



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 334 OF 2013

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

BEATRICE OMITI CLAIMANT

-VERSUS-

KENYA COMMERCIAL BANK LTD RESPONDENT

J U D G E M E N T

By Statement of Claim dated and filed on 6th December 2013 the Claimant avers that she was employed by the Respondent in 1994 and her employment was terminated by letter dated 13th August 2012. She avers that the termination was capricious, onerous and unfounded. She prays for the following remedies-

- i. For Declaration that her summary dismissal was unlawful.
- ii. Reinstatement thereof and in the alternative, payment of salaries and emoluments from time to alleged dismissal to date of judgment.
- iii. General damages for wrongful dismissal.
- iv. Costs.

The Respondent filed a Memorandum in Reply to the Claim in which it denies that the termination was unfair and states that the Claimant's dismissal was fair and procedural. The Respondent prays that the Claim be dismissed with costs.

At the hearing of the case the Claimant testified on her behalf while the Respondent called 5 (five) witnesses. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that she was employed by Kenya Commercial bank Limited, the Respondent in October 1994. She was transferred to Malaba in 2010. At the time she left employment she was a cashier.

The Claimant testified that on 19th June 2012 a customer came in the morning to buy Mpesa float for Kshs.57,000. She testified that according to procedure the transaction was supposed to be handled by one person but for some reason in Malaba it was being handled by 2 people. She testified that she received the cash while a colleague at the back office Mr. Bernard Chesasia issued the float as she did not have access to the phone and PIN number. She testified that after the customer deposited the money she moved to the back office to her colleague who was to issue the float and issue a voucher which she would use to enter

the transaction into the Bank's system. She however did not get the voucher and the customer did not get back to her.

The Claimant testified that she reminded Chesasia twice during the day but he did not give her the voucher to post into the system. She testified that after some time another customer came to withdraw Kshs.60,000. She noticed the customer when he was complaining loudly about another cashier that he had been delayed in the queue because an advantage customer had come after him and gone to the head of the queue.

She testified that before she could intervene the customer who she knew has served before, stormed to her counter. She served the customer and also persuaded him to open a fixed deposit account which he accepted. Because of that she got excited and went to the back office to tell her colleague about it. She also spoke to the Operations Manager then went back to her station.

The Claimant testified that the customer went back to her after she had served some other customers and insisted that she had not paid him the money he had gone to withdraw. She told the customer that after closing at the end of the day she will know if indeed she had not paid him. She testified that at the end of the day she had a shortage of Kshs.3000 in her summary. She explained that a cash summary is a document printed from the computer indicating opening and closing balances.

The Claimant testified that after closing she asked her colleague Chesasia how he had reconciled the Mpesa account and also asked for the voucher for the Kshs.57,000 Mpesa float transaction that he had not yet given her to enter into the system. She testified that Chesasia went to the computer and ran through the Mpesa account and noted that the voucher had not been posted. The Manager then told her that she must have an override of Kshs.57,000. She testified that it is then that she remembered the customer she had overpaid. That she realised the Kshs.3000 shortage and the Mpesa float of Kshs.57,000 would make an override of Kshs.60,000. She stated that Mr. Kirui her immediate supervisor and herself both called the customer whose name was Chrispinus Olunguha but the line got disconnected. She called him again and he told her that she did not overpay him.

The Claimant testified that she was accused to have suppressed the Kshs.57,000. She explained that to suppress in banking terms means to conceal with the intention of not declaring the money. In other words it means receiving money but not entering it in the system with intention to convert it to personal use.

The Claimant testified that on the same day in the evening the Manager asked her to explain what had happened. That the Branch Manager also asked her to explain. After explaining to both her manager and again to the Branch Manager she was told to post a shortage of Kshs.60,000. She testified that the Bank gave her one week to trace the shortage but she was not able to trace it. She was then sent on 30 days leave.

She testified that when she reported back from leave on 13th August 2012 she was given some duties but was not given a password. At about 2pm the same day she was called and issued with the letter of termination. The grounds for termination was suppressing Kshs.57,000. She appealed against the termination and was called to the head Office for hearing but the appeal was not successful. The Claimant denied that she suppressed any money.

Under cross examination the Claimant stated that she worked for the Respondent for 19 years and in Malaba for 3 years. She stated that work in back office entailed handling vouchers, while work in cash office entailed paying and receiving cash. She stated she was Cashier/Teller and she handled Mpesa transactions for about one month at Malaba. She stated she did not understand the procedures of Mpesa transactions. She stated that she was not trained on Mpesa transactions but was shown a few things. She stated that Mpesa has deposits and withdrawals. The Bank pays customers or customers go to the Bank for float.

The Claimant explained that when an Mpesa transaction is completed a message is received on the Mpesa phone. That for payments the Teller receives the message then writes the voucher and pays. For a

deposit, the Teller receives the money, enters the transaction then raises a voucher. For float once the customer gives the Teller the money, the teller counts the money, confirms the cash then creates a message on the phone, raises a voucher and posts. She stated that in the present case she did not have a phone or PIN. She received the money, raised the voucher and then took it to the person at the back office but retained the money

The Claimant was shown a reconciliation form (document on last page of Respondent's supplementary List of documents filed on 12th November 2014) which she admitted signing but stated it was prepared by her colleague. She confirmed that the reconciliation reflected a shortage of Kshs.57,000 which had not been posted. She stated the posting was done in the evening on the material day or the following day in the morning. She stated that she had not done the posting because the voucher was not given to her until later. She stated that after reconciliation the Bank lost Kshs.60,000. She stated she had paid a customer twice, that the customer went to her counter and she paid him and referred him to another counter, then he later came back and insisted he had not been paid so she paid him again. She stated that on that day she had a shortage of Kshs.3000 which is the difference between the Kshs.57,000 overpaid to the customer and the Kshs.60,000 that was lost.

The Claimant admitted that this was not the first time she had a shortage, and it is always assumed that a cashier has taken the money dishonestly until the shortage is sorted. She admitted that there was a time she received Kshs.2000 but posted Kshs.200. That she was issued with a show cause letter and explained that it was a typing error. She admitted she had a number of warnings and notices as reflected in the Respondent's Appendices 9 to 12 of the Supplementary List of Documents. She denied that she had a troubled history at the Bank.

The Claimant stated that she was asked to explain what happened by her immediate supervisor which she did. The following day the supervisor told her the explanation was not sufficient and she wrote another explanation. After that the Bank Manager also asked her to explain which she did. She was then sent on leave and when she reported back she was issued with the letter of termination. She stated she was not given a hearing.

Respondent's Case

RW1 KIRUI KIPLANGAT EVANS testified that he used to be the Claimant's supervisor at Malaba but at the time of hearing he was stationed at KCB Moyale as Manager, Service Quality and Compliance. He testified that at Malaba he was Assistant Manager, Service, Quality and Compliance. He testified that he had no personal issue with the Claimant but her problem was related to business as she used to have shortages and sometimes more money than was collected.

He testified that on 19th June 2012 the accounts did not balance at the end of the day. He testified that on that day the Claimant was assigned to work in Mpesa. When the accounts did not balance he assigned a colleague Mr. Lubanga who checked and confirmed there was no cash shortage. The shortage was on Mpesa. The Claimant had given a client float but failed to credit the money that she received. He testified that he called the customer Mr. Chrispinus who insisted he had not been paid twice. He also called another customer Mr. Odeke who said he saw the customer in front of him whom he described, stuffing a lot of money into his pocket.

Mr. Kirui testified that the Claimant posted the Kshs.57,000 the following day. He testified that on 19th June 2012 the Claimant also had a shortage of Kshs.3000 which was not posted or brought to his attention as required.

He testified that he initiated a disciplinary process by writing a memo to the Claimant asking her to explain what happened. She responded but he was not satisfied and escalated the issue to his supervisor Beatrice Wekesa who also wrote a memo to the Claimant. The Claimant's response was not satisfactory and the issue was escalated to the Branch Manager Emmanuel Longaratum. Mr. Longaratum called for more explanation from the Claimant. After her response he made a report to the regional office with copy to Human Resource Department (HR) to the effect that he was not satisfied. The Claimant was thereafter

sent on compulsory leave while investigations were carried out. He testified that during the period HR called for the Claimant's file. HR arrived at the conclusion to terminate the Claimant's employment contract. The letter of termination was sent to the Branch Manager who called the Claimant and issued the letter to her. The Claimant appealed against the termination but the appeal was not successful.

