



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 305 OF 2014**

**MUTEGI MATEMBO JACOB.....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....RESPONDENT**

**J U D G M E N T**

1. By a Memorandum of claim filed on 4<sup>th</sup> March,2011, the Claimant averred that he was on 18<sup>th</sup> June,1997 employed by the Respondent as a clerk and later promoted to a superior at a salary of Kshs. 83,381/= which included a house allowance of Kshs. 4,711/=.
2. On 25<sup>th</sup> June 2008 the respondent terminated the Claimant's employment for reasons which the Claimant avers were malicious assumptions and unjustified and were fabricated. The Claimant further stated that prior to the termination of his contract he had questioned the Branch Manager on why he (the Manager decided to freeze an account under investigation which could have led to the arrest of the fraudster about this was met with rude replies in the pretext of being annoyed. The Claimant therefore averred that the termination of this employment was wrongful and unlawful.
3. The respondent on its part pleaded that on 20<sup>th</sup> May,2008 it received a complaint from a customer, one Maria Wambua of fraudulent ATM withdrawals from his account between 13<sup>th</sup> May,2008 to 19<sup>th</sup> May, 2008 of Kshs. 740,000/= at Thika Branch and kshs. 460,000/= from 10<sup>th</sup> May 2008 to 20<sup>th</sup> May at various points totaling to in all to kshs. 1,200,000/= .
4. Initial investigations by respondent revealed that the Claimant had authorized issuance of a new ATM card while there was an active ATM card with the true account holder. He issued the replacement card without disability the existing card in case of loss or repossessing of the old card and that he released the pin mailer to the fraudster against a signature which clearly was different from the signatures held in the banking accounts.
5. The Claimant was on 28<sup>th</sup> May,2008 addressed to explain the lapses on his part that led to the huge loss which he did through a letter dated same day denying ever knowing the person who dealt with the fraudster. The Claimant according to the respondent, further admitted and said it is was human error in the course of his duty and expressed regret.
6. On 14<sup>th</sup> June, 2008 the Claimant was provided with further details showing improper conduct in relation to the fraudster's withdrawal from the clients account especially why he accessed/enquired into the account of the client severally without reasonable cause or request by client for services.
7. The Claimant in response asked for more time to reply to the details. Instead on 19h June,2008 the Claimant resigned which resignation the respondent refused to accept since the Claimant had not responded to the request for his explanation over the irregularities. The Claimant was further informed that services disciplinary action would be taken against him if he did not give explanations. The respondent subsequently terminated the Claimant's service on 25<sup>th</sup> June, 2008 due to loss of confidence in his services and paid him his terminal benefits.
8. In his oral evidence the Claimant stated that his duties entailed receiving applications and issuing ATM cars. The procedure was that the applicant's would first see the customer case would check if the applicant his another ATM card. The customer care would then verify the identity card details and signatures of the customer to find if they conceded with account details. The applications would then be brought to him at the close of business and he would also do the verification from his PC. He would then confirm and sign the authorization for issuance.
9. In this particular case a customer came and complained that his ATM card was not working in Nairobi. It was tested and it worked. It discovered that the customer was sharing the same pin with another person who turned out to be fraudster. The customer was referred to him

and when he checked the divider card the signature of the genuine customer and that of the fraudster were similar. He therefore advised the customer to change the signature a little. It was agreed that the account should not be frozen because the withdrawals were from a particular branch in Thika so that the fraudster could be arrested. The retail manager however froze the account.

10. He was called before the disciplinary panel and interviewed by the investigator. Concerning viewing the customer's account, it was his evidence that he did so for marketing purposes since at the time the respondent was marketing credit cards and loans and that they targeted customers with large deposits.

11. Upon termination he was paid his terminal dues which consisted of one month's pay in lieu of notice, leave dues and pension contributions.

12. In cross-examination he stated that he was the one who authorized the issuance of the ATM card in issuance. He also authorized the pin mailers. It was further his evidence that he could not detect the fraud immediately because the details given were the same as what was at the records. He however stated that if there was already ATM card the system would issue an alert. It further his evidence that before authorizing the issuance of an ATM card he had to confirm the applicant was the correct person. He however, stated that the detection of an existing ATM card would be done by the customer care and not at the personal banker's PC.

13. The respondent's witness Mr. Sammy Ndungu Mutonga stated he was the respondent's manager at the material time. According to him, the Claimant joined Kitui Branch in 2005 from Embu Branch.

14. According to him, the Claimant was responsible for receiving, handling and responding to customer mail, verbal enquiries and authorizing ATM orders. A customer by the name Maminya Wambua came to his office and complained of several withdrawals from his account.

15. They stated the investigations on how the ATM card was found it was the Claimant who handled the matter and authorized the issuance of the fraudster's ATM Card. Further, the Claimant severally accessed the customer's account prior to the issuance of the fraudulent ATM card.

16. In cross-examination he stated that he could not recall any previous warning or disciplinary issues against the Claimant'. He further confirmed that the system would prompt if there was another ATM card.

17. He further stated that the account was immediately frozen and that no decision was made to keep the account open to enable the arrest of the fraudster. The bank would have lost a lot of money if the account was not immediately frozen.

18. The reason for which a termination of employment is done are reasons which the employer genuinely believed to exist and which caused the employer to terminate the services of an employee. It is common ground that a customer by the name Maria Wambua lost some money as a result of issuance of a parallel ATM card to different person than herself.

19. The Claimant does not deny issuing the second ATM card. He however states that he did so after verifying the details on the application, the identity card and the signature on the divider card. The Claimant however stated that if there was in existence another ATM card, the system would prompt. The Claimant however did not say if in this particular case the system prompted him or not.

20. The Claimant further did not deny severally accessing the customer's account before the issuance of the fraudulent ATM card. His justification for doing so was that it was normal for marketing purposes since at the time the respondent was marketing credit cards and were targeting customers with large deposits.

21. When the matter was under intensive investigation, the Claimant initially cooperated and offered answers to questions raised however when more questions were raised, the Claimant instead of responding to the same attempted to resign but the resignation was refused by the respondent.

22. It is the Courts view that the allegations against the Claimant were serious and that he did not convincingly explain why he was not able to detect that there was already in existence another ATM card before issuing the second ATM card to the fraudster. Further, no prudent Bank would leave open an account under fraudulent attack hoping to arrest the fraudster as he continues with the fraud.

23. In the Courts view the reasons for terminating the Claimants service were valid and reasonable. Regarding procedure followed, the Claimant himself admitted he was issued with a show cause letter to which he responded. He further admitted appearing before the disciplinary committee of the respondent. The Court is thus satisfied that the process followed before termination was fair.

24. In conclusion the court finds the claim without merit and is hereby dismissed with costs.

25. It is so ordered.

Dated at Nairobi this 20<sup>th</sup> day of September, 2019

**Abuodha J. N.**

**Judge**

**Delivered this 20<sup>th</sup> day of September, 2019**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**