



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.119 OF 2015

MUTUA MUSAU CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent bank on 7th April 2008 and was stationed at the Respondent Ngong Town branch with duties of a Second Custodian. The monthly salary was kshs.56, 095.00. The Claimant roles also included that of authorisation of over the counter withdrawals from customers' accounts for transactions forwarded and or referred to him by cashiers that were above Kshs.1, 000,000.00 with regard to savings accounts. On 5th June 2012 the Claimant was terminated from his employment with the Respondent on allegations of theft by servant that he had stolen kshs.750, 000.00, the property of the respondent. The Claimant was arrested and charged on 22nd February 2012 with the offence of stealing by servant and contrary to section 281 of the Penal Code. Upon trial, the Claimant was acquitted of all charges on 19th September 2014.

2. The claim is that the termination of employment was unfair, unreasonable and unjustified for the reasons that the Respondent never gave the Claimant nay notice of intention to terminate his employment; the explanations given by the Claimant during investigations were never put into account at the disciplinary hearing; the Respondent failed to put into account that the Claimant never had contact with customers and remained at the back office performing his duties and authorising of cashier transactions; and that the Respondent failed to consider that in authorising the withdrawals of Kshs.450,000.00 and Kshs.300,000.00 from account No. 0944815031 on 30th January 2012 and 14th February 2012 referred to in his termination letter had been done by a cashier, Joseph Owino and he thus only relied on a bank card, customer identity card and withdrawal slip printed and scrutinised by the cashier and as presented to him. That the Respondent also failed to consider that in criminal case No.266 of 2012 he was found not guilty of the offence of theft by servant.

3. The Claimant is seeking his half salary from March 2012 to June 2012; full salary from July 2012 to September 2014; unpaid acting allowances for the period October 2011 to February 2012; general damages for unfair termination; interest and costs of the suit.

4. In evidence, the Claimant testified that it was alleged that he had stolen Kshs.750, 000.00 from the respondent, was arrested and charged in Criminal Case No.226 of 2012 with the offence of theft by servant but upon trial was acquitted. Before termination the Respondent had not given a warning as he had worked diligently over the years; was highly qualified for his position as a holder of a degree in

Mathematics.

5. The Claimant also testified that upon arrest and being charged in Court he was suspended from duty and then terminated on 5th June 2012. There was a disciplinary hearing but his defence was not considered or put into account before the termination. The Court in the criminal case found that the Claimant had been targeted as there was no case against him. The Claimant duties were at the back office and had no contact with customers and could therefore not have committed the alleged offences. The Claimant was not a cashier and only handled cash at the end of day when putting it in the safe. The Claimant asked the Court to confirm his claims as set out.

6. On cross-examination, the Claimant testified that while at the Respondent he had no disciplinary case until the allegations against him that led to his termination. However the Claimant confirmed that by letter dated 27th November 2008 and 27th November 2008 related to investigations where Kshs.300, 000.00 had been lost and he was called to a disciplinary hearing and it was established that the Claimant paid a customer without confirming the account details and he confessed to an inconsistency. Such were disciplinary cases against him and he was advised by the Respondent to take the matters raised as a learning point to avoid future potential losses. That following this case the Claimant was changed from a teller to a Custodian at the back office.

7. The Claimant also testified that it was while at the back office that more money was lost at Kshs.750, 000.00 where he was accused of fraudulent withdrawal by failing to follow the set down regulations. There was a disciplinary hearing following investigations part of which was a CCTV footage showing the Claimant putting money in his pocket. The Claimant testified that the cash he put in his pocket had been given to him by Joseph owino but the CCTV camera was not clear. That at the disciplinary hearing he confirmed to the committee that Joseph had given him cash and was also charged together with the Claimant and was convicted upon trial.

8. The Claimant also confirmed on cross-examination that the transaction where cash was lost was authorised by him and the problem was that the account related to a dead person but he did not know then and only got to know about it later but at the disciplinary hearing it emerged that the Claimant had signed for the transaction in approval of what the cashier had done and as presented to him. It was also noted by the committee that he should have gone an extra mile in ensuring good performance of his duties and he admitted putting cash in his pocket.

9. The disciplinary hearing was conducted on 4th May 2012 and on 5th June 2012 he was terminated. The Claimant was told to lodge an appeal within 10 days but did not file any appeal.

Defence

10. In response the Respondent admit that they had employed the Claimant and that the Claimant was arrested and prosecuted by an agency other than the respondent. The termination was lawful and informed by the claimant's breach of the laid down regulations and contrary to clause 12 of the terms and conditions of employment. The Respondent carried out investigations with regard to the savings withdrawals and only terminated the Claimant on 5th June 2012 after a disciplinary hearing that was held on 4th May 2012 where the Claimant fully participated and was given an opportunity to defend himself.

11. The defence is also that the Claimant is not entitled to the remedies sought as in the letter of termination it was noted that the Claimant had loans unpaid and upon leaving the respondent, the loan amounting to kshs.997, 409.09 have not been paid. The Claimant was informed that his dues would be applied to offset the loans due to the Respondent which letter he accepted on 7th June 2012. The employment of the Claimant was terminated in accordance with the Employment Act and the claim should be dismissed with costs.

2. In evidence the Respondent called Mr Odhiambo Ooko the Employee Labour Relations Manager as their witness. Mr Ooko testified that he was not in the employment of the Respondent when the cause

of action arose but he has the file with the facts and the records with regard to the claimant. the Respondent has internal processes on how to conduct disciplinary cases and in cases which require investigations, an employee is suspended for forensic team to take over and then report to the human resource office and for a determination as to whether there is an infraction that requires the employee suspended to respond to.

13. Mr Ooko also testified that the case of the Claimant was investigated and he was given 5 days' notice to attend disciplinary hearing with his representative. At the hearing the Claimant was given time to defend himself and minutes were taken and signed by all parties as a true record of the proceedings and the Claimant signed. The hearing was on 4th may 2012 at Barclays Plaza and on 14th may 2012, 10 days after the hearing the minutes are signed by the claimant. Pursuant to the hearing, the Claimant was terminated on 5th June 2012 and the reason given and the terminal dues were set out of which the Claimant was to be paid upon clearance with the respondent.

14. The Claimant was allowed to appeal but he did not.

15. Mr Ooko also testified that this was not the first disciplinary hearing conducted against the Claimant as a similar issue arose in 2008 and a hearing was conducted. The subject of the previous hearing was with regard to the loss of kshs.300, 000.00 and at the end of the proceedings the Claimant was urged to learn from it to avoid potential losses to Respondent property.

16. In cross-examination, Mr Ooko testified that from the records, the Claimant was charged in a criminal case for theft by servant and acquitted. There were 3 employees of the Respondent who were charged and the Claimant was the first accused. The subject of the criminal case was not the same as the claim herein and the reason for termination was on the basis of fraudulent transactions with regard to a customer's account No. 094-4815031 from 23rd January to 17th February 2012. The BASIS report of 2008 was not the reason for termination that ended with a warning to the Claimant to avoid potential loss to the Respondent but what resulted in his termination was the fraudulent activities followed by thorough investigations that revealed he had failed to follow set out regulations and procedures.

Submissions

17. At the close of the hearing, both parties agreed to file their written submissions. Such were filed on 11th February 2016 and 1st march 2016 for the Claimant and Respondent respectively.

18. The Claimant submit that he was terminated on the grounds that he fraudulently made withdrawals in account No. 094-4815031 from 23rd January to 17th February 2012 by failing to follow laid down procedures. He was charged in criminal case 226 of 2012 and was acquitted as there was no evidence. The Claimant submitted proceedings and judgment in the criminal case where he was acquitted on the basis that there was no evidence that he had made the fraudulent withdrawals in account No. 094-4815031 from 23rd January to 17th February 2012 unlike his co-accused. With such acquittal, the termination with regard to the criminal conduct was unfair. The burden then with regard to charges against the Claimant before the disciplinary committee was not that of prove beyond reasonable doubt but on a balance of probabilities as held in the case of **Muleka Luke Kizito Ojiambo versus The Music Copyright Society of Kenya [2016] eklr.**

19. The Claimant also submit that he is entitled to the claims set out in his memorandum of claim as his termination was unfair and without justification. The disciplinary committee did not put into account his defence and is entitled to the remedies set out.

20. The Respondent submit that section 45(1) of the Employment Act provide that an employer cannot terminate an employee without a valid reason and the statutory burden of proving that a termination was unfair is on the employee under section 47. What constitutes a valid ground for termination is set out by the Court in the case of **Peter Maina Kimani versus Mwalimu Cooperative Society, Cause No. 603(N) of 2009** where the Court held that negligent performance of duty by an

employee comprise a valid ground for termination and in the case of **Miriam Siwa versus Postbank limited, Cause No.837 of 2011** where the Respondent lost money through fraudulent transactions and the Claimant was found to have failed to exercise her supervisory role properly and resulted in the loss and the subsequent termination was held to be valid. In this case the Claimant failed to follow set procedures and authorised a transaction where the Respondent lost money. He was taken through a disciplinary process and his conduct was found wanting hence the termination of employment that was valid and justified in the circumstances.

21. The Respondent also submit that they followed section 41 of the Employment Act where the Claimant was given notice and advised to bring a representative of his choice. At the hearing the Claimant confirmed that he was comfortable with the proceedings and was able to defend himself. The Claimant was found culpable and terminated which was communicated to him way after the hearing, he was advised to lodge an appeal which he failed to do.

22. On the claim for terminal dues, the Claimant has an outstanding loan with the Respondent that is not paid and the dues were set out in the letter of termination and were used to offset the due debt. Nothing is due or arising in payments from the Respondent and noting that the Claimant failed to issue notice before filing suit, he is not entitled to costs. The claim should be dismissed.

Determination

23. The Claimant was terminated by the Respondent on 5th June 2012 on the reasons that he authorised fraudulent transaction amounting to kshs.750, 000.00 in a customer's account No. 094-4815031 from 23rd January to 17th February 2012. That he failed to follow the Respondent regulations and procedures while authorising the transactions. He was charged in criminal case No.226 of 2012 and was acquitted. The Respondent defence is that the criminal case was conducted by an agency other than themselves and at the disciplinary hearing the Claimant was called to defend himself against charges of fraudulence and upon being heard was found to have authorised transactions without following the laid down regulations and procedures that led to the loss of money.

24. An act of misconduct at the workplace may result in both criminal proceedings and civil proceedings against an employee. On the one hand where the alleged misconduct involve criminal conduct that is regulated under the Penal Code or any other form of legislation, such, the employer can move the process with the right agency separate from themselves to commence appropriate action. In this case, where the Claimant was suspected of having committed fraud, such were criminal matters appropriately reported to the police who proceeded to undertake their own independent investigations and charged the claimant. the result of such proceedings, though linked with whatever action the Respondent took at the workplace were however separate as the processes involved in criminal proceeding and work place disciplinary hearings are set out under different frameworks.

25. On the other hand, where the conduct of the employee amount to misconduct addressed by the employer as requiring a disciplinary action, such can take place at the workplace, the ongoing criminal proceedings notwithstanding. Majority of employers ignore the criminal element and proceed with the internal proceedings which largely address the civil element as held by the Court in the case of **BIFU versus ukulima Sacco Society Ltd, Cause No.1109 of 2011** that;

... The offences of fraud and falsification of documents in any transaction, by any person including an employee is criminal behaviour. Where the grievant was found by an audit report or an investigations report to have committed fraud and falsified documents to achieve any end, such criminal acts even where the grievant was terminated, these ought to have been reported to the police for proper criminal investigations. The action taken against the grievant, even where he was not issued with audit report or the internal investigations reports, a criminal charge should have been levelled against him. This was not done and the Respondent does not plead or give evidence to this effect. [emphasis added].

26. As held in the case of **Fred Oweggi versus CFC Life Assurance, Cause No.1001 of 2012;**

The evidence of the Respondent was that the Claimant was negligent in the performance of his duties. To prove this, it was not necessary to import the exactness required in criminal charges to disciplinary proceedings...

27. The Court in the case above relied on the case of ***Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & others (2006) 27 ILJ 1644 (LC)*** where the Court made an analysis of what forms criminal proceedings as against civil proceeding in the work place/labour relations cases.

28. In this case therefore, where the Claimant was issued with suspension for the Respondent to conduct forensic audit and investigations, he was called to answer to specific charges regulated by the internal policy of the respondent. Indeed in 2008 the Claimant had been taken through similar proceeding but was advised to proceed to work and exercise precaution to avoid potential loss in the future. I take it then the Claimant was conversation with the human resource policy that required any acts of misconduct be internal address with a hearing.

29. What is in issue herein with regard to the action taken by the Respondent is the termination of the claimant. Such termination was with regard to internal disciplinary hearing of 4th may 2012 and not the criminal proceedings in criminal case No.226 of 2012. Such distinction is clear herein.

30. Section 47 of the Employment Act therefore requires an employee called with allegations of misconduct to prove their case at the disciplinary hearing. It is noteworthy that at the hearing of the Claimant on 4th May 2012 when asked about the transactions he authorised, what is recorded and he approved is that;

... when asked whether Amos [claimant] could have signed if he saw the withdrawal slips he stated he would not have authorised.

Amos stated he preferred remote authorisation then because of his illness, particularly his recovering broken arm.

Amos was aware of the procedure to follow before making any authorisation but he didn't [did not] follow the procedure with the said two authorisation.

31. Such proceedings of the disciplinary committee are supported by the claimant's evidence in Court when he testified that;

... At the hearing I was shown evidence. Part of the evidence was CCTV footage showing me putting cash in my pocket. This cash was given to me by joseph ... he was my co-accused. ... The transaction where cash was lost I had authorised. The problem was that the transaction related to an account of a dead person but I did not know then and only got to learn later. ...

32. I find the Claimant was required to authorise transaction done by cashiers such as Joseph Owino and there were internal guidelines regulating his work which he failed to follow and as a result, the Respondent lost a substantial amount of money. The defence at the disciplinary hearing was that he was aware of the policy producer's applicable but preferred remote authorisation as he had a broken arm. However, the link to receiving cash from Joseph, his co-accused in criminal case 226 of 2012 create another set of engagement that is improper. Where the Claimant had followed the correct procedure without justification of his ailing arm, no money would have been lost. Where the Claimant received cash from Joseph his co-accused such translate to knowledge of fraudulent activity that he had just facilitated with his failure to adhere to set regulations and procedures. Such rules and procedures were to facilitate his due performance of work diligently and without shortcuts so as to aid criminal conduct.

33. The Claimant was given a fair chance and hearing without I find has not been faulted.

34. I therefore find the Respondent acted within a just and reasonable process to arrive at the decision

to terminate the claimant. I find there existed sufficient grounds and reasons to justify the termination of the claimant. the loss of the employer property in the course of an employee's work is tantamount to conduct that warrant summary dismissal but the Respondent took a fair decision to terminate the Claimant with due benefits.

35. The Court in arising at the above conclusion has put into account the provisions of section 45(5) of the Employment Act with regard to procedures and process taken by the Respondent in arriving at the decision to terminate the claimant. There was an investigation and a hearing in accordance with section 41 of the Employment Act; the Claimant had previous record of alleged misconduct and was fairly treated; and of paramount importance was the fact that the Claimant was advised to lodge and appeal which he failed to do. The justification for the failure to file an appeal was this he knew he would not received justice which I find to be a sham as all along the Respondent had acted within the law and had taken every step to facilitate the Claimant so as to be heard.

Remedies

36. In the termination letter of the Claimant was given pay in lieu of notice; salary due including up and until 5th June 2012; and leave pay. The Claimant is seeking half salary from March 2012 to June 2012. I take it that upon the suspension of the Claimant the CBA cited by the Respondent applied. The Claimant was selfish with information with regard to how much was paid during this period. Where the Claimant was on half pay during this period, upon termination, the other half is due. Such shall not be assessed.

37. The claim for full salaries from July 2012 to September 2014 is not supported by any evidence. The Claimant ceased employment with the Respondent on 5th June 2012 the period the Respondent has offered to pay for. Any further claims of a salary where the Claimant did not work for the Respondent has no basis. Such is declined.

38. Acting allowance from October 2011 to February 2012 is claimed. This was not proved at all. The defence filed by the Respondent denied the allegations with regard to the grade under which the Claimant said was placed under at the time of his termination. In reply to the defence and in evidence, the Claimant failed to go into the details as to why he is seeking the acting allowances. Such is declined.

39. On the finding that the termination was justified, no compensation or damages are due.

40. It is a good practice where the Respondent as the employer requires that upon termination the Claimant as the employee should undergo clearance with them. This is a practice that would ensure that all owing dues are cleared and paid to the Claimant and that all debts the Claimant is owing are paid before his clearance with the respondent. Any deductions made on the salaries and terminal dues to the Claimant are lawful and in accordance with section 19 of the Employment Act.

41. The Respondent has not set out whether the claimant is still owing his loan with them. such should have been in a counter-claim if still due. That notwithstanding, the Claimant should undergo clearance as set out above.

In conclusion, the claim by the Claimant is hereby dismissed in its entirety. Each party shall bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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