



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 859 OF 2015**

**ENOCK JUSTUSEEN OKUNYANYI.....CLAIMANT**

**- VERSUS -**

**NATIONAL BANK OF KENYA.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 12<sup>th</sup> July, 2019)**

**JUDGMENT**

The claimant filed the memorandum of claim on 20.05.2015 through Ojiambo & Company Advocates. On 28.03.2017 the claimant changed his advocates to J.A. Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) The declaration that the dismissal of the claimant was wrongful, unfair and unlawful for all intents and purposes.
  - b) The respondent to reinstate the claimant to his former position and office in the respondent bank without loss of benefits, seniority or service.
  - c) The respondent to pay the claimant all salaries and allowances lost as a consequence of the unlawful dismissal from 31.10.2014 to date of the award.
  - d) Costs of the suit.
  - e) Interest on (c) and (d) above till payment in full.
- OR in the alternative
- f) The Court declares the dismissal of the claimant wrongful, unfair, and unlawful for all intents and purposes.
  - g) The respondent to pay the claimant general damages for wrongful dismissal equivalent to 12 months salary.
  - h) Leave pay for leave earned but not taken in 2014.
  - i) Costs of the suit.
  - j) Interest on (g) to (i) above till payment in full.

The memorandum of response was filed on 14.10.2015 through Oraro & Company Advocates. The respondent prayed that the claim be dismissed with costs on full indemnity basis for being an abuse of process.

The following facts of the case are not in dispute:

- a) The claimant was employed by the respondent on 14.03.1994 as a clerical staff on permanent and pensionable basis and initially deployed at the respondent's Moi Avenue Branch.
- b) The claimant was promoted through ranks to a Branch Operations Manager in charge of the Hospital Branch on 10.01.2011 at a

monthly salary of Kshs. 182, 870.00.

c) The claimant had a good reputation and had no previous disciplinary cases with the respondent.

d) The duties of the claimant as a Branch Operations Manager included receipt and confirmation of transfer of funds; authorization of payments and communicating to customers on transfer of funds; RTGS and Swifts confirmation and doing follow-up calls; undertaking and overseeing reconciliation of bank books; ensuring prompt and efficient service is provided to customers; and maintenance of branch records.

The evidence is that on 12.06.2014 the claimant received and replied emails from one Nelly Mugo at the email address thus [nellymugo@gmail.com](mailto:nellymugo@gmail.com). The emails related to a swift transfer request for USD 10, 120 from the said Nelly Mugo. The claimant testified that he took all precautions set by the respondent and had the request processed and completed for authorization and payment by other officers of the respondent bank. It was later alleged that the swift request was made by a fraudster. The claimant testified that when he received the emails on the request he called the customer but he did not ask her to confirm the particulars of her email address. He also testified that he did not ask the customer to give an indemnity form to protect the bank and further, the bank had not prescribed an indemnity form for such transaction. The claimant testified that it was the trail of events and procedures in processing such a request that protected the bank's interests. The claimant further testified that he signed the transaction form to confirm that Nelly Mugo was the owner of the instruments.

The email dated 04.07.2014 at 08.15 by Abraham Kibet Chepkwony shades some light on the transaction that Dr Nelly Mugo was a regular and valued customer at the branch and normally undertook several electronic transactions and states further, **“The policy on electronic transmissions is that the remittance must be confirmed by the Manager or the Branch Operations Manager. The application document was brought to me duly filled and confirmation annotated on it as to conversation between the customer and the Branch Operations Manager – hence authorizing execution. Together with all the other electronic transfer instructions, which were also duly confirmed and authorized, I carried out the transaction.”**

Dr. Nelly Mugo, the customer wrote to the respondent's Hospital Branch on 16.06.2014 stating that she had received an email informing her of transfer of USD 10, 120.00 from her account through an email request from her gmail account. She stated that clearly her gmail account had been hacked and she stated that she did not do online banking. The email Dr. Nelly Mugo referred to in her handwritten complaint must be the one sent to her by the claimant on 15.06.2014 at [nellymugo@gmail.com](mailto:nellymugo@gmail.com).

By the letter dated 04.08.2014 the claimant was required to explain about the request as per the emails of 12.06.2014 debiting the Dr. Nelly Mugo's account with Kshs. 902, 180.00 (equivalent of the USD 10, 120.00 in issue). The claimant replied by his internal memo of 05.08.2014. He stated that he had complied with all procedures and verifications to process the request and in the crucial paragraph he stated, **“The claim by the customer on a Monday the 16<sup>th</sup> June 2014, that her email had been hacked and that the communication we had with her must have been a hoax, took me by shock. This was 4 days after the transaction had been executed. The telephone numbers that we always communicate with her were not interfered with either and that I cannot claim to have had these discussions with somebody else other than herself. I know this customer very well and nobody would have duped me to believe that she is Dr. Nelly Rwamba Mugo, if she was not the one. Had Dr. Mugo not endorsed this transaction when I confirmed with her, the money would not have been transmitted. We did this confirmation as a measure against any possible or suspected fraud. I wish to confirm that 99% of all the SWIFTS and RTGS messages that have passed through my hands, have always been confirmed with the customers as a safeguard against any possible fraudulent activities as per the recommendation by our audit teams who have visited the branch before. The telephone costs related to these kinds of confirmations in relation to swifts and RTGS can attest for it as we have always put the interest of the bank first. I regret that this has been my first and worst fraudulent activity to have taken place despite all the efforts I had put in place as narrated above. I know that the origin of the email in question which will give us a clue as to whether it came from the customer or not. The phone logs can also help us know whether this customer endorsed the transaction whole heartedly or had shown any reservation during this confirmation that I did not put into consideration.”**

The claimant was called to attend a disciplinary hearing. He did attend. He was dismissed from the respondent's employment by the letter dated 31.10.2014 and effective the date of the letter. The reason for dismissal was stated thus, **“This letter serves to confirm the Bank's decision to dismiss you from your employment on account of the Bank being reasonably and sufficiently satisfied that on 12<sup>th</sup> and 13<sup>th</sup> June 2014 you were grossly negligent in the performance of your duties. On the days in question, you acted on email instructions purported to have originated from a Bank customer to transfer funds. You failed to follow up with the customer to authenticate the instructions or obtain an indemnity, as a result of which a fraud of USD 10, 120=00 was perpetrated, the particulars whereof are well known to you.”**

The claimant appealed against the dismissal. The claimant's concerns were as follows:

a) He maintained the customer gave the email and telephone instructions.

b) The voice recording of the telephone conversation between the claimant and the customer on 13.06.2014 at around 10.00am would confirm that the customer gave the instructions.

c) There was no evidence that the customer's telephone numbers had been diverted or interfered with.

d) The customer's signature on the transfer forms had been verified by the respondent's officer in charge of RTGS and SWIFTS as correct.

e) When the customer called on 16.06.2014 to complain and immediate action was taken to recall the funds and the feedback received later was negative in that the funds had been utilised by the recipient in the USA.

f) The claimant's officer's profile had been amended giving the officer overall authority to post items and take referrals himself without referring and getting approvals of the Branch Operations Manager or Branch Manager. He wanted to know who in the ICT department had changed the officer's profile. The officer had posted millions of shillings on the system on 13.06.2014 without approval of the Branch Operations Manager or Branch Manager.

g) He had recorded a statement with the Banking Fraud Investigation department and the findings by Central Bank had not been conveyed to him.

h) His transfer to Hill Branch in April 2014 had been put on hold for no apparent reasons until June 2014 when the incident happened.

The respondent's witness No. 1 (RW1) was Willy Kiptoo Tanui, the respondent's Head of Security. He testified as follows:

a) He interviewed or questioned the claimant and the customer, Dr. Nelly Mugo about the incident.

b) He confirmed that the claimant called the customer on the material date (13.06.2014) to verify some things including agreeing on the dollar exchange rate. The customer confirmed they agreed on Kshs. 89.00 per USD 1.00. The customer admitted that the claimant called her but that she expected money in her account – that her understanding was about a credit on her account for certain donor funds and not a debit. The customer did not run a dollar account and so she could not receive cash on that account in USD. Transaction had been on 12<sup>th</sup> to 13<sup>th</sup> June 2014. The customer confirmed speaking to the claimant a few days prior to reporting her case on 16.06.2014. The telephone conversation was a misunderstanding as per the customer's position as told to RW1 during investigations but in her letter of 16.06.2014 she did not state as much.

The respondent witness No.2 was Tabitha Mtwā (RW2) the Employee Relations Advisor.

The Court has considered the evidence, the pleadings and the submissions and makes findings on the matters in dispute as follows.

The **1<sup>st</sup> issue** for determination is whether the termination was unfair. The evidence is that the claimant was notified the allegations against him, he replied, he attended the disciplinary hearing, he was thereafter terminated and he appealed. The Court returns that it has been established that the respondent accorded the claimant due process as per section 41 and 45 of the Employment Act, 2007. Indeed, the claimant does not submit on procedural unfairness in this case.

Was the reason for termination unfair? The evidence is that the customer admitted that the claimant called her on 13.06.2014, they discussed dollar rates of exchange, and the customer maintained a Kenya currency account – so that the conversation about the dollar rate could not have been about a credit but a debit on her account. The Court has considered that the claimant requested the replay of the recorded telephone conversation to confirm the content of the conversation but that was not done. The claimant's position that the customer's signature on the request forms was verified as true by the relevant respondent's officer remained unchallenged. The email dated 04.07.2014 at 08.15 by Abraham Kibet Chepkwony confirmed that the claimant had carried out all the due process and that the customer commonly carried out electronic transactions at the Branch. The Court returns that taking the evidence into account, the respondent cannot be said to have had a valid reason to dismiss the claimant as at the time of dismissal as per section 43 of the Act. The respondent may have lost money in the process but it has not been established that the same was attributable to the claimant's gross negligence as was levelled against him. The claimant, as submitted for him, acted reasonably because he took into account all matters he was required to take into account and he has not been shown to have acted upon extraneous considerations. Once again, the Court considers that the email dated 04.07.2014 at 08.15 by Abraham Kibet Chepkwony confirmed that the transaction in issue had complied with all the expected protocols and the Court returns that had the respondent directed its mind properly to the matters at hand and the circumstances of the allegations, it would be obvious that it was not a case for dismissal of the claimant, even in exercise of the remotest objectivity in the matter. The Court considers that in light of the evidence and circumstances of the case, it cannot pass for a case that one employer could very well subjectively be entitled to dismiss and the other one be entitled to retain the employee or impose such other lenient punishment like a reprimand.

It is submitted for the respondent that the claimant was negligent for acting on instructions given on a customer's wrong email address – that the email giving instructions had an extra "P". However in the letter dated 16.06.2014 the customer alleged that her email address had been hacked and not that it was the wrong address. The email by the claimant dated 15.06.2014 at 15.36 and which must have prompted the customer to write the letter of 16.06.2014 was addressed to the claimant at her email [nellymugo@gmail.com](mailto:nellymugo@gmail.com) so that on a balance of probability, that was her correct email address at the material time, but only that, in her words, it had been hacked. Further, by the customer confirming that she spoke to the claimant on 13.06.2014 about the dollar exchange rate and the voice record of the conversation not having been replayed, there is no reason to hold the claimant culpable in negligence whereas even if the email had a defect, the customer had confirmed the transaction on phone and by signing the request forms as was required by policy. It all sounds like a transaction in dreamland but on evidence and circumstances before the Court, the claimant cannot be held culpable of negligence or grossly negligent as the Court refuses to follow illusions but is bound by the material before the Court. The Court considers that many bad things may go wrong at the workplace but unless such bad things are shown to be attributable to an employee's misconduct or poor performance, the happening of such bad things by itself cannot constitute a fair or justified or genuine reason for imposition of this or other punishment against the employee. In this case, the Court further returns that the alleged reason for dismissal has not been shown to relate to the claimant's conduct, capacity or compatibility; or based on the operational requirements of the respondent (as envisaged in section 45(2) (b) of the Employment Act, 2007). The evidence is that the claimant substantially complied with the respondent's operational requirements for the electronic transaction in issue and therefore, the reason for termination is found not valid or genuine.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. As submitted for the respondent the claimant was dismissed on 31.10.2014 which is over 4 years ago. Section 12 (3) (vii) of the Employment and Labour Relations Court Act is clear that an order of reinstatement of any employee is available within 3 years of dismissal. The three years have lapsed and the Court is guided that reinstatement would not be an appropriate remedy in the circumstances of the case.

The claimant prays for 12 months' compensation. The Court has considered the factors under section 49 of the Employment Act, 2007. The claimant had served for 20 years. He had a clean record of service. He was willing and desirous of continuing in the respondent's service. The Court has reconsidered the evidence and the submissions made for the respondent. There is no established mitigating factor that has been urged. The aggravating factor in the case is that in view of the seriousness of the accusations a report was made against the claimant and he recorded a statement with the Banking Fraud Investigation Department and the findings by Central Bank had not been conveyed to him – showing that he was not culpable at all but which circumstance had not been taken into account by the respondent. It was suggested for the respondent that the claimant had been apologetic when in his response dated 05.08.2014 he wrote and concluded, **“Sir, I did exercise the care that any reasonable person would exercise in such circumstances and I humbly regret and apologize for the unfortunate loss that the bank has incurred as a result of what transpired.”** The Court returns that the statement is clear that the claimant reiterated that he had acted reasonably and at the same time, he was putting himself in the shoes of his employer by way of the virtue of empathy and regretting and apologising for what had befallen the bank, as a good employee, in the opinion of the Court, writing as a part of the Bank and expressing the loss as much. In the opinion of the Court such cannot be a statement to be adversely brought against the claimant. In the circumstances and taking into account the enumerated considerations and the findings of the Court earlier in this judgment, the claimant is awarded 12 months compensation for the unfair termination at Kshs.182, 870.00 per month making **Kshs.2, 194, 440.00**. RW2 testified that there were 23 leave days on 31.10.2014 and the claimant is awarded Kshs.182, 870.00 x23/30 making **Kshs.140, 200.30**. Further, RW2 testified that salary for October 2014 had been paid but provided no documentary evidence for such payment and the claimant is awarded **Kshs.182, 870.00** accordingly and as was prayed for. Thus, the sum payable to the claimant by the respondent is **Kshs.2, 517,510.30**.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs.2, 517,510.30** by 01.09.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 12<sup>th</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**