



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1886 OF 2013

AGNES KAVATA MBITI.....CLAIMANT

VERSUS

HOUSING FINANCE COMPANY LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute – unfair and unlawful dismissal and or termination of employment

1. By letter dated 25th February, 2003 the claimant was employed by the respondent as an IT Security Officer at a monthly salary of Kshs.75,187.00. The claimant commenced her employment on 1st April, 2003.
2. The claimant worked diligently and in June, 2006 she was allocated additional duties to lead the ITC Help Desk section with duties of help desk management, systems administration and project coordination. In march, 2009 the claimant was appointed as a member of the Core Banking Solution (CBS) with functions of implementing the Core Banking system provided by Intrasoft International.
3. The claimant's salary was reviewed with time and basic pay as at 2012 being Kshs.124,230.00.
4. On 18th July, 2013 the claimant was summarily dismissed from her employment by the respondent on the basis that an investigation had been conducted and an internal audit revealed that the claimant had given instructions for the data base audit to be switched off through an internal email dated 29th November, 2010; that the claimant had failed to disclose to the divisional head of the head of audit that the data base audit had been switched off; and that the claimant's actions led to the loss of Kshs.12,207,210.00 and despite the loss the claimant did not disclose that the data base audit had been switched off.
5. The claim is that the termination of employment was without basis, notice, or hearing and thus unlawful. That the claimant was never given the investigations report and allegations made were never brought to her attention so as to have a chance to give a defence. The claimant's supervisor, the ICT manager was privy to the fact that since April, 2010 the data base audit was not functional and had advised that it should be switched off in accordance with the consultant's advice. The error to the data base audit had been occurring for 7 months before the claimant sent the email dated 29th November, 2010. The ICT manager was aware that there was a hardware change following constant errors.
6. The claim is also that the claimant was discriminated against as allegations for non-disclosure that the system, data base audit was switched off was only made against her. Such accusation led to her dismissal from employment. Daniel Chege was involved in the audit and preparation that culminated in the

dismissal of the claimant but his role was never addressed. The loss of Kshs.12,207,210.00 in 2010 was not occasioned by the switching off of the data base audit. In December, 2011 and December, 2012 there was a loss through frauds committed in a similar manner and the data base audit was unable to prevent it.

7. The claim is for;

- a) *Compensation for unlawful and unfair dismissal and loss of employment at Kshs.1,889,184.00*
- b) *One month notice pay Kshs.157,432.00;*
- c) *17 days worked and unpaid Kshs.89,211.00;*
- d) *5 leave days Kshs.26,237.00*
- e) *Costs and interests.*

8. The claimant testified in support of her case that upon her employment by the respondent she worked diligently and was recognised for her good work and earned salary increments and bonuses. On 18th July, 2013 the claimant was issued with a letter of summary dismissal dated 17th July, 2013 on the grounds that she was grossly negligent and had misconducted herself leading to the loss of over Kshs.12 million. That the claimant had issued an email for data switch off on 29th November, 2010 leading to the loss.

9. The claimant also testified that on 29th November, 2010 at 11m she sent an email to staff under her supervision, following several system failures within the year. The systems supplier had advised the respondent on how to address the system failure was to switch it off at night. Following such a failure, the claimant thus issued an email directing the switch off. The email was copied to her supervisor.

10. The responding had previously suffered losses following fraudulent transactions by employees. The claimant was not charged with any fraudulent activity. The employees were charged in court in 2011.

11. On 24th April, 2013 the claimant was called to the board room to explain why she had switched off the data base audit. Present at the meeting was the human resource manager Mr Raymond Mwangi, the systems auditor Mr Daniel Chege, operations manager Mr Atanas Mwilu, head of audit Mr Joseph Ngare and head of security Mr Cleophas Meli. The claimant was asked to give a history of the data base audit system and the switch off. The security manager was then asked to take a statement from the claimant from a separate room. She then resumed her duties.

12. On 18th July, 2013 the claimant was called by the human resource officer, present were the human resource manager, human resource director and the business development manager. The claimant was informed that following a systems audit the respondent had taken a decision that she should be dismissed from her employment.

13. In the letter of dismissal, the respondent indicated that the claimant had been taken through a disciplinary hearing which was not correct. No hearing had been conducted. There was no meeting with the claimant on 17th July, 2013 as alleged. The meeting held in April, 2013 was only an explanation and a statement had been taken from the claimant. There was no feedback until the date of dismissal.

14. The claimant also testified that there was no due process leading to her dismissal from employment, it was unlawful and her claims should be confirmed.

Defence

15. In defence, the respondent admit they employed the claimant in 2003 to 17th July, 2013 when she was dismissed from her employment. The dismissal was on the grounds that the claimant made arbitrary decisions that were adverse to the respondent; she usurped the functions and mandate of the management

committees set up with the respondent organisation and thus made decisions that undermined the security and integrity of the operations structure and operations. The claimant was also dismissed on the grounds of making decisions affecting other departments in which she was not a member of within the respondent organisation, making decisions on operations that were being overseen by management committees without the mandate of the respondent and making fundamental decisions without consulting with her superiors or formal approval. The claimant also made executive decisions to junior staff without obtaining approval from her superiors.

16. While the claimant was in the employment of the respondent her salary was reviewed as part of human resource policy. However following the claimant's negligence there was loss of Kshs.12,207,210.00 and the claimant was guilty of material non-disclosure. This was in gross negligence and in breach of employment terms and conditions.

17. The claimant committed acts which were unauthorised by the respondent and led to financial loss. The claimant was bound by her terms and conditions of employment by failing to perform her duties diligently. The claimant was taken through the disciplinary process and found culpable.

18. On 24th April, 2013 the claimant appeared before the respondent's disciplinary committee, she was given complaints against her and she gave oral and written statements. There were investigations and the claimant was found responsible to losses incurred by the responding and thus the dismissal from employment. The claims mad should be dismissed with costs.

Counter-claim

19. The respondent in counter-claim against the claimant states that by a contract of employment dated 25th February, 2003 the claimant made an undertaking that she would not perform her duties in a careless or negligent manner; not improperly use the respondent's property; not disclose information prejudicial to the respondent; be bound by the respondent's staff regulations and to uphold the good image of the respondent. The claimant also made an undertaking to indemnify the respondent against all loss and damage or injury arising from her misconduct and negligence as its employee.

20. The claimant without authority from the respondent issued a directive which she lacked the mandate to do that resulted in the loss of Kshs.12,207,210.00. The claimant should pay for such loss and damage.

21. The claimant failed to notify her supervisor of her action despite being aware at all material time of the financial risk posed by her decision. Such was negligent and amounted to gross misconduct. The claimant is liable to compensate the responded for the loss of Kshs.12,207,201.00.

22. The counter-claim is for the sum of Kshs.12,207,210.00 together with interests and costs of the suit.

23. The respondent witness was Raymond Ndirangu Mwangi the human resource manager of the respondent. He testified that as the officer in charge of the respondent human resource, part of his duties is to ensure that once a new employee joins the business, a contract of employment is issued together with a code of conduct and other policy documents. The claimant was issued with such documents upon her employment with the respondent.

24. Mr Mwangi also testified that when the claimant was terminated from her employment with the respondent she had been seconded to IT Co-banking team and was issued with a letter to this effect. The claimant has a job description for her duties.

25. Between December, 2010 to November, 2011 the respondent lost over Kshs.12 million fraudulently through writing a script from bank end and co-banking system. The employees running the script were arrested and charged with a criminal case in court. The claimant was not charged as some information was not out. As the criminal case progressed, a document was produced that the claimant had given authority to close IT system. This was through an email written by the claimant on 29th November, 2010 and had been deleted from the system and from the claimant's computer as she was the sender. This was

the email that led to the dismissal of the claimant. Had the email not been submitted, there was no link to the claimant. The email was traced from one employee in the claimant's team and it was authenticated as true and correct.

26. The claimant confirmed to have sent the email. This email was relied upon by different employees of the respondent in their work. Some of these employees committed act of fraud and have since been charged in court. In their defence to the criminal charges, they have produced the claimant's email as having given them authority to transact.

27. The respondent conducted investigations and confirmed the email sent by the claimant was authentic. The claimant was called together with her manager and was informed of the investigations on 24th April, 2013. The claimant did a written statement. The email sent by the claimant was to the employees directing them to shut down the data base audit system before moving transactions and after updating the system.

28. The implication of the email sent by the claimant was that all transactions sent during the shutdown through the data base audit system could not be tracked. The shutdown left a blind record. This meant that those in IT department could credit an account without being tracked. This happened and the respondent lost Kshs.12 million.

29. In the job description given to the claimant she had no authority to issue such direction. Only the management could do so. Her line manager could not issue such an order. During the investigations the claimant was asked to explain why she ordered for the switch off of the data base audit system but had no satisfactory answer. 3 months later the claimant was called to give an explanation at a disciplinary hearing but she had no satisfactory answer.

30. The respondent found the claimant to have been grossly negligent by not discharging her duties well. Noting the position held by the claimant, the respondent opted to take a drastic decision of summary dismissal.

31. The claimant had asked to resign but the respondent decided to issue a termination letter. The claimant was paid for days worked; for leave days due and for notice of one (1) month.

32. Clause 4 of the claimant's employment contract, it provided for summary dismissal where the claimant contravened her employment terms by being negligent, careless or when she failed to obey lawful orders. The code of conduct required the claimant to report fraud, risks, error and ensure her personal integrity at all time and also report any unethical conduct among employees. The claimant was issued with the code of conduct and she signed in accepting the terms and conditions.

33. The claimant was dismissed on the grounds of gross negligence and due to the loss of Kshs.12 million. The claimant should be ordered to refund the lost amounts to the respondent.

34. There was no response by the claimant to the counter-claim.

Submissions

35. Both parties filed written submissions.

36. The claimant submits that the allegations levelled against her are that she gave instructions for the data base audit switch off through an email of 29th November, 2010 and that she did not disclose this fact to the head of department and this led to the responding incurring a loss of Kshs.12,207, 210.00. That the claimant was never given the investigations report and the allegations made against her are baseless. That the claimant was not given a hearing to defend herself before the summary dismissal. The claimant has relied on the case of **Godfrey M Mae versus Equity Bank Limited [2014] eKLR** and the finding that procedural fairness requires that before dismissal from employment an employee should be given a chance to defend herself on any accusations. The employee has the right to be informed of the charges

against her inn advance.

37. The claimant submits that section 43 of the Employment Act, 2007 was not followed by the respondent in effecting her dismissal from employment. There was no valid reason for the dismissal. The alleged negligence of duty I not a matter for summary dismissal under section 44(4) of the Employment Act, 2007. In **Jane Wangui Gichuki versus Rift Valley Railways (K) Limited [2015] eKLR** the court held that negligence of duty cannot be a reason for summary dismissal.

38. Even in a case for summary dismissal, section 41 of the Employment Act, 2007 requires that an employee be given a hearing which was not the case for the claimant. The resulting termination of employment was unlawful and unfair and the claimant is entitled to the remedies set out in her claim.

39. The respondent submits that there was justification to dismiss the claimant from her employment on ground of gross misconduct and negligence which matter is defined in the case of **Fulgence Sunza Masai versus KRA [2014] eKLR** as conduct so undermining the trust and confidence inherent in the particular case that the employer should no longer be required to retain the employee.

40. The claimant by email dated 29th November, 2010 issued instructions to the data base audit system switch off and when the same was off the respondent lost Kshs.12,207,210.00. The claimant had no authorisation from her superiors to issue a directive for the switch off of the database. This was never part of her job description. As a result of such negligence of duty, during the switch off period the respondent incurred losses through fraud. Such misconduct by the claimant warranted summary dismissal from her employment. The claimant was bound by her contract of employment and the code of conduct she signed upon employment to act in good faith and to ensure all unethical conduct was prevented and which she failed to do leading to the respondent loosing Kshs.12 million for which she is liable to repay with interests. There was a valid reason for the termination of employment as held in **Miriam Siwa versus Kenya Post Office Savings Bank Limited [2014] eKLR**.

41. Section 45 of the Employment Act, 2007 allow an employer to terminate an employee form her employment where there ware fair and valid reasons. Due to the gross misconduct of the claimant, the respondent was justified in the terminating the claimant from her employment as held in **Nelson Ken Kipkemei versus Diamond Trust Bank Kenya Limited [2015] eKLR**.

42. The respondent also submits that the claimant was accorded fair procedure before termination of her employment. Hearing of the employee does not necessarily have to be oral in all cases. Provided there is evidence that the employer has achieved a degree of fairness appropriate to the task to enable a fair decision, there is no rule that fairness can only be achieved through an oral hearing was held in

Local Government Board versus Arlidge [1915] A.C 120.

43. The claims made by the claimant should be dismissed with costs to the respondent and the counter-claim confirmed with costs and interests as prayed by the respondent.

Remedies

44. The claimants has admitted that she has since been paid for 17 days worked in July, 2013; leave earned and notice pay of one (1) months.

45. The claimant also admitted she authored the email dated 29th November, 2010 which email led to her dismissal from employment.

46. The claimants has justified her conduct of ordering the systems switch off on the grounds that the respondent had been exposed to fraud before and before she sent the subject email, the respondent had been faced with system challenges. In her email, she was to await the service provider to advice and in any case she copied several other officers including her supervisor. There was no feedback of any wrongdoing. Some of her colleagues copied to the email have since been charged in court with criminal

offences but the claimant has never been charged for any wrongdoing.

47. On cross-examination, the claimant testified as follows;

... as part of my job description I had to supervise the people under me. I had no direct mandate to issue instructions to switch off the database. My role was to supervise those under me ...the email of 29th November, 2010 was my email. I had no direct mandate to issue directions but in consultation with my supervisor he told me to do so. I agreed with Benjamin and others as he was my direct supervisor.

When there was a systems failure the 'server room' would escalate the issue to me. I then directed them to switch off the system. My communication with Benjamin was verbal. I was communicating what I had been advised to do.

I got verbal communication from my supervisor.

48. The gist of the allegations made against the claimant were that she directed a systems switch off without authority of the respondent and based on such directions, during the period of the systems switch off, there was a fraudulent loss of Kshs.12,207,210.00. This loss arose out of the gross negligence of the claimant as there is no evidence of any instructions given to her by the respondent to direct the systems switch off. Such mandate was only available to the management team and not to the claimant or to her supervisor as alleged.

49. Of concern is the fact that in the Memorandum of Claim, the claimant has attached various email communications with her team member's *server room* but has failed to attach the subject email sent on 29th November, 2010. This email was the subject of her termination from the employment with the respondent. at the time of filing the claim, the matter of the claimant's actions of 29th November, 2010 was an issue.

50. The respondent case is that the claimant issued the email of 29th November, 2010 without authority and then proceeded to delete it from the system and from her computer. This email only arose in criminal proceedings when the claimant's colleagues were charged in court. the existence of this email had not come to the notice of the respondent until such time. Had this been disclosed, the claimant should have been dismissed from her employment as it happened on 17th July, 2013.

51. It is therefore imperative that the conduct of the claimant from 29th November, 2010 be brought into scrutiny. Further her conduct from 24th April, 2013 when she was called for interrogations and wrote her statement ought to be assessed.

52. On 29th November, 2010 the claimant wrote to the *server room* as follows;

... due to the recent nightly failures, we have agreed that sybsecurity tables will be truncated daily after the BFN.

DB Audit will also have to be switched off before nightly, then on after nightly.

Please include amend the checklist accordingly and adhere. ...

53. On 24th April, 2013 when the claimant was asked to write her statement she wrote as follows;

... the authority to switch off was given by the IT manager verbally and i was tasked with the responsibility of communicating to the team as team leader.

Initially I did not know how to switch on and off the dh audit until at some point it was discovered through audit (...) that it updates. then the vendor Ester of Neptune guided us at Benjamin's office

by phone. I not have the rights to switch on and off and was not part of my duty and it was something I did not know.

I was not asked by anyone about switching on and off of the database audit during the investigation of the loss of 12m and also I did not know that this was part of the investigation. The intention of the system was to assist in identifying who did what in the system but not to prevent theft. ... [underline added].

54. The claimant therefore of her own hand admits that she had no authority to order the switch off of the database audit. She directed the switch off on 29th November, 2010 following verbal instructions by her supervisor.

55. At the point the claimant wrote her statement on 24th April, 2013 she was aware of her colleagues who had been charged in court with criminal charges. The background of such charges were related to issues of fraud that had occurred from December, 2010 to November, 2011. The respondent had lost Kshs.12,207,210.00.

56. The claimant can therefore not be found to state that the respondent had been faced with previous cases of fraud and thus should not be asked to explain her actions in switching off the database audit system. It is not a sufficient defence in employment that other employees are in error. The employment contract issued to the claimant was specific to her and not correlated to her colleagues. The code of conduct was a personal responsibility and not a collective to adhere.

57. The claimant has not explained why she never asked for written instruction(s) from her supervisor to carry out a function she was not conversant with and in any case a matter that was not part of her duties. The admission that the claimant she did not have the right to direct the switch off the data base audit yet she went ahead to authorize her team to do so places her in direct conflict and in breach of her work requirements as set out in the code of conduct to which she accepted to abide upon her employment by the respondent.

58. To act contrary to her call of duty and direct employees under her supervision outside her mandate, I find to be an act of negligence. Such negligence I find resulted in the respondent as the employer to incur a loss of Kshs.12,207,210.00.

59. Where an employer has a work place policy that sets out the work requirements and acts that amount to gross misconduct, such must be read in the context of section 44 of the Employment Act, 2007. Each business is unique and section 8 of the Employment Act, 2007 allows an employer to tailor a work place policy setting out matters that are considered unique to the business and which warrant rules and regulations in such a sector.

60. The claimant has relied on the case of **Jane Wangui Gichuki versus Rift Valley Railways (K) Limited [2015] eKLR** and the assertion that negligence of duty is not a matter for summary dismissal. However the facts to the cited case are different from herein. Also, in my reading of section 44 of the Employment Act, 2007 at subsection 44(4)(c) it provides;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

61. An employee who is negligent, who is careless or who performs work improperly and as a result the employer suffers loss, injury or damage, the law allows the employer to summarily dismiss such an employee from her employment.

62. The only condition the employer must abide is to ensure the adherence to the provisions of section 41(2) of the Employment Act, 2007 as follows;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

63. The employee must be given a hearing. The defence that the claimant was called on 17th July, 2013 and due to her position the respondent opted to take a drastic action and issue a letter of summary dismissal is not a sufficient defence to negate the mandatory provisions of the law. Such action should be frowned upon. Where the respondent had found it fit to investigate the claimant's conduct from 2010 to 2013, nothing stopped the respondent from undertaking a proper disciplinary hearing and allowing the claimant to give her defence. Section 44 of the Employment Act, 2007 is quite generous to an employer. The notices required in a case of gross misconduct are shorter and where justified, the employee can be issued with less notice. What the employer must demonstrate is that there existed exceptional circumstances to warrant less notice period than in ordinary cases of misconduct.

64. In this case, I find a fundamental flaw in terms of procedure. Even where the respondent had valid and fair reasons to dismiss the claimant from her employment, the procedure adopted was contrary to the law. Such is not justified in this case and amounted to unfair procedure and contrary to section 45 of the Employment Act, 2007 which provides as follows;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; [underline added].

65. The claimant is thus entitled to compensation in accordance with section 49 of the Employment Act, 2007. In this case, an award of one (1) month's gross pay I find to be appropriate. On the last earned salary, the claimant is awarded Kshs.157,432.00.

66. The submissions that the claimant has since been paid for notice; leave days earned; the days worked in July, 2013, these claims are marked as settled.

Counter-claim

67. There is no defence to the counter-claim. There is no effort by the claimant to explain her conduct to controvert the counter-claim. As set out above, the claimant having admitted she authorized the email dated 29th November, 2010 and she had no authority to author the same, she had no rights to authorise the switch off of the data base audit system and which she did and this led to the respondent loss of Kshs.12,207,210.00 the claimant is responsible for the loss.

In conclusion therefore, judgement is hereby entered in the following terms;

a. The claimant's summary dismissal from her employment was unprocedural and is awarded compensation of Kshs.157,432.00;

b. Judgement is entered for the respondent against the claimant in the counter-claim for a sum of Kshs.12,207,210.00 together with costs and interests.

c. The award to the claimant shall be paid less what is owed to the respondent in terms of the counter-claim.

d. Each arty shall bear own costs.

Dated and delivered in open court at Nairobi this 27th day of July, 2017.

M. MBARU JUDGE

In the presence of:

Lillian Njenga and David Muturi – Court Assistants

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