



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 325 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MBAGGA WETANGULA.....CLAIMANT

-Versus-

CO-OPERATIVE BANK OF KENYA.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent, a commercial bank, as a graduate clerk on 3rd March 2010 and was posted to Chuka Branch where he worked until 30th September 2010 when he was transferred to Kakamega Branch. On 18th December 2012 he was again transferred to Malaba Branch where he worked until he was suspended from work on 22nd November 2013. He was eventually dismissed summarily from employment on 6th March 2014. The grounds for his suspension and eventual dismissal was that while working as Mpesa teller in Malaba Branch he made fraudulent Mpesa transfers of Kshs. 845,992 occasioning loss of the same to the Bank contrary to the provisions of the Bank's Operating Manual.

Aggrieved by his summary dismissal the Claimant filed this suit alleging that his dismissal was unlawful and without justifiable cause or excuse. He prays for the following remedies-

- (a) A declaration that the claimant termination was unlawful, illegal and unfair and an order compelling the Respondent to pay the claimant exemplary damages as per paragraph 4.
- (b) A declaration that the claimant was entitled terminal dues and an order compelling the respondent to pay the claimant terminal dues.
- (c) A declaration that the claimant was entitled to one months' salary in lieu of the termination notice and an order compelling the respondent to pay the claimant terminal dues in the sum of Kshs. 89,922/=.
- (d) An order compelling the Respondent to pay the claimant as sum of Kshs. 197,829/= for the salary not paid.
- (e) Costs of this suit.
- (f) Any other relief this court may deem fit and just to grant.

The Respondent filed a Memorandum of Defence and Counterclaim in which it denies the allegations and averments in the Statement of Claim and states that the dismissal was lawful and fair as it was in

compliance with both Clause 10.5 of the Respondent's Staff Manual and sections 41 and 44(4)(g) of the Employment Act. It denies that the Claimant is entitled to any of the remedies sought. The Respondent further counterclaims Kshs. 1,814,460.45 being moneys owing by the Claimant to the Respondent arising from lawful advances made by the Respondent to the Claimant by way of House Loan of Kshs. 1,377,951, personal loan of Kshs. 395,630 and credit card balance of Kshs. 40,879.45 together with interest. The Respondent prays that the Claim be dismissed and judgment be entered in favour of the Respondent as prayed in the Counterclaim.

The case was heard on 29th September 2016 and 23rd November, 2016. Both parties called witnesses. The Claimant testified on his behalf while the Respondent called DUNCAN MACHARIA, its Security Manager and SIMON MUREITHI MAINA, its Employee Relations Manager. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was employed by the Respondent in March 2010 and posted to Chuka Branch where he worked for 6 months before being posted to Kakamega Branch. In December 2012 he was posted to Malaba Branch. At Malaba he worked as a teller and also as an Mpesa Agent for the Bank.

He testified that on 14th November 2013 he received a call from an Accounting Officer at Head Office who asked to speak to the Mpesa Teller. The Officer asked him to switch off the Mpesa phone but he did not. On 15th November 2013 when he reported for duty he called Head Office and asked if he could proceed with Mpesa transactions. He was informed that there had been a fraud using the Mpesa Till between 2 and 3 pm on 14th November 2013. He testified that he did not transact any business around that time. He testified that reconciliation was done on that day and confirmed by the Operations Manager Mr. David Wariero. He testified that to his knowledge the opening balance was Kshs. 774,830 and there were transactions of deposits and withdrawals that day, that total deposits that day was Kshs. 440,400 and total withdrawals Kshs. 472,000. The closing balance was Kshs. 846,430 as confirmed by Operations Manager Mr. Wariero at the close of that day.

The Claimant testified that criminal proceedings were preferred against him, that he was arrested on 17th November 2013 and charged in **Bungoma CMCR 2416 of 2013** but was acquitted. He was summoned by the Branch Manager Mr. Michael Juma to appear before a panel on 26th January 2014 and told to meet the Human Resource Manager in Nairobi the following day without being informed why. When he reported to Nairobi on 27th January 2014 he was taken before a Disciplinary Committee. He was informed about it just before the proceedings started. He testified that he was asked to explain what really happened but was before that not informed of his right to be accompanied by another employee of the Bank. He was again summoned by Mr. Juma through his cell phone to appear before the panel on 16th February 2014. When he went back to Human Resource no charges were read to him but he was again taken through the same process being asked to explain what happened. He was then told to go back and wait for their communication.

The Claimant testified that on 6th March 2014 he was called by Michael Juma to go to the office where he was served with the letter of dismissal dated 6th March 2014. He was later paid his pension contributions and 50% of employer's contribution. He testified that the criminal proceedings were going on at the time of the dismissal.

He testified that the termination was unfair because he did not carry out the fraudulent transactions, he balanced the Mpesa account, the Operations Manager confirmed that he had balanced further, he was acquitted of any wrongdoing by the criminal court in Bungoma. He stated that many branches were affected by the fraud but he was the only one dismissed. He further testified that the Operations Manager was never called to testify at the disciplinary proceedings and he was never given any charge sheet.

The Claimant testified that his last salary was Kshs. 100,488 and he had loans with the Bank totalling Kshs. 1,814,460.45 at the time of his dismissal which he still owes the Bank.

Under cross examination the Claimant confirmed that he was called by Head Office and told to switch off the Mpesa phone for some updates to run but he refused. He testified that the call informing him to switch off the Mpesa phone was passed to him by the telephone operator who told him where it was coming from and the person calling introduced herself. He stated he did not switch off the phone because he did not understand where the call was coming from. He stated he did not call back because at that time he was serving a customer. He stated he was not aware that Mr. Wariero admitted he was negligent in confirming the Claimant's reconciliation. He denied disobeying the instructions to switch off the phone.

The Claimant stated that when he reported to the office on 15th November 2013 he was informed by Stephen Macharia who worked at e-banking at Head Office that there were some fraudulent transactions. That on the same day the Branch Manager came with some policemen who arrested him. He stated that he was served with suspension letter after he had been charged in court and the letter informed him that he was suspended because of fraudulent transfer of Kshs. 845,992. He stated it was not the first time he heard about the fraud. He stated that the suspension was under clause A5c of the CBA which he had never seen although he was a member of the union. He stated that he did not inform the union about his suspension and was not aware the union represents employees' interests but was aware the union negotiates for employees' terms.

He stated that he was issued with a notice to show cause why disciplinary action should not be taken against him and he responded. He stated he was aware disciplinary process was going on from 15th November 2013. He stated he was aware why he was arrested.

The Claimant stated that when he went to Nairobi on 27th January 2014 he was not aware he was going for a disciplinary hearing but participated in the proceedings and did not raise any objection because he was asked to explain what happened. He stated that he did not ask to be accompanied by a fellow employee because he was not aware he was entitled to the same. He stated that he was not aware that Mr. David Wariero was also taken through disciplinary process.

The Claimant stated that he had not submitted a copy of the judgment in the criminal case to the court and the court was not aware of the grounds for his acquittal. He stated his letter of dismissal stated the grounds for dismissal and also that he had appeared before the disciplinary committee and his explanations did not exonerate him and that the letter did not refer to the criminal proceedings.

The Claimant stated that he was aware he owes the bank Kshs.1.8 million which he has not completed paying. He confirmed that during suspension he was paid half of basic salary. He stated that he had prayed for payment of terminal dues and that whatever was due to him may be used to offset his loan.

He stated that he did not have proof that there were several Mpesa frauds in the Bank but he was the only one who was dismissed.

Respondent's Case

DUNCAN MACHARIA RW1 testified that he had worked for the Bank since 2011 and was aware of the case before the Court having been informed by Mike Juma on 15th November 2013. He testified that he was involved in the investigations of the matter. He testified that what initiated the investigation was a reported loss of Kshs. 845,922 which came about as a result of 5 Mpesa transactions to various agents. He stated that according to the transactions the agents are supposed to have deposited an equivalent of the amount so as to get it in form of float but the transactions did not happen on the Bank's end as there were no actual deposits in the Bank's account. He stated the money was credited to the agents without the equivalent being received. He testified that there were other transactions which were genuine on the said date. He testified that it is the Claimant who transacted the account as the Banks Mpesa Teller in possession of the PIN to transact.

Mr. Macharia testified that investigations unearthed anomalies in reconciliation where the Acting Manager did not use the correct procedure by inquiring through the Mpesa message system to confirm balance. He stated that he interviewed Mr. Wariero who stated that he relied on the messages in the

phone. He stated that he prepared two reports, the first one was a preliminary report. He testified that he confirmed that 5 Mpesa transactions were fraudulent as there were no corresponding entries in the Bank's system and it was the Claimant manning the counter. He testified that the Claimant denied making the transactions.

He testified that the Head Office monitors transactions and gives float, and that is how the fraud was discovered. He testified that in the investigations report it was recommended that the Claimant and the Acting Operations Manager should be issued with show cause letters, that the Claimant should show cause why disciplinary action should not be taken against him for the loss and the Acting Operations Manager to show cause for not following the correct procedure which would have detected the fraud.

Under cross examination Mr. Macharia stated that he was able to establish how the transactions were done. He stated that e-banking monitors the transactions and can load and reduce the float if it is excess but cannot operate the money once allocated as it is only loading that is done in Nairobi. He stated that the system can be operated from Nairobi even when the Mpesa phone is switched off. He stated that investigations were concluded in December 2013 after the Claimant had been charged in criminal proceedings at Bungoma. He stated that he did not testify at Bungoma Court but was aware the Claimant was acquitted. He stated in re-examination that all loading is reflected in the account and Nairobi cannot operate float but can cancel it.

RW2 SIMON MUREITHI MAINA testified that he had worked with the Respondent since 15th March 2010 and was aware about the case before the Court. He testified that the Claimant was an employee of the Bank as a teller based in Malaba Branch. One of the Claimant's duties was to receive and account for monies on behalf of the Bank. That on 14th November 2013 one of the Claimant's roles as a Teller was to serve as Mpesa Teller and he was in possession of the Bank's Mpesa phone which was loaded with float. That he was to dispense the cash in the Mpesa phone procedurally as provided in the Bank's Procedure manual. He testified that on 14th November 2013 the Respondent discovered that a float of Kshs. 845,992 was transferred from the Mpesa phone unprocedurally.

Mr. Maina testified that the Claimant who was a member of the union was suspended in accordance with the provisions of Clause A5c of the CBA. That investigations were conducted by the Respondent's Security Department and the Claimant was found to have violated the provisions of the Respondent's Operation Manuals.

He testified that a show cause letter was issued to the Claimant who responded. His response was not satisfactory and he was subsequently invited to a disciplinary hearing on 27th January 2014. The Claimant was issued with a letter of invitation to the hearing and was advised of his right to be accompanied by a member of staff and there was a confirmation of receipt of the letter by the Branch Manager. He testified that the Claimant attended the disciplinary hearing as scheduled. After the hearing the disciplinary Committee decided to look into the matter further and the Claimant was invited to another hearing on 17th February 2014 which he attended. He testified that the invitation letters state the purpose of the hearing and there was no communication from the Claimant that the notice was not sufficient. He testified that after the disciplinary panel deliberations the Claimant was found to have contravened the Bank's Operation Manuals by transferring Kshs. 845,992 and occasioning the Bank a loss of the said amount which is a violation of clause A5 of the CBA. The Claimant was also covered by the Staff manual under which failing to account for money received or held on behalf of the Bank was a ground for dismissal. The Claimant was subsequently dismissed from service and given an opportunity to appeal within 21 days as per staff manual but he did not.

Mr. Maina testified that the dismissal of the Claimant was procedural. He testified that the Claimant was instructed to switch off the Mpesa phone to stop fraudulent activities but refused to obey the instructions. He testified that the Acting Operations Manager at Malaba was also warned over the incident.

Under cross examination Mr. Maina stated the Claimant attended two disciplinary hearings and the letters for invitation for both hearings were sent through the Branch Manager and copied to the Operations Manager but not to the Claimant. He stated that the Head Office did not call the Claimant. That the

Claimant was called by the Branch Manager. He stated that according to him the letters were received by the Claimant and he attended the hearings. He stated that the minutes of the meeting do not reflect that the Claimant was informed of his right to call a witness or to ask for time to prepare. That the minutes do not reflect that the Claimant was asked when he received the communication for the hearing, or that he was informed of his right to be accompanied by a colleague or union official.

Mr. Maina stated that he is aware that Mpesa is loaded by Head Office upon request of user of the phone. He stated he did not have records of loading on the material day. He stated that once loaded the amounts cannot be offloaded from the phone remotely. He stated he was not aware of the float limits for Malaba as there are 143 Branches each with its float limits. He stated that the Claimant was instructed to switch off the phone by Lydia who introduced herself as admitted by the Claimant. He stated that there are no records that the Operations Manager was asked to instruct the Teller to switch off the phone. He stated that the procedure through which the Teller could confirm if Lydia was authentic was by calling Head Office. He stated that he was not aware the Claimant was charged and acquitted in a criminal case concerning the Mpesa transactions.

Submissions

In the Claimant's written submissions it is submitted that his dismissal was unfair because he was not accorded sufficient time to prepare for the hearing and was not informed in advance of the disciplinary proceedings. It was submitted that in addition the notice did not specify the charges against the Claimant or inform him about his right to be accompanied by a union official or colleague. It is further submitted that at the hearing the Claimant was not informed of his rights.

It was further submitted that it was unfair for the Claimant to go through the disciplinary hearing and the criminal case at the same time.

It is also submitted that there appears to have been an institutional failure on the part of the Respondent to safeguard Mpesa Tellers as the Respondent admitted at page 46,47 and 48 of the Defence where it is stated that there was a habit of fraudsters invading Mpesa Tills. It is submitted that the Claimant should not be blamed for the failure to protect Mpesa Tills.

It was submitted that the Respondent failed to call a crucial witness Mr. David Wariero, the Operations Manager and the representative from e-banking, and that there was failure to produce Mpesa statement and call Safaricom Agent. It was further stated that the reconciliation statement was not availed to the court. It was submitted that the testimony of RW2 on how the Mpesa Till works should be ignored. The Claimant relied on the case of **David Wanjau Muhoro v Ol Pajeta Ranching Limited [2014] eKLR** in which **Rika J** analysed what constitutes fair procedure.

It is urged that the court awards exemplary damages for unfair termination in the sum of Kshs. 10,000,000 relying on the judgment in the case of **Patrick Njuguna Kariuki v Del Monte (K) Limited [2012]eKLR** in which **Ongaya J.** awarded the Claimant exemplary damages in the sum of Kshs.8,000,000 for unfair termination.

Respondent's Submissions

In the submissions filed on behalf of the Respondent, it is argued that there was valid reason for termination of the Claimant's employment under section 44(4)(c), (e) and (g), that it is clear from the evidence adduced in court that the Claimant was not truthful about the matters leading to his dismissal, that the Claimant is guilty of facilitating fraudulent transactions as is evident in documents provided to court by the Respondent. It is further submitted that the Claimant was in possession of the Mpesa phone at the time of the fraudulent transactions.

It was submitted for the Respondent that the Claimant was subjected to due process in accordance with section 41 of the Employment Act as he was afforded sufficient opportunity to respond to the charges against him both through the show cause letter and during two disciplinary hearings. That the offence was

committed during a time that the Respondent had consistently warned its employees against fraudsters and that the Respondent took into account all considerations before arriving at the decision to terminate the Claimant's contract.

On remedies sought by the Claimant it was submitted that the Claimant was paid all that was due to him.

On the counterclaim it is submitted that the Claimant admitted owing the Respondent the sum claimed of Kshs. 1,184,460.45.

The Respondent relied on the following cases –

(a) ELRC Cause No. 67 of 2014 – Thomas B. Miningwo –vs- Egerton University in which Justice Radido S. stated as follows-

With regard to the Claimant's averments that he was acquitted by the criminal court, the Respondent wishes to rely on the judgement herein where the learned Judge found that ... "Listening to the testimony of the Claimant, the gravamen of his cause of action was the fact that he was acquitted in a criminal trial of the offence of theft by servant contrary to section 281 of the penal Code. 36. The standard of proof in criminal cases is higher than in cases such as the instant one. 37. The purposes and objectives of a criminal trial are different from disciplinary proceedings within the employment relationship. Different legal principles apply. 38. In my view, the acquittal of an employee cannot without more be a legal ground for finding that a dismissal was unfair or wrongful. In the same vein, a criminal action by the State against an employee does not generally in law require the holding up of a disciplinary hearing against the employee. 39. The Claimant's acquittal in itself could not found a cause of action for unfair termination and that fact cannot assist his case herein."

b) ELRC Cause 162 of 2012 – Sophia Wambui Muthoni –vs- Muramati Sacco Society Limited whose facts the Respondent submits are similar in nature to this case wherein the Claimant herein betrayed his fiduciary responsibilities and put the Respondent at risk. In the Judgement the learned Judge found as follows:

"In this case the Claimant betrayed her enormous fiduciary and confidential responsibilities.She failed to protect Members' money. She stole, and presided over theft by her junior officers of Members' money, destabilizing a critical Cooperative Society. She does not merit any remedy for the minor procedural lapses. In the end, the Court is satisfied there were overwhelming valid reasons justifying the decision made by the Respondent terminating the Claimant's contract of employment. Procedure was in large fair, though perhaps flawed in minor aspects. The Claim is hereby dismissed in its entirety, with no order on the costs."

c) ELRC Cause 1189 of 2013 – Elijah Aggrey Atsali –vs- Nairobi Water and Sewerage Company by Justice Abuodha J. N.

d) ELRC Cause 908 of 2013 – Nelson Ken Kipkemei –vs- Diamond Trust Bank Kenya Limited by Justice Abuodha J. N.

The Respondent submits that the circumstances in the present case are similar in nature to the ones determined in the two authorities herein above (c) & (d) wherein the courts dismissed the Claimants claims. The Respondent prayed that this court be equally persuaded.

Determination

I have carefully considered the pleadings and evidence adduced in court, the written submissions filed by parties and the authorities cited. The issues arising for determination are whether the termination of the Claimant's employment contract was fair both procedurally and substantively, whether he is entitled to the remedies sought and whether the Respondent is entitled to the prayers sought in the counterclaim.

Procedural Fairness

The Claimant contends that the termination of his employment contract was unfair because he was not accorded sufficient time to prepare for the hearing, was not informed in advance of the disciplinary proceedings, that the notice for the hearing did not specify the charges against him or inform him about his right to be accompanied by a union official or colleague and further that at the hearing he was not informed of his rights.

From the evidence on record, the Claimant attended two disciplinary hearings in Nairobi on 27th January and 17th February 2014 and did not raise any objections during the hearings. Prior to the hearings he was suspended and thereafter issued with a notice to show cause which he responded to. The subject of the suspension and notice to show cause were the same as the grounds of his dismissal being fraudulent Mpesa transactions. These were also the subject of a criminal case against the Claimant being **Bungoma CMCR 2416 of 2013**. The minutes of the proceedings of the disciplinary hearing of 27th February 2014 indicate that the charges were read to the Claimant.

Further, the Claimant's letter of suspension required him to report to the Manager, Malaba Branch office every business day at 9.00 am. The email correspondence annexed as Appendix 4 of Memorandum of Defence show that the Branch Manager received instructions to invite the Claimant for the disciplinary hearing and the Claimant confirmed he would attend. The instructions to the Manager expressly state that he should inform the Claimant of his rights to be accompanied by another member of staff. This is indicated in bold letters on the instructions.

From the foregoing I am satisfied that the Claimant was subjected to fair disciplinary procedure before the summary dismissal.

Substantive Fairness

Section 43 of the Employment Act provide for substantive fairness as follows-

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

In the present case it is not denied by the Claimant that there was loss of money through fraudulent withdrawal of money through Mpesa transactions or that he was solely in charge of the Mpesa transactions at Malaba Branch on the material day. The Claimant further admitted getting a call from Head Office and being asked to switch off the Mpesa phone around the time that the fraudulent transactions occurred but failing to do so.

The Claimant further admitted having been charged in **Bungoma CMCR 2416 of 2013**. The Claimant testified that he was acquitted but curiously did not produce the proceedings and judgment to enable the court assess whether the charges for which he was tried and acquitted were similar to the charges for which he was summarily dismissed. The court is however cognisant that an acquittal on a criminal charge is not an automatic release from civil liability as the test for criminal convictions is much higher, beyond any reasonable doubt, while that in civil cases is on a balance of probabilities which presents a much lower threshold.

For these reasons I find that there was sufficient and justifiable cause for the Respondent to take disciplinary action against the Claimant.

Remedies

Having found that there was both procedural and substantive fairness for the dismissal of the Claimant what remedies is he entitled to?

The Claimant prayed for terminal dues, notice of Kshs. 89,922, Kshs. 197,829 being salary not paid, costs and any other relief the court may deem fit to grant. Having found the termination fair, the Claimant is not entitled to notice. The Claimant did not specify what other terminal dues he seeks and further did not state what constitutes the claim for Kshs. 197,828 being salary not paid. The court is thus unable to grant any of the two. The prayer for exemplary damages is further not payable as no justification has been given for the same and the Claimant does not fall under the limited circumstances when such damages are payable.

Counterclaim

The Claimant admitted owing the Respondent the sum of Kshs. 1,814,460.45. Judgment is therefore entered in favour of the Respondent against the Claimant is the said sum of Kshs. 1,814,460.45 together with interest as agreed in the contract between the Claimant and the Respondent in respect thereto.

Conclusion

In conclusion, the claim by the Claimant is dismissed and judgment entered for the Respondent in terms of the counterclaim in the sum of Kshs. 1,814,460.45 together with interest.

There shall be no orders for costs

Orders accordingly.

Dated, Signed and delivered this 2nd day of November, 2017

MAUREEN ONYANGO

JUDGE