



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.678 OF 2013

HARRISON MUHIA MWANGICLAIMANT

VERSUS

STANDARD CHARTERED BANK OF KENYA LTD.....RESPONDENT

JUDGEMENT

Issue in dispute – wrongful termination of employment

1. The claim is prosecuted by the Banking, Insurance & Finance Union (K) (BIFU) even though the claim is filed in the name of the claimant. BIFU and the Respondent have a recognition agreement and a collective bargaining agreement signed between BIFU and the Kenya Bankers Association of which the Respondent is a member.

2. The Claimant was employed by the Respondent bank as a Clerk on 1st September 1989 and posted to Karatina Branch, Personal Banking Division. He was then trained as a teller and served in various branches within the respondent's network of branches with his last station being Kenyatta Avenue Branch in Nairobi. The Claimant was wrongfully terminated on 11th March 2010 while at the Kenyatta Avenue branch.

3. On 21st December 2010, the Claimant served one customer, G4S Securicor and incurred a difference of Kshs.146, 000.00. He declared the difference as provided for in the operating manual on cash differences or overages at the end of banking business. The customer, G4S brought a consignment for deposit where Kshs.2, 146,000.00 was in thousands and the Claimant received the money only to realise that there was a defence of Kshs.146, 000.00. The Claimant wanted to go through the money again to confirm but realised that since he was alone he would lose more money and the operations and branch managers were not around. The Claimant went ahead to confirm the deposit as his till was balancing and without taking into account the missing Kshs.146, 000.00. However, while balancing accounts, the Claimant realised a shortage of Kshs.146, 000.00 which he declared and informed the branch manager. As there had been a scuffle with the G4S Securicor staff on this matter, the Claimant requested for a review of the CCTV camera to ascertain the claim and to help see the action of all the parties and trace the person who had taken the missing cash noting the Claimant had only served one customer, G4S Securicor for that day. But the money could not be recovered.

4. The claim is also that on 17th March 2011, the Claimant was terminated from his employment with the respondent. He was earning Kshs.124, 042.25 per month. The reason for termination was the discovery of a teller difference of Kshs.146, 000.00 which occurred during the Court of duty and making reference to clause A5 (a) (IV) of the CBA.

5. The Claimant appealed against his termination on 18th March 2012 and denied any wrongdoing and on the basis that the Respondent was harsh in terminating him after serving for 21 years without previous record on any misconduct. On 27th May 2011, the appeal was dismissed despite the fact that more shortages of millions of money were rife in the bank and no action was taken against the staff involved. Overages and shortages are operational errors as admitted by the respondent.

6. The claimant's case is also that his termination is as a result of a witch-hunt against him by his branch manager Mr David Idoru for agitating for a payment for overtime in the branch. The Claimant had been threatened with sacking over the matter which he reported. The Respondent is also guilty of unfair labour practices as they were quietly retrenching and or downsizing its staff and the reasons used to terminate the Claimant relate to operational mistakes and in any case the Respondent was going to lose millions if the Claimant had fallen to the trap of G4S Securicor staff who had wanted to get access to over 20 million.

7. The claim is also that the operational mistake committed by the Claimant was not a criminal offence to warrant a termination of employment. The difference in cash was declared immediately as required. The Claimant was only terminated for other reasons of lodging a complaint against his branch manager and therefore the reasons given for termination were not valid.

8. The Claimant asked for a review of the CCTV camera records but was denied. Such a record would have shown who took the missing cash.

9. The Claimant is seeking for a declaration that this termination was unfair; a compensation is due; payment of all salaries and allowances lost from the date of termination on 11th March 2011 to date; re-engagement effective the next day after judgement; exemplary damages for malicious termination at kshs.5,000,000.00; interests; and costs.

10. In evidence, the Claimant testified that on 21st December 2010 he was a Banker at the counter. He was responsible for bulk teller. He did his duties but at the end of day when doing cash balance he realised a shortage of Kshs.146, 000.00. On this day he had served a single customer, G4S Securicor who was banking money for their clients – 100 transactions. Upon the realisation of the shortage, he did a record of total cash less Kshs.146, 000.00 on the books and he informed the line manager who confirmed the shortage. The till was surrendered to the strong room leaving the vouchers as the first step in the declaration of cash loss. On the final cash book the Claimant signed and the Cash officer also signed and a certificate was issued on it by Mr Chebon.

11. The Claimant also testified that he went through the vouchers again and noted a voucher he had issues with the client, G4S. The thousands show a figure of kshs.2, 146,000.00 but with the help of the cash officer, the Claimant called G4S from their office to confirm if they had a problem with their cash records but they declined and insisted that they were fine. The Claimant took over 40 minutes to follow up on the matter with G4S but without success. A report of the loss was the fore done.

12. On 22nd, the next day, the procedure on report was done for the books to pass. The cash vouchers were signed by 2 bank official – cash officer and the branch manager. The Claimant had posted the voucher and posted it to the computer system so as to balance his books.

13. The Claimant remained at work until 6th January 2011 when he was called for a hearing. He explained the incident and events of 21st December 2010 and the role of G4S. That the Respondent singled out and capitalised on the entry the Claimant had made by posting Kshs.2, 146,000.00. Other transactions he had made were never put into account. The Claimant was later issued with a termination letter on 11th march 2011. He appealed but this was dismissed without consideration of his request to recall the CCTV footage for the material day to review the actions of the G4S officers. That previously the Respondent has done a recall of CCTV records and arrested several cases. That the G4S officers had a history of similar losses and at one case, the Claimant noted missing \$5,000 and when they searched for it, they could not trace the same. The officers called the office and within a few minutes the Respondent recalled the CCTV cameras and the missing cash could not be cleared as it had not been submitted. That on 21st December 2011, a

G4S officer had been spotted picking bag and walking out of the bank and his colleagues confirmed they know the missing officer.

14. The Claimant also testified that he has served the Respondent for 22 years, he has a family and children in school. When he was terminated he suffered greatly as he had no previous case of misconduct and it was normal to have a cash difference and in his case he declared his shortage immediately per the procedure.

15. On cross-examination the Claimant testified that in October 2010 he had received a verbal warning with regard to an overage of Kshs.7, 000.00. That the practices with bulk teller was to have G4S collect cash for their clients and present the same at the bank. That the cash would be posted in batches with a banking slip, and then the cash would be counted. The teller has to confirm the bank slip Vis-vies the submitted cash. The Claimant had served G4S Securicor for over 5 years and he knew their system. He had no reason to take precaution or have any suspicions. He also handled Wells Fargo who had a similar practice of making deposits for clients.

16. That the Claimant did not detect the cash loss with regard to transactions made on 21st December 2010 until the next day, 22nd December 2010. He recalled that he had a confrontation with the G4S officers who had mixed up cash. The confusion created could have led to the loss when the Claimant was confused during the counting of the cash.

17. That the practice when dealing with bulk teller and clients was to –

- take the banking slip;
- take cash and count;
- confirm the slip and cash; and
- post the banking slip and cash

18. That the Claimant took all these steps.

Defence

19. In defence, the Respondent admit they had employed the Claimant and he was terminated upon justifiable reasons and followed by due process.

20. On 21st December 2010, when the Claimant was conducted his duties as a bulk teller, he received cash from G4S crew where there was a deposit of kshs.2, 496,161.00. Out of this amount, Kshs.146, 000.00 was in denomination notes of Kshs.1000, 00 which the Claimant acknowledged and posted in the client's account despite having noticed that there was a shortage of this amount. The Claimant made a cash deposit slip to this effect.

21. While performing end of day activities on 21st December 2010, the claimant's manager discovered a difference of Kshs.146, 000.00 in the claimant's till and which amount had not been declared. There was no report by the Claimant on this loss as the line manager is the one who made the discovery and the loss after the Claimant had posted the cash deposit and had failed to balance at end of day.

