



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 1422 OF 2014

ABRAM KAMAU KIMANI.....CLAIMANT

-VERSUS-

GUARANTY TRUST BANK (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent on 7.12.2009 starting as a Graduate Trainee and later rising to become Project Department Officer. His duties were that of a Teller. He started with a gross salary of Kshs.30,000 per month but later it was increased of Kshs.70,000. He worked until 24.8.2011 when he was served with a summary dismissal letter and thereafter brought this suit seeking the following reliefs:-

- (i) The summary dismissal to the grievant/claimant be declared unlawful and hence null and void as provided in section 49 sub section 3
- (ii) The respondent compensate the loss of employment gross salary of twelve months amounting to Kshs.840,000.00 as provided in the employment Act section 49 sub section 1 part C
- (iii) That the court to determine severance payable by law, reasonable expenses incurred by grievant/claimant as a consequence of termination. And any compensation including ex-gratia payment in respect of termination of employment as provided in employment Act section 49 sub section 3 part H, J, and M respectively.
- (iv) All the above prescribed entitlement on summary of dispute and submission part F above.
- (v) The respondent to pay the legal fees in the suit which claimant/grievant will have incurred.

2. The respondent admitted that the claimant was her employee but denied that she unlawfully dismissed him. She averred that the claimant was summarily dismissed for gross misconduct after being accorded a hearing. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 19.10.2018 and 12.11.2018 when the claimant testified as Cw1 and the respondent called her HR Officer Ms Veronicah Nyambura Gitau who testified as Rw1. Thereafter both parties filed written submissions. The issues in dispute are:-

- (a) Whether the dismissal was unfair and unlawful.
- (b) Whether the reliefs sought should be granted.

Claimant's evidence

4. Cw1 testified that he joined the respondent on 7.12.2009 as a Graduate Trainee earning Kshs.30,000 per month. That after successful completion of probation, his appointment was confirmed on permanent basis by the letter dated 16.6.2010. That he thereafter rose the ranks to become Project Management Officer earning Kshs.70,000 per month.

5. Cw1 further testified that on 6.8.2011, a client by the name Gamba Home Renovetors presented to him a cheque for Kshs.75,000 for

cashing. That he picked money from the cash box and counted Kshs.75,000 using a counting machine. That the client requested for the separation of the money into Kshs.50,000 and Kshs.25,000. That in the process of accounting, one Kshs.1,000 note fell out of the counting machine but he picked it and added back to the separated cash to make it Kshs.50,000 and Kshs.25,000. That the client picked the money and signed the back of the cheque to confirm that the payment was done correctly and left without any complaint

6. He further testified that on 15.8.2011, the respondent's Operations Manager Mr. Athanas Mwilu visited Westlands branch and after brief talk with the Branch Manager, he was called into Branch manager's office where he was told to do a brief handing over because he was required at the Headquarters to discuss an issue. That when he reached the Head Office, he was led to the Boardroom where he found the HR Manager Damaris and Mr. Athanas who informed him about the complaint by Gamba Home Renovators that he had attempted to steal Kshs.1000 after it fell of the cash-counting machine. He was therefore asked to write an advance report about what happened but when he did so they tore the same and forced him to write another report indicating that the incident had a reputation risk to the Bank.

7. He further testified that on 16.8.2011, Mr. Athanas came to the Westlands Branch and served him with 7 days compulsory leave. Thereafter he received a call from the Head Office on 24.8.2011 to collect a summary dismissal letter. He contended that he was dismissed before being accorded a hearing in the presence of another employee of choice and without meeting his accuser, Gamba Home Renovators. He further contended that he was not shown any CCTV clips before the dismissal. He therefore prayed for the reliefs sought.

8. In cross examination, he confirmed he was a teller throughout his service at the respondent. He admitted that he was the teller captured in the CCTV clip played in court. He further confirmed that the person he was serving was Gamba Home Renovators. He admitted that the clip represents the transaction where he paid the said client Kshs.75,000 against a cheque.

9. He admitted that after separating the money into Kshs.50,000 and Kshs.25,000, he gave the client the Kshs.50,000 and he pocketed it but the Kshs.25,000 he counted and returned to him to recount using the machine. That thereafter he gave the client his money plus an envelop and receipt. He contended that it was normal for a customer to request for a recount of money.

10. He denied that the meeting held on 15.8.2011 constituted a disciplinary hearing. He maintained the he was only asked to write a report which he did in form of a letter to the HR Department denying any alleged intention to steal Kshs.1000. He admitted that he was aware of his right of appeal but his appeal through the union (BIFU) was not welcome. He further admitted that the letter dated 13.5.2011, which promoted him to project officer indicated that the said position was not unionisable.

11. He further stated that he had a loan from the respondent and the dismissal letter stated that all his salary for August 2011 was to be paid less the outstanding loan. That the whole salary was applied toward the said loan and the employer went further to recover the loan from his pension. He contended that his pension was never a security for the loan and contended that recovering the loan from his pension was illegal.

Defence evidence

12. Rw1 testified that on 6.8.2011 at around 12.14 p.m., a customer presented a cheque for Kshs.75,000 at the Westlands Branch and requested the claimant to break the cash in two bundles of Kshs.50,000 and Kshs.25,000. That thereafter the customer filed a complaint against the claimant and upon reviewing the CCTV footages, the claimant was seen pushing Kshs.1,000 note under the counting machine after it was blown off while claimant was counting the Kshs.75,000 for the customer.

13. She further testified that the claimant was summoned to the Head Office where he was asked to show cause why disciplinary action should not be taken against him and he wrote the letter dated 15.8.2011 denying the intention to steal the Kshs.1000 note and promised not to repeat the same. That thereafter, he was sent on compulsory leave and the bank outsourced an investigator who found that the teller (claimant) had ill intention by hiding the Kshs.1000 note and recommended for disciplinary action against the claimant. That as a result, the claimant was called back and informed about the findings and on

24.8.2011 he was dismissed. She contended that the meeting held on 15.8.2011 was a disciplinary hearing before a committee of the respondent.

14. She further testified that after the dismissal, the claimant was paid his dues which were applied to clear his loan of Kshs.21,995.66 from the respondent. She contended that the set off against the terminal dues was grounded on the terms of the offer letter for the loan. She contended that the claimant utilized all his earned leave days.

15. She contend that the bank acted fairly in dismissing the claimant because there was a valid and fair reason and a fair procedure was followed. She relied on the CCTV clip to show that while the claimant was counting the money for the customer, one Kshs.1,000 note was blown off and he pushed it under the counting machine. That at the request of the customer, Cw1 recounted the money and handed over the same to the customer.

16. In cross examination, Rw1 admitted that she joined the respondent in 2014 and contended that her evidence herein was based on office records that she had interacted with. She further admitted that she saw the said CCTV clip herein for the first time in 2015. She however denied knowledge whether the claimant was shown the CCTV clip or the investigations report but she admitted that the investigation report indicated in second last observation that the images were not very clear.

17. Rw1 further admitted that she did not know how the claimant was invited to the meeting or whether he was alerted about the agenda for meeting or whether he was told to be accompanied to the meeting by another employee. She however admitted that the claimant wrote the letter dated 15.8.2011 the same date he alleged the disciplinary meeting. She further admitted that the customer never attended any disciplinary hearing to face the claimant and that admitted the customer never complained in writing. Rw1, however contended that he did so verbally to a Bank Officer who was unknown to her. She maintained that the letter of offer of the loan provided for a set off from any money coming into the claimant's bank account.

Analysis and determination

(a) Unfair and unlawful termination

18. Under section 45(2) the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that the termination was grounded on valid and fair reason and that a fair procedure was followed. Valid and fair reason is one that relates to the employees conduct, capacity and compatibility or based on employer's operational requirements. Fair procedure on the other hand refers, but not limited to according a hearing to the employee before separation.

Reasons for dismissal herein

19. The reason cited for dismissing the claimant in the dismissal letter dated 24.8.2011 was

“Further to the Disciplinary hearing held on 15th August 2011, it is the finding of the Committee that the incident of the breach of the Bank's Code of Conduct committed by yourself on 6th August, 2011, in relation to an attempt to steal from a client Kshs.1,000/= which breach and exposed the Bank to a reputation risk, is a ground for summary dismissal in accordance with clause A2 of the Bank's disciplinary Policy, details whereof are well within your knowledge. Under the circumstance we hereby advise that you have been summarily dismissed from employment at Fina Bank with immediate effect.”

20. The alleged attempted theft from Gamba Home Renovators was founded on the CCTV clip produced as exhibit and played in court during the hearing. The said CCTV clip and a certificate were produced without any objection from the claimant together with the investigation report dated 18.8.2011. The documents are to the effect that while the claimant was counting money to pay a customer using a machine, one Kshs.1000 was blown off and he failed to pick it to include it to the counted money. Instead

he pushed it under the counting machine and attempted to handover the counted money to the customer but through the vigilant eye of the customer he could not succeed as the customer demanded a recount and separation of the money into bundles of Kshs.50,000 and Kshs.25,000.

21. I have carefully viewed the CCTV clip and it is clear that the claimant committed the offence of attempted theft of Kshs.1000 note from Gamba Home Renovators on 6.8.2011. The said money was blown off the cash counting machine and instead of picking it and adding it back, he pushed it under the counting machine only to pick it after the customer refused to let him steal the money. I am therefore satisfied that the respondent has on a balance of probability discharged the burden of proving a valid and fair reason as required by section 43 and 45 of the Employment Act.

Procedure followed

22. The claimant contended that he was not accorded any fair hearing before the dismissal. That on 15.8.2011 he was called to a meeting in the Head Office where he met Damaris (HR Manager) and Mr. Athanas (Operations Manager) where he was told to show cause in writing why disciplinary action should not be taken against him in relation to the alleged attempted theft of Kshs.1000 from Gamba Home Renovators. That he wrote his defence but the same was torn and he was forced to write another letter admitting that he omitted Kshs.1000 from the customer's Kshs.75,000 but denied that he had intended to steal the same. The said evidence has not been rebutted by the said Damaris and Athanas who allegedly formed the disciplinary committee.

23. In addition, the claimant contended that after the said involuntary letter, he was suspended to allow investigations but he was dismissed without being shown the Investigations Report or the CCTV footage and without being accorded a hearing in the presence of another employee of his choice. Rw1 did not rebut the foregoing evidence. She admitted that she was not aware whether the claimant was accorded a hearing in the company of a fellow employee or whether he was shown the investigation report and the CCTV clip.

24. Under section 41 of the Employment Act, before the employer terminates employee's contract on ground of misconduct, poor performance or physical incapacity, he shall first explain to the employee in a language he understands, and in the presence of another employee of his choice, the reason for which termination is being considered and the the employee and his chosen companion shall be entitled to air their representations which shall be considered before the termination is decided.

25. The burden of proving the said procedural fairness lies with the employer. Rw1 never participated in the hearing of the claimant's disciplinary case. She joined the respondent after the claimant's dismissal. She has not rebutted the claimant's evidence that he was called to a meeting on 15.8.2011 without prior notice that he was to face disciplinary case and he was not given the right of being accompanied by another employee of his choice. That at the meeting, he was not given freedom to defend himself and finally, he was not shown the CCTV clips and the Investigation Report before the dismissal. After considering the evidence tendered, I find that the respondent has on preponderance of evidence failed to prove that a fair procedure was followed before dismissing the claimant from service. Consequently, I return that the claimant has proved that he was unfairly dismissed without following a fair procedure as required by section 41 and 45 of the Employment Act.

(b) Reliefs

26. In view of the foregoing finding, I make declaration that the dismissal of the claimant from his employment was unfair and therefore unlawful. Flowing from the foregoing, I award the damages under section 49(1) of the Act. He will get one month salary in lieu of notice plus 3 months' salary compensation for the unfair termination. In granting the said compensation, I have considered the fact that the claimant worked for a short period and contributed to his dismissal through misconduct.

27. The claimant prayed for 21 leave days on prorata basis. The respondent produced leave record showing that as at 1.1.2011, the claimant had 28 accrued leave days and at 28.5.2011 he utilized 18.5

days. Assuming that he was earning 1.75 leave days per month under section 28 of the Employment Act, he earned 14 days as at August 2011 when he was dismissed. Adding the 14 days to the 9.5 days carried forward equals to 23.5 outstanding leave days.

Hence $23.5/26 \times 60,900 = 55,044.23$

He however prayed for Kshs.47,419 and that is what I will award to him.

28. The claim for other damages caused by the dismissal amounting to gross annual salary is dismissed for lack of basis either in law or in the contract of service.

Conclusion and Disposition

29. I have found that the dismissal of the claimant was grounded on a valid and fair reason but it was rendered unfair and unlawful by the failure to follow a fair procedure. I therefore enter judgement for the claimant in the following terms:

- (a) Notice.....70,000
- (b) Compensation.....210,000
- (c) Leave..... 47,419

327,419

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The said sum shall be paid subject to statutory deductions. The claimant will however have costs plus interest at court rates from the date hereof

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of April, 2019

ONESMUS N. MAKAU

JUDGE