

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 544 OF 2014

BANKING, INSURANCE & FINANCE UNION (K).....CLAIMANT

VERSUS

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

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant Walter Opinde a former employee of the Respondent. It was averred that the Grievant was employed as a graduate clerk on 10th January 2008 and posted at Kisii Branch. He was said to have worked diligently and was appointed an acting cashier on 22nd October 2010. He was issued with a show cause letter seeking his explanation on embezzlement of Kshs. 350,000/- and was dismissed for failing to account for Kshs. 350,000/-. The Union asserts that the Grievant was not allowed to appear before the disciplinary panel with a union official or shopsteward. The matter was reported to the Ministry of Labour and subsequently referred to this court as there was a deadlock on the conciliation due to non-appearance by the Respondent. The Grievant was stated not to have been able to have both the keys and the combination to the ATM room. The Claimant argues that the dismissal of the Grievant and the retention of the custodian was discriminative as the custodian was not punished. The Claimant asserts that if money was stolen from the ATM then both the Grievant and the custodian were to blame and that the allegations on falsification of records were untrue and fabrications by the Respondent. The Claimant averred that the Respondent acted in bad faith considering that no money was lost and that there was no substantive justification or a valid reason for the dismissal. The Claimant sought the declaration that the dismissal was unlawful and wrongful in nature, a reinstatement of the Grievant back to his former position without loss of his position and benefits as well as payment of the unpaid dues for the period he was unlawfully dismissed. The Claimant also sought costs of the suit.

2. The Respondent asserts that the Grievant was employed with effect on 15th January 2008 as per the letter of offer. The Respondent avers that the Grievant was subject to the policies and procedures, staff manuals and code of conduct and ethics of the Respondent. The Respondent asserts that the record of the Grievant was not clean as alleged and that he was issued with warnings prior to the dismissal. The Respondent averred that the Grievant was not denied an opportunity to be heard in the presence of a union representative or a colleague and that he was offered the opportunity vide the email of 27th February 2013. The Respondent asserts that the Grievant falsified or manipulated the ATM records by indicating the physical cash and the ATM balance was Kshs. 1,184,500/- by adding a sum of Kshs. 350,000/- to ATM No. 14 which sum was not taken from the vault. The Respondent averred that the Grievant had not reported the difference in the actual balances to the operations manager. The Respondent asserts that the Grievant failed to adhere to the dual custody requirement by accessing ATM No. 14 alone to load the cash to conceal the difference. The Respondent avers that the Grievant's conduct was to conceal his fraudulent dealings and was in breach of the operating manual and the business code of conduct and that in the circumstances the dismissal of the Grievant was justified.

3. The Grievant and the Respondent's witnesses Mr. Samuel Magati Osero and Mr. Simon Mureithi Maina testified. The Grievant stated that he received discriminatory treatment as his co-custodian Lilian was only reprimanded for the incident while he was dismissed. He said that dual custodianship means dual responsibility and entails dual punishment in case of a mistake. He stated in cross-examination that the system balance might differ with the cash and that the ATM balance and the print out were in agreement except for this case the system balance was not adding up. They agreed with her co-custodian to put an imaginary figure to allow the balance. He stated that he did not conceal the same from auditors. He said that he was not aware that Kshs. 350,000/- was loaded to the ATM. He stated that they always balanced the ATM the next day and that in this case the auditors realised the difference before they did. He agreed that they did a dishonest thing to conceal the figure from the auditors. He denied training Lilian on ATM matters and called such an allegation a fallacy. He stated that the ATM cannot be reconciled on a daily basis. In re-exam he testified that he was not the custodian on 31st January 2013 and that he took over on 5th February 2013. He denied adding any cash to the ATM and he could not confirm the accuracy of the disciplinary meeting minutes. He said that Lilian was a continuing custodian and was experienced and he did not need to train her.

4. The Respondent's 1st witnesses Samuel Magati Osero stated he investigated the matter at Kisii branch and that there was non-disclosure of the sum. He said there was malpractice in the handling of ATM 14 at the Kisii branch and the culprits were the Grievant and Lilian as there was a difference which the custodians had not declared. He testified that the Grievant took over as custodian on 27th January 2013 and Lilian was a continuing custodian. He stated that the Grievant was custodian when the difference was detected. The difference was from 31st January 2013 where the balance in the ATM account was Kshs. 1,194,500/- while it was supposed to be Kshs. 1,509,000/- which indicated the shortage and the dual custodians did not account for that sum. He stated that prior to reconciliation some Kshs. 350,000/- was added at 11.59am to conceal the shortage which had occurred on 31st January. He testified in cross-examination that the difference was detected by the compliance team that was at the Kisii branch. He said the reconciliation revealed anomalies. He stated that the cash was clandestinely added to the ATM and that whoever added it did not want it known. He said that the CCTV footage shows them both walked inside without guards and that the other custodian must have left. The second custodian was warned while the Grievant was dismissed. He stated that his report recommended disciplinary warning and not dismissal and that the treatment meted out was according to the gravity of one's contribution. He was re-examined and stated that for money taken from the vault it has to be escorted by security guards and that the journal confirms that money was added. He said that Lilian was working on a different ATM and that HR were not bound by his recommendation. The 2nd Respondent's witness was the employee relations manager and he stated that the dismissal was not unlawful as gross misconduct

justifies summary dismissal. He testified that the Grievant tried to conceal the cash shortage on ATM 14. He said that the Grievant acted without integrity and the Respondent lost trust in him. He was cross-examined and he stated that Lilian was a senior to the Grievant and that in the custodianship the section head was not automatically the senior. He stated that no money was added to the ATM and that they just added figures. In re-examination the witness stated that the Kshs. 350,000/- was keyed in which was virtual and not actual money.

5. The parties filed submissions in which the Claimant submitted that there was discrimination in the manner the joint custodians were dealt with. The Claimant submitted that the Grievant was dismissed without adherence to the CBA and contrary to the provisions of the Employment Act and Article 27 of the Constitution on the substantive procedures required. The Claimant relied on the case of **BIFU (K) v Co-Operative Bank of Kenya Limited [2016] eKLR** and urged the grant of relief to the Grievant as prayed in the claim.

6. The Respondent submitted that the actions of the Grievant amounted to gross misconduct which permitted the summary dismissal as provided for under Section 44(3) of the Employment Act. It submitted that the Grievant had failed to obey a lawful and proper command in his employment and there were valid and fair reasons for the dismissal. The Respondent cited the case of **Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union [2017] eKLR** where the Court of Appeal held that the appellant was entitled to terminate the grievant's services summarily due to gross misconduct. The Respondent further submitted that the Grievant was accorded a hearing in terms of Section 41 of the Employment Act. The Respondent submitted that the Grievant was not entitled to an order of reinstatement and placed reliance on the Court of Appeal decisions in **Kenya Airways Limited v Aviation & Allied Workers Union & 3 Others [2014] eKLR** and **Peter Otieno Opollo v Board of Governors Kisumu Polytechnic & Another [2013] eKLR** where the Court of Appeal stated that the reinstatement sought was not practical and that it would be forcing the employer and employee on each other. The cases of **George Kariuki Ngugi & 2 Others v Brolaz East Africa Limited [2014] eKLR** and **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR** were cited in support of the Respondent's arguments as well. The Respondent urged the dismissal of the Claimant's case with costs.

7. The Grievant was dismissed for an offence the Respondent classified as manipulation and falsification of the ATM balances on ATM No. 14 at Kisii branch. The Respondent heard the Grievant and summarily dismissed him. The Claimant asserts that the dismissal was discriminative as the other joint custodian was only reprimanded and warned unlike the Grievant herein who was summarily dismissed. It is clear that the fairness of the dismissal is subject to the internal disciplinary mechanism and the provisions of Section 41 of the Employment Act. It is common ground that there was a hearing at which the Grievant was allowed to bring a fellow employee of his choice. He stated in his testimony before the court that he opted not to be accompanied. This is markedly different from what he averred in the claim. The ATM he handled is the one that had the shortfall leading to the queries by the compliance team. He and his co-custodian handled the ATM's in a manner that breached the Respondent's operating procedures as the Grievant and his colleague Lilian handled different ATM's instead of handling the ATM's together as was required. As there was proof the Grievant was a custodian at the material time, the only inference the Respondent could draw was that there was fraud on the part of the Grievant. Had they both been handling the ATM's as required they both would have suffered the same fate. Though they were dual custodians, they operated singly on the ATM's thus entitling the Respondent to take action against the Grievant and the other custodian. His punishment was higher because the anomaly was not reported after the balances did not tally as required. He explained that the cash that was used to top up the ATM was from offsite ATMs and this was negated by the investigator who stated that the money from offsite ATMs was only available at the branch from 12.00pm and the addition was made at 11.59am. The Respondent had cause to terminate in terms of Section 44 of the Employment Act. The dismissal therefore was warranted and the only order that would commend itself for me to make is one dismissing the claim but with each party bearing their own costs.

It is so ordered.

Dated at Nyeri this 19th day of March 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 25th day of March 2019

Radido Stephen

JUDGE