when this particular termination took place. The claim for award of damages, is not warranted in the first place since the termination was for a valid reason and the termination was effected upon proper conduct of a disciplinary hearing and was thus fair.

36. In the final analysis, the entire suit by the Claimant is dismissed. The circumstances that led to the termination of employment of the Claimant were unfortunate. He was taken in by extremely cunning persons and lowered his guard in the process. There is no prove that the Claimant was an intentional participant in the transaction, and was only excited to broaden the customer base of the Respondent. There is no prove that he benefited at all from the impugned transactions.

37. The court finds this an appropriate case to allow each party to bear their own costs of the suit and it is so ordered.

Dated and Signed in Kisumu this 11th day of February, 2019

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 15th day of February, 2019

Maureen Onyango

Judge

Appearances

Mwaniki Gitau & Co. Advocates for Claimant

Mohammed Muigai & Co. Advocates for Respondent

Daniel Ngumbi – Court Clerk