



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.96 OF 2015

RUTH WAITHERA MUTHAMA.....CLAIMANT

VERSUS

AIC KIJABE HOSPITAL.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 16th October, 2001 in the accounts office as an Admission and discharge assistant. She was promoted to various positions the last being the Deputy Account in September, 2007. The claimant was dismissed from her employment on 11th September, 2014 on the grounds of negligently disclosing her password to her fellow colleagues and interns in her department which placed the respondent in a vulnerable position where fraudulent activities were committed using the system access given by the claimant.

The claimant was last earning Ksh.33, 187.00 per month.

The claimant was issued with letter dated 11th September, 2014 which terminated her employment on the grounds that she often disclosed her AMS system and work station passwords to her colleagues and interns in the department and that her shift password was used to commit fraud.

On 14th August, 2014 while the claimant was on her annual leave she received letter seeking her to explain alleged anomalies discovered in the Britam accounts.

By another letter dated 14th August, 2014 the respondent directed the claimant to explain anomalies on shift No.26355 which was under her name and on alleged money collected but not remitted to the head cashier are required.

The claimant submitted her written explanations by letter dated 14th August, 2014 and stated she was not aware of any anomalies in the shift and the matter should be investigated.

By letter dated 5th August, 2014 the respondent security manager unearthed the culprit of the fraud under shift No.26355 being Joel Njau Mungai, the matter was reported to Lari Police Station and there was an admission to the fraud and theft of the respondent's funds and offer to repay the same.

By letter dated 21st August, 2014 the claimant was directed by the human resource officer of the respondent to show cause why her employment should not be terminated over alleged negligence act which facilitated fraud under shift No.26355. By letter dated 22nd August, 2014 the compliance manager of the respondent suspended the claimant until the Britam accounts was reconciled fully which she attended to from 25th and 26th August, 2014.

On 28th August, 2014 the claimant attended the disciplinary hearing where she made her oral and written submissions to the committee.

The reasons given for termination of employment are not valid and there was no finding that there was collusion with the work colleague who admitted to committing fraud and offered to repay the stolen funds. The allegations of negligence were not proved as there was no truth. The claimant had worked with a good work record and such should have been put into account which the respondent failed to do and preceded to unfairly terminated employment.

By letter dated 18th November, 2014 the claimant was directed to collect her terminal dues.

The claimant is seeking the following;

- a) 12 months' salary in lieu of notice;
- b) Salary due from 1st to 11th September, 2014;
- c) Payment of leave not taken;
- d) 12 months compensation;
- e) Interests on the dues owing;
- f) Costs of the suit.

The claimant testified in support of her claims as outlined in the memorandum of claim.

The claimant testified that while on leave she was summoned back to work to give account with regard to the use of her password to the AMS system and shift and explained that her computer was the only one attached to the scanner and smart card reader and all employees could access her computer for the service. When patients came and wanted to know their limits of cash use, only her computer could access the stem. Other employees knew her password and used it daily but the AMS password was not shared. At the hearing it was established by the ICT manager that only people with malicious motives could use the claimant's password and Joel Njau did that and committed fraud and admitted to it and offered to pay.

The defence is that sometime on 14th August, 2014 the respondent's compliance officer Mr Wanyoike was going through the cashiers shift and discovered shift No.23655 belonging to the claimant was running in the system since June, 2014 while she was on leave and it had collected cash amounting to ksh.259, 828.25.

The claimant was summoned from her leave by the finance director to hand over the cash received under her name and to explain why there was no remittance but she denied running her shift. The finance director sourced the assistance of the ICT department to establish who had received money and at which point and it was established that an amount of ksh.102, 000.00 was collected by an employee Samuel Ndung'u using the claimant's shift and later handed over to Joel Mungai who failed to remit the same to the respondent.

On 21st August, 2014 the claimant was issued with a show cause notice for being negligent by sharing her AMS password with a fellow colleague and who later used it fraudulently to collect and defraud the respondent in the shift an amount of ksh.236, 655.00.

The claimant responded to the show cause notice but failed to explain the stated issues and opted to attack the person who had issued the show cause notice. The claimant was invited before the disciplinary committee on 28th August, 2014.

During the hearing the respondent called the AMS administrator who took the panel through the passwords created and once such password is issued to an employee she was not supposed to share and its use by another employee was upon disclosure which was not allowed in the policy of the respondent.

The claimant in her defence admitted she shared her password with interns and this was confirmed by the AMS administrator that the username was being used under different passwords by the interns and it was evident from the administrator that the claimant's password had been given out to many other people. This resulted in security breach and aiding of fraud which led to theft by the negligence of the claimant disclosing her passwords to other employees.

The defence is also that the claimant was issued with termination notice due to misconduct for disclosing her AMS systems and work station password to employees and for allowing her shift password to be used to cause fraud. There was due process in addressing the matter and the claimant was allowed written defence and oral hearing. The claims made are without merit and should be dismissed.

Josphat Mwaura Wanyoike testified that he is credit manager and was the compliance manager for the respondent supervising the claimant. The claimant was dismissed from her employment due to sharing of her systems credentials and the username and password. These were secret password to the employee. The policy did not allow sharing. Upon sharing, such was in breach of policy and any fraud which arose as a result the subject employee who had shared the password was responsible.

Mr Wanyoike also testified that the evidence by the claimant that her printer was shared in password was not allowed as any employee could use the same but using individual credentials and not a shared password. The system which takes cash was audited and it was discovered that her username and password was used and the respondent lost ksh.228, 800.00. He identified the anomaly and called the claimant to explain. Upon investigations, the cashier who used the claimant's password and cash lost was identified and he agreed to pay. The claimant was dismissed for sharing her password credentials.

At the close of the hearing, both parties filed written submissions.

Determination

The issues which emerge in this case can be summarised as follows;

Whether employment terminated unfairly; and

Whether the remedies sought are due.

The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act. The section provide as follows;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The claimant was recalled from her annual leave following discovery over use of her password to access the payment system at work with the respondent. Following her response, she was issued with a show cause notice on 21st August, 2014 on the grounds that she negligently shared her AMS password with a fellow employee who was fraudulently used to collect cash and defraud the respondent of funds under her shift No.23655. Her response of 14th August, 2014 was found not satisfactory and failed to give any useful information over the matter.

The court reading of the claimant's response of 14th August, 2014 is indeed far from responding to the substantive issue at hand. The response is a mere deviation from the issue and shifts focus from the claimant's conduct to questions to the officer in charge.

The claimant was invited to the disciplinary hearing. Present was the AMS systems administrator who gave an elaborate process on the allocation and use of password which were individual and per individual and not to be shared and could only be traced through the system to show which officer was using which facility. In this case the use of the claimant's password was evident and this must have arisen after her sharing her systems credentials.

The claimant admitted in her evidence that the password to the AMS were not to be shared. Such sharing and use by other employee could only occur with malice. In her case another other employees accessed the password for use in scanning smart cards and Joel Njau used her password credentials to access the finance system and committed fraud and leading to the respondent's loss of funds.

These matters were put to the claimant in the show cause notice. She was invited to a hearing and witnesses called. There was finding that the responses given were not satisfactory.

However, from the disciplinary committee proceedings the AMS administrator testified that there was no evidence that the claimant had shared her password but an audit of the system revealed the password had been given to many other employees. There as a recommendation that the claimant be issued with a warning letter. It was also established that the claimant's shift allocation were done individually except individual allocation which Joel Njau had to step in and do.

The claimant admitted that she used her password in the presence of Joel Njau and he may have maliciously picked it and she was not aware of what he was doing. That Njau used her passwords to cover for his shortcomings. She shared the AMS password with interns.

The claimant had worked with the respondent in the accounts department for over 12 years. As the Deputy Accountant a high degree of professional conduct in her duties was required. The nature of position held and the functions of the job were not those of an ordinary employee as any work lapse would lead to serious loss and damage.

Matters set out to the claimant in the show cause were serious and related to negligence of duty. The responses given in defence do not reflect a seriousness with which the same ought to have been addressed.

In the case of **Evans Kamadi Misango versus Barclays Bank of Kenya Limited [2015] eKLR** the court held as follows;

This Court has stated in the past that banks operate in a highly sensitive environment requiring the highest degree of prudence and probity to which their employees must adhere.

Similarly, an accountant or an officer working in the accounts department operates in a highly sensitive environment which requires the highest degree of prudence. See **David Karume Burugu versus National Bank of Kenya Ltd [2014] eKLR**.

In this case, the court finds the respondent **as** the employer discharged its burden as imposed by Section 43 of the Employment Act, 2007 by establishing a valid reason that would move a reasonable employer to terminate the employment of an employee. On the notice to show cause, the claimant failed to give a proper account as to why she was negligent in her duties and caused her systems password and credentials to be shared or cause to be identified and applied to access the system and where fraud was committed. Save for the show cause, the claimant was invited to a physical hearing and where she was given a fair chance to urge her defence but failed to discharge her duty by giving a satisfactory response. The respondent terminated employment for a genuine and valid reason pursuant to the provisions of section 41 and 43 of the Employment Act, 2007.

The dues owing to the claimant were outlined in the letter terminating employment.

Such dues should be availed within reasonable notice.

The claim for 12 months' salary in lieu of notice consequently fails. The claim compensation must fails on the finding employment terminated for good cause.

In the final analysis the Claimant's entire claim is dismissed with no order for costs.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU JUDGE

In the presence of: