



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 198 OF 2015**

**BANKING, INSURANCE & FINANCE UNION (KENYA).....CLAIMANT**

**VERSUS**

**COOPERATIVE BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Banking, Insurance & Finance Union (Kenya) on behalf of its member, Judy Wambani Wamalwa (the Grievant), a former employee of Cooperative Bank of Kenya. The claim is contained in a Memorandum of Claim dated 13<sup>th</sup> February 2015 and filed in court on 18<sup>th</sup> February 2015. The Respondent filed a Statement of Response on 24<sup>th</sup> March 2015.

2. When the matter came up for hearing, the Claimant called the Grievant while the Respondent called Emmajean Chepekmoi Luta, Simon Muriithi Maina and Samuel Magati Osero. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that the Grievant, Judy Wambani Wamalwa was employed by the Respondent as a Graduate Clerk on 27<sup>th</sup> June 2011 and posted to Mumias Branch. She was confirmed in her appointment on 27<sup>th</sup> December 2011. At the time she left employment, she was a teller at the executive counter.

4. On 23<sup>rd</sup> March 2011, the Grievant was arrested and booked at Mumias Police Station. On 25<sup>th</sup> March 2013, she was charged with conspiracy to defraud contrary to Section 317 of the Penal Code and on the same day she was suspended from duty.

5. On 15<sup>th</sup> April 2013, the Grievant was issued with a show cause letter on allegations of theft of Kshs. 32,701 to which she duly responded. On 9<sup>th</sup> May 2011, she appeared before a disciplinary panel and on 17<sup>th</sup> May 2013, she was summarily dismissed.

6. The Claimant reported a trade dispute to the Minister for Labour on 30<sup>th</sup> July 2013 who appointed a Conciliator. The matter was however not resolved at the conciliation stage, hence this claim.

7. The Grievant was acquitted of the criminal charges on 14<sup>th</sup> July 2014 upon which the Claimant wrote to the Respondent asking for her reinstatement but received no response.

8. It is the Claimant's case that the Grievant's dismissal was unlawful and unfair. Additionally, it was in violation of Clause A5 (c) (ii) of the Collective Bargaining Agreement.

9. The Claimant now seeks the following on behalf of the Grievant:

- a) Reinstatement without loss of benefits or break in years of service;
- b) Back salaries and allowances;
- c) 12 months' salary in compensation for unlawful dismissal ;

d) Kshs. 3,000,000 as exemplary damages;

e) Costs.

### **The Respondent's Case**

10. In its Statement of Response dated 24<sup>th</sup> March 2015 and filed in court on even date, the Respondent states that the Grievant, Judy Wambani Wamalwa was posted to its Mumias Branch on 27<sup>th</sup> June 2011. She worked as a teller and her duties included; receiving and paying various financial instruments, processing and paying MoneyGram transactions, processing foreign drafts and SWIFTs, processing TT messages as well as paying and receiving cash.

11. The Grievant was also appointed as a Checker on various dates whose roles included; ensuring smooth running of the Audit Department and coordination of other sections, filing and retrieval of records, batching vouchers for microfilming and referral of cheques/entries without sufficient funds.

12. The Respondent maintains that the Grievant's suspension was pursuant to the express provisions of Clause A5 (c) of the CBA.

13. The Respondent avers that it conducted investigations into the theft of Kshs. 32,701,093 at its Mumias Branch. On 25<sup>th</sup> March 2013, its Head of Security issued a report which recommended disciplinary action against the Grievant for gross misconduct under Staff Manual Part III Section 2 Appendix 14.

14. The Respondent adds that following the finding of the Disciplinary Committee meeting held on 9<sup>th</sup> May 2013, the Grievant was summarily dismissed pursuant to Clause A5 (a) of the CBA for the reasons that:

a) She watched as funds were un-procedurally paid out at her counter from 2<sup>nd</sup> March 2013 to 21<sup>st</sup> March 2013 but only reported the same on 21<sup>st</sup> March 2013;

b) She failed to raise an alarm over the malpractice following the payment of customers by the custodians rather than the tellers;

c) She kept Kshs. 3 million given to her by the custodians on 19<sup>th</sup> March 2013 and 21<sup>st</sup> March 2013, which had not been posted to her and later gave the same to the custodians to be paid without any instructions/ cheque to debit the customer's account.

15. It is the Respondent's case that there were justifiable and lawful grounds for the Grievant's dismissal as she willfully and neglected or carelessly and improperly performed her duties under her contract of employment. The Respondent holds that the Grievant either willfully or by negligence allowed or facilitated the loss of the Respondent's cash or property.

16. Regarding the criminal case against the Grievant alongside others, the Respondent states that she was acquitted after her dismissal had taken effect. The Respondent adds that pursuant to Clause A5 (c) (iii) of the CBA, reinstatement would only apply if the Grievant was still on suspension.

### **Findings and Determination**

17. There are two (2) issues for determination in this case:

a) Whether the Grievant's dismissal was lawful and fair;

b) Whether the Grievant is entitled to the remedies sought.

### **The Dismissal**

18. The Grievant was dismissed by letter dated 17<sup>th</sup> May 2013, stating as follows:

**"RE: SUMMARY DISMISSAL-LOSS OF KSHS. 32,701,093 AT MUMIAS**

#### **BRANCH**

*We refer to previous correspondence on the above matter culminating in your appearance before the Staff Disciplinary Committee on 9<sup>th</sup> May 2013 and have to inform you that your explanation did not exonerate you from the charges preferred against you.*

*Consequently, the Bank has decided to summarily dismiss you from service with immediate effect in accordance with the provisions of Clause A5.a) of the Collective Bargaining Agreement. You are required to handover all Bank inventory and/or documents that may still be under your control, together with the staff identification card to the Manager, Mumias Branch immediately upon receipt of this letter.*

*Note that loans and other facilities accorded to you by virtue of your status as a staff member in the Bank become repayable*

immediately in full as follows:

Personal loan (FBT)	-	Kshs. 491,666.00
Res. Prop. (new)	-	Kshs. 1,367,331.00
Coop Card	-	Kshs. 24,977.00Dr
<b>Total</b>	-	<b>Kshs. 1,858,997.00</b>

Further, note that all outstanding loans in your name will start attracting interest at the prevailing commercial rate effective 30 days from the date of this letter until the same are fully repaid.

Any monies due to you less liabilities shall be determined and paid to you as soon as possible on receipt of the duly completed attached Form HRD/2.

**Please note that your Certificate of Service is available for collection from this office immediately.**

(Signed)

**ANNE KAHUTHU**

**FOR: DIRECTOR**

**HUMAN RESOURCES DIVISION**

19. Prior to the dismissal, the Grievant had been issued with a show cause letter on 15<sup>th</sup> April 2013, accusing her of breach of security in matters affecting the Bank's business, particulars being that:

- a) Between 2<sup>nd</sup> March 2013 and 21<sup>st</sup> March 2013, she abetted a fraud of Kshs. 32,701, 093 facilitated by Cash Custodians as she witnessed funds being un-procedurally paid to an accomplice through her counter, without raising an alarm, only reporting on 21<sup>st</sup> March 2013;
- b) On 19<sup>th</sup> & 21<sup>st</sup> March 2013, she received and kept in custody Kshs. 3 million which had not been posted as per procedure, later handing over the cash to Cash Custodians who gave out the cash to their accomplice through her counter without any instructions to debit the customer's account.

20. The Grievant responded to the show cause letter on 18<sup>th</sup> April 2013. In her response, she states the following:

- a) That in the course of the day on 19<sup>th</sup> March 2013, the Cash Custodians brought Kshs. 2 million from the strong room and placed it on top of her cash box, alleging that a customer was coming to receive it. She removed the cash from the top of her cash box and put it inside the trolley awaiting the customer. A few minutes later one of the Cash Custodians, David Watila collected the money from her, allegedly to go and pay the customer from the bulk counter;
- b) That on the morning of 21<sup>st</sup> March 2013, she became suspicious because the Cash Custodians brought her Kshs. 3.6 million but only posted Kshs. 600,000 to her journal. Further, there was no cheque to debit the Kshs. 3 million. She informed the Cash Officer, Dickson Odak of the anomaly on phone, who told her that he would notify the Branch Manager, Emmajean Luta. Five minutes later, David Watila collected the Kshs. 3 million, allegedly because the Branch Manager would carry out a surprise cash check at the strong room;
- c) That fifteen minutes later, David Watila gave her Kshs. 2 million, allegedly for the payment that was to be made before the surprise cash check. Watila later picked the money from her to pay the customer at the bulk counter. The Grievant notified Dickson Odak of this incident after which she was summoned by the Branch Manager for confirmation of the report to Odak.

21. The Grievant pleads that she was a whistle blower and a victim of a well-orchestrated fraud, involving her seniors at the Branch. The question in the mind of the Court at this stage is whether in the circumstances of the case, the Respondent had a valid reason for dismissing the Grievant as contemplated under Section 43 of the Employment Act, 2007.

22. In considering what constitutes a valid reason within the meaning of Section 43, in **Paul Waigiri Muriuki Vs Nairobi Water and Sewerage Company Ltd [2015] eKLR** this Court stated the following:

***“When the Court sits it does not ask itself what it would have done had it been in the position of the employer. What it asks is whether given the facts and circumstances of the particular case, the employer acted lawfully and in a reasonable manner.”***

23. In her testimony before the Court, the Grievant admitted that she did not report the incident of 19<sup>th</sup> March 2013 to any of her superiors.

The Court was puzzled as to why her suspicion was not aroused on this day only to come alive three days later, on 23<sup>rd</sup> March 2013. This Court has stated elsewhere that bankers operate in a highly sensitive environment, within which they handle other people's money. The duty of care must therefore be commensurably high (*Agnes Murigi Mwangi v Barclays Bank of Kenya Limited [2013] eKLR*).

24. The Court was referred to Clause 3.1 of the Respondent's Cash and Cash Movement Policy which prohibited the keeping of cash on a teller's counter without a transaction at hand. This is what the Grievant did on 19<sup>th</sup> March 2013 and no credible explanation was offered for this significant lapse.

25. The Grievant confirmed to the Court that she was well aware of the Cash and Cash Movement Policy and her allegation that it was generally not followed at her Branch was not a good reason for her to flout it. I say so because, if the Grievant had raised the alarm on 19<sup>th</sup> March 2013, subsequent losses could have been forestalled. She failed in her duty of care to the Respondent

Bank and its customers and the Court will not shield her.

26. In presenting its case before the Court, the Claimant laid a lot of emphasis on the Grievant's acquittal by the Senior Principal Magistrate at Mumias. The only thing I will say on this account is that there is no necessary nexus between the verdict in a criminal trial and the findings in an internal disciplinary process, even on the same set of facts.

27. This jurisprudence was well captured by my brother, **Rika J** in *James Mugeria Igati v Public Service Commission of Kenya [2014] eKLR* as follows:

***“The Claimant appears to confuse the disciplinary process, which is properly a private process between an employer and its employee, whose aim is to ensure the employer's business is not harmed by delinquent employee behaviour, with a criminal trial which is a public process where prosecution is carried out by the state and is purposed on securing the safety of the general population, and on maintenance of a stable social order. This Court has expressed the view in the past that the two processes are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process.”***

28. The foregoing position was confirmed by the Court of *Appeal in Attorney General & another v Andrew Maina Githinji & another [2016] eKLR* and is therefore firmly grounded case law. The Employment and Labour Relations Court neither sits on appeal over nor is it guided by decisions of lower criminal courts. The role of this Court is to evaluate the disciplinary processes and outcomes at the work place and if the law has been followed and the decision is on the whole reasonable, the employer's action must be left to stand.

29. In the instant case, I find that the employer had a valid reason for dismissing the Grievant as required under Section 43 of the Employment Act. Additionally, the Grievant was subjected to the disciplinary process set out under Section 41 of the Act as well as Clause A5 of the Collective Bargaining Agreement between the Claimant and Kenya Bankers Association.

30. For the foregoing reasons, I find the Claimant's claim to be without merit.

The result is that the entire claim fails and is dismissed.

31. Each party will bear their own costs.

32. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JANUARY 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Mwaura (Union Representative) for the Claimant

Mr. Kiche for the Respondent