



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 543 OF 2013
BANKING, INSURANCE & FINANCE UNION CLAIMANT
v
CO-OPERATIVE BANK OF KENYA LTD RESPONDENT

JUDGMENT

1. The Banking, Insurance & Finance Union (the Union) instituted legal proceedings against the Co-Operative Bank of Kenya Ltd (Respondent) on 3 April 2013 and the Issues in Dispute were stated as Wrongful dismissal from employment of Melodie N. Gatuguta (Grievant).
2. The Respondent filed a *Statement of Response* on 8 May 2014 contending that the dismissal of the Grievant was procedural, lawful and fair.
3. The Cause was heard on 25 October 2018, 20 November 2018, 20 February 2019 and on 10 June 2019. The Grievant and the Respondent's Investigations Manager and Employee Relations Manager testified. The witnesses adopted their witness statements and also produced and relied on several documents.
4. The Union filed submissions on 20 June 2019. Although the Respondent filed its submissions on 18 July 2019, they were only brought to the attention of the Court in the course of delivering the judgment (Court had reached paragraph 4 of the judgment) forcing the Court to retreat to look at and consider the submissions.
5. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as examined hereunder.

Unfair termination of employment

Procedural fairness

6. Sections 35(1) and 41 of the Employment Act, 2007 provide the primary procedural safeguards an employer should comply with before terminating an employment contract on the grounds of *misconduct, poor performance or physical incapacity*.
7. The Grievant was issued with a show cause on 11 January 2013. She responded on 14 January 2013.
8. The Grievant was then invited to an oral disciplinary hearing scheduled for 24 January 2013. The invitation letter informed the Grievant of the right to be accompanied by another member of staff of her choice.
9. The Grievant attended the disciplinary hearing and minutes of the hearing were produced in Court.
10. Although the minutes show that the Grievant was accompanied by a colleague, she alleged that she was denied a chance to be accompanied by a Union representative.
11. The Respondent informed the Grievant of a right to be accompanied. It was therefore upon the Grievant to alert or ask a union representative to accompany her.
12. The Grievant did not disclose whether she requested for a union representative to accompany her, and whether such union representative was denied entry or audience before the Disciplinary Committee.

13. Further, the Grievant did not indicate that at any point she told the Disciplinary Committee that she was not satisfied with being accompanied by a colleague instead of a union representative.

14. After the hearing, the Disciplinary Committee recommended dismissal and a summary dismissal letter was issued to the Grievant on 25 January 2013.

15. The Grievant appealed against the summary dismissal on 11 February 2013 and on 10 April 2013, the Respondent's Director, Human Resources Division informed her of the rejection of the appeal.

16. After considering all the evidence placed before it, the Court finds that the Respondent was in substantial compliance with procedural fairness requirements.

Substantive fairness

17. Sections 43 and 45 of the Employment Act, 2007 have placed a burden on employers to prove the reasons for dismissing an employee, and that the reasons are valid and fair.

18. An employer is also enjoined by section 45(4)(b) of the Act to demonstrate that in meting out a sanction, it acted in accordance with *justice and equity*.

19. The allegation which led to the summary dismissal of the Grievant was On 28th December 2012 you received fraudulent RTGS instructions from an alleged John Otieno who is not an authorised agent to the above mentioned account, to transfer Kshs 3.7 million from the account which you posted and recorded for processing without even asking the person to provide his ID card for you to confirm his details. Your actions facilitated fraudulent transfer of funds and loss of Kshs 3.7 million to the Bank and contravened the provisions of the Operating Manual Vol. III which requires that RTGS instructions should be delivered by the account holder, signatories or authorised agents.

20. In attempt to discharge the statutory burden placed on it, the Respondent called 2 witnesses.

21. The first witness was an Investigator. He produced a copy of the Respondent's *RTGS transfer procedures* and stated that the Grievant did not follow the procedures as the instructions for the transfer in contention was not delivered by the requisite persons (account holder, authorised agent or account signatory).

22. The witness also stated that under the procedures, it was the responsibility of the Operations Manager to authorise any transaction above a Teller's limit after making a call back, and that the Operations Manager confirmed during investigations that she made a call back to the account holder's given phone number.

23. The witness however stated that the Account holder denied receiving the call back from the Operations Manager, or issuing the cheque presented to the Grievant (the Account holder was out of the country).

24. According to the witness, although the investigations did not include interviews with the telephone service provider, the Account holder informed him that the service provider had informed him that his sim card had been fraudulently replaced on 28 December 2013.

25. Under cross-examination, the witness admitted that the Grievant did not hide any information during investigations and that the Operations Manager admitted that the Grievant sought her guidance upon receiving the *RTGS* request. He admitted that the Grievant had no reason to doubt that the Operations Manager had made a call back.

26. The witness also admitted that the Branch Manager approved the transaction after which the Grievant posted the transaction into the system, and therefore he could not blame the Grievant. In the same breathe, he blamed the Grievant, the Operations Manager and the Branch Manager for negligence leading to the loss of money.

27. The Respondent's second witness was the Employee Relations Manager and her testimony related substantially to procedural fairness aspects, already discussed by the Court.

28. It is not disputed that there was a fraudulent transaction and that it is the Grievant who was the recipient of the *RTGS* instructions occasioning loss of a customer's monies.

29. The Grievant was confronted with a situation which she considered required the intervention of her bosses because the request for the *RTGS* appeared not to be in order. She reported to the Operations Manager. The Operations Manager initiated a call-back and confirmed that the *RTGS* instructions had been given by the Account Holder. The Branch Manager then approved the transaction.

30. The Court has anxiously considered the evidence on the role played by the Grievant in the fraudulent transaction.

31. The Grievant did not initiate or take any unilateral action to post the request into the system upon receiving the *RTGS* instructions. She sought for advice from her superiors. The superiors authorised and approved the instructions before the Grievant posted the request into the system. It is probable that the fraud would not have passed through if the Grievant's superiors had not endorsed the instructions.

32. Cyber fraudsters had however disabled the Account holder's phone and diverted the calls. The fraudster who received the call-back gave an all clear and on the basis of the clearance, the Operations Manager caused the Branch Manager to approve the *RTGS* transaction before the

Grievant was instructed to proceed and complete/post the transaction.

33. The Grievant did not strictly comply with the standard operating procedures, but in the same light, she did not initiate by herself any process to trigger the fraudulent transaction. It was only after she had consulted with and gotten the go ahead of her bosses that she instituted compliance with the transaction instructions.

34. The Court observed the demeanour of the Grievant and noted some tinge of naïveté in her. Without endorsing the naïveté, the Court finds that she did what any ordinary employee in her circumstances would have done, consult the supervisors.

35. In the view of the Court, though the Respondent might have had valid reasons to summarily dismiss the Grievant, the summary dismissal was not fair, and did not accord with *justice and equity* in terms of sections 45(2)(b) and (4)(b) of the Employment Act, 2007.

36. The sanction of summary dismissal was therefore too severe for the role played by the Grievant (see *Mutua Musau v Barclays Bank of Kenya Ltd* (2016) eKLR cited by the Respondent where the employer instead of summary dismissal terminated the services of the Claimant with terminal dues). The Court notes that the Respondent's Disciplinary Procedures had other forms of penalties, including termination on notice.

Appropriate remedies

Reinstatement

37. The primary relief sought by the Grievant was reinstatement without loss of any benefits.

38. In the view of the Court, and in consideration of time lapse of more than 3 years, this would not be an appropriate case to order reinstatement.

Compensation

39. In lieu of reinstatement, and in further consideration of the length of service of the Grievant (slightly above 2 years), the Court is of the view that compensation equivalent to 3 months gross wages would be appropriate and fair (gross salary in January 2013 was Kshs 72,873/-).

Conclusion and Orders

40. The Court finds and holds that the summary dismissal of the Grievant was not fair or in accord with *justice and equity* and awards her

(a) Compensation **Kshs 218,619/-**

41. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 16th day of September 2019.

Radido Stephen

Judge

Appearances

For Grievant Mr. Mwaura Ngare, Chief Organising, Banking, Insurance & Finance Union, Kenya

For Respondent Mr. Kimondo instructed by Kimondo Mubea & Co. Advocates

Court Assistant Lindsey