



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 988 OF 2013

DONNA M.A. ABONG'O.....CLAIMANT

VERSUS

KENYA POST OFFICE SAVINGS BANK.....RESPONDENT

JUDGMENT

1. The Claimant seeks to recover from the Respondent for her alleged unlawful dismissal from employment. She averred that she was employed as a clerical officer from 3rd January 2000 till 16th July 2012 when she was dismissed. She stated that she was transferred to Jogoo Road branch to work as a cashier temporarily on 16th January 2012 and that on 19th March 2012 as she balanced her till and gave over the cash to the acting branch manager as the current branch manager was preparing to go on leave. She states that upon processing the transactions and confirming them, the Claimant was given keys to the safe by the acting manager and she then left leaving other staff in the office. On the morning of 20th March 2012, the Claimant reported to work as usual and handed over the keys she had kept to the acting branch manager who shortly thereafter as she was preparing to start working at her till shouted that there was money missing from the safe. She joined the team in looking for the lost funds but none was found. Auditors came and met the two managers and on 26th March 2012 she received a letter from the business growth manager asking her to foot part of the loss within 48 hours and give an explanation. She stated that she received a show cause letter requiring her to show cause. She averred that she replied but was sent on interdiction vide the Respondent's letter of 23rd April 2013 and placed on half salary. She was placed before the staff disciplinary and was dismissed from service on 16th July 2012 whereupon she communicated appealing the decision on 20th and 26th July 2012. The Respondent maintained the decision to dismiss her. She sought a finding that the dismissal was unfair and unlawful, an award of 12 month's salary as compensation – Kshs. 946,848/-, one month's salary in lieu of notice, balance of half salary during the period of interdiction between April 2012 and July 2012 – Kshs. 157,808/-, service pay for 12 years – Kshs. 946,848/-, damages to be assessed by court, costs of the suit and any other relief the court may deem just and fit to grant. She also sought a certificate of service.

2. The Respondent in the reply to the claim stated that the Claimant had omitted to mention that she had been interdicted and warned for flouting operational procedures occasioning the Respondent loss of Kshs. 3,022,091/- in 2006. The Respondent averred that the Claimant was to hold the safe combination keys and was to apply the joint custodianship so as not to permit the other safe keys holder access the safe alone. The Respondent averred that on 20th March 2012 the acting branch manager who was the co-custodian opened the safe and on counting the cash therein found a shortage of Kshs. 700,000/-. This was reported to management and an audit was caused which confirmed the same. The Respondent avers that the Claimant was issued a show cause notice and payment of 50% the cash shortage sought from her while the acting branch manager was to pay the other half. The Respondent averred that following her refusal to pay her share as per bank policy she was issued with another show cause letter on 18th April 2012 then subsequently placed on interdiction on 23rd April 2012. She was invited to a staff disciplinary meeting on 13th June 2012 and during the meeting she defended herself and the committee evaluated the investigation report and guided by the standard operating procedures regarding handling of cash established that the Claimant was culpable as a joint operator of the safe. She was informed of the decision to terminate her services at the notification meeting on 9th July 2012 and was issued with a dismissal letter subsequently. She appealed against the dismissal but the Respondent upheld the dismissal as her failure to comply with the dual custody procedures was a breach of her terms of service and amounted to gross misconduct under Section 44(4)(c) of the Employment Act. The Respondent averred that the Claimant was not entitled to any of the reliefs she claimed as the dismissal was not unfair since it was fair and proper. The Respondent thus urged the dismissal of the Claimant's suit with costs.

3. The Claimant testified and the Respondent relied on the memo in reply as well as the documents the Claimant availed. She stated that she was not a safe combination keys holder and that she was just given the keys to hold. She stated she was not required to do anything else such as cash handover. In cross-examination, she testified that she was not charged with the loss of any cash and that it was the manager who went on leave who reported the shortage. Regarding the matter in 2006, she stated that she was exonerated and given a warning.

4. The final submissions were filed on 14th January 2019 by the Claimant whilst the Respondent's submissions were filed on 18th January 2019. The Claimant submitted that she did not have the combination to the safe and that the keys were handed over to her casually at her till for safe keeping and not as co-custodian. She relied on the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** where the

court held that for the grounds of gross misconduct requires there to be suspicion of having committed a criminal offence to the detriment of the employer. She stated that no charges were preferred against her and no investigation was undertaken by the Police or the Banking Fraud Investigations Department. She submitted that the accusations of gross misconduct were therefore misplaced and the dismissal therefore was afoul the law in particular Section 47 and the burden was upon the Respondent to prove the dismissal was justified. The Claimant relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and submitted that there was no procedural or substantive fairness. The Claimant submitted that she had proved her case and urged the grant of prayers in her claim.

5. The Respondent submitted that the issues for determination were whether the Claimant's dismissal was unfair and secondly, whether the Claimant was entitled to the compensation sought. It submitted that under Section 45(a) of the Employment Act, the termination is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done following fair procedure. The case of **Thamuda H. Mwaruwa v Kenya Ports Authority [2017] eKLR** was cited for the proposition that a termination is fair if it complies with Section 41 and 51 of the Employment Act. The Respondent submitted that it beats logic to deny being responsible yet she was the safe keys holder while the branch manager was the safe combination holder. The Respondent submitted that the Claimant signed in acceptance of the keys as a custodian and that it was her negligence, among others, that led to the loss. The case of **Fulgene Sunza Masai v Kenya Revenue Authority [2014] eKLR** and that of **Agnes Kavata Mbiti v Housing Finance Company Limited [2017] eKLR** were cited for the proposition that the justification to dismiss on grounds of misconduct undermines the trust and confidence the employer would need to have and therefore there would be no need to retain the employee; and that an employee who is negligent or who performs work with the resultant loss by the employer is liable to summary dismissal. The Respondent submitted that it discharged its burden under Section 47(5) of the Employment Act and the dismissal justified. The Respondent relied on the cases of **Benson Roliano Wemali v National Environment Management Authority (NEMA) [2015] eKLR** and **Thamuda H. Mwaruwa v Kenya Ports Authority (supra)** and submitted that the Claimant was not entitled to the remedies she had sought.

6. The dismissal of the Claimant followed an alleged theft at the Jogoo Road branch of the Respondent. The Claimant was stated to have been a joint safe custodian and she held the keys while the acting branch manager held the safe combination. No audit report was presented or the statement of the alleged co-custodian who was the acting branch manager. It would seem that the Respondent's manual was flouted by the branch officials leading to the loss as the Claimant is not shown to have signed anywhere for the balances at the safe or the items secured therein. Whereas she held a key, it would seem there was no valid reason for the dismissal. The loss from all accounts was not properly investigated and the Respondent simply rushed to apportion blame. It is telling that the acting branch manager accessed the safe ALONE on the material date when the loss was discovered and called out when she apparently realized money was missing. This points out to the fact that the acting branch manager was accessing the safe alone in contravention of the bank policy. The Claimant was a junior officer and the Respondent's manager failed to follow the correct procedure in accessing the safe. The Respondent did not proper controls in place to avoid a scenario such as the one that faced the Claimant who maintained her innocence all through. She testified and her demeanor was candid and she was emphatic she was not the one who stole the money neither did she participate in the process preceding the closure of the safe on the material evening. The Respondent therefore did not have a valid reason in the law for the dismissal. The Claimant is thus entitled to recover for the unlawful dismissal. She however cannot recover any service pay as she was a member of a retirement benefit scheme. She even drew part of her pension and is awaiting the balance upon reaching retirement age. She can only recover the following in the judgment I enter against the Respondent:-

- a. One month's salary in lieu of notice – Kshs. 78,904/-
- b. Half salary withheld for 3 months – Kshs. 118,356/-
- c. 12 month's salary as compensation Kshs. 946,848/-
- d. Costs of the suit
- e. A certificate of service in terms of Section 51.

It is so ordered.

Dated at Meru this 5th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 12th day of February 2019

Radido Stephen

JUDGE