



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2168 OF 2012

REHEMA MUTHONI SAIDI.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

Mr. Masaviru for Claimant

M/s Opolo for Respondent

JUDGMENT

1. The Claimant was employed by the Respondent on 11th July 2005 initially as a Management Trainee and rose through the ranks to Manager Operations until her termination on 6th September, 2011 while she was earning a consolidated monthly salary of Ksh. 182,325.00.
2. On 19th January 2011, the Claimant authorized payment of a fraudulent cash withdrawal of Ksh. 1,800,000 with respect to Account Nos. [particulars withheld], Embu Branch.
3. The employment of the Claimant was terminated after being given a show cause letter to which she responded with an explanation of the circumstances leading to the fraudulent withdrawal of cash. The Claimant also was called to a disciplinary meeting in which she gave her explanation subsequent to which the Respondent made a decision to terminate her employment.
4. In her Memorandum of Claim filed on 26th October 2012 the Claimant avers that the termination was unfair for the following reasons;
 - a. The finding of acting negligently was not supported by the operating environment at the time
 - b. The Defendant failed to maintain a safe system of work that would not have enabled frauds to be committed by customers.
 - c. The policy of the Defendant was to put customers first and it was not prudent to punish the Claimant for implementing this policy.
 - d. The policy of not paying based on black and white photo without reference to the customer Branch had not been communicated to the Claimant as at 19th January 2011. The circular came after the fraud was committed.
 - e. The circular on call back did not make it mandatory for one to call the customer's Branch. The directive was to call the branch if in doubt or suspicious of the transaction.
 - f. The Defendant did not take into account the good working history of the Claimant and the punishment of termination was harsh.
 - g. The customer who fraudulently withdrew the money had insider information and the concerned employee was dismissed.
 - h. The call back to Embu branch would not have assisted since the information that they had was held

in the system.

5. The Claimant testified under oath in support of these material averments in the Memorandum of Claim. The Claimant was based at Prestige Plaza Branch where the teller referred a transaction to the Claimant for approval. The Claimant scrutinized the voucher and it was well filled. She cross checked with the details in the system on the customer's signature, photograph, contract details and the statement to see previous transactions. The customer had made several large transactions at Kiserian branch and the signature matched. The Claimant interviewed the customer and asked him about the account details, his address and telephone number. She asked him when he opened the account and why he had come to transact at Prestige Plaza. The customer gave consistent answers which corresponded with what was in the system. The customer said he came to Prestige Plaza because he was building at Riruta and Kariobangi and Prestige was convenient. The photo resembled him but the photo was old and black and white. The identity card looked genuine from the features of it. The Claimant was convinced that this was the true customer. The Claimant then authorized the transaction. The teller had also done due diligence.
6. On the next day, the forensic unit told the Claimant and the teller, Margaret Nduta that the transaction was fraudulent. On 22nd January 2011, the Claimant was asked to show cause in writing and she gave the explanation above. The customer had also withdrawn money at Sarit Centre. At Kiserian he had withdrawn about Ksh.3 million.
7. The account had no telephone number to cross-check with. That whenever she called the Branch, she was asked to confirm with the information in the system. The Claimant said that she fully complied with 'know your customer' (KYC) requirements. There was a salary paid regularly into the account from the Office of the President and the customer said that is where he worked. He said he was on leave.
8. The employment of the Claimant was on 6th September 2011 terminated for gross negligence. The Claimant states she was not negligent at all. The termination was unfair and unlawful. The Claimant seeks compensation. The Claimant was paid terminal benefits and paid off the loan given by the Respondent. The Claimant was also given a Certificate of Service.

The Claimant prays for the reliefs sought.

Defence

9. The Respondent filed a Memorandum of Defence on 12th October 2013 in which it admits the employment particulars of the Claimant.

The facts leading to the termination of employment of the Claimant are not in dispute. In the letter of termination, the reason for termination was simply put as acts of gross negligence. The staff loan was retained at staff interest rates up to 30th September 2011 and she was to arrange to clear the indebtedness with the Respondent.

10. The Claimant appealed the decision to terminate her employment by a letter dated 15th September 2011. The Appeal was dismissed. The Claimant was given a Certificate of Service dated 13th October 2011. The Respondent describes the particulars of negligence to be that the signature appended on the withdrawal voucher differed with the specimen signature; she failed to view customer's detail in the system so as to counter check details furnished by the fraudster. She authorized the payments of Ksh. 1.8 million to the fraudster without calling the home branch and she failed to observe due diligence as required before authorizing payments.

The Respondent prays that the claim be dismissed with costs.

Determination

11. The issues for determination are as follows:

(i) Was the employment of the Claimant terminated for a valid reason?

(ii) Was the termination done in terms of a fair procedure?

(iii) Is the Claimant entitled to the reliefs sought?

Issue (i) and (ii)

The Court will deliberate issue (i) and (ii) together. The competing facts of this case from the pleadings by the parties, sworn testimony by the Claimant and RW1 Peris Gituro, the Branch Manager Kenya Commercial Bank, Thika Road who was the Branch Manager of Prestige Plaza when the incident the subject of this suit occurred and RW2 Robley Ngonje, Senior Employee Relations Manager have been carefully evaluated by the Court.

12. It is the Court's considered view on the facts presented that;

- i. The Claimant had taken all necessary steps in clearing the customer who defrauded the bank except failure to call the customer's branch at Embu.
- ii. The explanation by the Claimant that the Manager was supposed to call the home bank when in doubt is supported by the relevant circular produced before Court.

In this case, based on the subjective judgment of the Claimant, which is the basis of customer evaluation, the explanation given by the Claimant is reasonable.

- iii. The bank contributed to the errors made in that the customer had recently withdrawn large amounts of money in Kiserian and Sarit Centre branch. These withdrawals were fraudulent but had not been detected or notified to the other branches including Prestige. This omission helped in validating the customer and the Respondent must take responsibility for the failure.
- iv. The bank had failed to update the account of the customer in that the account still had an old black and white photograph and had no reference telephone number making it more difficult for a teller and manager to detect any anomalies in comparing the identity card photograph with the photograph in the system and calling back the customer. The bank must also take responsibility for this.
- v. The bank admits that the fraudster had insider information from an employee of the bank, which enabled him to answer all the interview questions made to him by the Claimant easily and without any hesitation making it difficult for the Manager to pick him out. The Respondent must also take responsibility for this since it had not informed its managers to be aware of inside information by customers which diluted the verification process.
- vi. The Claimant had served the bank diligently and with a clean record for a period of 16 years and had risen through ranks due to her good record. This is a strong mitigating factor in her favour that ought to have been taken into account. It should also be remembered that the nature of the job done by the operation managers placed her in a precarious position being a human being and therefore not immune to errors of judgment even after exercising great care.

13. It is the Court's finding that the Claimant had exercised reasonable care in discharge of her job on this occasion and since the bank takes insurance cover for such eventualities due to the nature of its business, the Claimant ought to have gotten away with a severe disciplinary warning since this was her first mistake from the evidence before court.

14. In **ELRC Cause No. 125 of 2014, Banking Insurance and Finance Union –vs- Barclays Bank of Kenya**, this Court observed "*the grievant had played a minor role after complying with all procedures by overlooking one aspect of the BASIS. The actual culprits who RW1 assured the Court were dealt with by the Respondent were based in a different bank at Moi Avenue who had opened an account using fake documents*".

This was a consideration by the Court in finding that the dismissal of the Claimant therein was inordinate punishment.

15. The present case is very similar to this case and the Court is of the view that the Respondent ought to have been more considerate to the Claimant considering all the circumstances of this case.

The failure to do so means that the reason for termination of the Claimant was invalid within the meaning of section 43(1) of the Employment Act, 2007 and was therefore not justified.

16. Accordingly, the Claimant has proved on a balance of probabilities that the termination of her employment was wrongful and unfair and has discharged the onus placed on her by Section 47(5) of the Act.

17. Accordingly, the termination violated Section 45(1) as read with 45(2)(a) of the Act and the Claimant is entitled to compensation in terms of Section 49(1)(c) of the Act.

Issue (iii)

18. In assessing the compensation payable, the Court is guided by the provisions of Section 49(4) of the Act.

In this regard the Claimant does not wish to be reinstated to employment but seeks equivalent of 12 months salary as compensation for the wrongful and unfair termination.

The Claimant also seeks unspecified lost benefits, interest and costs.

Since this was a normal termination, the Claimant's employment was terminated with notice and she received her pension benefits. The Claimant was at the time of termination heavily indebted to the bank courtesy of staff loans she was still repaying.

19. The Claimant served the bank for six years without blemish and therefore she did not contribute to the termination in a significant way.

The Claimant received a Certificate of Service but had not gotten alternative employment. It is very difficult to get a new job in the banking industry after a termination by another bank. This is an aggravating factor in this case that the Court ought to take into account. The Claimant would have served the Respondent for many more years but for the termination. She has lost immense career prospects and growth and of course her means of earning an income.

20. In Cause No. 125 of 2014 (supra) I awarded 10 months salary as compensation for the wrongful and unfair termination of employment. This suit bears much similarity to the said case and the Court awards 10 months salary to the Claimant as compensation in respect of the loss and damage she has suffered.

21. The final order of the Court is that;

- i. The Respondent to pay the Claimant Ksh. 1,823,250 being equivalent of 10 months salary as compensation for the wrongful and unfair termination of employment.
- ii. The amount is payable with interest at Court rates from date of filing suit till payment in full.
- iii. Costs of the suit are awarded to the Claimant.

Dated and delivered at Nairobi this 6th day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE