



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 115 OF 2013

VIOLET KADALA SHITSUKANE.....CLAIMANT

VERSUS

KENYA POST OFFICE SAVINGS BANK.....RESPONDENT

JUDGMENT

1. The Claimant herein filed the suit on 29th January 2013. In the suit she pleaded that she was employed on 12th March 1992 as a clerical officer and she rose through the ranks over the years and became a Senior Cashier drawing a monthly salary of 64,864/-. She was given a show cause notice dated 9th February 2012 citing the removal of a restraint on a deceased client's account leading to withdrawal of Kshs. 100,000/-. She was interdicted and on 12th June 2012 her contract of service was terminated. She averred that this was informed or based on malice and thus sought special loss and damage which was pay in lieu of notice Kshs. 194,592/-, pay in lieu of leave days earned Kshs. 64,864/-, prospective loss of income for 19 years Kshs. 194,788,992/-, maximum compensation for unfair termination and costs of the suit plus interest on the sums claimed.
2. The Respondent filed a Memorandum of Response on 27th February 2013. In the Response, the Respondent averred that the Claimant's continued service with the Respondent was always subject to the Claimant's due compliance with the Respondent's staff regulations and polices as well as the law. The Respondent averred that the Claimant was terminated on reasonable and justifiable grounds for negligence in the course of her duties as a result of which an irregular and unlawful withdrawal was made from a deceased person's account. The Respondent averred that the Claimant was lax and casual in using her password and failed to zealously safeguard her password from unauthorized access. The Respondent averred that the Claimant was indebted to it to the tune of Kshs. 1,012,568.75. The Respondent averred that the Claimant was entitled to notice pay, payment in lieu of leave days earned all totalling to 241,507.33. The Respondent averred that after deducting this from the sums due to the Respondent the Claimant had a balance to pay in excess of Kshs. 600,000/-. The Respondent thus sought the dismissal of the Claimant's suit. Vide an amended Response to the Claim filed on 19th December 2013 the Respondent averred that the Claimant was indebted to the tune of 1,151,715.05 and sought this by way of Counter-Claim.
3. The Claimant filed a Response to the Respondent's Amended Memorandum of Response and Defence to Counter Claim on 13th February 2014. In the Response and Defence to Counter Claim the Claimant averred that as at January 2013 her house loan had a balance of 548,891.80, while the personal loan, car loan and medical recoveries were 39,555.20. She denied being negligent in the performance of her duties. She thus sought dismissal of the Counter Claim and entry of

judgment as per her Claim.

4. The Claimant testified on 27th May 2014. In her testimony she stated that she was not employed at present and was taking care of her children. She testified that she worked for the Respondent in 1992 and after some years of work and training was later appointed a cashier and posted to Kisumu branch. She testified that she worked as a cashier for 9 years and was promoted to be a supervisor and later to Senior cashier. She held that position until her termination. She testified that she had a basic salary of 64,864/- and an owner-occupier allowance of Kshs. 12,690/- plus other allowances of Kshs. 3,200/-. She testified that her service was exemplary and she was never issued with a warning and had a clean record. She testified that a customer whose husband was deceased came and complained that her late husband's account had been interfered with. After investigations it was established that the person who had effected the withdrawal was a colleague Philip Okeyo. She was given a letter to show cause and she responded to it. She testified that when she was informed that her password had been used to lift the restraint, she responded that the person who used it must have stolen it and used it without her consent. She was interdicted and subsequently dismissed. She testified that she did not receive any payments from the Respondent. She thus sought payment of notice, the leave days accrued and the 19 years of lost service. She denied being careless with her password and in reference to the Counter Claim testified that she paid some sums in October 2012 and September 2013 leaving balance of Kshs. 588,447. She testified that after deducting all sums due to her the balance owed to the bank is Kshs. 548,891.80.
5. In cross-examination the Claimant testified that she was presently unemployed and her husband was in *jua kali* and she relies entirely on him. She testified that Philip Okeyo's service was also terminated. She agreed that the password was not revealed when keyed in and looking at the screen one cannot tell the password but looking at the keyboard one can. She testified that for someone to see the password they would have to be near, look directly at the keyboard and see her type it in. She testified that she was given opportunity to give her defence and she responded by way of letter dated 11th February 2011 and she was unable to explain how the password was taken. She was interdicted and after termination appealed the decision to terminate her services. She testified that Philip Okeyo did not say how he got the password and unless he said how he got it we cannot know how he got it. She testified that the language she used in her appeal letter was so that the bank gives her job back. She testified the hearing was not fair as she was not reinstated. She conceded that there was no guarantee she would serve the Respondent till her retirement age.
6. In her re-examination she testified that her password was used to remove the restraint but not to withdraw the cash. She stated that she was given a show cause and was later interdicted. She testified that in her appeal letter she promised to be more diligent.
7. The Respondent called 3 witnesses who were the Business Growth Manager, the Assistant Manager Investigations and the Human Resource Manager Employee Relations. The Business Growth Manager Mr. Paul Njoroge testified that the Claimant was his former colleague who was the senior cashier in Kisumu branch. He testified that he received a complaint that someone had accessed a deceased customers account. He testified that he checked to see and from the transaction ID he was able to identify who had accessed the funds. He testified that the Claimant removed the restraint. He testified that he gave the Claimant a show cause notice to which she responded. He testified that she stated in the response that the cashier must have mastered or copied her password and used it for the transactions. He stated that he did not find it satisfactory and interdicted her and referred the case to the Bank's investigators. He did not take part in the investigations and after the investigations the Claimant was invited to the staff disciplinary meeting to defend herself. He testified that after the disciplinary committee meeting he was called to inform her of the management decision to terminate the Claimant's services. The meeting was held in the presence of the HR officer and gave the letter of termination dated 7th June 2012. He testified that he did not think her termination was unfair considering as her immediate supervisor he gave her a chance to explain how the password was used. He testified that the investigations found her negligent and she went before the disciplinary committee and she even had opportunity to appeal if she felt the decision was not proper.

8. In cross examination he testified that he received the report on the account in December 2011 and this enabled him to start investigations. The customer complained at the bank and he referred the matter to the security officer. He testified that the Claimant removed a restraint order and he gave her a show cause on 9th February. He testified that the Claimant accepted her password was used. She does not say she removed the restraint. He testified that Okeyo stated that he used the supervisors card to approve and the managers card to withdraw. He testified that the Claimant is not the supervisor or the branch manager. He stated that the Claimant was heard at the disciplinary meeting and decision made. He testified that reasons were given to the Claimant at the meeting on 28th May 2012. He testified that the Claimant stated that she was not aware till he called her to his office in 2012 and the only evidence he had was the system log which requires a user ID and password. The user ID is the personal file number and then one inputs the password to log in. He testified that the Claimant failed to adhere to operational procedures.
9. The second defence witness was Mr. George Onyango the assistant manager in charge of investigations. He testified that he received a report from the first defence witness Mr. Njoroge to the effect that an account for a deceased customer had been operated after the demise of the customer. He testified that he accessed the account and was able to confirm that there were transactions which were made after the demise of the customer. He established that the cashier who had transacted was the same and the restraint was removed, as per the record, by the Claimant. He testified that the Claimant's computer and password was used to remove the restraint. He stated that Philip Okeyo owned up making transactions and he (Philip) stated that the Claimant's password was used without the Claimant's consent. He testified that he found this unacceptable as passwords are not to be shared. He confirmed that no report was made to the police on the incident as he thought it better to deal with the issue departmentally and in his view it would not have been sustainable to charge them as he would have had to charge all the three officers.
10. In cross-examination he testified that he is a trained former police officer and is based at Head office. He stated that it is not the role of the investigation to declare that the Claimant should remain at home. As a manager he weighs what to take to the police. He denied that the Claimant was singled out as the other officers were dismissed.
11. In re-examination he testified that Okeyo did not state the source of the password.
12. The final defence witness was Mr. Peter Muya Karanja the HR Manager Employee Relations. He testified that he knew the Claimant who was terminated because her password was used to remove a restraint on an account for a deceased client. He testified that the Claimant was given a notice to show cause and she responded. She was also taken before the disciplinary committee and she was given opportunity to defend herself. He testified that she stated that she did not know that her password was used to remove a restraint on an account till she was called by the investigator. He testified that the Claimant did not deny that her password was used and she said the cashier could have mastered her password as they worked together. He stated that the Claimant was given the letter of termination in a notification meeting and she exercised her right of appeal. He testified that he knew Okeyo admitted using the Claimant's password to remove the restraint. He testified that from where he sat the password was assigned to Violet and if it was used by someone else it was negligence of duties. He testified that Okeyo admits using her password without her consent and does not disclose how he (Okeyo) came to get the password. He testified the Claimant was given a fair hearing and had opportunity to respond. He testified that all the elements of fair hearing are present in the case. He stated that the Claimant was paid in lieu of notice, leave outstanding for 22 days and the money was used to offset the outstanding liability the Claimant had. He thus stated that the Court should dismiss the Claim and help the bank recover the dues less the notice and leave pay she is entitled to.
13. In cross-examination the witness testified that if the Claimant has not paid or if there is any outstanding amount to be paid she should pay. He testified that the Claimant did not protest the 22 days as outstanding leave days but on the loan. He testified that regarding the loan it is a simple

issue of reconciliation. He maintained that the restraint was removed and her password was used. The bank carried out investigations. He agreed the password was used by Okeyo and testified that the password is secret to the Claimant. He testified he was not competent to determine the issues of the Penal Code. He testified that it was the Claimant to show how her password was used. He testified she was negligent as it's a fact her password was used and she did not perform her functions to the required standard. He testified that Okeyo's admission did not exonerate the Claimant. He testified that the password is not written and he did not think the cashier could read minds. He stated that the Claimant was heard before her termination and the dismissal was procedurally okay. He testified that she wrote a letter on appeal and was remorseful for the actions.

14. In re examination he testified that the Claimant did not dispute the dates in the letter of termination. He stated that password is a secret instrument given to the person to enable them operate and it is not available to others and it is only supposed to be known by the person to whom it is assigned.

15. Parties proposed to file written submissions but as of the date of judgment none are on the file. In the case before me the issues for determination are

- a. whether the termination was unfair or unlawful within the meaning of the law
- b. whether the Claimant is entitled to any relief
- c. whether the Respondent is entitled to recover on the counter claim

16. The Claimant's case is that she was dismissed without cause in 2012. She testified that she had worked for the Respondent with diligence and without any incident or warning from her engagement in 1992. She testified that she was called and informed of an incident where her password was used to remove a restraint. She responded to the show cause letter and indicated that the culprit, her colleague Okeyo, had probably memorised or copied her password. She was given a chance to appear before a disciplinary committee in Nairobi and wrote a letter to the Managing Director appealing her dismissal. She was aggrieved by the decision to terminate hence the suit. The Respondent on the other hand denied the termination was malicious or wrongful. It was the testimony of the Respondent's witnesses that the Claimant was negligent in her duties leading to the illegal withdrawal of a restraint on a deceased customer's account and subsequent withdrawals from the said account. The Respondent sought a payment of outstanding dues on loans and liabilities owed by the Claimant.

17. In any termination of an employee the procedural fairness test propounded by the Court is one which accords to the dictates of Section 41 of the Employment Act. Section 41 of the Employment Act makes provision on the termination of an employee as follows:-

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

18. The Respondent is required under Section 43 of the Employment Act to prove the reasons for the termination were proper.

43.(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.

19. In this case, the Claimant was notified of the allegations against her and was given an opportunity to defend herself. This she did by the reply to the show cause letter. In the explanation to her prior to her dismissal, the Respondent's manager called her and in the presence of the HR manager told her of the intention to terminate her services. She was accorded a chance to appeal the decision but the appeal was unsuccessful. Was this in accord with the law? To my mind in order to fit in the procedural steps one must have a modicum of the tenets of the law. In this case I do not see a marked departure from the requirements that apply to such cases. In the premises I would not declare the termination as unlawful. The employer has indicated the reasons for the termination in terms of Section 43.

20. The only issue there is in the termination is the failure to allow her to have an employee of her choice to be present at the time she was informed of the decision to terminate and to hear the representations she or her chosen employee could make. The Claimant's password was used and she was the sole custodian of it. How one could memorise her password or access it is beyond me. She therefore was negligent and the dismissal warranted. Her dues were not properly calculated in my estimation as the notice period to be given is not split between basic and house allowance. Therefore the payment ought to have included both her basic and house allowance of course excluding the other variable allowances she would earn. The computation of the sums she was entitled to was thus one that requires recalculation and in essence one that will affect the dues she was entitled to.

21. On the counter-claim, the Bank did not prove the sums due to it under the various heads as no statement was produced. The Claimant however admitted being indebted to the tune of Kshs. 548,891.80. If the calculation is redone on the dues to her the sum due will even reduce further.

22. No pay is due on the 19 years of service abruptly cut short due to her sudden termination. I refer the parties to the case of **D. K. Njagi Marete v Teacher Service Commission [2013] eKLR**.

23. I therefore will enter judgment for the Respondent against the Claimant for the admitted sum of KShs. 548,891.80 less the sums not included being 3 months notice pay on house allowance. The Claimant's suit is dismissed but I will make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of **January** 2015

Nzioki wa Makau

JUDGE