Mr. Kirui testified that he worked with the Claimant for about 2 years and his assessment was that she was not an honest person. He testified that there was an incident when a customer deposited Kshs.2000 but she credited Kshs.200. He testified that there was another incident involving Kshs.5000 and another one involving US Dollars(\$100). He further testified that there was a customer who complained that he gave the Claimant excess funds but this could not be confirmed. He testified that there were other personal issues which the Claimant is aware of.

Under cross examination Kirui stated that on 19th June, 2012 there was a shortage of Kshs.3000 which arose from soiled notes and was later reconciled. Mr. Kirui stated that the Claimant worked in Mpesa for more than 2 months. He stated that the Kshs.57,000 lost was cash received by the Claimant for float.

RW2 SAMUEL OUMA testified that he was working at the Respondent's Kisumu Branch but was working at Malaba Branch as cashier at the time of termination of the Claimant's employment. He testified that on 19th June 2012 the Claimant was working in the cubicle next to his and both of them were working as cashiers. He stated that there was a customer who wanted to withdraw Kshs.60,000 but did not have identification. When he asked for the identification the customer responded that he did not have any and that he normally transacts at the bank without an identity. He testified that when he told the customer that identification is a requirement of the Bank, the customer took his voucher and left the counter. He testified that there was no commotion. The customer then went to the Claimant's queue. Mr. Ouma explained the process of transacting on Mpesa as explained by both the Claimant and RW1.

Under cross examination Ouma stated that the name of the customer who wanted to withdraw without an identity was Chrispinus. He stated that without an Mpesa PIN no Mpesa transaction can be done.

RW3 BRIDGID NEKESA testified that she was working at Malaba Branch of Kenya Commercial Bank as Manager, Operations. She testified that the Claimant was fired because the Bank lost confidence in her due to loss of cash. She testified that the Claimant was not able to explain a cash transaction of Kshs.57,000. She testified that she learned about the issue on the same day when she was informed by Beatrice her immediate supervisor that the Claimant was not able to account for Kshs.57,000. She testified that when the difference persisted the following day it was reported to the regional office. The bank regulations required that any difference of more than Kshsssss.5,000 must be reported. He stated that they still tried to trace where the money had gone even after reporting. She testified that she was aware Kirui wrote to the Claimant to explain the loss. She testified that she was aware that the Claimant claimed she had paid a customer twice although a teller is not supposed to make a second payment to a customer without informing the immediate supervisor and without following the laid down procedure. She testified that the teller would have been asked to close and balance to establish if there was an excess and the in charge would supervise the balancing and a payment would only be made after establishing that there was an excess.

RW3 testified that she told the Claimant to try and look for the money before it is reported to HR and gave her 3 to 4 days but she remained adamant and asked "Kwani nitoe wapi" which is Kiswahili for "where do you expect me to get it from?" She testified that Kirui asked the Claimant to explain what happened but her explanation was not satisfactory. Kirui escalated the matter to her and she did the same but the explanation was still not satisfactory so she escalated it to the Branch Manager. She testified that the Claimant was given a hearing in the presence of the union but her case was found to be bad. She was dismissed and paid her terminal benefits which included pension of about Kshs.2.8 million.

She testified that she was aware the Claimant had a loan which was converted to commercial rates after she left employment.

Under cross examination she stated that the Claimant was not sent on compulsory leave but the incident

occurred when she was supposed to take her annual leave.

RW4 BERNARD CHESISHA testified that he worked with the Claimant at Malaba Branch for about 2 years. He explained the procedure for Mpesa transactions as had been done by the other witnesses. Under cross examination he stated that the Claimant did not have a PIN number for Mpesa because she was going on leave and it takes time to get a PIN number. He stated it was normal for Mpesa transactions to be conducted by more than one person.

RW5 EMMANUEL LEPARATUM testified that he was the Branch Manager at the Respondent's Malaba Branch at the time the Claimant's employment was terminated. He restated the evidence as adduced by the other defence witnesses.

Determination

I have considered the pleadings and evidence on record. I have further considered the submissions filed by the parties. The issue for determination is whether the termination of the Claimant's employment was fair and if she is entitled to the prayers sought.

The subject of unfair termination has been stated and restated in the numerous decisions of this court as well as the Court of Appeal. There must be both procedural and substantive fairness as provided in sections 41 and 43 of the Employment Act.

In the present case the Respondent has adduced a lot of evidence relating to the validity or reasons for termination of employment which to a large extent is admitted by the Claimant. In her own testimony the Claimant stated that she suspected she paid a customer twice and in the process lost Kshs.60,000. Although there was some variation in her evidence and that of the defence witnesses, all were agreed that the Claimant lost Kshs.57,000 that she was unable to satisfactorily explain even after being given an opportunity to do so by her immediate supervisor, RW1, by the Operations Manager, RW3 Brigid Nekesa and the Branch Manager RW5 Emmanuel Leparatum. The Claimant further admitted that she had a chequered history with the Respondent marked by several warnings and cautions bordering on questionable transactions relating to customer accounts as demonstrated by Respondents Appendices 9 to 12 in the Respondent's undated Supplementary List of Documents filed on 9th July 2014. It is therefore not in doubt that the Respondent had valid reason to take disciplinary action against the Claimant.

The second limb for valid termination of employment has however not been demonstrated by the Respondent. The specific requirements of section 41 of the Employment Act were not complied with by the Respondent. In the case of ***Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR***, Radido J summarised the legal fairness requirements set out in Section 41 of the Employment Act, 2007 as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The material portion of the Claimant's letter of termination states as follows

"TERMINATION OF EMPLOYMENT

This has reference to the correspondence exchanged, discussions held with you and the disciplinary exit interview held on 13.08.2012.

We advise that it has been established that you committed acts of gross misconduct, details of which are well within your knowledge. As a consequence, the Bank has lost confidence in you and your services with the bank is hereby accordingly terminated with effect from today's date in accordance with terms of Clause 5(d) of the Collective agreement covering section heads, check clerks, clerical, technical and subordinate staff. "

The letter does not mention a disciplinary hearing in terms of section 41 or at all. All that was done according to the letter is exchange correspondence, hold discussions and disciplinary exit interview.

A copy of the Collective Bargaining Agreement that the Claimant was subject to is contained in the Respondents Further Supplementary List of Documents dated 11th and filed on 12th November 2014. Clause 5(d) of the CBA which is referred to in the letter of termination reads as follows-

d) Notice of Termination of Employment

The notice period shall be one month's notice on either side in writing or the payment of one month's salary in lieu thereof by either party, subject to the reasons for termination being included in the letter in question.

In the Claimant's case the reasons for termination are not included in the letter although the Clause referred to expressly requires the reasons to be included. Loss of confidence is not a reason for termination as it is the cause of the loss of confidence that is material in termination cases. In **Cause No 674 of 2012: John Ngatia Ndung'u V Kenya Commercial Bank Limited** the court observed as follows with respect to the words "loss of confidence"-

...an employee facing disciplinary action is entitled to a clear statement of the exact offences for which the employer is considering disciplinary action. Use of phrases such as 'irregularities, gross negligence and loss of confidence' without further elaboration give the impression that the employer is on a fishing expedition to find some fault against an employee and validate a fait accompli.

[EMPHASIS ADDED]

I find that the Respondent did not give the Claimant a hearing and further the reason for termination was not stated in the letter of termination. This is a violation of the Claimant's right to be heard as expressly provided for in section 41.

Section 45(2) provides that-

(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.

The termination of the Claimant's employment was therefore unfair for want of procedural fairness.

Remedies

The Claimant prayed for reinstatement. This is a remedy that is only available within 3 years of termination and only under exceptional circumstances. The Claimant whose employment was terminated more than 3 years ago is not eligible.

The Claimant further prayed for salary to the date of judgment. Her employment having been terminated on 13th August 2012, she has not rendered any services to the Respondent since then for which she can claim payment. The prayer is rejected.

The Claimant further prayed for damages for wrongful termination. Under clause 12, the Claimant is entitled to compensatory damages to a maximum of 12 months' salary. Taking into account her long service of 19 years and all other relevant circumstances of the case, I award her the maximum compensation of 12 months gross salary in the sum of Kshs.1,518,276.

Having admitted owing the Respondent some money the decretal sum may be applied to off-set the same.

Orders accordingly.

Dated, Signed and Delivered this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE