



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.707 OF 2012

BANKING, INSURANCE & FINANCE UNION (KENYA)CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD RESPONDENT

JUDGEMENT

Issue in dispute – wrongful summary dismissal from employment of Vincent Odari Amulega and Lameck Maina Muchangi (grievants)

1. The claimant is an employee's trade union registered under the Labour Relations Act and the respondent is a commercial bank registered under the Banking Act. The parties have a Recognition agreement and a Collective Bargaining Agreement (CBA) which is signed between the union and Kenya Bankers Association of which the respondent is a member.

2. The grievants were employed by the respondent on 14th March, 2005 and 16th March 2006 respectively as Graduate Clerks. They rose to the positions of Cash Officers.

3. On 20th February, 2009 the grievants were issued with a show cause letter for theft of Kshs.5, 794,129.00 by Dedan Yara, the head teller. The grievants were required to respond by 24th February, 2009. They were then suspended for the loss of the amount and before they could respond to the show cause are required.

4. The grievants responded to the show cause and denied theft of any monies or the sum of Kshs.5, 794,129.00 and stated that they handed the same to the head teller, Mr Yara who disappeared with the same. The grievant discharged their duties as required by the respondent. There was no negligence in handling the monies procedures were followed in realising the money to Mr Yara. The monies were signed for by the operations manager and transferred to the head teller account of Mr Yara.

5. The grievants were summarily dismissed for the loss of Kshs.5, 794,129.00. They appealed against the dismissal from employment but the respondent upheld the decision to dismiss the grievants vide letter dated 27th February, 2009.

6. On 6th February, 2009 the grievants and the operations manager gave the head teller Kshs.11,000,000.00 after receiving two cheques from Chemelil Sacco and Siaya Teachers Sacco who wanted to be paid Kshs.7,000,000.00 and Kshs.4,650,000.00 respectively. The operations manager is still in the employment of the respondent and the fact that the three of them were involved in releasing the money to the head teller. The operations manager had authorised the transactions.

7. Mr Vincent Amulenga, the grievant went to CBK Kisumu to follow up the cash order from the other branches in the region and left Mr Lameck, the branch manager Mr Frank Ochomo and operations manager Ms Beatrice Suba in the office. At this time the alleged head teller was in his corporate teller cubicle. Mr Amulenga was later called and informed that the head teller had disappeared without paying the Siaya Teachers Sacco and the other teller were complaining that they did not have cash.

8. The grievants were unfairly terminated from their employment with the respondent as there was no procedural fairness or any substantive reasons to justify the same. The grievants had not committed any offence and by punishing them for an offence committed by the head teller, Mr Yara is an unfair labour practice.

9. The claim is that the grievants should be reinstated back to work without loss of any benefits.

10. In evidence, the claimant's witness was Mr Amulenga. He testified that as a cash officer with the respondent he was also the strong room custodian and ATM custodian with duties to supply cash, repatriate cash to CBK when there was an excess order cash from CBK in case branches from Nyanza and western province were lacking cash. He was doing these duties with Lameck Muchangi, the other grievant.

11. To gain access to the strong room the grievants needed the operations manager. When a corporate client came to the bank, they had to present their cheques to the chief teller who then forwarded the cheque to the grievants requesting for cash. The grievants then went with the cheque to the operations manager enquiring for cash removal from the strong room. Once allowed, the cash was documented in the cash register according to the specifications and then left with the operations manager to the strong room. To gain access to the strong room the grievants needed 2 keys which the witness had and the colleague had the other. They also required an operations code and time lock both of which were in the possession of the operations manager. There was no way for the grievants to gain entry to the strong room without the operations manager.

12. On this day, 9th February, 2009 the grievant testified that they went to the strong room after following all the required steps and there were 2 clients, Siaya Teachers Sacco and Chemelil Teachers Sacco. Chemelil needed Kshs.7 million and Siaya needed Kshs.4.65 million. Because of IT the grievants were able to see the cash position of each teller. After checking the cash position of the chief teller, Mr Yara the grievants ascertained he needed Kshs.11 million more in order to pay the 2 cheques.

13. The transaction is that the grievants could only transfer cash to a teller not to customers. The grievants posted the cash from the treasury register then posted electronically to Mr Yara cash position journal. It was actualised by the operations manager. The grievants then removed the cash from the strong room to Mr Yara and who confirmed the cash and transferred electronically from this strong room to his journal.

14. Mr Amulenga also testified that upon completing this process, the operations manager, the manager, and Nairobi the head office could see the cash position. If a teller stayed with high cash position, the head office of the manager concerned had to call to ask why the teller had that high position. To transfer the cash, Lameck had to put half password and the witness had to also put his half password since he was charge of the entire western and Nyanza regions under the authorisation of the operations manager.

15. Mr Amulenga also testified that he went to CBK Kisumu to deliver cash overs from other branches as well as check on cash transactions. On this day he went to withdraw money from CBK but there were technical issues. He went to follow up on the two transactions and while away Lamarck called the witness with information that Mr Yara was not in his cubicle and tellers were had run out of cash and his phone had been switched off.

16. Mr Amulenga also testified that he came back to the bank and found that indeed Mr Yara had taken off with Kshs.5, 794,000.00. Between this incident and going forward, the witness was still the strong room custodian, ATM custodian and Cash officer until he was suspended on 20th February, 2009.

17. The grievants were issued with show cause letter and he explained why he should not be disciplined on the reason that he had followed all required procedures.

18. The grievants were called to Nairobi thinking they were to attend disciplinary hearing. They were both called to the head office the next day. They travelled overnight on 26th February, 2009 and arrived on 27th in the morning. There was no hearing. They waited up to 2pm, until Susan, the Employee Relations Manager called them one by one. Inside were Ms Susan and Mr Mutai who told the grievants that one board of management member had decided to terminate their employment. There were no reasons given for the termination of employment. The grievants were not given a chance to argue their case before them. When the witness tried to enquire he was told to file an appeal. He was handed a termination letter on the same day. This dismissal was unfair, selective because the grievants followed procedures in their work and did not give cash to an outsider and could not perform telling duties alone.

19. On the appeal, the grievant got a regret letter asking for further information which they did not have.

20. When the witness went to the CBK Kisumu, he left the operation manager, the co-custodian and branch manager. That Kisumu branch is designed in a way that if a teller is leaving the cubicle, they must use the door next to the branch manager or the one next to the operations manager. The operations manager is in charge of all tellers. By this time the branch did not have a CCTV. On average the witness dealt with Kshs.200 to Kshs.250 million in a day. He worked honestly and diligently and even committed himself to the respondent by taking a mortgage which he was to pay for the rest of his life. The grievant did not need a teller or any assistance to commit steal from the bank. He had the strong room key and the bank code. He had the password for disarming the room.

21. From the termination letter, there are two figures in contention. There is a difference between the figure in the show cause and the one in the letter of dismissal. There was an amount that was not accounted for. There was money which the teller had debited from the customer's account which the operations manager was supposed to ask questions but did not. This was w=for amounts in excess of Kshs.200, 000.00.

22. The grievants case is that they were treated selectively because the manager and operations manager who had the greatest responsibility were warned and transferred. The branch manager, sent to Githurai branch and the operations manager to Kericho branch. The operations manager had another warning letter before.

23. Mr Amulenga also testified that the document on cash movement and transaction filed by the respondent is not correct as the document in use at the time of employment was one dated 2008 but the respondent file done for 2011.

24. The grievant also testified that the Cash & Cash Movement Operating Manual was the document is use. He was not supervising the teller but by the operations manager. The grievant was not supervising the head teller. He was under the supervision of the operations manager. The operating manual does not reflect his role on treasury cash.

25. The grievant also testified that he followed the laid down procedures according to the operating manuals. This is confirmed by the respondent in defence of 26th march 2014.

26. The grievants duties did not allow him to pay customers but could post to tellers and receive and repatriate cash to CBK. He had no contact with clients.

27. The claim is that the grievants should be reinstated, be paid damages and salaries since March, 2009.

Defence

28. In defence, the respondent admits they employed the grievants as tellers at the Kisumu branch. The grievants were also custodians in charge of the strong room and also had the duty to depositing and

withdrawing money from the strong room.

29. On 9th February, 2009 the grievants withdrew Kshs.11 million from the strong room to be paid to Chemelil Teachers Sacco and to Siaya Teachers Sacco at the request of a fellow teller Mr yara. This request was made to the grievants without first receiving the cheques for the amount contrary to the laid down procedure.

30. Allegedly, yara was to add the Kshs.11 million to the money he already had in his teller journal and pay Chemelil Teachers Sacco Kshs.7 million and also pay Siaya Teachers Sacco a sum of Kshs.4, 650,000.00. Yara only paid Chemelil but did not pay Siaya. In the process, Kshs.5, 794,129.00 was stolen from the respondent by Yara who also disappeared immediately.

31. On 20th February, 2009 the respondent issued the grievants with a notice to show cause letter to which they replied and a decision was taken to terminate their employment for negligently facilitating the loss of Kshs.5, 794,129.00. The respondent relied on the provisions of the Employment Act and the CBA between the parties to effect the termination of employment.

