



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 66 OF 2015

JYOTI SHARMA ALUANGA.....CLAIMANT

v

PRIME BANK LIMITED.....RESPONDENT

JUDGMENT

1. This judgment could not be delivered on 8 June 2018 as scheduled because I was away on other official engagements.
2. Jyoti Sharma Aluanga (Claimant) was employed on a 2 year contract by Prime Bank Ltd (Respondent) as a Clerk through a Memorandum of Agreement dated 15 February 2007.
3. On 18 March 2008, the Respondent and Claimant entered into another Memorandum of Agreement indicating that the Claimant was now a junior officer. The contract was to lapse on 17 March 2010.
4. On 27 January 2012, the Respondent wrote to the Claimant to inform her of her summary dismissal on account of gross misconduct.
5. On 22 January 2015, the Claimant instituted legal proceedings against the Respondent and she stated the Issues in Dispute as
 - (i) Whether the summary dismissal of the Claimant by the Respondent on the 27th January 2012 for alleged gross misconduct was wrongful, unfair, without any reasonable cause and in breach of the contract of employment, the Banks Human Resource Policy and the Employment Act, 2007.
 - (ii) Whether the Claimant is entitled to an award of general damages and/or compensation for wrongful dismissal, and if so, the quantum of damages and/or compensation.
6. In a Response filed on 29 June 2015, the Respondent contended that the dismissal was fair.
7. The Cause was heard on 18 December 2017, 26 February 2018 when the Claimant and Respondent's Human Resources Manager testified, and on 2 May 2018 when the Respondent's Head of IT and Senior Manager, Clearance Department testified.
8. The Claimant filed her submissions on 16 May 2018 while the Respondent filed its submissions on 30 May 2018.
9. The Court has given due consideration to the pleadings, evidence and submissions and adopted the Issues for determination as proposed by the Claimant in the Memorandum of Claim.

Whether dismissal was unfair

Procedural fairness

10. On 26 October 2011, the Respondent wrote to the Claimant to inform her that she was being suspended from duty to facilitate further investigations into allegations of fraud in the bank's clearance systems.
11. The specific allegation set out in the suspension letter was generating and transmitting an outward file containing fraudulent transactions to the clearing house.

12. The Respondent carried out investigations and on 16 January 2012, it wrote to the Claimant inviting her to attend a disciplinary hearing on 26 January 2012.
13. The allegation outlined in the invitation letter was

... fraudulent activities in the clearing department that led to substantial losses to the bank.
14. The invitation letter advised the Claimant of the right to be accompanied during the hearing, and set out 3 broad grounds alleged to have been breached.
15. The Claimant appeared before the Disciplinary Committee and on 27 January 2012, she was informed that it had been decided to summarily dismiss her on account of gross misconduct.
16. The Claimant contended that the allegations were ambiguous and that the hearing only took 5 minutes. She also lamented that no specific charges were placed before her.
17. In the view of the Court, the process contemplated by section 41 of the Employment Act, 2007 does not require an employer to hold a mini-court in the name of a disciplinary hearing.
18. The employer may inform the employee either orally or in writing about the allegations with sufficient detail to enable the employee know the particulars and to respond thereto. He can respond either in writing or make representations orally.
19. In the case at hand, the Claimant was put on sufficient notice about suspected fraudulent transactions in both the suspension letter and invitation letter to a hearing and at no point did she request the Respondent for further or other particulars.
20. At the brief hearing, the testimony on record is that the Claimant opted not to make any tangible representations.
21. The Court is therefore satisfied that the Claimant was notified in advance of the allegations to confront and was also afforded an opportunity to make representations while accompanied by a colleague and that the process as undertaken by the Respondent met the statutory minimums as contemplated by section 41 of the Employment Act, 2007.

Substantive fairness

22. In terms of sections 43, 45 and 47 of the Act, an employer has the burden of proving the reasons for dismissal, that the reasons were valid and fair and justifiable to warrant a dismissal.
23. The dismissal letter cited breach of the Respondent's code of ethics and declaration of secrecy and violation of section 44(4)(c) & (g) of the Employment Act, 2007 (wilful neglect/careless performance of duty and reasonable suspicion of having committed a criminal offence).
24. These are the grounds/reasons the Respondent was expected to prove.
25. The Claimant served in the Respondent's Clearing Department. Part of her duties included receiving electronic files from other banks and branches of the Respondent and creating and sending electronic files to the Central Bank of Kenya.
26. The files sent from the Respondent's branches (and other banks) would be consolidated and sent to the Central Bank of Kenya by the Claimant and her immediate boss.
27. In the course September 2011, the Respondent decided to carry out an audit within the clearing department. The audit revealed some suspicious transactions involving the alteration of electronic funds files meant for Central Bank of Kenya.
28. Around the same time, the Respondent had entered into a software system upgrade with Fintech Kenya Ltd, and Fintech Kenya Ltd had sent a consultant, Stanley Kamau to help the Respondent with the software upgrade.
29. According to a report dated 27 September 2011 by the Respondent, the said Stanley Kamau had needlessly accessed the system from his laptop.
30. The report noted that application log events for 16 September 2011/17 September 2011 were missing and that the system logs had stopped or been tampered with after 23 September 2011.
31. The system application logs for 24 September 2011 were also missing and that Stanley Kamau had attempted or sabotaged the system logs from his laptop.
32. The system logs were stopped on 27 September 2011 and Mr. Kamau's lap top was confiscated by the Security Manager.
33. An analysis of the laptop showed that Mr. Kamau had remotely accessed the Respondent's systems using 2 IPs.

34. The investigations also established that the username JYOTI had created a file on 17 September 2011, but the person who used the profile did not log out.
35. Similarly, JYOTI logged into the system on 26 September 2011, but it appears that there was a manipulation of the entries.
36. The Respondent made a report to the Police.
37. The Police investigations and analysis established that the Claimant communicated with Mr. Stanley Kamau on 15 September 2011 at 1812 hours, 19 September 2011 and on 25 September 2011 at 1849 hours when the frauds were committed.
38. According to the Respondent, the logging by JYOTI into the system on 17 September 2011 and the telephone communication(s) with Stanley Kamau made the Claimant part of the conspiracy which led to the loss of money.
39. It is common that the fraudulent transactions occurred while the Respondent's systems were undergoing an upgrade.
40. The investigations carried out by the Respondent established that the consultant, Mr. Kamau had made unauthorised entries into the system at the material times.
41. The Respondent's third witness and Claimant's immediate boss also testified that the said Mr. Kamau was behaving suspiciously and staying in the offices instead of going home even when he had no business to transact in the offices. 24 September 2011 was given as one such day.
42. The Respondent's second witness on his part stated and confirmed the findings in the investigations report that some logs were deleted from the system.
43. In the view of the Court, the deletion of entries into the system required someone with above average knowledge of not only the system but in-depth information and experience on computer information hardware and software.
44. The Respondent did not attempt to demonstrate that the Claimant had such knowledge or experience.
45. However, the consultant Mr. Kamau had both the knowledge and experience.
46. It is more probable that he was the culprit and not the Claimant. As to the nexus between the Claimant and the said Mr. Kamau, the evidence presented in Court was most tenuous and was derived from the mobile communication between the Claimant and Mr. Kamau (and others).
47. That link, in the view of the Court was not sufficient to establish that the Claimant was remiss in the performance of her duties or in her conduct.
48. The Court finds that the Respondent did not discharge the burden expected of it. The dismissal of the Claimant was not for valid reasons or fair.

Appropriate remedies

Compensation

49. The Claimant served the Respondent for about 5 years and in view of the length of service, the Court is of the opinion that the equivalent of 5 months gross salary would be appropriate (the gross salary at time of separation was Kshs 91,293/-).

Pay in lieu of notice

50. The Claimant's contract at clause 16 provided for 3 months written notice or pay in lieu of notice.

51. The Court finds the Claimant is entitled to the same (computed on basis of basic/gross pay of Kshs 91,293/-).

Service pay

52. The Claimant is not entitled to service pay since she was registered with and making contributions towards the National Social Security Fund and a pension fund.

Conclusion and Orders

53. The Court finds and holds that the dismissal of the Claimant from employment was unfair and awards her and orders the Respondent to pay her

(a) Compensation

Kshs 456,465/-

(b) Pay in lieu of notice Kshs 273,879/-

TOTAL **Kshs 730,344/-**

54. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 19th day of June 2018.

Radido Stephen

Judge

Appearances

Mr. Otieno Oyoo instructed by Otieno-Oyoo & Co. Advocates for Claimant

Mr. Kimani instructed by Macharia-Mwangi & Njeru Advocates for Respondent

Court Assistant Lindsey