



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 900 OF 2012**

***(Before D. K. N. Marete)***

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

**VERSUS**

**CONSOLIDATED BANK OF KENYA LTD.....RESPONDENT**

**JUDGEMENT**

This matter was originated by a Claimant's Supplementary Statement of Claim dated 20th March, 2013. The issue in dispute is therein cited as;

*Unfairly /unlawful dismissal from employment of Ms. Esther Nkirote*

The respondent in a Memorandum of Reply dated 14th June, 2012 denies the claim and prays that it be dismissed with costs.

The claimant's case is that the grievant, one, Esther Nkirote, was employed by the respondent on 21st July, 2001 and posted to work at the bank's Isiolo branch as subordinate staff. It is her case that in the initial contract. She was a temporary staff.

The claimant's further case is that the grievant's term and conditions were later improved on and confirmed as permanent and pensionable. After two (2) years as such permanent employment, she was promoted and in 2003, she was transferred to the respondent's Maua branch as clerical staff.

The claimant's other case is that at Maua, she worked as cashier, enquiries officer and Acting Section Head (supervisor) – the highest cadre the unionisable

employees would be under the Collective Bargaining Agreement. In 2008, she was again transferred to the respondent's Laare branch as such section head.

The claimant's further case is that at Laare, the grievant was confirmed as supervisor and doubled as the branches Acting Operations Manager. In the events of shortage of staff, she could be a cashier as she was indeed an all round worker. She was also a diligent and industrious employee.

The claimant's other case is that while the grievant was on leave around October, 2009, there were fraudulent transactions in the accounts of Gitonga P. Mungathia and Jacinta K. Muroka occasioning a loss of Kshs.101,620.00. Here, the banks pin millers were fraudulently stolen and money was withdrawn from these accounts by Automated Teller Machine. The grievant and the Branch Manager were accused of negligence by the respondent.

The claimant's further case is that on or around 20th December, 2011, there were another fraud at the work place fraudulently done on the accounts of two customers, Julius Thira Muchiri A/c No.0120645396800 and Mwenda M' Itabathi A/C No.0120647292100 both of which were debited and amount of kshs.561,020.00 stolen.

Her other case is that on 21st February, 2012, the grievant was required to show cause why severe disciplinary action should not be taken against her. She responded on 23rd February, 2012 and on 1st March, 2012, her services were terminated for negligence in the performance of her duties. She launched an appeal on 7th March, 2012 but this was rejected by a letter dated 13th March, 2012.

The claimant avers that this matter was reported to her and after interviewing the grievant she found that the accusations leveled against the

grievant were farfetched and unfounded as the reasons were neither valid nor proven.

The matter was referred to the Minister of Labour for conciliation but the parties

would not agree. The conciliator issued a certificate of disagreement. This is presented as follows;

*3.1 The Claimants would like to submit before this Honourable Court that in the first fraudulent case, the grievant was working under the supervision of the Branch Manager and when the security document got lost, it cannot be blamed on the grievant since he was not the In Charge of the Branch. Such sensitive security documents like pin mailers are normally kept under lock and key by the Branch Manager or his/her assistant. In any case, at the time the fraud took place, the grievant was on leave.*

*3.2 In any case, the money which was alleged to have been fraudulently stolen was recovered from the Manager and the offence in this matter was left to lie and it cannot be brought back again when another offence is allegedly committed two years down the line.*

*3.3 The Collective Bargaining Agreement at Section A5 (b) states very clearly the validity of warning letter. Warning letters are only valid for twelve (12) months and the same cannot be relied upon if another offence is committed after the twelve months. In other words, the grievant had no valid warning letter.*

*3.4 In the second instance, the bank actually knew that the dishonest worker was a Mr. Jacob Ruriga who was an employee. He fraudulently registered some fake e-cell banking and when this racket was discovered, Mr. Ruriga took off and disappeared and has never been seen to date. The Respondents had done very little to trace, apprehend and charge the culprit.*

*3.5 It would be dishonest and unfair for the bank to misdirect their anger to the grievant while the bank knew clearly well who the mischievous worker was.*

*3.6 The branch had a Branch Manager who was the overall Supervisor and no transaction could take place without the authority of the Branch Manager. The Branch Manager was not punished for this offence, the dishonest employee Mr. Jacob Ruriga has not been apprehended to date. This is selective punishment which borders on with hunt, victimization and discrimination.*

*3.7 The e-cell banking registration after being processed at the branch had to be brought to the Head Office for authority and operationalization. Nothing was done to punish these officers as well.*

*3.8 It is incredible and discriminative to select the grievant for punishment and spare all the other employees who were involved in the fraud.*

*3.9 The Claimants cannot understand why the Respondents settled on the grievant for punishment and spare all the other employees who were involved in the fraud.*

The claimant posits a case of the respondent's action being bad in law, selective and hence a breach of the laid down procedures under the CBA. Again, this is an outright contravention of section 41 (1) of the Employment Act, 2007 as follows;

*41.(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

This is the celebrated and coveted rule on procedural justice in cases of termination of employment.

She prays as follows;

*4.1 The Claimant would wish to pray to the Honourable court that the Respondent's decision to terminate the services of Esther Nkirote was bad in law and hence should be reversed and the grievant be re-instated back to her previous position without loss of employment benefits or seniority in service.*

*4.2 In the absence of re-instatement, the Claimants would wish to further pray that the grievant be re-engaged in her former position and she should be compensated for having suffered unlawful and unfair termination of employment.*

*4.3 The salaries and allowances and other employment benefits which the grievant has lost as a result of the unfair termination of employment should be paid to her in full.*

*4.4 The grievant should also be compensated for having suffered unfair and unlawful loss of employment.*

*4.5 Costs of the suit.*

The respondent denies the claim.

It is her case that the claimant's case is selective on disclosure and that she has omitted the following salient ingredients of the same;

- i. That the Grievant while still employed by the Respondent but in her capacity as a customer of the Claimant, applied for a house loan in January of 2011. The said loan was approved the Respondent and a Letter of Offer duly executed by both the Respondent and the Grievant consequent to which the Grievant was advanced Kshs.4,800,000.00 at an interest rate of 2.0%. See Annexure 8.
  - ii. The terms of the said contract were that, the Grievant would repay the loan with monthly installments of Kshs.24,282.00, a first legal charge would be created over the property as security for loan and it was a further term of the contract that in the vent of departure from employment the loan facility would be charged at the Respondent prevailing commercial interest rates. (See Annexure 8 above) also See Annexure 9
  - iii. That in March and April of 2012 the Grievant failed to pay or make any attempt to pay the requisite monthly installments consequent to which her loan account fell into arrears of 98,155.00 this was because upon termination the loan facility was being charged at the prevailing commercial interest rates. (See Annexure 8 above)
  - iv. That as a result of the Grievant failure to make any loan repayments the Respondent was left with no option but to issue her with a demand notice which it did vide letter dated 9<sup>th</sup> May 2012.
  - v. That it is normal procedure for the Respondent to issue notice after one month of default by a borrower, this position is sanctioned by law as evident from paragraph 6 above. In this case the Respondent issued the notice after two months of default which clearly shows that the said notice is not premature, was issued in good faith and was not intended to victimize or “witch hunt” the Grievant as alleged by the Claimant. This allegation is both false and misleading to His Honourable court.
8. The Respondent further denies the contents of paragraph 2 and 3 of the Submissions section of the Claimants Memorandum of Claim and in response avers as follows;
- i. That the loan contract entered into by the Grievant and the Respondent was separate and distinct from the employment contract.
  - ii. It was a term of the said contract that as security for the loan advanced, a first legal charge would be created over the suit premises.(See Annexure 8 above)
  - iii. The said Charge established a Chargee – Chargor relationship between the Respondent and the Grievant respectively.
  - iv. The Respondent also avers that the Chargee Chargor relationship is governed by the Registered Land Act and/or alternatively the Land Act and Land Registration Act 2012.

She further puts her case thus;

9. The Respondent further denies the contents of paragraph 4 of the Submission section of the Claimants Memorandum of Claim and in response avers that it followed due procedure in terminating the Grievant employment in that:-
  - i. Termination of the Claimant’s employment was fair, valid and followed due procedure therefore lawful;
  - ii. That the Respondent paid the Grievant terminal dues in accordance with the terms of her contract of employment and in compliance with the applicable laws.
12. The Respondent in response to the Claimant’s prayers states that the Grievant is not entitled to the orders sought in that:-
  - iii. The issues herein do not relate or arise out of employment rather they are related to and arise from a loan agreement contract which created obligations of borrower – lender and consequent to which a charge was created over the suit premises creating a further relationship of Chargor – Chargee between the Grievant and Respondent respectively.
  - iv. This Honourable court therefore lacks the jurisdiction to hear and determine this matter which is a debt recovery case arising out of breach of contract.

This matter came to court variously until the 18th April, 2018 when it was heard *inter partes*. At the hearing, the parties testified in recitation and reiteration of their respective cases as pleaded.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?

2. Whether the claimant is entitled to the relief sought?

3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in her written submission dated 3rd May, 2018 reiterates her case and submits a case of unlawful termination of the employment of the grievant by the respondent.

The claimant submits that for eight (8) years running, the grievant had had a blemish free stint of service. This was until the year 2009 when she was accused of negligence by failing to secure the ATM cards which led to the theft of Kshs.101,620.00. This happened when she was on leave and therefore absent from office. The grievant and her manager were both accused of negligence and surcharged on equal basis and the amount of Kshs.50,810.00 recovered from each of them. This closed the matter and no warning letter was issued to her.

The next episode occurred on 21st February, 2012 when the respondent discovered that three customers accounts had been defrauded of Kshs.1,111,000.00 as follows;

- 012XXXXX – Julius T. Muchiri Kshs.340,800 – 0700XXXXXXX
- 012XXXXX – Adriano K. Miruka Kshs.620,200 – 0728XXXXXXX
- 012XXXXX – Mwenda M'itabathi Kshs.220,220 - 0729XXXXXX

The claimant's further submission is that these three fraudulent withdrawals were initiated and carried out by, one, Jacob Njuguna Ruriga, an employee of the bank working in the branch as personal banker. He had purported to register the three customers in the respondent's E-banking platform but instead of entering the customer's cell phone numbers, he registered his own to perpetrate and perfect the fraud. When this was discovered, he disappeared from the branch, never to come back.

The claimant further raises issues on this matter and submits as follows;

*13. That it is surprisingly interesting that upto date nine (9) years down the line, the respondent has never bothered to look for the fraudster, apprehend him and charge him in court of law for stealing by servant. Instead the respondent thereafter turned its anger to an innocent employee accused her of gross negligence and dismissed her from employment.*

*14. The other question which is begging for answers is that the grievant was allegedly responsible for two fraudulent transactions of Mr. Julius Muchiri and Mwenda M'itabathi and another employee Florence Gikunda was responsible for the third fraudulent transaction of Mr. Adrian K. Miruka and she was left scot free and she is still working for the respondent bank upto date.*

*15. That if the offence allegedly committed by the grievant was as gross as the one committed by Florence. Why was she spared and the grievant dismissed. Thus creating a serious question of discrimination and selective/subjective punishment.*

*16. In addition, the grievant was a junior officer who was working under the instructions of Branch Operation Manager (BOM) and the Branch Manager. Her role was simply to verify the work of the personal banker and forward the same to Branch Operations Manager for approval and authority. As a unionisable employee she had no authority or mandate to authorize any transaction. The branch authority lies with the management staff as properly captured in the audit report (respondents annexure 2 at page 8) as follows:-*

*“The branch Operations Manager and the operation officer simply rubber stamped the customer joining forms without following laid down procedures under KYC on verification of documents. The exceptions were so glaring as in the case of Adriano where he uses his thumb print as the signature yet the management were so lax to verify this easy procedure. Had the management taken their work seriously, the business would have avoided this embarrassing loss both to the customers and to the business.*

*The grievant was definitely not part of the branch management and further the fraud committed on Adriano's account was overlooked by Florence Gikunda (the branch operation manager) and not the grievant. Florence is still working in the respondent bank upto date.”*

*Why was she spared and the grievant picked for a termination? This only confirms that the respondent was only interested in getting rid of the grievant an action which amounts to victimization.*

The claimant further submit that on 21st February, 2012, the grievant was issued with a show cause letter for the fraudulent withdrawals of Kshs.561,020.00. She gave her responses on 23rd instant explaining the circumstances leading to the loss. Immediately thereafter, on 1st March, 2012, her employment service was terminated.

The grievant was never invited to any disciplinary meeting as is required of section 41 of the Employment Act, 2007. This, she (claimant) submits, renders any purported termination of employment a nullity in law. It is of no effect.

Again, on 13th March, 2012, the grievant appealed against the unfair termination but this was ignored by the respondent. She (respondent) failed to constitute an appeals committee to hear the grievant's grounds of appeal, which procedure is mandatory. Instead, she simply wrote back to the grievant in the following terms;

*'We refer to your letter dated 7<sup>th</sup> March 2012 appealing for re-instatement and advise that your request cannot be considered as your termination was based on the gravity of the offence and your past performance and conduct.*

This, she again submits, was a unilaterally decision of an individual sitting in his boardroom and did not afford the appellant an opportunity to litigate her grounds of appeal.

The claimant sought to rely on the authority of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR** where Mbaru, J. at page 32 observed as follows;

*"That whatever reason or reasons that arise to cause an employer to terminate an employee that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. This applies in the case for termination as well as in a case of summary dismissal."*

No justifiable reasons for dismissal were offered or issued to the grievant in the circumstances. The reason of negligence as employed by the respondent is farfetched, unfounded and unproven.

In any event, there was a coterie of the respondent's officers at the branch and the head office who involved themselves in the authorization of the transaction leading to this fraud without due confirmation and verification of the data involved. The grievant was not one of these and had no authority or competency to do this.

The respondent on the other hand and in her written submissions dated 28th May, 2018 reiterates her case and submit a case of lawful termination of employment. It is her case that on diverse dates between 20th December, 2011 and 7th December, 2012 the grievant authorized fraudulent e-cell registrations for two customers without verifying the customers details and authenticity of the applications as is required by the banks strict operational procedures. As a consequence of this, the bank lost Kshs.561,020.00.

The respondent's bank awarded the grievant an opportunity to explain the fraud and she admitted that she trusted one, Jacob Ruriga who was the personal banker at the time. In view of previous warnings and the grievant's failure to follow its operational procedures, she was terminated from employment with effect from 1st March, 2012.

The claimant pegs her case on the fact that at all times, the grievant was innocent of the misconduct accused of. Like is ably illustrated in the presentation of her case, the grievant was not entirely responsible for the fraud leading to the loss of Kshs.561,020.00. Firstly, the function of authorizing that kind of activity was not in her authority. She was a junior and unionisable officer. Two, the branch management and the respondent's headquarter office partook to the authorization and actualization of the said transaction. Pinning the same on the grievant is therefore escapist, unfair and unlawful.

Most of all, the respondent in terminating the employment of the grievant did not pursue the procedural aspect stipulated under section 41 (1) of the Employment Act, 2007. She did not afford the grievant an opportunity of ventilating her case through disciplinary proceedings thus making the termination a nullity. The grievant should have been awarded a hearing in the presence of a shop representative of her choice. Moreover, the respondent failed to comply with section 43 of the said Act on notifying the grievant of the reasons for termination or even ascertaining that such reasons were indeed proven in terms of section 43 of the Act. The respondent's case therefore fails for want of process and substantial fairness.

Overall, this matter tilts in favour of the claimant. This is because she has demonstrably proved a case of unlawful termination of employment on a preponderance of evidence. I therefore find a case of unlawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and award relief as follows;

i. One (1) months salary in lieu of notice.....Kshs.67,303.00

ii. Twelve (12) months salary as compensation for unlawful

termination of employment=Kshs.67,303.00 x 12 =.....Kshs.807,636.00

**Total Claim.....Kshs.874,939.00**

iii. Alternatively, the amounts payable in (i) and (ii) above shall be pegged on the monthly gross salary of the grievant at the time of termination, should this be higher.

iv. That in the event of any discrepancy between the gross salary of the grievant and the amount of Kshs.67,303.00 provided for in the grievant's Letter of Confirmation of Appointment dated 20th January, 2009, the later shall prevail in a tabulation of the amounts payable in (i) and (ii) above.

v. The commissioner of labour shall, with the involvement of the parties, compute the amounts payable in (i) and (ii) above, as applicable, in terms of orders (iii) and (iv) of this judgement of court.

vi. Mention on 18th April, 2019 for a report on computation in (i) and (ii) by the Commissioner of Labour, if at all.

vii. The costs of this claim shall be borne by the respondent

Dated and signed this day of 2018.

**D.K. Njagi Marete**

**JUDGE**

Delivered and signed this 20th day of December 2018.

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Odero for the claimant union.
2. Mrs. Kamau instructed by Muteithia Kibira Advocates for the respondent.