22. On the same day the Claimant wrote and email to Mr Tom Nyandiko of G4S alerting him of the cash difference he had incurred during a deposit by their crew and he alleged there had been confusion while handling the cash transaction.

23. On 22nd December 2010 the Claimant wrote a letter to the Respondent noting his confusion in handling the transaction that led to the cash loss of Kshs.146, 000.00 and promised to be more cautious.

24. On 29th December 2010 the Human Recourse manager set notice to the Claimant for disciplinary hearing for 6th January 2011 which he attended in the company of two (2) union officials. At the hearing, the Claimant admitted to having been confused and that he genuinely believed that he had the money he had posted; that he had not followed the set procedures in regard to the consequence management grid; he apologised for the mistake.

25. Following the disciplinary hearing, the Claimant was found to be grossly negligent in the performance of his duties especially noting his long experience. One of the union representatives present also noted the mistakes made by the Claimant and requested that the Respondent put into account the number of years served.

26. The Claimant was terminated through letter dated 11th March 2011 in accordance with the CBA. He lodged an appeal but no new issues were raised and the same was dismissed. the Claimant was found to be negligent in the performance of his duties as he knew that there was a shortage but did not raise the same with his line manager; he did not return the deposit slip to the G4S crew to amend the figures to tally with the physical cash deposit; the Claimant accepted and deposited cash into the client account which cannot be reversed; the Claimant dealt with the client alone despite the confusion that he alleged; and he has served in the same position for over 15 years and has a clear knowledge of the telling process and the consequence management grid.

27. That proper procedure was followed in terminating the Claimant in accordance with sections 41, 43 and 45 of the Employment Act. The memorandum of claim has been executed by the wrong party and contrary to Rule 7 of the Industrial Court (Procedure) Rules and should be struck out. The remedies sought are not due and the claim should be dismissed with costs.

28. In evidence, the Respondent called **Charles Mutemi Muthembwa** the Branch Operations and Service Manager and who has served the Respondent for the last 20 years at various branches. He worked with the Claimant at the Kenyatta Avenues Branch in 2008. That the Claimant was terminated in 2011 following a teller difference of kshs.146, 000.00 and per internal procedures, he was invited for hearing, was allowed to appeal but there were justifiable grounds for termination.

29. On 21st December 2010 the Claimant made a transaction for kshs.2, 496,161.00 and issued deposit slip and posted the same into the system. This showed a successful transaction as it was posted into the system for the credit of Respondent customer. However the posting and cash at hand were not reconciling.

30. The Claimant did an incident report are required. This is meant to show what caused the occurrence and what should have been done to prevent it. There was a shortage of kshs.146, 000.00 as a deposit slip was issued and could not be reversed. The witness as the Operations Manager took the incident report which was supposed to have been done by the claimant, then his supervisor, Isaac Chebon the Cash Officer. A verification was done and there was confirmation of kshs.146, 000.00 shortage. This was to help in the balancing of the till. The totals in cash tally that the Claimant had did not balance as required. The difference was reported at 7.30pm by the Cash Officer to the witness that the Claimant could not balance his till.

31. The witness followed up to ascertain what had happened and he came across an email the Claimant had sent to Tom Nyandiko of G4S which he was copied. The email was done upon the discovery of the shortage. However upon investigations, the witness discovered that the Claimant had not followed the bulk teller procedures which required him to be keen. The practice on bulk deposits required that;

- a customer gives a deposit slip;
- the teller to ask for cash
- the teller to count the cash by denominations

- teller to confirm and approve totals
- teller to tally the amounts to agree on exact amounts;
- ensure that totals tally with amounts in words
- upon the confirmations cash is kept aside in full view of the customer, stamp the bank slip and place in printing machine and a copy is handed to the customer;
- cash is kept/placed in the box
- At the time of stamping the deposit slip is a confirmation that the cash deposited with the Respondent is correct in terms of the deposit slip and cash deposited.

32. In this case, all deposit slips done by the Claimant were stamped. Upon the Claimant giving the deposit slip, any difference over or less, a teller he must do an incident report. The claimant's teller difference of 21st December 2010 is dated 22nd December 2010, which was done to confirm the difference the following day. Other than committing to the shortage, the Claimant was also admitting that there was a loss.

33. The loss can be attributed to negligence. The manner the bulk teller is constructed, a customer is a cubicle through the access and permission of the teller. When the Claimant opened the cubicle for G4S crew, they must enter with the deposit slips. All deposits are confirmed within the cubicle. The Claimant took it upon himself to talk to depositors. What the Claimant should have done is to detain the G4S crew if the deposits were not reconciling or ask the line manager to intervene. By posting the deposit to the customer account is not reversible. When the teller gave access and allowed G4S crew to leave the cubicle and the bank, he gave them approval over the transaction.

34. That the Claimant ought not to have completed the transactions with the shortfall. The Claimant did not do a report to the line manager on any shortfall on the same date. This was only done the next day upon the operations manager finding the till not balancing.

35. On cross-examination, the witness stated that in the incident report, the loss made by the Claimant was noted as an operational loss while he was charged with negligence at the hearing of his case. That Mr Gichia was head of operations at the time and attended the disciplinary hearing and he stated that the Respondent had excess money on this day and had the CCTV been reviewed this would have been clarified. That Mr Wagala also said that further investigations should be done by G4S and a review of CCTV be reviewed with an interview of the G4S officers. However this was not done as on the claimant's case, he was the only one who was allowed to grant any customer access to the bulk teller cubicle. The CCTV are for security surveillance and not to help the Claimant do his work. The incident report was not with regard to theft or robbery but on the negligence of the claimant.

36. The second witness called by the Respondent was **Evans Munyori**, head of Human Resource in Retail Banking and has been with the Respondent for 12 years. That in December 2010 he was the Business Partner for Consumer Perking and Retail Banking. He was the claimant's Relationship Manager. He issued the Claimant with the notice for his disciplinary hearing and present were 2 union officials – Harrison Ochange and Jonathan Wanzala, the Member of Central Committee and shop steward respectively. He participated at the appeal hearing and took minutes which confirmed the termination of the claimant.

Submissions

37. The Claimant submit that on 21st December 2010 he served one customer G4S Securicor and incurred a difference of Kshs.146,000.00 which he declared as provided for in the Operation Manual on cash differences or overages. That his case related to a witch-hunt, malice and he had noted problems with the branch manager, David Idoru for agitating for the payment of overtime in the branch. This had been

reported to the human resource office.

38. The Claimant also submit that the error committed by the Claimant was not a criminal offence as set out under clause A5 of the CBA to warrant a termination. The claimant was negligent as alleged as he declared his difference and had he been allowed to review the CCTV camera records, it would have been noted that the G4S Securicor staff did not deliver all the cash.

39. That the Respondent did not discharge the statutory obligation on substantive and procedural justice as required under sections 43, 45 and 41 of the Employment Act. The Claimant had worked for 22 years without any disciplinary issue. The remedies sought should issue.

40. The Respondent submit that in the memorandum of claim, the Claimant has not signed as required under Rule 7 of the Industrial Court (Procedure) Rules making the claim incurably defective as it is executed by an incompetent party who is not a party to the claim. The executor to the pleadings is not the Claimant or his advocate and the claim should be dismissed on this account.

41. On the substantive issues, the events leading to the dismissal of the Claimant were the fact of his admission that on 21st December 2010 he received a deposit and posted the same to the credit of the customer knowing the same to be less by Kshs.146, 000.00; he did not report to the line manager and while the manager was performing reconciliation noted the same as the Claimant had cleared the amounts and upon being questioned he stated that he had been confused by the customer hence the error. The Claimant failed to follow the laid down procedures in receiving and posting the deposit from a customer. Due to the negligence, the Claimant was terminated pursuant to clause A5 (a) (IV) of the CBA.

42. The Respondent also submit that there was a justifiable reason to terminate the Claimant following an incident where Kshs.146, 000.00 was lost. The Claimant was taken through hearing and he admitted to the loss on account of being confused by a customer which amounted to negligence on his part. Such negligence was a dereliction of duty and under section 44(4) (c) of the Employment Act, such warrant summary dismissal. The Respondent was lenient and opted to terminate the Claimant purely on a without prejudice basis noting his long service. Such termination was pursuant to the provisions of section 45(2) (c) of the employment Act.

43. The Respondent also submit that owing to the reasons for termination of the claimant, the remedies sought are not due. He cannot be re-engaged as there were justifiable reasons for termination and there is lack of trust and fidelity between the parties. The Claimant cannot thus claim for salaries due from date of termination to date as he was taken through due process and found to have acted in a negligent manner. No special damages of any compensation is due. The claims should be dismissed with costs.

Determination

Whether the claim is properly framed for the claimant/union;

Whether the Claimant was wrongfully or unfairly terminated

Whether there are remedies

44. On the preliminary issue raised by the Respondent on the execution of the memorandum of claim, this should have been addressed from the onset and before the parties were able to delve into the hearing. Rule 4 of the Court Rules requires that a Claimant such as the one at hand to execute his pleadings and file a Verifying Affidavit.

45. A claim filed under Rule 4 is therefore different from one filed under the provisions of Rule 5 in that one is filed by an unrepresented claimant, while the other is by a Claimant through the provisions of the Labour Relations Act which specifically allow trade union representatives to represent their members in Court as a distinct right only available to such a party and not due to any other person/party. Rule 4(1) and (2) thus provides that;

4 (1) A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out-

(a) The name, physical and mailing address and full particulars of the claimant;

(2) A statement of claim filed under paragraph (1) shall be accompanied by an affidavit verifying the facts relied on.

46. While Rule 5 provides that;

5 (1) where a labour dispute is referred to the Court in accordance with the provisions of the Labour Relations Act-

(a) The statement of claim shall be signed by the authorized representative of the party referring the labour dispute to the Court; or

47. In this case, the Claimant is Harrison Muhia Mwangi, and at his paragraph 1.1 and 1.3 he describes himself as;

That the Claimant is an employee's trade union registered under the Labour Relations Act 2007 to represent unionisable employees in the Money Market Sector.

...

That the parties in dispute have a valid Recognition Agreement and a Collective bargaining Agreement which was signed between the union and Kenya bankers Association of which the Respondent is a member

48. The claim is then signed *Isaiah Munoru, for the claimant[s], of making, Insurance & Finance Union (K)*. In this regard, there is an obvious lapse, apparent negligence or sheer carelessness on the part of the Claimant or his union representative. The description assigned in the pleadings is misleading as the *claimant*, Harrison Muhia Mwangi is obviously not the person set out under the above paragraphs. What is clear is that the annexed Verifying Affidavit belong to the Claimant confirming the facts set out under the memorandum of claim as belonging to him.

49. As noted above, these are matters that ought to be raised instantly. This should not wait until the tail end of the hearing when both parties have completed their evidence. The Claimant also is not without blame as when the Respondent made note of the provisions of Rule 7 at paragraphs 31 and 32 of the Statement of Defence, there was no action taken to address the lapse and proceeded on as if nothing ought to be changed.

50. In the circumstances, and noting there is a Verifying Affidavit deposed by the *Claimant, Harrison Muhia Mwangi*, I will deal with the substantive issues at hand. Where there was a procedural question to be raised, the Respondent ought to have moved the Court instantly. Stalling on the same since 2013 and only to raise it at this point is not in the interests of justice.

51. On the question as to whether there was wrongful or unfair termination of employment, The Employment Act, 2007 has placed an onerous legal obligation upon employers in claims for unfair termination or wrongful dismissal. Section 43 of the Act requires the employer to prove the reasons for termination/dismissal, section 45 requires the employer to prove that the reasons are valid and fair reasons and section 47(5) of the Act expect the employer to justify the grounds for termination/dismissal.

52. To this end, the Claimant was issued with notice for hearing and the matters for the same set out with regard to a cash deposit difference that he was aware about. Indeed the Claimant had already gone out of his way to write to G4S Securicor seeking intervention over the deposit and noting that officers from the customer had confused him. The Claimant copied this email to his line manager and the Operations

Manager. The Claimant was then invited for hearing and his explanation found not satisfactory. The Claimant made an appeal where he asked for CCTV records but this was declined as there was already an admission of a cash difference that did not require the use of CCTV to prove as the Claimant had only attended to one (1) customer and his till had not balance with a loss of Kshs.146, 000.00.

53. As it were, the Respondent had ensured the due compliance with sections 43 and 41 of the Employment Act in terms of giving reasons and ensuring the Claimant enjoyed the rights set out under section 41 of the Employment Act. The burden now placed on the Claimant was to show that the termination was wrongful.

54. Section 47(5) of the Employment Act sets the statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal. The section provide that;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

55. An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer. However, where an employer has demonstrated that there was compliance with the law in terms of procedure and the substantive reasons for termination, then the employee bears the burden to prove that indeed there exists good grounds for the Court to make a finding of wrongful termination.

56. In this case, the Claimant was terminated from his employment with the Respondent in terms of clause A5 (a) (IV) of the CBA as set out under paragraph 4 of the letter of termination dated 11th March 2011. Such clause A5 (a) (iv) of the CBA provides;

Dismissal

Any of the following acts on the part of an employee shall constitute gross misconduct and/or serious neglect and shall justify instant dismissal.

...

iv) If he/she is convicted on a criminal charge of an offence involving, on his part, moral turpitude or if after the employers due investigation he/she is found guilty. For the purpose of this clause, an offence involving moral turpitude on the part of an employee is an offence involving active dishonesty and also an offence involving actual violence.

The following would involve moral turpitude:-

1. all crimes concerning the misappropriation of property belonging to third parties (i.e. larceny, burglary, embezzlement, house breaking, fraud);

2. fighting and assault, or engaging in riotous, disorderly or immoral behaviour during working hours or on the bank's premises or within its precincts;

3. Treason.

57. Are the above offences and or misconduct what the Claimant committed?

58. Both parties agree that the genesis of the acts complained of against the Claimant and leading to his termination were the events of 21st December 2010 where he received a deposit slip and cash that had a difference of Kshs.146, 000.00; he proceeded to approve and credit the customer; and this led to the loss of the same. This the Claimant has admitted as having occurred and the Respondent confirmed the same. Is this then the offence of *turpitude* contemplated by the parties in the CBA at Clause A5 (a) (iv)?

59. The Claimant has admitted that he received only one client on 21st December, 2010 – G4S Securicor. The deposit slip was for Kshs. 2,496,161.00 but later he discovered there was a shortage of kshs.146, 000.00. The Claimant reasoned that while he was counting the cash with the G4S crew they confused him and he never noted the shortfall. He however went ahead and posted the wrong amount into the system and to the credit of the customer hence making a loss of Kshs.146, 000.00.

60. The Claimant has further explained the shortfall in that, he later learnt that one of the G4S crew was seen picking an envelope from the box and left the bank. He however does not state who saw the G4S officer pick and leave the bank. What is clear is that at the Respondent bank, a bulk teller has a set of procedures to follow when handling bulk deposits and the Claimant had done so on many occasions with G4S and Wells Fargo clients. He had actually been doing bulk telling for over 5 years. That when doing bulk telling, one has to allow/give access to the customer into the bulk teller cubicle, the customer has to hand over the deposit slip and follow this with handing over of cash which has to be counted in all denominations. This is confirmed vis-a-vis the deposit slip in terms of cash in words and the teller has to confirm before stamping the cash deposit slip and cash deposited, then print the same and hand over a copy to the customer in confirmation that there is an approval of what is on the despised slip and the cash deposited. That by posting the credit to the system, this is a credit to the customer and this cannot be reversed as the cash posted is for the customer. Once the customer has left with the deposit slip that is a confirmation of money held by the Respondent for that customer.

61. The claimant's further defence is that upon incurring a difference of Kshs.146, 000.00 he declared the same in accordance with the Operation Manual on cash differences of overages. That this difference was due to the fact that G4S Securicor brought in a consignment of deposit from their several clients amounting to Kshs.2,496,161.00 which the Claimant received only to realise a difference of Kshs.146,000.00. He only noted the defence when balancing his till at end of day. That there was a scuffle with the G4S Securicor staff and he requested for CCTV camera to ascertain what had happened.

62. Did the declaration of the difference in accordance with the Operating Manual correct the same? to the contrary, even where the charges made against the Claimant relate to matters set out under A5 (a) (iv) in the CBA, which relate to criminal offences and *turpitude*, by his own admission, the Claimant lost the property of the Respondent amounting to Kshs.146, 000.00 as this amount was wrongly posted to the credit of a customer and could not be recovered due to the returns made by the Claimant in the course of his work. By his own admission, the Claimant cannot then allege that he was charged with the wrong offence and that he should have been treated leniently for the difference incurred and which resulted in a loss to the employer. The Claimant cannot rely on the Operating manual to justify his act of omission and commission in a case where his duties required him to exercise due diligence, attention and care while handing all persons attending at his place work. The Claimant has acknowledged that he was the Bulk teller and had done such duties for a long time and that he granted access and exit to the G4S Securicor staff for the cash deposits and there were laid down procedures on how to handle such customers.

63. I find, the Respondent complied with due process, accorded the Claimant his rights before termination and where the acts complained of required summary dismissal under the provisions of section 44(4) (c) of the Employment Act, the Claimant was dismissed instead. The Claimant was paid in lieu of notice and his due leave days.

64. As this was a termination of employment and not a summary dismissal, the Claimant should also be paid his terminal dues payable to an employee leaving the Respondent after long service and in accordance with the CBA.

Remedies

65. The Claimant is seeking compensation and re-engagement. On the finding that the termination was justified, no compensation is due. Re-engagement of an employee is given consideration where termination of employment is found to be unfair and based on the circumstances leading to the termination. Section 49(4) (b) requires that;

(b) The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;

66. In this case the Claimant has lost the property of the employer, he is not remorseful in terms of willingness to repay such monies and fixated on a premise that this was an operational error and in any case there were other employees who either lost more monies and the Respondent had other overages. Such is not a positive attitude towards ones work and the conduct of an employee who should be re-engaged. Employment is personal and where a mistake or misconduct has been committed, there is personal responsibility and accountability. In any event the claiomtn had an individual letter of appointment and save for the terms and conditions of employment agreed upon with his union, the Claimant as an employee remained bound by the terms of his employment contract to ensure that he performed his duties diligently and faithfully towards his employer.

67. The claim for back salaries is not due as the termination was lawful. There was notice pay that adequately compensated the Claimant following due process in terms and procedure and the reasons given for termination. Such is declined. Equally, exemplary damages sought for malicious termination of employment does not arise as the charges made against the Claimant arose from his own admission of incurring a difference and was well aware of how such arose. The consequence of such loss and difference resulted in termination of employment. other matters set out by the Claimant as having occurred from his manager in terms of being victimised for lodging a complaints with the human resource office on overtime payable, such I find to be extraneous. Such cannot form the basis of the Claimant incurring losses and cash difference when undertaking his duties, as by virtue of his employment he was required to be diligent, which he failed to do. The claim is thus declined.

68. As the claim is essentially filed by the claimant, save for the issue of the attendance of the Union, which should not have been the case, no costs are due.

The claim is hereby dismissed in its entirety. No orders as to costs.

Delivered in open court at Nairobi this 8th day of December 2016.

M. MBARU JUDGE

In the presence of:

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