32. The grievants employment was terminated lawfully as they issued Mr Yara with the amount of Kshs.11 million in anticipation of two cheques from customers who had not submitted the cheques to the bank contrary to bank procedures.

Sections 2.4 of the respondent's Business Code of Conduct provides that treasury cash must be under the joint control of the appointed custodians and that all employees should protect the bank asset and ensure their efficient use in terms of section 13.0. The grievants did not take time to ascertain whether the cheques upon which the money were to be paid against been had properly presented.

33. The defence is also that the grievant Amulenga stated that after withdrawing the funds he allegedly left for the CBK for transactions at 11.40am and only came back at 3pm but the records indicate that he authorised a transaction at 12.30pm in the bank and thus was not truthful. The grievants were dismissed in February, 2009 but filed suit in 2012 and they have not explained the time lapse.

34. The grievants acted negligently where the respondent lost monies and this conduct undermined the trust and confidence inherent in the employment contract. There is no cause of action that warrant the orders sought by the claimant. The suit should be dismissed with costs.

35. In evidence the respondent's witness Samuel Magati Osero testified that he is head of security for investigations with the respondent and held the same position in February, 2009. He investigated theft in Kisumu branch which had occurred on 9th February, 2009. The incident related to the head teller who absconded duty having stolen cash in his custody a total of kshs.6, 263,299.00. The witness prepared a report on his investigations on 16th February, 2009.

36. Mr Osero also testified that in his investigations he found out that the cash theft was a well-planned theft by yara. He established that at 11.42 am the cash custodians, Amulenga and Lameck got cash out of the vault. The vault had to be secured by 2 custodians and they accessed the strong room and handed over the cash to yara. This was wrong. The bank rules and regulations required hat cash is removed from the vault for a purpose.

37. Upon investigations, the grievants stated that they removed cash from the vault as it was needed to pay for 2 cheques – Chemelil Teachers Sacco and Siaya Teachers Sacco. The head teller got Kshs.7 million at 11.00am at the time he had Kshs.3 million which was sufficient to replenish other tellers.

38. The grievants instead of removing Kshs.7 million from the vault they removed Kshs.11 million. The Chemelil cheque of Kshs.7 million was sufficient to replenish the tellers. The regulations at the respondent are that when a customer brings in cash, the same must be confirmed to ensure there is sufficient cash for payment.

39. The grievants lied to the witness that by 11.42am they had both cheques from the 2 customers which were not correct. An interview conducted with Siaya Teachers Sacco confirmed that they came to the bank at 1.30pm and at this time the head teller had been removed at the vault and the head teller disappeared.

40. Mr Osero also testified that Mr Yara exploited an opportunity that was availed by co-custodians by design or collusion of the grievants. He recommended they be issued with a show cause for negligence for failure to follow code of regulations to protect the respondent property as they were negligent. Had the grievants not removed excess cash to the head teller would not have had so much cash available to him to steal.

41. The co-custodians had the right to access the vault but such cash must be removed for a reason. The head teller must also ensure that the cash at hand was not in excess. When the head teller received cash from customers, with the operations manager had to ensure it was evacuated and secured. Both had to ensure the correct cash was kept by each teller.

42. The 2nd respondent's witness was Simon Mureithi Main who testified that he is the Employee Relations Manager. He knew the grievants when they were working for the respondent. They were dismissed on the reasons of the loss of kshs.11 million at the Kisumu branch. This was done following an investigations conducted by Mr Osero, head of security.

43. At the time the grievants were dismissed, they were earning a gross salary of kshs.74, 803.00 per month. They were pensionable and were paid terminal dues on 15th February, 2009 and a discharge form is filed. There were 28 leave days and these were computed and paid.

44. Before the grievants were dismissal from employment they were taken through due process, a show cause was issued and they filed a reply. They were called for a meeting by the human resource officer with regard to the theft of Kshs.6, 269,299.00 to Kisumu branch. The basis of the show cause was that the grievants were negligent when they issued cash to the head teller, Mr Yara without ascertaining the need for it. When the grievants were heard in their defence, a decision was taken to dismiss them for the loss of kshs.5 million

45. At the close of the hearing, both parties filed written submissions Determination

46. The claim is that the grievants Mr Amulenga and Lameck were employed by the respondent and while at Kisumu branch and working as Cash Officers, on 9th February, 2009 the head teller Mr Dedan Yara presented them with two cheques from Chemelil Teachers Sacco and Siaya Teachers Sacco for payment of Kshs.7 million and Kshs.4.65 million respectively. The grievants and the operations manager gave the head teller a total sum of Kshs.11 million to pay for the two cheques. Only Chemelil Teachers Sacco was paid and soon thereafter the head teller disappeared having stolen a total sum of Kshs.5, 794,129.00. The grievants were issued with show cause letters for the loss of this amount and for alleged negligence in undertaking their work. They were then suspended. The grievants were called for a meeting at the head office on 27th February, 2009 and were thereafter dismissed from their employment on the grounds of negligence and for the loss of the sum of Ksh.5, 794,129.00.

47. In defence, the respondent's case is that on 9th February, 2009 the grievants withdrew Kshs.11 million from the strong room to be paid o Chemelil Teachers Sacco and Siaya Teachers Sacco at the request of a fellow teller, Dedan yara. Such instruction to withdraw the money was without first recalling the cheques for the amount requested for which was contrary to laid down procedure. Mr yara was to add the sum of | kshs.11 million to monies he already had in his teller journal and pay Chemelil teachers Sacco Kshs.7 million ad also pay Siaya Teachers Sacco Kshs.4.65 million. Mr Yara only paid Chemelil Sacco and in the process stole kshs.5, 794,129.00 and he disappeared. The respondent conducted investigations and it emerged that the grievants negligently facilitated the loss of Kshs.5, 794,129.00 and this led to their dismissal from employment.

48. Mr Amulenga testified on behalf of the grievants and detailed how he was able to access the strong room for the withdrawal of Kshs.11 million. The respondent bank procedures required that the transaction be authorised by the operations manager and that he had to be accompanied by the co-custodian and in this case it was Mr Lameck, the other grievant. All transactions had to be authorised by the operations manager. In this regard, Mr Amulenga testified as follows;

...When a corporate client came to the bank, they had to present their cheques to the chief teller who then forwarded the cheque to the grievants requesting for cash. The grievants then went with the cheque to the operations manager enquiring for cash removal from the strong room. Once allowed, the cash was documented in the cash register according to the specifications and then left with the operations manager to the strong room.

49. On this evidence, the defence that the grievants were negligent in performing their duties and thus facilitated the theft of Kshs.5, 794,129.00 requires interrogation.

50. On 27th March, 2014 the respondent filed the witness statement of Beatrice Suba who at the time of the cause of action herein, the events starting on 9th February, 2009 was the operations manager, Kisumu branch. She does not outline what her duties were but avers as follows;

...the procedure that was to be followed was that if a teller requested more funds the same would only be disbursed to the teller by the claimants [the grievants] upon the teller showing them that he/she needed additional funds by forwarding to the claimants the cheque against which payment was to be made

On 9th February, 2009, the claimants withdrew a total Kshs.11,000,000/= from the strong room to be paid to Chemelil Sacco and to Siaya Teachers Sacco at the request of a teller – Mr Dedan Yara without first receiving the cheque for Siaya Teachers Sacco for the amount contrary to the laid down procedures.

That I later got to know from the Bank's records that the claimants as the custodians of the strong room issued Kshs.11,000,000.00 to Mr Dedan Yara to encash two cheques from customers, despite the fact that Siaya Teachers Sacco had not submitted their cheque to the bank contrary to bank procedures.

...

That my role was only to authorise payments on the physical cheques presented to me.

51. What emerges from the claim and defence is that Beatrice Suba as the operations manager relied on some records to arrive at her findings that the grievants had accessed the strong room and removed Kshs.11 million. Such records are not submitted for the court to assess when the claimant removed such cash from the strong room and whether they had the supporting cheques to support the access to the strong room so as to get the amount of Kshs.11 million.

52. This is crucial as without such records to confirm exactly why the grievants accessed the strong room to get such a large amount to money, their evidence that when a corporate client came to the bank they had to present their cheque to the chief teller who then forwarded the cheque to the grievants to get the cash from the strong room. That such a transaction had to be authorised by the operations manager.

53. The grievants' evidence is more probable as the grievants had a supervisor over their work. It cannot be that they were left alone to access the strong room at will and get as much money as they wished. This cannot be the case for any given financial institution such as the respondent which is highly regulated by internal policies and fundamentally by the Central bank of Kenya and the requirements under the Banking Act. For Ms Suba to state that there was no control over the grievants in their work, and then fail to produce any records as to their work activities in accessing huge sums of cash, the evidence by the grievants must be believed.

54. It is apparent that the respondent lost huge sums of money on 9th February, 2009. The parties acknowledge that Mr Yara took off with the money. The only charge against the grievants is that they negligently facilitated the theft when they let Mr yara have a huge amount of money at his disposal. However, the respondent does not make any mention as to what efforts were put in place to apprehend Mr Yara. What is clear is that in the investigations of Mr Osero he established that a sum of Kshs. 6, 269,299.00 was stolen from the respondent. in the charge made against the grievants, they were alleged to have facilitated the loss of Kshs.5, 794, 29.00. The difference in both amounts is not explained.

55. The termination of employment is regulated in law. There must be substantive reasons for the same as well as fair procedure followed to justify the termination of employment. Section 41, 43 and 45 of the Employment Act, 2007 are couched in mandatory terms. The law requires that an employer must have a valid reason that is genuine and fair to justify the termination of employment. Even where there is such reason that warrants the termination of employment, due process must be adhered to. This is to ensure that the employee is given a fair chance to give their defence as from such defence the employer is able to put such defence and representations into account before a sanction can be issued. Without the defence from the employee, the employer has no advantage of both sides to a given set of facts.

56. Section 41 of the Employment Act, 2007 is set on mandatory terms as follows;

41. Notification and hearing before termination on grounds of misconduct

(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.

57. Even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, section 44(4) requires that before such sanction can issue, an employer must ensure procedural justice to the employee by allowing the employee to give their defence. Such defence must be before a representative of the employee's choice. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.

58. In this case the grievants testified that on 27th February, 2009 they were each called to a meeting with the human resource manager and later issued with termination letter. The grievants had travelled overnight from Kisumu to Nairobi head office thinking they were going to assist the respondent with investigations only to be called in for issuance of letter of termination and thus ending their employment with the respondent.

59. By the 27th February, 2009 the respondent had conducted investigations through Mr Osero, it is not clarified if the claimants who were on suspension had chance to read this report but what is apparent, the meetings held on 27th February, 2009 were without prior notice as to the agenda and the grievants were not allowed chance to bring their representative at such a meeting which ended up in the termination of their employment. Such flawed procedures cannot find justification when viewed against the provisions of section 44(4) read together with section 41 and 45 of the Employment Act, 2007. Where there is procedural lapse in the termination of employment, section 45(2) of the Employment Act, 2007 provides 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 [underline added]

60. In this case, without the respondent demonstrating the exceptional circumstances leading to the dismissal of the grievants without following due process, the resulting termination of their employment is unfair. Such cannot find justification in accordance with section 45 of the Employment Act, 2007.

61. The respondent also relied on materials and records not produced for the court to assess the veracity of evidence against the grievants. The reliance on section 13.0 and 17.0 of the *Business Code of Conduct* to dismiss the grievants from their employment by the respondent is not supported by any evidence. Such code is not attached for the court to assess the contents and why such sections were applicable to the grievants.

62. The court on several occasions allowed the respondent time to produce more documents and records. There was no compliance. The respondent was also given sufficient time to bring all their witnesses. There was no compliance.

63. Ultimately, the dismissal of the grievants was procedurally unfair.

Remedies

64. The claimant is seeking the reinstatement of the grievants. The grievants were dismissed from employment on 27th February, 2009. The claim was filed on 26th April, 2012. The matter could not be heard to conclusion due to various reasons, largely not the fault of the claimant. The presiding judge was transferred after the grievants gave evidence-in-chief. The defence had to be adjourned on several occasions for the production of all the witnesses and up and until the 29th March, 2017 when the court looked at the history of all adjournments granted to the respondent to produce its witnesses but had failed to do so and thus closed the case.

65. On the above background, the court must put into account the provisions of section 12(3) of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act, 2007 in addressing reinstatement. It has been over 8 years since the termination. There must be various changes to the respondent business since the grievants were dismissed from their employment. To order a reinstatement in such circumstances I find not appropriate.

66. The remedy of compensation is available to the grievants. Putting into account the circumstances leading to the dismissal of the grievants compensation for 6 months gross pay is adequate. At the time of dismissal the grievants gross pay as Kshs.74, 803.00 and each is hereby awarded Kshs.448, 818.00.

67. Notice pay is due in a case of unprocedural termination of employment each grievant is awarded Kshs.74, 803.00 as notice pay.

68. I find the owing leave days have since been paid.

Judgement is hereby entered for the claimant with an award of Kshs.448, 818.00 as compensation for each grievant; notice pay of Kshs.74, 803.00 for each grievant; costs of the suit.

Dated and delivered in open court at Nairobi this 10th day of August, 2017.

M. MBARU JUDGE

in the presence of:

Court Assistant: David Muturi

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