



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO.623 OF 2010
BANKING, INSURANCE & UNION (KENYA).....CLAIMANT
VERSUS
BARCLAYS BANK OF KENYA LTD.....RESPONDENT
JUDGEMENT

The issue in dispute – wrongful termination of employment and non-payment of early retirement benefit scheme to Julius Njoroge Kamau.

Claim

1. The claimant union has filed the claim on behalf of the grievant, Julius Njoroge Kamau (the Grievant).
2. The grievant was an employee of the respondent serving in various capacities for 11 years from 15th January, 1988 to 14th August, 2000.
3. The respondent had in place an open Voluntary Early Retirement Scheme (VERS) for all employees from 28th February, 1997 by circular No.15. On 18th May, 2000 the grievant applied for VERS as he was to retire with his terminal leave commencing on 31st May 2000 after successfully applying for the VERS on 18th May, 1999.
4. The grievant was prevailed upon to delay as the respondent as to bring new staff after closure of Ol-Kalaou branch. The retirement was to take place at the end of the terminal leave and his terminal benefits were to be credited to his account. At the time the grievant was earning Kshs.45, 374.00 per month.
5. Under the VERS the respondent was to pay the grievant 40.75 months x kshs.45, 374 = Kshs.1, 848,990.90 on the last day of his terminal leave being pay for;

Three months' notice

Three months' salary for every years worked = 3 months

January 1988 to December 1999 = 12 years x 3 = 36 months

January 2000 to August, 2000 = 7 months x 3 = 1.75 months

Total months = 40.75 months

6. By letter dated 14th August, 2000 the grievant terminated the employment of the grievant with payment of one month a notice pay. The reasons given was that the grievant withheld information which would have been useful in frustrating a fraud involving irregular withdrawal of kshs.42,002.00 from a savings account No.8430200 in the name of Phyllis Wamuyu Mwangi.

7. The facts of the alleged fraud are that on 29th May, 2000 a bank customer, John Mwangi Koinange and M. Wanjuki visited the grievant house and casually enquired over his wife's ATM card which had been made 'HOT'. He had the official pin slip and mentioned to the grievant that his wife was hospitalised at Mary Immaculate Hospital Mweiga and the ATM card was retained while trying to withdraw some money to pay the hospital.

8. On 31st May, 2000 a lady customer, Lear Wambui Ithatwa and a fraudster came to the grievant counter to be served. The customer wanted to withdraw kshs.42, 002.00 but the grievant found that apart from the pass care there was no ID card for identification. She informed the grievant that she had lost or misplaced the ID card. The grievant had no authority to pay in the absence of an original ID card.

9. Out of courtesy the grievant informed the customer that he would send her to the supervisor to explain her case and to be interviewed for her identity to be ascertained. The supervisors are the custodians of the Specimen Signature Card used to identify customers who claim to have lost their original ID card.

10. The grievant printed the payment voucher and called the acting in-charge, Savings Account Card Ms Gertrude Mumbi (Ms Mumbi) and explained to her that he was sending the customer over to her because she did not have an ID card and wanted to withdraw money. Ms Mumbi called the customer for the interview.

11. Around 1.30pm the customer was sent back to the grievant by Ms Mumbi who authorised the payment voucher on a fresh police abstract indicating loss of ID card. The grievant paid the customer and posted the transaction at 1.33pm and went out for lunch. At 2.30pm the grievant was called by the operations manager, Duncan Waithaka where he found Ms Mumbi and the Business manager, Patrick Macharia. They had two letters, the customer specimen signature card and the savings withdrawal voucher for kshs.42, 002.00 which he used to pay the customer earlier on. They informed him that he could have paid a fraudster because of the contents of the letters.

12. The first letter and dated 29th May, 2000 the customer used thumb print and indicated she was a nurse at Ngobit Health Centre. The other letter was from Mary Immaculate hospital with a covering letter from Nyeri branch asking Nyahururu branch to issue a Bankers Cheque in favour of Mary Immaculate hospital debiting the account in question.

13. The grievant looked at the specimen signature card and concluded that photograph on it was not of the person he had paid earlier. Ms Mumbi who had interviewed the customer also agreed with the grievant. The specimen details belonged to John Koinange's wife and recalled having seen him at the bank hall before he left for lunch. The grievant also recalled the 29th May, 2000 when Mr Koinange visited him over his wife's ATM card. The grievant shared about his suspicions. Mr Koinange had an account in the bank and a search by the operations manager got the details and a further search revealed that he had given his wife authority to operate his account.

14. It was agreed that the respondent should get in touch with Mr Koinange to establish how his wife's documents got into the hands of the fraudster. The grievant offered to take the team to Ngobit health centre where Ms Phyllis Wamuyu, wife to koinange was working. The branch manager organised for a police escort and two criminal investigating officers. The team went to the residence of Ms Wamuyu and found the daughter who directed them to where the father was at Marian shopping centre and he was traced at 9pm taking beer with friends.

15. Upon interrogation, Ms Wamuyu's pass card was recovered from him and Kshs.6, 000.00 and the recovered card had been used to withdraw cash earlier at the respondent bank. Mr Koinange was arrested together with another man he had tried to pass a parcel to. They travelled to Nyahururu.

16. On 1st June, 2000 the woman and fraudster was arrested over the Kshs.42, 002.00 she had been paid was and the grievant and Ms Mumbi were directed to write statements with the police. The fraudster was charged in court and the grievant, Ms Mumbi and operations manager, Mr Waithaka were bonded as prosecution witnesses.

17. Since the grievant was to start his terminal leave on 31st May, 2000 upon being granted VERS and the date had passed as they pursued the fraudster he went to the manager to be released but was informed that due to the pending criminal case then in court he would be released later upon the determination of the case.

18. When the grievant went to check on his terminal benefits he was issued with a termination letter dated 14th August, 2000. The parties failed to agree on the disciplinary process and payment of VERS benefits. The claimant reported a dispute with the Minister under the provisions of Trade Disputes Act (now repealed). A conciliator was appointed but the respondent refused to implement the recommendations that the grievant be paid his VERS benefits.

19. The refusal by the respondent to pay the grievant his VERS benefits is wrongful on the grounds that the respondent was negligent what is failed to ensure accounts and ATM system were updated to make them current and the failure to properly have the signatures and photographs of account holder verified to avoid fraud should not be visited upon the grievant who had recommended the non-payment to the fraudster. Following investigations, the fraudster was arrested and the grievant wrote his statement and he was not held culpable and he followed all bank regulations. Police investigations found the grievant as a witness and not an accused person. Internal investigations within the respondent Nyahururu branch revealed the grievant was innocent.

20. The claim is for an award of the VERS benefits of Kshs.1, 848,990.00 with costs.

21. The grievant testified in support of his case.

Defence

22. In response, the respondent's case is that the grievant was employed by the respondent bank as a Clerk on 15th January, 1988 at a salary of Kshs.38, 424.00 per annum and he completed his probation and was confirmed into permanent and pensionable employment. It was a term of employment that he would not breach the terms and conditions of his employment and should it be known that he had divulged bank information to other parties not intended to receive the same such would be ground for dismissal. The parties agreed to terminate employment by notice of one month.

23. The respondent defence is also a notice of preliminary objections on the grounds that the suit is time barred as the grievant was terminated on 14th August, 2000 and suit filed on 4th June, 2010 a period of 10 years after the cause of action arose and contrary to section 90 of the Employment Act, 2007.

24. The defence is also that on 31st May, 2000 at 12.02pm a lady, Phyllis Wamuyu Mwangi approached the grievant at the Nyahururu branch to withdraw funds from Account No.8430200 held at the branch. He had a savings pass card and police abstract and stated she had lost her ID and need to withdraw Kshs.42,002.00 and the grievant processed the same and paid. Later the in charge Ms Mumbi was informed by the manager to stop any operations of the account as the pass card was reported lost and the owner was admitted in hospital in a coma.

25. Ms Mumbi realised that the grievant had paid the fraudster and thus informed the operations manager who summoned the cashier and the in-charge. The grievant indicated that he paid the money to a lady

who was accompanied by a man he knew, Mr Koinange and that if he was traced he would reveal who the lady was. The grievant did a statement to the effect that he had prior knowledge that Phyllis Wamuyu Mwangi was hospitalised; he could identify the customer; Mr Koinange had visited him at home; and he had seen Mr Koinange in the banking hall on the material day of the fraudster withdrawal.

26. Upon investigations, it was established that the grievant had acted dishonestly. This led to fraud in the respondent bank. The fraud was committed while the grievant had information which he did not disclose to stop the fraud.

27. The respondent reviewed the grievant's work record and established he had several memos cautioning him against overdrawing his account and cash differences. This incident coupled with his past record led to his termination on 14th August, 2000. Such termination of employment was fair, lawful and premised on sufficient grounds. The grievant was in breach of his employment contract. The grievant had an obligation under his employment contract not to give information of any parties without instructions from the bank and he knew the owner of Account No. 8430200 was hospitalised and in a coma by paying somebody else while he knew the genuine account holder was in breach of bank regulations and procedures and termination of employment was appropriate under section 17 of the Employment Act Cap 226 (now repealed).

28. The respondent's business is keeping in safe custody of funds belonging to customers and shareholders. The action of the grievant has potential of eroding the reputation of the respondent mandate. The Collective agreement with the grievant provided that either party could terminate employment by giving one month's notice or payment in lieu thereof.

29. The claimant for 3 months' notice pay is not justified and is contrary to the collective agreement. The termination of the grievant was in accordance with the collective agreement and the claims made not justified.

30. The respondent did not call any witness.

31. In paragraph 6 of the Respondent, defence to the claim a preliminary objection is raised to the effect that the suit is time barred.

32. The objections raised by the respondent were addressed by the court **vide ruling dated 22nd October, 2012 where the court dismissed the same.**

33. The claim herein is for the payment of VERS benefits due to the grievant. Such claim arose out of a memo of the respondent dated 30th March, 1999 to employees on a VERS and to which the grievant applied on 18th May, 1999.

34. Evidence on record is that the respondent approved the grievant's application for VERS and he was due to proceed on his terminal leave and the funds due credited to his account. The grievant was entitled to Kshs.1, 848,990.00 under the VERS benefits. This far the evidence is not controverted by the respondent.

35. I find no material evidence by the respondent to the due benefits to the grievant under the VERS. There is no reply to the VERS application or any response to the averments made in this regard in the defence. I take the claimant's evidence in this regard as correct.

36. Following the grievant awaiting his VERS terminal benefits he was on 29th May, 2000 approached by a person for a payment of Kshs.42, 002.00 from Account No. 8430200 and which turned out to be a payment that was fraudulent. In his statement over the events leading to and on the actual date of payment on 31st May, 2000 the grievant stated that;

... on 31st May, 2000 a lady customer who was on the que came to my counter to withdraw money.

She presented a wallet with a pass card inside and I could see there were various duplicate withdrawals slips inside. That she had misplaced her ID card. I printed the withdrawal slip but didn't post to the account, I then gave the slip and the pass card to enquiries counter, I then sent the lady there so that she can be interviewed by our superiors and so that they can get her specimen signature card and compare the photograph on it with the face between them...

37. To these events Ms Mumbi in her statement wrote as follows;

... as the savings in charge at around 12pm a savings withdrawal of Kshs.442002 printed by cashier Mr Kamau was referred to me. The debit was accompanied with a savings pass card and police abstract for loss of ID card. Since I did not know the customer, I went to the counter and enquired who the customer was. The enquiries clerk did not know the customer but the cashier directed me to the customer. Incidentally the customer was standing in front of the cashier Mr Kamau. So I called the customer by the counter and enquired from her about the loss of ID card. The customer said it was lost and I therefore took her thumbprint which I witnessed.

Back on my desk I scrutinised the account, the customers signatures appeared to be okay, the savings card serial number tallied with our records and no account notes were held. Satisfied with the details I authorised the debit and returned it to the cashier Mr Kamau to pay.

Thereafter at around 12.30pm we received instructions from the customer not to allow any withdrawals from account 8430200. The instructions were received by the daughter of the account holder. ... [underline added].

38. I take it the respondent bank has procedures, checks and balances to ensure the safe keeping of their customers and shareholders funds and assets. On the facts set out in the statements of the grievant and the in charge Ms Mumbi on the events taking place on 31st May, 2000 where the grievant in due diligence and noting a customer seeking with withdraw funds did not not have the required documents thus sent the customer to his supervisor for verifications and confirmation of signatures and which was done by Ms Mumbi by checking through the account details, thumbprint and filed specimens and approved the payment to the lady, the grievant thus cannot be faulted.

39. Where the grievant had additional information with regard to the account and the holders of such an account prior to the reference of the alleged customer to Ms Mumbi so as to file the same and stop payments, this is not clarified. I take it all customers attending at the respondent bank and branch where the grievant was and was on his que to be attended was entitled to receive equal treatment like all other customers. Where the grievant was not satisfied with any aspect of the customer, he escalated the same to his superiors and in this case the customer was referred to Ms Mumbi who indeed did several verifications procedures and approved the payment of Kshs.42, 002.00 out of account No. 8430200.

40. The claim herein is specific. It relates to the payment of Kshs.1, 848,990.50 being the payment due to the grievant for VERS benefit and computed as including a notice pay of 3 months, payment for 3 months for every year worked and a payment for work from January, 2000 to August, 2000.

41. The VERS application was made on 18th May, 1999. The grievant is therefore entitled to the benefits due to him under the VERS and in accordance with memo of the respondent dated 30th March, 1999 and one dated 31st March, 1999 and which made reference to the Staff Circular No's 15 and 14 of 28th February, 1997 to which he made application on 18th May, 1999. The due benefit of Kshs.45,374.00 x 37.75 = 1,712,868.50 is due as the claimant was due for payment of his one months' notice as set out in the letter of termination and thus claim for notice pay at 3 months not due.

Accordingly, judgement is hereby entered for the claimant for the payment of kshs.1, 712,868.50 with interests at court rates from 4th June, 2010 until payment in full. Each party to bear own costs.

Delivered in open court at Nairobi this 7th day of November, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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