



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 317 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GEORGE KENNEDY OTIENO.....CLAIMANT

VERSUS

BARCLAYS BANK LIMITED.....RESPONDENT

JUDGMENT

By his memorandum of claim dated 11th November and filed on 19th November 2014 the claimant avers that his employment was unfairly terminated by the respondent by letter of summary dismissal dated 18th September 2012. The claimant prays for the following remedies –

- a) Reinstatement to work and payment of salary up to date from September 2012
- b) In the alternative one month's salary for every year worked from April 2007 to date.
- c) Salary for the timer of dismissal
- d) Costs of tis cause plus interest.
- e) Any other relief this court may deem just and expedient

The respondent filed a memorandum of defence and counter claim on 15th June 2015 in which it denies that the summary dismissal of the claimant was unfair and counterclaims for Kshs.954,147 plus interest being staff loans granted to the claimant while in employment and Kshs.6,790 being a Barclays card debt. The respondent prays as follows –

1. That the court finds the termination of the claimant's employment lawful and fair.
2. That the court upholds its decision to terminate the claimant's employment.
3. Enter judgment against the claimant for Kshs.954,147 plus interest.
4. Dismiss the claimant's suit with costs awarded to the respondent.

The claimant filed a reply to defence and defence to counterclaim on 3rd July 2015 in which he denies owing any money to the respondent.

At the hearing of the case the claimant testified on his behalf while the respondent called one witness, CHARLES KAGUORA MAINA, an Investigator, RW1. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The claimant testified that he was employed by the respondent in April 2007 as Retail Support Grade B1. He was subsequently promoted in 2001 to Retail Support Grade B2 in charge of compliance and branch operation at the respondent's Kisumu Branch.

After promotion, he was in charge of checking and confirming completeness and accuracy of all loan applications, account opening application forms and card application forms. In addition, he assisted the Branch Operations Manager in the daily operations of the branch at the back office. His last salary was Kshs.109,950.

The claimant testified that on 29th June 2012 there was a meeting of the staff of the Branch at Imperial Hotel Kisumu at which they were addressed by Directors from Nairobi. Later on the same day the Branch Operations Manager who arrived late for the meeting announced that passwords for all staff had been compromised. All staff were advised to immediately change their passwords. They all went to the office and changed their passwords.

He testified that on 4th July 2012 at 8 am, Mr. Charles Maina from Investigations Branch, Nairobi visited Kisumu Branch. After the Branch morning meeting, the Branch Operations Manager called the claimant and informed him that Charles Maina wanted to see him at the Boardroom.

He testified that he went to the Boardroom where Charles Maina, without even greeting him, introduced himself and informed him that he had come to arrest the claimant because he was a robber and a thief.

The claimant testified that he was scared and sat down so that Mr. Maina could substantiate the allegations. Mr. Maina then locked the door, asked him if he had a lawyer and if he could afford bond, then placed a bundle of audit reports on the table, with transactions on specific dates marked. Mr. Maina asked him if he knew anything about the marked transactions. He responded that he did not. Mr. Maina thereafter called policemen who arrested him. He was later charged with the offence of being involved in fraudulent transactions in Kisumu Criminal Case No. 428 of 2012.

The case was heard and finalised in 2015 when he was acquitted for lack of sufficient evidence. In the meantime he was suspended from work on 19th July 2012.

He testified that he was called for a disciplinary hearing, which was held in Kisumu on 23rd July 2012 and his employment was terminated on 18th September 2012. He appealed against the termination and went for the appeal hearing in Nairobi. The appeal was not successful.

The claimant testified that he was not accorded a fair hearing because he was threatened and was terminated before the outcome of the criminal case. He further testified that during the hearing of the criminal case both his advocates and the court requested for documents such as internal transfer callover vouchers, CCTV footages, CCTV reports and service maintenance logs, which the respondent refused to produce. He further felt the termination was unfair because he was arrested and charged before being subjected to a hearing by the bank.

He testified that he was paid some money by the bank after the termination of his employment. That about Kshs.290,000 was paid into his KCB account while about Kshs.100,000 was paid into his Barclays account. He however did not access the money paid into his Barclays account together with his savings because it was used to offset his outstanding loans.

He prayed that the court assess what is due to him and orders the bank to pay him. He also prayed for costs.

Under cross examination he admitted that he had a loan of Kshs.855,356 which he had not paid and was outstanding. He stated that the reason for termination was transactions of 20th and 27th June 2012, that he was on duty on both dates but did not log onto his workstation.

He admitted that he signed the minutes of the disciplinary hearing on 1st September 2012. He admitted that the minutes reflected that he was on duty on the two dates when there were fraudulent transactions using his machine. He testified that he was the only person who used his password and therefore there was reasonable suspicion that he was the one who did the transactions, as he did not give anybody his password.

He stated that he had no evidence that Charles Maina harassed him, that he did not complain of harassment by Mr. Maina to his Branch Manager or raise the issue during the disciplinary hearing or even in the letter of appeal.

He testified that before disciplinary hearing he was given a letter of suspension which stated the details of the fraudulent transactions. He further testified that he was invited for disciplinary hearing by a letter, which stated the grounds for the hearing. He confirmed that the minutes of the disciplinary hearing were accurate and further that the letter of termination stated the reasons for termination. He further confirmed that the minutes of the appeal hearing were accurate.

RW1, CHARLES KAGUORA MAINA testified on 12th July 2017 that he worked with Barclays Bank as an Investigator from August 2009. His duties involved conducting bank internal investigations and liaising with other law enforcement officers. He testified that he knew the claimant as an employee at Kisumu Barclays Branch as authorised/supervisor. That the claimant was in charge of cashiers in the branch and of making authorisations and pay-outs to customers, which were above the cashier/tellers limits.

He testified that in the course of his work he received a complaint from a customer named Stephen Mungai about unauthorised transactions on two of his accounts totalling Kshs.4.45 million: for Account No. 0758009734 and Account No. 131612012 between 13th and 27th June 2012. The transactions were done from Kisumu Branch allegedly by a teller named Francis Muyabi and authorised by the claimant. Upon investigations, he established that the customer never made the withdrawals since there were no documents/voucher supporting the said transactions.

That further investigations revealed that the claimant authorised one transaction for Kshs.1,958,000 on 20th June 2012 and another transaction of Kshs.1.8 million on 27th June 2012 from his work station/computer assigned to him in the bank. That investigations revealed

that the claimant had logged into his computer during the two transactions, that is Machine No. KE009-DPC-037.

As a result both disciplinary and criminal proceedings were commenced against the claimant. That he interviewed the claimant during investigations when the claimant also recorded a statement. That the claimant stated he was not aware of the two transactions, although they were authorised on his machine using his password.

He testified that the bank has a policy that every user/staff member has to take care of his/her password while logging into the bank system and is liable for the misuse of his/her password.

He testified that after interviewing the claimant and visiting Kisumu he prepared a report. That the claimant's employment was later terminated after a disciplinary hearing.

Under cross examination RW1 stated that the claimant was not in charge of CCTV cameras, that he relied on a compliant from the customer and that passwords are personal to the user. That a staff member logs into the system and creates a password only known to the user. He stated that computers were assigned depending on the role and not everybody had a computer. He stated he was not aware that the claimant's computer was used by people from sales from time to time. He further stated that it was not the claimant's mistake that CCTV cameras did not capture his computer.

He testified that the claimant was suspended with five other staff all of whom did not report back to work. He stated he was not aware the claimant was acquitted.

Determination

After considering the pleadings, the evidence and the submissions, the issues arising for determination are whether the claimant's employment was unfairly terminated, whether he is entitled to the reliefs he has prayed for and whether the respondent has proved its counterclaim.

Fair Termination

It is submitted for the claimant that the claimant was terminated on grounds of misconduct for failing to safeguard his password as a result of which a transaction was made without the authority of the account holder but the Board did not explain to the claimant the reference or criteria for his termination making the termination invalid. The claimant relied on the decision of Rika J. in *GMV –V- Bank of Africa* where the court held that the respondent had an obligation to give valid reason or reasons for termination and observe procedural fairness.

It is further submitted for the claimant that there was no proof of the withdrawals as no statements were produced and neither was the complaint from the customer produced in court. It is further submitted for the claimant that no internal audit report was produced from Kisumu Branch.

For the respondent it was submitted that there was valid reason for termination of the claimant's employment as he admitted that the fraudulent transactions were posted on his machine and that he was on duty on the material days. That it is on this basis that the respondent concluded the claimant had been negligent with his password leading to the loss of Kshs.3,785,000.

The claimant indeed admitted at the hearing that he was the only person using his password and it was reasonable for the respondent to assume or suspect that he was the one who did the transactions. The claimant further testified that on the date he was interviewed by RW1 he was handed a list of transactions marked on specific dates. He was thus aware of the transactions in issue as he was availed the statements. In any event, the claimant was not charged with stealing money. The employer only accused him of being careless with his password, which he admitted. He testified that he occasionally allowed a fellow employee to use his computer. This is in his statement to RW1.

Section 44(4) provides that it is gross misconduct for an employee wilfully neglect to perform his duty or to carelessly and negligently perform his work. Further Section 44(4)(g) permits an employer to dismiss an employee for gross misconduct if on reasonable and sufficient grounds, the employee is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

In the instant case, the claimant admitted that he was the only one who used his password and that it was reasonable for the employer to suspect that he was the one who authorised the fraudulent transactions. Authorisation of fraudulent transactions is a criminal offence for which an employer may summarily dismiss an employee. There was thus valid reason for dismissal of the claimant unless he could explain how his password was used without his knowledge to authorise the unauthorized transactions.

The submissions by the claimant that there were no statements of audit reports produced in court to prove the fraudulent transactions is irrelevant as it was not disputed that there were irregular transactions, the only issue having been that it was the claimant's password that was used to access the respondent's system and authorise the fraudulent transactions.

The claimant further submitted that the claimant was acquitted for the offence of fraudulent transaction due to lack of evidence. The respondent on the other hand submitted that the claimant's acquittal was long after the termination of his employment and that the two processes are distinct. The respondent relied on the Court of Appeal decision in *Attorney General and Another –V- Andrew Maina Githinji and Another (2016) eKLR* in which the court cited the decision in *Kibe –V- Attorney Generals (Civil Appeal No. 164 of 2000)* where the Court of Appeal held that –

“Acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”

I thus find that the respondent was not obliged to wait for the criminal proceedings to end before taking disciplinary action against the claimant. The grounds for disciplinary action were different from the grounds in the criminal charges.

On the issue of procedure, the claimant admitted having been given reasons for the disciplinary action and attending two disciplinary hearings, the one that led to his termination and the second one following his appeal. He was notified of the hearings in good time, which was in compliance with Section 41.

I thus find the termination of the claimant's employment both procedurally and substantively fair as there was valid reason and he was taken through a fair disciplinary process.

The claimant prayed for reinstatement which he is not entitled to as the court has found the termination of his employment to be valid and fair. He is not entitled to pay in lieu of notice as the same was paid and applied to offset part of his loans. He is not entitled to salary after the date of dismissal.

On the counter claim the claimant admitted having been granted two loans and having a credit card debt all totalling Kshs.954,147 which he stated he had not cleared as he was not in employment. I therefore enter judgment for the respondent against the claimant in the sum of Kshs.954,147 with interest at bank rates in accordance with the terms of credit between the claimant and the respondent which was based on subsidised staff interest rates..

Conclusion

In conclusion, the claimant's case is dismissed and judgment entered in favour of the respondent in the sum of Kshs.954,147 as prayed in the counterclaim.

There shall be no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 11TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 16TH DAY OF JULY 2019

MATHEWS NDERI NDUMA

JUDGE