



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2028 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 27th April, 2018)

BANKING INSURANCE AND FINANCE UNION (KENYA).....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit claiming unfair/unlawful termination of employment of Lilian Tintira Kaoka. The Claimant aver that Lilian Tintira was employed by the Respondent on 1st April 2008 as a Graduate Clerk. She was posted to commence clerical duties at the Respondents' Harambee Avenue as a Cashier and Customer Service Officer and later transferred to the bank's Sameer Park branch in 2013 in the same position. Her duties were payments and receipts of cash, cheque payments and deposits, KRA returns, money gram transactions, chief teller and ATM control and banking. Lilian worked in the bank for close to eight years without any cases of indiscipline as to warning or caution letters and she had a clean working record.

2. The Claimant further avers that on or about 27th February 2015, a customer walked into the bank and went to the grievant's cubicle for service. He intended to withdraw Kshs.1,000 through a cash withdrawal voucher. After being presented with the said withdrawal slip, the grievant entered into the account using the customer's account number as required and on checking the customer's signature, the Grievant discovered that the signature was not a perfect match to the one captured in the bank's specimen signature in the bank's system. The grievant requested the customer to counter sign the withdrawal slip for proper verification but even then, the signature was still differing. The grievant requested the customer to go and see the branch's customer service officer for further assistance as she continued to attend to other customers.

3. The grievant cancelled this transaction and then continued with the rest of the day's work. The customer did not return back to see the grievant. After months, in May 2015, the grievant was called by the bank's security team and asked to record a statement regarding the attempted withdrawal of Kshs. 1000 which occurred in February 2015 which she did stating exactly what she did when the customer came to her counter.

4. The grievant was later invited to a disciplinary hearing on 17th June 2015 to explain the circumstances of the attempted withdrawal. The invitation letter to a disciplinary hearing accused her of reversing an entry in a dormant account while in the actual sense it was a cancellation and not a reversal, as such

cancellations do not reflect in the cashier's report of the day.

5. On 4th August 2015, the grievant was dismissed from the services of the Respondents for what the bank referred to as "gross misconduct by transaction on a dormant account thus activating and giving rise to posting of fraudulent transaction resulting into loss of Kshs. 3,153,000/=".

6. The matter was brought to the attention of the Claimant and on 24th August 2015, a trade dispute was reported to the cabinet secretary of Labour, Social Security and Services as required by Section 62 of the Labour Relations Act, 2007. The dispute was considered and accepted and a conciliator Mr. J N. Ndiho was appointed to endeavor to settle the dispute by conciliation. The conciliator in his report found that no offence was committed by the grievant and recommended re-instatement.

7. In their response, the Respondents denies each and every allegation contained in the statement of Claim and admit that the grievant worked for the Respondent. The Respondent aver that on 17th March 2015, the transaction Monitoring Unit noticed some suspicious transactions on an old account number 01243033673200 belonging to a customer by the name Kenyatta Kimori. The suspicious transaction to customer's account amounted to a loss of Kshs. 3,153,000 and on investigating the matter, the Respondent discovered another person not being the customer had been withdrawing money from the account with the assistance of tellers from other branches of the Respondent bank.

8. The Respondents states that on 27th February 2015, the Claimant working as a teller at Sameer park branch performed a withdrawal of Kshs.1000 on the customer's account of which she reversed and on being questioned about it, the Claimant failed to provide a satisfactory explanation for her actions. On reviewing the CCTV footage, the Claimant was seen typing something on her computer and was unable to produce a withdrawal voucher to support the transaction.

9. The Respondent further state that the Claimant has not provided satisfactory explanation or documentary evidence that the alleged transaction was undertaken hence was dismissed due to gross misconduct by transacting on a dormant account which resulted to activating and giving rise to a fraudulent transaction and a loss of Kshs. 3,153,000. They aver that the Claimant failed to observe the expected level of care while performing her duties.

Submissions

10. The Claimant submit that the Claimant was interrogated by the bank security team for reversing an entry of Kshs. 1000 in a dormant account facilitating a fraud of Kshs. 3,153,000. Both testimonies from the Claimant and Respondent witnesses confirmed that it is not possible to post or reverse an entry in a dormant account, in fact madam Tabitha Mutua witness for the Respondent clarified to the court during her testimony that dormant account is that account which no one can post in or out (no debits and no credits). No teller can post any transaction in a dormant account since a teller has no authority (password) to activate such an account.

11. The Respondent submitted that on investigating the matter, they discovered that another person not being the customer had been withdrawing money from the account with the assistance of tellers from other branches of the Respondent bank, the grievant failed to either provide satisfactory explanation for her actions or provide any evidence of an alleged customer trying to withdraw money.

12. The Respondent states that they accorded the grievant an opportunity to be heard by way of a disciplinary hearing which was conducted on 19th June 2015 in accordance with the Employment Act and found the grievant guilty of gross misconduct.

13. The Respondents further states that the relationship between the grievant and the Respondent has been severed as it was a relationship based on mutual trust which trust has now been lost and reinstating the grievant would amount to imposing her on the Respondent when already it is believed that the grievant in one way or another participated in fraudulent transactions that caused the Respondent to lose Kshs.

5,135,000.

14. I have examined all the evidence and submissions of the parties. The issues for determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of the grievant.

2. Whether grievant was accorded due process before dismissal.

3. What remedies can be given in the circumstances.

15. The grievant was said to have been dismissed for facilitating withdrawal and reversal of money – Kshs.1000 in a dormant account thus causing the bank loss of over 3 million. The grievant denied committing this offence and this she says was not possible in a dormant account.

16. The grievant was taken through a disciplinary hearing and she told Court that the Disciplinary Committee on her case confirmed that the account was already active and was not activated by her and that the CCTV footage did not show that there was a customer before her. This position is evidenced from the minutes of the disciplinary hearing on 1/7/2015 (page 23 of Respondent's documents).

17. For RW1 to come and state otherwise is to contrast the Respondent's own evidence from the documents. The reasons advanced for dismissing the grievant was opening and reversal of an account transfer which the Respondent found was not true during the disciplinary hearing. It is therefore my finding that there was no valid reason to warrant dismissal of the Claimant.

18. Section 43 of Employment Act states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

19. In absence of proper reasons which employer must be seized off, dismissal is not an option. In the premise I find there was no reason that Respondent had to dismiss the grievant.

20. The grievant was accorded a fair hearing with positive conclusions for her. Infact the disciplinary panel did not find her culpable. It is however not apparent as to why the Respondents still dismissed her.

21. Section 45(2) of Employment Act 2007 states as follows:-

(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.

22. Since I have made a finding of lack of proper reasons to warrant dismissal of the grievant, I find that

the dismissal of the grievant was unfair and unwarranted and I declare it so.

23. On the 3rd issue, the grievant seeks reinstatement by this Court. The Respondents on their part are opposed to a reinstatement citing a relationship that has broken down.

24. From the evidence on record, I do not perceive a relationship that has broken down. The Respondents own disciplinary committee absolved the grievant of any wrongdoing. The matter was also handled by a conciliator who recommended reinstatement of the grievant absolving her of any wrong.

25. The grievant is a young lady whose career paths seems to be on a nose dive by virtue of the action of the Respondent unfairly accusing her and then dismissing her. The only remedy that can compensate the grievant is reinstatement or reengagement which I now order. I also order that the grievant be paid all her salary since dismissal to date and the Respondent to continue to pay her salary and allowance when due until her retirement age unless involved in a misconduct.

26. Costs to the Claimant.

Dated and delivered in open Court this 27th day of April, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odero for Claimant

Kavage holding brief for Mrs. Omondi