



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1338 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

SAMSON OMONDI ONYANGO.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

JUDGMENT

The claimant was employed by the respondent, a limited liability company operating as a commercial bank, on 2nd February 1995 initially as a casual employee. He rose through the ranks to the position of Section Head, a position held to the time of leaving employment of the bank upon the termination of his employment on 12th March 2012. At the time of termination the claimant was earning a basic monthly salary of Kshs.92,366 and a house allowance of Kshs.10,000, making a total of Kshs.102,366.

The reason for termination of the claimant's employment as stated in the letter of termination was that he committed acts of gross misconduct which caused the respondent to lose confidence in him. The process leading to the termination of the claimant's employment commenced with a show cause letter dated 2nd February 2011 requiring the claimant to explain credits made into his account number xxxxxxxxx in the sum of Kshs.40,200 from the account of Charles Wambua who was an employee of the respondent at Kipande House Branch, the account of RW who was a minor son of Charles Wambua and from the account of Jane Ogoti who was also an employee of the respondent working with the claimant at the Central Processing Centre (CPC), a unit at the Head Office handling cheques clearance and salary processing from customers in various branches. The claimant was a Section Head at the CPC.

The inquiry commenced after the respondent noted that on various dates between 9th January and 22nd February 2010, irregular transfers were made to the claimant's account through several vouchers which were raised, authorised and posted at CPC contrary to Operations Manual, which required such transactions to be made in branches on the strength of customers letters or instructions.

The claimant was specifically required to explain the following –

1. Why he authorised irregular debits to account numbers xxxxxxxxxx, xxxxxxxxxx in name of Charles Wambua and RW.
2. Why he authorised transfers from account No. xxxxxxxxxx and xxxxxxxxxx in name of Jane Ogoti and JO.
3. Why he engaged himself in money lending business through his account no. xxxxxxxxxx.

The claimant responded to the show cause letter by his letter dated 4th February 2011 which is reproduced below –

“Samson Onyanga

C/O Central Processing Centre

04.02.2011

Head of CPC

Dear Madam

Re: Irregular transactions and debits to customers account

Your letter dated 2nd February 2011 refers

I refer to your above letter and wish to state as follows –

1. I have never engaged in any money lending business in my life and neither have I ever used my Account no xxxxxxxxxxxx, for any money lending business.

2. Jane Ogoti is a member of staff at CPC and JO is her Son who is a minor. I recall in two instances when Jane was not on duty and some of his relatives came to see her only to find out that she was not there. Since we were in the same department Jane would call me and asked if I had some money so that I can give to her relatives who had travelled from up country. I did so as a colleague. Jane would use any of the accounts she had signing mandates i.e. either her account or her child's account to make transfers to my account by signing a debit to either of these accounts and raising a corresponding credit to my account. Since the debit (?) had been authorized by the account holder/ mandate, when the vouchers were brought to me to authorize their posting, as in charge of posting, I saw nothing wrong in these transactions and I would authorize their posting in good faith and in the ordinary cause of business. I also authorized similar entries for various other staff members of different cadres in CPC and so for me this was a normal thing.

3. I wish to state further that I worked with Mr. Wambua in the same Department in CPC over a period of time and also closely participated with him in KCB sport activities (football), in December 2008, he approached me and told me that he had a pressing financial commitment and urgently needed money. Since he did not have a cheque book, he wanted me to take the KCB Kencom Sacco "Masaa Loan" of Kshs.60,000 for him to enable him meet the pressing financial need. It was part of the loan requirement by Kencom Sacco that the loan be repaid in a maximum of five instalments and five post-dated cheques must be issued to qualify for the loan. Kencom Sacco would recover their money by pushing through the cheques to the account each month. I obliged took the loan for Wambua in my name and gave Kencom Sacco five post-dated cheques of Kshs.15,900 each to cover the repayment instalments, I gave Wambua the Kshs.60,000/= 1 had received from Kencom Sacco. The agreement with Wambua was that each month he would give me the Kshs.15,900 to deposit in my account to cover for the cheques I had issued to Kencom Sacco. Unfortunately, Wambua did not honour his part of the agreement and I ended up being debited with the cheques without any cover from Mr Wambua. I went ahead and repaid the loan in full. I then followed up Wambua for this money and he agreed to be giving me the money bit by bit until he completes paying if. To pay this money, Wambua usually signed a debit to his account or to his son's account and he would give them to me so that I would credit my account. To date, Wambua has paid me Kshs.30,200 and he still owes Kshs.29,800/=. I did not have any knowledge nor suspect that Wambua was engaged in any irregular activities. I always believed that the funds in his account and his son's account were part of his salary. As such, I authorized the entries in good faith and in the ordinary cause of business.

4. I also wish to state that the practice of transferring funds from one staff's account to another using mandated debit as I did in 2 & 3 above is a common practice in CPC. This has also always been practiced/ done by bosses in CPC and also by my peers in CPC. During the time that I have been in CPC this has been the practice, even before I was promoted to a signing position (Section Head). My predecessors used to do it; my superiors also did it and so I believed it was ok as long as the signatories to the account being debited signed the debit note/ voucher authorizing the debit to their account. In all these cases and similar others that I authorized for other staff members, I did them in good faith and in the ordinary cause of my duty and that all the transactions were authorized in accordance with the set authorization limit.

In view of the foregoing, I do not see why disciplinary action should be taken against me.

Yours sincerely

SIGNED

Samson Onyango

CC .Divisional Director- Operations”

The claimant's case was presented to the respondent's Disciplinary Committee which recommended the termination of his employment after reviewing the case. A letter of termination was thereafter issued to the claimant on 23rd February 2011. The claimant appealed against the termination of his employment but the appeal was unsuccessful.

Aggrieved by the termination the claimant instituted the instant suit in which he avers that the termination of his employment was unfair and seeks the following remedies –

- (a) Salary for the month of November 2010 to February 2011 retained by the bank.
- (b) 3 months' salary in lieu of notice one month salary in lieu of notice retained by the bank
- (c) Terminal benefits totalling to Kshs.17,992,800/= with interest from the date of filing suit till payment in full.
- (d) Interest on (a), (b), (c) above at court rates.

(e) Costs of this suit

(f) Any other relief that the court may deem fit and just to grant

The respondent filed a replying memorandum in which it denies that the termination of the claimant's employment was unfair. The respondent states that the Claimant as a Section Head in charge of accounts, was under an obligation to adhere to and enforce the Respondent's work procedures, guidelines and policies including Circular No. 95/749 dated 16 March 1995 which required that all money transfers ought not to be effected before instructions are duly confirmed with/by account holders and that the said money transfers be effected at the branches.

That in breach of the above work procedures, guidelines and policies, the Claimant made irregular money transfers at the Central Processing Centre (CPC) which actions amounted to serious misconduct and therefore a fundamental breach of his employment contract, which exposed the Respondent to a risk of serious loss and damage.

Particulars of the Claimant's Misconduct as pleaded by the Respondent

- a) Failing to adhere to work policies, banking procedures and guidelines in place including Circular No. 95/749 dated 16th March 1995
- b) Making money transfer transactions which were not authorised by customers whose accounts were debited
- c) Using his position as Section Head to make unauthorized entries at CPC.
- d) Raising vouchers and authorizing payment of money using unsigned vouchers from the accounts of Charles Wambua, RW
Wambua, Jane Ogot and Reginald Omare;
- e) Raising vouchers and authorizing payment of money without the authority of the Account holders namely Charles Wambua, RW, Jane Ogot and Reginald Omare;
- f) Unlawfully used his position as Section Head to process entries which were not authorized as per set signing limits in place at the Central Processing Centre in the accounts of Charles Wambua, RW, Jane Ogot and Reginald Omare.

Following discovery of the irregularities aforesaid, on 2nd February 2011, the Respondent requested the Claimant to show cause why disciplinary action should not be taken against him.

That on 4th February 2011, the Claimant responded to the notice to show cause indicating that he did not see the reasons why disciplinary proceedings ought to be taken against him.

The Respondent further avers that the Claimant's representation was considered and a decision made to terminate the Claimant.

Evidence

At the hearing of the case the claimant testified on his behalf while the respondent called two witnesses JAPHETH MUTINDA MULANDI, an employee of the respondent working at CPC who was the claimant's immediate Supervisor and ROBLEY NGOJE, the respondent's Employee Relations Manager.

The claimant testified that he was employed by the respondent on 2nd February 1995, that he was a Manager from 1996 and his last position was Section Head in charge of accounts and reconciliation. He testified that his duties entailed receiving vouchers, issuing them to staff for posting, ensuring all vouchers were authorised and ensuring the vouchers were filed safely after posting.

He testified that Charles Wambua was his colleague at CPC but was transferred to Kipande House Branch. That Wambua borrowed Kshs.60,000/= from him which he obtained from the SACCO on the understanding that Wambua would pay him, then he would pay the SACCO. That although the understanding was that Wambua would pay by cheques, he instead raised vouchers, which he signed and gave to the claimant to debit Wambua's account and pay in his (claimant's) account. The vouchers accumulated to a total of Kshs.40,200.

He testified that under the Bank's policy he was not allowed to practice money lending and he did not do so.

He testified that he was unlawfully terminated because there was no complaint from a customer and the vouchers used to debit the impugned accounts were signed by the account holders. That the vouchers were for Kipande House Branch but were posted at CPC.

Under cross-examination he confirmed that he received show cause letter which stated the charges against him. He conceded that some of the vouchers were signed by Wambua, whom he explained was working at Kipande House but went to CPC to sign, while others were not signed.

He also admitted having a previous letter of caution and a warning letter.

JAPHETH MUTINDA MULANDI, RW1 testified that he worked at CPC with the claimant. That claimant was Section Head in Accounts and Reconciliation of cheques. He testified that sometime in 2009 and 2010 it came to the attention of the respondent that the claimant was involved in fraudulent transactions and that the claimant received money from other staff. The claimant also initiated transactions from customer's accounts against the Bank's policy that customer transactions should only be done at branch level, not at Head Office. He explained that when a customer wanted to initiate a transaction the customer went to the bank in person or gave written instructions. The transaction was then effected in three parts; the voucher is raised, checked by a different person and approved by a third person. The claimant was authorised to approved transactions at Head Office level only.

He testified that the claimant effected transfers from two customer accounts and received money from the two accounts of Charles Wambua and RW to his account which he did at CPC but which was only supposed to be done at Branch level. That the claimant authorised the transactions.

He testified that the charges against the claimant were; one, receiving irregular payments not explained, to his account from a customer's account; two, initiating customer's transactions at Head Office level instead of Branch level. He was also accused of carrying out transactions in Jane Ogoti's account. Thirdly that he lent money to Charles Wambua and was given post-dated cheques, which was irregular as lending was against bank policy.

RW2, ROBLEY NGOJE testified that from where the claimant was working he was not supposed to debit a customer's account and pay into another account. He was also not supposed to debit a customer's account without written authority. He testified that the claimant was paid terminal dues in the sum of Kshs.269,336.35 which was paid into his account and utilized to liquidate his loan. He testified that he claimant cleared his outstanding loan of Kshs.2,357,660.30 on 9th April 2014.

He testified that the claimant's terminal dues were composed of salary, notice, 47 days accrued leave and leave allowance as well as salary arrears for November, December 2010 and January 2011. He testified that the claimant was entitled to one month's notice and not three months' notice as claimed.

Determination

I have considered the pleadings, evidence and submissions of the parties. The issues arising for determination are whether the termination was fair both procedurally and substantively and if the claimant is entitled to the remedies sought.

From the evidence on record, it is clear that the claimant was guilty of the charges levelled against him by the respondent being that he authorised customer transactions at CPC, which was at Head office while such transactions were only supposed to be carried out at branch level. Secondly he initiated some of the transactions at CPC in Head Office against the bank's policy that transactions were only to be initiated by the customer and at the branch level. Thirdly he admitted lending money to his colleague Charles Wambua yet money lending by staff was by bank's policy prohibited.

The claimant admitted to all these charges although he attempted to explain about initiating transactions.

He admitted in his response to show cause letter that he initiated transactions from Jane Ogoti's account and from the account of her son JO when Jane was not on duty, acting on telephone calls from Jane which he regularised at a later date after Jane raised the vouchers. He further admitted doing the same with Wambua's account and the account of Wambua's son, RW, which he paid to himself to repay the loan he had extended to Wambua. The claimant further admitted to these charges in his witness statement dated 13th May 2012 and filed with the claim at page 3 of the bundle of documents.

Banks are extremely sensitive to dishonesty by staff as banks hold customers' funds and staff have access to such funds. Banks therefore demand of their staff a higher level of integrity than normal in other occupations.

The claimant stated in his witness statement that he was questioned by Forensic Department of the Bank following discovery of fraud by Charles Wambua.

The Respondent having been satisfied that the Claimant's conduct

amounted to gross misconduct and breach of its security procedures, it was entitled to terminate the Claimant. The Court of Appeal decision in the case of **Samuel Kalomit Murkomen v Telkom Kenya Limited [2017] eKLR** held as follows with regard to validity of reasons for termination of an employee: -

*“In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer. See **Alfred Mutuku Muindi -vs- Rift Valley Railways (limited) [2015] eKLR**..... The Canadian Supreme Court decision in **Me Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161** in its own words articulated that-*

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”

In the case of **Sarah Wanyaga Muchiri v Henry Kathii & another [2014] eKLR** the Court held as follows with regard to validity of reasons giving rise to termination

*“In order to elaborate on the understanding of what unfair termination of employment as stated by statute means Lord Denning in the case of **British Leyland UK Ltd v. Swift [1981] IRLR 91** stated as follows:*

“The correct test is: Was it reasonable for the employers to dismiss him " If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him”

In the case of **David Karume Burugu v National Bank of Kenya Ltd [2014] eKLR** the Court cited with approval the holding in the case of **Agnes Murigi Mwangi Vs Barclays Bank of Kenya Limited [2013] eKLR** as follows:

“Banks are in the business of handling other people's money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face.

Given the Claimant's position as a supervisor, the Court finds that failure to date a debit voucher in his favour compromised the position of trust bestowed upon him by the Bank. Consequently, I find that the Respondent had a valid reason for terminating the Claimant's employment.”

From the foregoing, it is clear that the respondent had a valid reason to terminate the employment of the claimant.

The respondent however did not prove that it complied with fair procedure as provided under Section 41 of the Employment Act. The claimant was questioned by the Forensic Department, then suspended. He was thereafter issued with a show cause letter which he responded to. The Disciplinary Committee meeting held on 14th March 2011 decided that the claimant's employment be terminated without giving him a hearing. The claimant testified that he was only

given a hearing on his appeal.

For these reasons, I find the termination was procedurally flawed and thus the termination of the claimant's employment was unfair in terms of Section 45(2) the Employment Act which provides that –

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Courts have held that as long as an employer substantially complied with the fair procedure as provided under section 41 of the Employment Act, mere procedural lapses even if detected will not amount to unfair termination. This was the holding in the following cases:-

a) In the case of **Peter Kithaka Mbawa vs Coca Cola Juices Kenya Limited, Cause No. 1956 of 2014** the Court held as

follows with regard to the objective criteria of a fair hearing:-

“I find that the failure to have another employee present during the disciplinary hearing in the circumstances of this case never prejudiced the Claimant's case in the face of such admission to the misconduct cited. There is no doubt that he was told his offence and thereafter invited to defend himself. There is no further doubt that his defence was considered by the employer before the termination was decided. The said proceedings met the objective of the requirement of a fair hearing prescribed by section 41 of the Employment Act and the Rules of natural justice. Consequently I return that the Respondent has proved on a balance of probability that she followed a fair procedure before terminating the Claimant's contract of service”

b) The Court of Appeal in the case of **Samuel Kalomit Murkomen v Telkom Kenya Limited [2017] eKLR** upheld the finding of the trial Court where the Court found that compensation of one month's salary was sufficient to cure such a procedural lapse. The Court held as follows:-

“It is not in dispute that in as much as the respondent substantially followed the laid down procedure in disciplinary process there were some procedural anomalies. These anomalies arose during the disciplinary hearings. The trial Judge appreciated that apart from the sweeping statement in the minutes that the aforementioned departments met and deliberated on the issues, there was no evidence that the appellant was present during the said deliberations or that he made any representations. It was equally not clear whether the appellant had been accompanied by a co-employee of his choice during the disciplinary hearing in accordance with Section 41 of the Employment Act. Thus, to the extent that the respondent did not follow the statutory procedure the dismissal was unfair.

It is quite clear that in determining which remedy to grant an employee whose termination is deemed unfair, the court exercises its discretion. In this case, the trial Judge deemed the award of one month’s salary being Kshs.100,000/= as adequate. Taking into consideration the circumstances of the case and the conduct of the appellant, we think that he was not entitled to twelve months gross pay, exemplary or aggravated damages as compensation. More so, because his termination was based on valid grounds albeit that the procedure followed was flawed. We see no misdirection on the part of the trial Judge to justify the interference with the damages awarded. ”

Remedies

The claimant prayed for the salary for November 2010 to February 2011 retained by the bank. The claimant did not specify what this amount was. He did not even produce copies of statement of his account in which he was paid salary to prove that he did not receive salary for the said months. No question was put to the respondent’s witnesses on the same, especially to RW2 who testified as to the payment of terminal dues for the claimant. He did not produce the letter, if any, advising him of the withholding of the salary. Appendix 8 of respondent’s bundle however reflects payment of salary arrears for November, December and January 2010. I therefore find that the claimant did not prove that his salary for November 2010 to February 2011 was withheld or was payable, or how much was unpaid. The claim therefore fails and is accordingly dismissed.

The claimant further prayed for payment of three months’ salary in lieu of notice. The respondent produced the Collective Bargaining Agreement which provides for one month’s salary in lieu of notice which RW2 stated was paid to the claimant as reflected in Appendix 8 of respondent’s bundle of documents.

I find that the claimant was paid one month’s salary in lieu of notice and is not entitled to the claim for three months’ salary in lieu of notice.

The claimant further prayed for terminal benefits totalling Kshs.17,992,800/= as special damages. No breakdown or tabulation was given of this amount either in the pleadings filed by the claimant or in his testimony in court. The same is also not explained in the written submissions. The court has no clue what the said sum represents. The prayer is dismissed as not proved.

As pointed out in the respondent’s submissions, no specific prayer was made in respect of compensation for unfair termination and in the absence of such prayer, although I did find the termination procedurally unfair, I am unable to give any award for the same.

For the foregoing reason, the prayers for interest and costs must also collapse.

Having established unfair termination but having not proved any of his prayers, the entire claim fails. The claim is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE