



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 53 OF 2011

CATHERINE WANJA NJERU.....CLAIMANT

VERSUS

KENYA POST OFFICE SAVINGS BANK RESPONDENT

JUDGEMENT

1.The claim herein was filed on 18th January 2011. Hearing commenced on 12th July 2011 before Madzayo, J. and the Claimant gave her evidence-in-chief and was in the course of cross-examination. however upon the Court being restructured as a Superior Court of Record, hearing was scheduled before Marete, J. who heard the Claimant's case afresh and pending defence hearing, the Judge was transferred and the matter allocated before this court. On 30th September 2014 when the matter came for hearing, both parties agreed to proceed from where Marete, J. stopped and thus the Court heard the respondent's case and herein is the judgement.

2.The issue in dispute is the unlawful termination of Catherine Wanja Njeru being the claimant/grievant herein. The concept of being a 'grievant' arise in matters where a unionised member is represented by the Union unlike in a case where an advocate directly represent a litigant who then is the 'claimant', plaintiff or as the case might be.

3.The claim was filed on 18th January 2011; the defence was filed on 31st May 2011; and at the close of the hearing each party filed written submissions dated 26th January 2015 and 9th February 2015 for the Claimant and Respondent respectively.

Claimant's case

4.On 2nd January 1990 the Claimant was employed by the respondent, an entity carrying out banking business within Kenya and wholly owned by the government and reporting to the Ministry of Finance. The Claimant was terminated on 30th November 2010.

5.The Claimant was employed as an Accounts Officer on a starting salary of Kshs.7, 380.00. she rose through the ranks and at the time of termination was Regional Manager, Western Region and based at Kisumu earning **Kshs.220, 843.00**. On 26th October 2009 one customer sought to transfer funds on Real Time Gross Settlement System (RTGSS) for an amount of **Kshs.2, 670,000.00** from an account in the respondent's Kisumu Branch to the National Bank Account. The procedures for such a transaction were

laid down in a policy document. The policy procedures directed what was to be done at Branch level supervised by the Branch Manager. The Claimant who was in charge of 13 branches could only confirm whether or not the customer account had been debited with the amounts in the cheque and once satisfied all was in order, then in application of RTGSS policy sign the cheque as second signatory. On 12th January 2010, during another RTGSS transaction, it was discovered by the Kisumu Branch that the system in use was flawed and had actually been changed by the respondent's head office without notification to the Branch offices. Due to the differences in policy guidelines at head office and Branch offices it was discovered that the client's account at Kisumu Branch was double credited into the recipients National Bank Account, thus **Kshs.2, 670,000.00** was unaccounted for at different intervals. Upon investigations by the Claimant and Respondent senior officials, it was discovered that the customer had benefited from the flawed system of money transfer. Abdul Waheed Khan, a son of the bank customer, Mohamed Yamin, did acknowledge receipt of the double transfer effected on 26th October 2009 and another 36 hours later and he undertook to repay the said amount and gave a breakdown of this undertaking. Following the undertaking, the customer Abdul Waheed Khan remitted **Kshs.500, 000.00** to the Respondent in part payment.

6.The Claimant also stated that on 30th May 2010 she was placed on interdiction on half pay to allow further investigations. She appealed against the interdiction on 21st June 2010 which was disallowed on 28th July 2010. Contrary to procedure, the Claimant remained on interdiction for over six (6) months instead of One (1) month. The Claimant made another appeal on 25th October 2010 and again it was rejected on 27th October 2010 citing ongoing investigations. On 18th November 2010 the Claimant was summoned at the head office and verbally informed that the Respondent's board had decided to terminate her services and she could appeal within 14 days. Vide internal memo dated 30th November 2010 the respondent, terminated the claimant noting that she had been interdicted on 20th August 2010 whereas she had been interdicted on 30th May 2010. The outcome of the investigations upon which the Claimant had been interdicted was never shared with her.

7.The Claimant lodged an appeal against her termination on 6th December 2010. There was no response on the appeal. The events leading to the claimant's termination and failure to get response on her appeal caused her to suffer mental anguish as she was never given a fair hearing and is thus seeking to be reinstated, re-engaged and her withheld salary paid or the terminal dues and benefits paid as follows:

- a. *Withheld half salary from 1st June 2010 to 30th September 2010 at kshs.287, 020.00*
- b. *Withheld half salary after increment in October to November 2010 at kshs.156, 428.00*
- c. *Notice of 12 months at Kshs.2, 650,116.00*
- d. *Compensation for loss of employment and remainder of term to retirement age at 60 years at Kshs.26, 040.00*
- e. *Severance/gratuity pays for 20 years at Kshs.13, 250,580.00*
- f. *Other statutory entitlement*
- g. *Certificate of service*

8.In evidence the Claimant stated that upon employment by the Respondent on 2nd January 1990 as an Accounts Officer she rose through the ranks and became the Regional Manager, Western Region and was based in Kisumu. Her duties were administrative in all the 14 branches under her jurisdiction and a job description was issued to her. She was not involved in the day to day affairs of the branches as this was for the Branch managers. A case was reported where there was a double credit to an account that had happened 4 months earlier and reported to the head office. The Claimant was supposed to sign any cheque that was above the limit of the Branch Manager at 1.5 million and in this case the amount was over 2.6 million. The Claimant was the second signatory. She checked on all the requirements and established the cheque was in order and then signed in approval.

9.The Claimant also gave evidence that on 30th May 2010 she was interdicted on the grounds that the matter was under investigations, she made an enquiry on the investigations but 27th October 2010 the Respondent replied that the matter was still pending investigations. While the Claimant was under

interdicted she got the beneficiary of the double credit and he made an undertaking to repay the money and on 30th October 2010 deposited Kshs.500, 000.00 and committed to pay Kshs.50, 000.00 plus interest monthly. On 18th November 2010 the Claimant was invited to a meeting and present were the Operations and Acting Manager and human resource Manager and she was informed that due to the Kisumu matter, the Respondent had decided to terminate her services and she could appeal in 14 days. It was an informal meeting that lasted 5 minutes.

10.The Claimant also gave evidence that on 30th November 2010 she received her letter of termination in the form of an internal memo and noting wrong dates for interdiction and her dues were not paid. The Claimant is seeking for orders that the interdiction was irregular, the termination was irregular and should thus be reinstated and all withheld salaries paid and in the alternative compensation for mental and emotional disturbance, inability to pay bills, loss of respect and loss of image and personality as the interdiction was in bad faith.

11.The Claimant also stated that she was not negligent in her work and the transaction leading to her interdiction and eventual termination was done in accordance to the policy in place. The Respondent has since changed the policy to avoid similar occurrence. The Manager should have noticed the error as he hands on person.

12.On cross-examination, the Claimant gave evidence that she was terminated on account of not guiding the Kisumu Branch properly with regard to transfer of funds into a client's account. The procedure applied was wrong but not a false entry. No money was lost and the customer was followed up and made an undertaking to pay. The shortfall of 2.7 million was not immediately detected as such a loss should have been detected by the Branch manager. The Branch Manager was also terminated.

Respondent's case

13.In defence the Respondent admitted that they had employed the Claimant as an Accounts Officer and rose through the ranks to become a Regional Manager. On 26th October 2009, a customer visited Kisumu Branch to transfer Kshs.2.67 million from his account to a National Bank Account, the beneficiary being his son. On the same day the Branch authorised another transfer to the same customer and the Claimant was a signatory to the transfer. This led to a double transfer to the customer of another Kshs.2.67 million. Due to negligence, the Branch did not discover the double transfer until 12th June 2010. On 14th January 2010 the Claimant was asked to explain the incident and to try and recover the amount overpaid and on 10th May 2010 the Claimant was asked to explain and give actions taken to recover the money since she had not handled the matter according to procedure. On 14th May 2010 he Claimant gave a reply noting that the customer had assured the Branch that he would pay the amount but he later hired a lawyer exonerating him from blame. On 17th May 2010 the Claimant as the Manager in charge was asked to give an explanation as to why the correct procedure had not been followed and on 19th May 2010 she replied noting that she was the one who has facilitated the Kisumu Branch Manager in his efforts to recover the money. On 30th May 2010 the Claimant was interdicted to allow for further investigations as she had failed to give the required explanations.

14.On 21st June 2010, the Claimant appealed against her interdiction stating that she had reported the incident and that she had followed the correct procedures. On 28th July 2010 the appeal was unsuccessful as investigations were ongoing. On 31st August 2010 the Respondent received an audit that noted that due to the negligence of the claimant, the bank's position was very weak. On 25th October 2010, the Claimant again appealed against her continued interdiction. On 11th November 2010 the Claimant was invited to a meeting with the Respondent on 15th November 2010 to discuss her case. On 30th November 2010 the Claimant was terminated from her employment with the Respondent due to gross acts of negligence in performance of her duties and was to be paid 3 months in lieu of notice and also her outstanding leave days.

15.The Respondent also stated that the Claimant had a poor disciplinary record while employed by the

respondent. the Claimant was subjected to disciplinary action on several occasions some similar to the reasons for her eventual termination being;

On 8th March 1996 the Claimant was given a warning for carelessness and making hasty decisions which would have cost the Respondent in terms of man hours;

On 6th June 1997 the Claimant was cautioned to improve her inter-personal relations after her impolite reply to the then Principal Training Centre;

On 24th November 1999 the Claimant was cautioned for her lateness and absence from duty;

On 22nd July 1998 the Claimant was given a warning for insubordination and missing information on reports and she was informed that her actions amounted to serious offence under the Respondent Code;

On 19th April 1999 the Claimant was cautioned for irregularly opening a trust account and she was reminded that she was a senior officer she should have acted to protect the Respondent assets;

On 10th August 2000 the Claimant was interdicted for authorising the encashment of third party cheque for Kshs.60,000.00 despite being instructed to stop the practice; and

On 25th August 2006 the Claimant was issued with a show cause letter for failing to adhere to timelines, which led the Respondent to delay a decision on a planned major promotion.

16.The Respondent also stated that the termination of the Claimant was lawful as her actions constituted serious acts of negligence in the performance of her duties. Due to the negligence the Respondent suffered loss and the Claimant failed to guide her team appropriately in the handling of the incident where a client received double payment. As a Regional manager, the Claimant failed to discharge her duties properly as this amounted to misconduct. The Claimant was given numerous occasions to explain herself, the interdiction was appropriate and following investigations, the Claimant was found culpable. The Claimant is not entitled to any dues and her claim should be dismissed with costs.

17.In support of the Respondent case, the witness called was Anne Karanja the Acting Managing Director who was previously the Director Banking who had worked with the Claimant while she was the Regional Manager. On 30th November 2010 the Claimant was terminated due to loss of funds following the claimant's negligence and failure to account from a customer request in October 2009. The Claimant facilitated the double transfer of 2.67 million while the correct procedure was to just transfer once but in this case due to the double transfer, the Respondent lost 2.67 million. The customer's instructions on 26th October 2009 were effected twice.

18.The witness also stated that procedure in effecting such a transaction where done correctly was to do one transaction. In this case the first transfer was done electronically and the second was done through a cheque and to the respondent, this was a double transfer. In this case the investigations report revealed that the error committed by the Claimant was in the second transfer where she signed the cheque as a second signatory; as a Manager she was aware of the procedure to be applied when she signed the cheque. She should have confirmed the payment had been made and by signing the cheque as the second person, this then resulted in double payment. At the time of effecting the second payment through cheque, the client account did not have sufficient funds to make another transfer. The customer account was not debited and had this been checked, the Claimant would have noted there were no sufficient funds for the cheque that she signed.

19.The witness also stated that she has previously worked in operations with the Respondent and the procedure was clear. Before signing a cheque, the Claimant should have confirmed the subject account had cash and remove it before issuing a cheque on the account so as to have a debit. From the

investigations report, the Claimant only noticed the error on 12th January 2010. The money sent by error has not been received and only Kshs.500, 000.00 was paid leaving a big balance of 2 million. Upon the discovery of the error the Claimant contacted the customer in April 2010. There was a 3 ½ months lapse before the customer got any communication on 15th April 2010. Had the customer been contacted immediately, the cash would have been recovered as he was a constant depositor at the Respondent Branch and there were enough funds to enable the refund. The blame is therefore on the Claimant as the Regional Manager as she was the supervisor of the accounting officer at the Kisumu branch. on 30th April 2010 the Claimant issued a show cause letter to the manager, Kisumu Branch noting the error in issuing a cheque without following procedure; the Manager at Kisumu Branch failed to adhere to procedure. The Claimant was admitting there was an error and the recovery procedure applicable were to follow since there was an error in failing to follow laid down procedures.

20. On 28th April 2010 the Claimant wrote to the Manager, Kisumu Branch noting that all managers had been trained on funds transfer on 3rd October 2009, and a date before the error in double payments was done. At this time the witness was the Director Operations and no such error had occurred in the transfer of funds. Hence a show cause notice was issued to the Claimant on 10th May 2010 asking the Claimant to explain the failure to follow procedure and the action taken when the error was noted;

Failure to debit the customer account

Recovery of cash from staff at fault

21. On 14th May 2010 the Claimant gave a summary on how the transactions occurred on the double payment. The reply was not sufficient and the Respondent further asked the Claimant to give more details clear on specific failures noting the issues that she was to reply to noting the failures and her personal action on;

Her responsibilities – on 19th May 2010, the Claimant replied and noted that she had personally visited the customer the beneficiary of the double payments but the lost amounts have never been recovered;

22. On 11th November 2010, the Claimant was called for a meeting and the witness [Anne Karanja] as the Director Business Operations was the chair and others present were the Manager Human Resource and Other staff – the meeting objective was to explain to the Claimant on the question of the double payment but the Claimant appeared to be in a hurry and took about 5 minutes and the Respondent had to write to her again. Another meeting was held at the Respondent head office, the Claimant attended the meeting but appeared agitated and in a hurry and indicated that she knew why she had been called and then left the meeting. The Managing Director then terminated the Claimant stating the reason for the termination which was the double payment to a customer due to failure to follow procedures and this was an act of gross misconduct and negligence as explained to the Claimant on 18th October 2010.

23. In the letter of termination, the Respondent offered to pay the Claimant 3 months' salary in lieu of notice. The Claimant was a member of the pension fund and could access the same. at the time of termination the Claimant had liabilities amounting to Kshs.417, 493.80 being Kshs.411, 694.80 on house loan and Kshs.5, 844.00 for car insurance.

24. The witness also stated that the Court should dismiss the entire claim and grant the Respondent judgement for 2.7 million lost by the Claimant with costs.

25. In cross examination the witness stated that the Claimant had a clear job description and as the Regional Manager for Western Region, she was based at the most active Branch in Kisumu, she was conversant with all procedure as she was tasked with the responsibility to ensure compliance. The Branch managers gave daily reports to the Regional manager; close of business was at 5 pm. The Claimant would sign all high volume withdrawals and cheques at the Kisumu Branch while she had the responsibility to oversee other branches.

26. The witness also stated that she chaired a meeting when the Claimant was called before her termination, but it lasted for 5 minutes. It was a management meeting. The question of negligence was addressed. There were minutes taken by the Human Resource Manager but these have not been filed. The Respondent Board of Directors did not call the Claimant for hearing, but she had been on interdiction and there were several letters giving a summary of the irregularities committed by the claimant. On 11th November 2010 the Claimant had been called for a meeting but the agenda had not been indicated. The Claimant had been interdicted since 30th May 2010 which was not lifted as the matter was under investigations. There was an internal audit done by the Compliance department and the Respondent does follow their recommendations. Part of the recommendations was that the matter was not due to the fraud by staff but failure to follow the procedures correctly.

27. The witness also gave evidence that the procedures in use then were later changed around April/ May 2010. Previously the system in use by October 2009 was electronic, which was changed following Central Bank of Kenya directions that payments over 1 million should be by electronic transfer. Some banks could do funds transfer and used cheques but by May 2009 all Respondent branches were online and thus removed the need to use cheques. Kisumu Branch was connected online and could therefore not use both the electronic and manual system. At the time of the incident subject herein, it was possible to electronically transfer funds. The branches not connected at the time could issue cheques, but not Kisumu branch.

28. In this case, the Branch Manager had to do end of day reconciliations to ensure all transactions were done correctly. The Regional Manager had to confirm in compliance with regulations. In all branches, roles are separated where the Branch Manager has to feed all information into the system and the Regional Manager had access to customer accounts and while the Branch Manager did reconciliations, the Regional Manager had to make confirmations and correct any irregularities. On 26th October 2009 there was the double transfer and on 27th October 2009, a cheque for a similar amount was effected. In this case, the Claimant did not verify despite access to the customer account and went ahead to sign the cheque. Though the customer paid kshs.500, 000.00 the balance remains unpaid and the Claimant was to be surcharged.

Submissions

29. In support of her case, the Claimant submitted that she is entitled to her claim as outlined as she complied with all laid down procedures for the transfer of funds to a customer on 26th October 2009. That at the Branch level, the Manager was responsible in the verification of all the customer details and cheques that required to be signed by the Regional Manager were only those that involved high volumes and in this case the Claimant did confirm from the details given by the Branch Manager that indeed they were corrected before proceeding to sign the cheque. The Claimant was however interdicted to allow further investigations, she appealed against the interdiction as it went beyond the policy duration of one month but again was told that the investigations were still ongoing. On 30th November 2010 the Claimant received an internal memo on her termination with wrong details on her interdiction and thus seek the Court to find that the interdiction was irregular, the subsequent termination unfair and should be reinstated back to her position with the Respondent and be paid all her due salaries and those withheld during the interdiction as well as compensation and damages for loss of respect and image.

30. The Claimant also submitted that the basis for her claim and the orders sought is that the procedure for RTGS transfer was followed as per prescribed procedure manual, her role was to sign the cheque upon verification by the Branch Manager of the customer details and in this case, she was not negligent as alleged. As of 26th October 2009 when the Claimant signed the cheque, the customer account had adequate funds to support the payment and thus by signing the cheque, she had confirmed from the supporting documents and account balances as required. The double payment was only discovered by the Branch Manager on 12th January 2010 when he was making another transaction of similar nature and when seeking confirmation from Head officer the Manager discovered that the transfers done on 26th October 2009 were by cheque. The procedures applicable for funds transfer at the time have since been changed by the Respondent noting the anomaly and need to avoid similar incidents. At the time of signing

the cheque and making payment on 26th October 2009, the procedures had not been changed and the only procedure in use was manual using the ATM WEB. There was no negligence and the customer agreed to pay in instalments and an agreement was drawn to this effect.

31.The Claimant also submitted that following the interdiction of the claimant, there were investigations that recommended that she be surcharged with the loss that the Respondent incurred and the same be shared with the Branch Manager at ½ each being kshs.1,335,000.00 but this was not communicated to the claimant. the Branch Manager Kisumu was dismissed, there was no disciplinary hearing and the policy changes in the funds transfer were being implemented in phases where Kisumu was using both manual and electronic systems.

32.The Claimant thus submitted that she was not terminated for a valid and justified reason noting that she was put on interdiction for long period and was never called for hearing. The investigations done did not involve the Claimant and for this to be used against her as the basis for the termination without a hearing was unfair procedure and contrary to the Respondent code and policy. When the Claimant made her appeals with regard to her interdiction and termination, they were just treated as a formality and never given any serious ness for a hearing. There were thus serious procedural lapses. Section 43, 45 and 47(5) of the Employment Act requires that the reason for termination be valid, reasonable or justifiable. In this case the Claimant was not responsible to the error resulting in the double payment and hence no justifiable reason to terminate her employment.

33.The Claimant also submitted that the procedure manual in use at the time was flawed. It was not clearly indicated that the use of ATM WEB was exclusive and there were ambiguities as to its use and that of a cheque until end of day process. the Branch Manager had to prepare a cheque together with supporting documents at which point the Regional Manager could confirm and sign which was done in this case. The Claimant should therefore be reinstated as held in **Frederick Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR.**

34.The Respondent also submitted that the Respondent had a valid reason for terminating the Claimant from employment as she authorised the double payment of 2.67 million from a customers' account when the payment ought to have been effected only once and this was as a result of failing to confirm whether the customers' account had sufficient funds. The Respondent lost 2.67 million and to date only Kshs.500, 000.00 has been recovered. The Claimant wrote to the Kisumu Branch Manager noting that procedures had not been followed and had the Claimant been diligent she should have checked the customers' account before signing the cheque as the second signatory so as to avoid the double payment. When the error was discovered, the Claimant failed follow up on the recovery from the customer. When the Claimant was required to show cause on 17th May 2010, she replied noting that all the staff at Kisumu Branch had been trained on the procedures and the she apologised over the lapses that led to the double transfer of 2.67 million occasioning the loss to the respondent. The Respondent relied on the case of **Banking Insurance & Finance Union versus Post Bank Ltd [2013] eKLR, Cause No.694 of 2010** where the Court held that when an employee is dishonest, the employer has a right to terminate.

35.The Respondent also submitted that due process was followed in the termination of the claimant, she had a show cause issue don 10th May 2010 where three was a detailed reply imputing error to the Kisumu Branch manager, a further show cause was issued on 17th May 2010 seeking clarification leading to the double transfer of 2.67 million and why the Claimant failed to adhere to laid down procedures. The Claimant gave another detailed response noting that the staff at Kisumu had been trained and she promised to be more careful in future. The Claimant was interdicted pending further investigations, the Claimant was called for disciplinary hearing where she repeated her responses as in the show cause letter and on 11th November 2010 she was invited to a disciplinary hearing where the Claimant confirmed to have been given a hearing by the director operations and director human resource. On 30th November the Claimant was terminated for committing acts of misconduct when she authorised a second payment to a customer in the sum of 2.67 million without ascertaining whether the account had sufficient funds. The Respondent relied on the provisions of section 44(4) (c) and (e) of the Employment Act, and the case of **David Getare Nyangau versus Houseman General Contractors Ltd [2013] eKLR.**

36. the Respondent also submitted that the Claimant failed to take advantage of the meeting held on 18th November 2010 but instead left declining to answer to the charges and relied on the case of **BIFU versus Barclay Bank of Kenya, Cause No.1660 of 2013** where the Court held that an employee who fails to attend a disciplinary hearing cannot fault the employer and then claim unfair termination. In this case therefore the reliefs sought are not justified especially that of reinstatement considering all the factors that should be addressed under section 49(4) (b) and (d) of the Employment Act, such an order would not be appropriate. On the withheld salary, the Claimant failed to prove this claim and due to the huge loss of 2.67 million, this should not be paid. The Claimant is not entitled to any compensation as the termination was justified. The Claimant should be dismissed in its entirety.

Determination of the issues

Whether the termination was justified

Whether there are any remedies

37. The law with regard to termination of contracts is that the same should only be terminated where there are reasons, which reasons, the employer at the time of terminating such a contract genuinely believed to exist hence the termination. In this case section 43 of the Employment Act is important to refer;

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.

38. However, even where there are genuine reasons leading to the termination, an employee is entitled to challenge the same as even where there is a genuine reason that may lead to a termination, the same must be assessed as to its validity, fairness and reasonableness based on each case. The test of fairness must therefore be looked at with regard to the conduct of the employee, the policy procedures given by the employer and fundamentally the procedures adopted by the employer leading to the termination. These are important considerations that the Court must address as by assessing each case, a finding as to whether a termination was unfair or unfair must have the basis on the above issues being established to exist or not to exist.

39. What is of paramount importance and the Court gives very high regard to is that even where an employer finds gross misconduct and sufficient reasons to terminate an employee is the question as to whether that employee was given a fair chance to challenge the decision of termination through an appeal by an independent panel/committee/body or person other than the panel/committee/body or person who heard the case and made the decision to terminate. This is what would entail adherence to the fair rules of natural justice and what is outlined under section 45(5) of the Employment Act thus;

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider—*

(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) The conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural

requirements set out in section 41;

(d) *The previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

(f) *The existence of any previous warning letters issued to the employee*

[Emphasis added].

40. The law therefore sets a template within which a case of termination must be looked at. In this regard I note the Claimant was terminated on 30th November 2010. The reasons for the termination were outlined thus;

....

You recall that on diverse dates already communicated to you, you failed to ensure payment from a customer's account were made within the procedures communicated on RTGS. It is also noted you failed to guide your operations team on how to effect such payments. This resulted in the irregular drawing from a customer's account. This constitutes serious acts of negligence in performance of your duties and borders on gross misconduct. These facts were well explained to you during the meeting with management on 18th November 2010.

...

41. Therefore at the time of termination, these were the reasons that existed with regard to the claimant. But the Claimant has contested these reasons noting that the drawing of the payments from the customer's account followed the applicable procedure at the time and there was no wrongdoing on her part. The Claimant cited the *Procedures for Value Capping: Funds Transfer Service Real-Time Gross Settlement System (RTGSS)* and noted that where there was a bulk transfer of funds exceeding the limit for a Branch manager, she would be the second signatory. The procedure was;

Step 1

At branch

- *The customer will fill in the prescribed form for RTGS*
- *The letter confirms the details of the form and signs of the 'for official use only' section*

Step 2

The Branch to:

- *Draw a cheque from the customer account in favour of our banker e.g. national Bank of Kenya or Co-operative Bank of Kenya or Kenya Commercial Bank Ltd.*
- *Provide instructions of remittance as per customer request to the bank and signed per mandate (the Branch managers will have to be authorised as per the current practice). The instructions should be in bank letter head, a sample of which is provided.*

Step 3

The Branch MUST (we recommend the Branch Manager to do so):

- *Deliver instructions and cheque to the bank for execution and receive acknowledged copy from the bank*
- *Ensure all instructions are with the bank by an agreed time between the bank and ourselves.*

42. The above steps were to be done at the Branch level save for signing of cheques which were exceeding amounts such as the case at hand where the funds transfer related to 2.67 million and thus required a second signatory who was then required under the procedures applicable to confirm whether or not the customer's account had been debited with the amounts in the cheque supposed to be signed and that the documents presented by the Branch Manager were in order and only then, with the assurance of such checks was the cheque to be signed and the RTGSS completed. In this case, the Claimant was emphatic that she complied with the laid down procedures as the cheque presented to her on 26th October 2009 had already been signed by the Branch Manager and that she was satisfied that all was in order as at the time she signed the cheque the customer had sufficient funds in his account to warrant the payment. The respondent's witness Anne Karanja contested this argument on the basis that the Claimant as the Regional Manager had the duty to guide the team under her supervision which she failed to do. That the Claimant had access to all the customer accounts and could verify as to whether the reference account had sufficient funds for the transfer before she could sign a cheque which she failed to do in this case and had she checked the account properly, she could have discovered that there was already an electronic transfer and by signing the cheque, this was a double payment. Further that the Claimant when asked to explain herself, she put blame on the Kisumu Branch Manager noting that all the staff in Kisumu had been trained in the new policy on funds transfer and since the Branch was connected online, there was no need to do an electronic transfer as well as the manual cheque transfer. The Respondent witness also admitted that the new policy as required by the Central Bank of Kenya was under review, it was being implemented in phases and a new policy was not in place until sometime in April 2010 whereas the transaction subject of the claimant's termination had taken place on 26th October 2010.

43. In this regard therefore it can be surmised that the new policy on the electronic transfers and the procedure applicable with regard to RTGSS procedures were under review, were undergoing changes and the staff were being trained on the new procedures for use. This can be surmised from the reply by the Kisumu Branch Manager who wrote in his defence noting that the error could have arisen as the system was new and he was not yet conversant with it. The claimant also wrote a show cause to the Kisumu Branch Manager noting that he and the staff had been trained on the new procedures, an indication that indeed the claimant was aware of such new procedures. Equally the investigations and audit reports in this case are also important to note thus;

Conclusion

The double crediting was contributed by staff who failed to consult the relevant offices in case of doubts, on operational procedure. Due to the negligence, the Bank's position is generally weak and hence there is need to review the way forward in a consultative manner in order to arrive at as a solution which does not expose the bank and also ensures the Bank interest is safeguarded.

44. In essence the audit report was an acknowledgement that Respondent procedures were generally weak and required a review as in the recommendation at paragraph 4.1.5 and 4.1.6 the report notes;

The procedures need to be reviewed to minimise similar cases of misinterpretations.

The matter is not a fraud on the part of staff but failure to follow the procedure correctly

45. This infers that the Claimant and the other staff at Kisumu Branch who participated in the transaction on 26th October 2010 were acting in good faith though contrary to procedure as the motive was not to commit fraud; rather it was their failure to use the procedures correctly which procedures were noted to be open to misinterpretation. In this case, unfortunately huge sums were lost through a transaction approved under the hand and supervision of senior staff that included the claimant.

46. With regard to the provisions of section 43 of the Employment Act, the Conduct of the Claimant came into focus. When the discovery with regard to the double transfer was discovered in January 2010, she did not move with haste to recover the lost funds. Indeed the error was only noted by the Kisumu Branch Manager when the customer wanted to undertake a similar transaction. In this regard, the Claimant as the overall supervisor who received end of day reports of reconciliations; where diligent, the double transfer

should have been noted earlier than it was and the lost funds may have been covered as she notes that the customer continued to make transaction in his account. The systems in place even without the policy at the time being reviewed had manual checks and balances that should have enabled the Claimant as the supervisor with high degree of responsibility to act accordingly and address the anomaly promptly and without blaming her juniors as overall she carried the highest responsibility. Even when the error was noted, it was not until April 2010 when the Claimant made effort to contact the customer so as to recover the Kshs.500, 000.00.

47.I therefore find, the Respondent policy coupled with failures by the Claimant and other staff at Kisumu Branch contributed to a large extent in the losses that the Respondent incurred. This was addressed subsequently in the policy review as the one for 2006 has since been changed with one adopted in April 2010. There must have been a good reason for these reviews and changes noting the changes in technology and need for further training of staff at Respondent business. At the point when the claimant was sent on interdiction, there existed genuine reasons for her to respond to that are valid. Fair procedure then required her to be removed from the workplace for the Respondent to undertake investigations upon which the Claimant was to be given a fair chance to respond to.

48.On that basis, even where there was an error by the Claimant or the Respondent procedures had ambiguities, the Claimant was sent on interdiction to facilitate investigations based on the applicable policy. Where such interdiction and investigations were necessary, and the Claimant was subjected to the same, the Respondent then had a duty to ensure due process in addressing the interdiction. As noted by the Claimant in her pleadings, evidence and submissions, the policy required that once on interdiction, it was to be for a period of one month. Thus when the Claimant appealed against her interdiction, indeed she had a justification to do so. The subject policy had provided for a time period for such an action and to keep an employee on interdiction over long periods of time was tantamount to subjecting the employee to mental anguish and with loss of income as to keep such an employee on half pay even with the promise of an ongoing investigations is to remove her from her job where she had full pay and was able to live in dignity. As noted in the case of **Caliph O Ogega versus the National social Security Fund, Cause No. 280 of 2013** where the Court held;

Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the Employment Act. ... due process must be followed.

49.Fair procedure is therefore the fodder for labour relations. Even where an employer has valid and justifiable grounds to effect a termination, fair procedure in addressing the same must be followed. Without fair procedure, due process becomes a mirage. From the point of the interdiction of the claimant, in find fundamental lapses in fair procedure;

On 10th May the Claimant was interdicted;

On 21 June 201 the Claimant appealed against the interdicted;

On 28th July 2010, the appeal was rejected;

On 25th October 2010 the Claimant lodged a second appeal against her interdiction;

On 27th October 2010 the second appeal was rejected;

On 11th November 2010 the Respondent invited the Claimant to a meeting without setting out the agenda;

On 30th November 2010 the Claimant was terminated.

50. the above outline of proceedings cannot be equated to fair procedure.

51. Both parties admitted there was a meeting held on 18th November 2010 which lasted for approximately 5 minutes as the Claimant left agitated and not keen to have her case addressed. There is however no evidence on what agenda this meeting was to have. It is equally not clear why the Respondent failed to take minutes or invite the Claimant for a disciplinary hearing if at all this was the intention of calling her for this meeting. Such a hearing notification should have followed the laid down procedures per the Respondent policy manual and practice where the Claimant should have been accompanied by a fellow employee of her choice. This is not a negotiable procedure; it is mandatory even where the Respondent policy is not emphatic on the same. where the intention was to ensure due process in hearing the Claimant in her defence, the investigations report or the audit report that led the Respondent to terminate the Claimant should have been availed to her prior to the disciplinary hearing/meeting and her right to attendance together with her representative from the work place outlined for her. Where the Claimant chose to attend alone, the duty was on the Respondent to outline the right to her well in advance and not ambush the Claimant as it were. This is the rationale behind section 41 of the Employment Act.

52. Fair procedure as noted under section 45(5) of the Employment Act entails that upon termination, an employee to be granted right of appeal. My reading of the termination letter dated 30th November 2010 did not indicate how, when or to who an appeal was to lie. Even for an old customised employee of 20 years like the claimant, the basic minimum requirements of the law are equally guaranteed to her once she is the subject of termination of her employment. It does not matter the rank, time period served or the offence/misconduct cited; the right to a hearing in the presence of another colleague and the notification for appeal are entitlements that did not abate. The Respondent cited the case of **Peter Akidah Omburo versus South Nyanza Sugar Company Limited, Cause No. 366 of 2010** the matter had similar issues at trial like this case and the Court held that fairness of a hearing is not determined solely by its oral nature and it may be conducted through exchange of letters which amounts to fair hearing. In the case, Mr Peter Omburo had been engaged in a long exchange of show cause correspondence where he was afforded an opportunity to defend himself but he chose to be rude and arrogant to the employer. However each case must be looked at on its own merits. Where an employer has made a clear intention that an interdiction will lead to a hearing despite a protracted exchange of correspondence, that intention if not achieved, an employee is left with expectation that has justification under section 41 of the Employment Act. When the Claimant appealed against her interdiction, prompt replies were that the matter was still under investigations. This investigation where it was completed, it was not shared with the claimant. Where the Claimant was the subject of such an investigation, she was never called to be interviewed. The investigation opened and closed without a key informant not being given a chance to explain herself. To therefore rely on such an investigation without hearing the Claimant in the presence of a fellow employee of her choice, I find to be an unfair procedure. To thus rely on a flawed procedure to terminate the claimant, an essential element lacked; that of procedural fairness.

53. This is unlike the case of **BIFU versus Barclays Bank of Kenya Ltd**, where the Claimant was specifically called severally for his disciplinary hearing, the agenda was sent in advance and was advised to be accompanied by his union representative but still failed to attend the disciplinary hearing. The Claimant in this case was never invited for a disciplinary hearing despite being on interdiction for a long period.

Remedies

54. On the finding that the claimant's termination was procedurally unfair compensation is due. The Court will award three (3) Months' pay in compensation. This amounts to KShs.662, 529.00.

55. The Claimant is seeking that her interdiction be declared unlawful and an order that her withheld salaries be paid. I find there were substantive grounds leading to the termination however the process adopted in arriving at such termination was unfair. On such basis, the Claimant cannot find justification in a claim for reinstatement and the interdiction which commenced lawfully ended up in an unfair procedure that the Court had made a finding and awarded. Reinstatement will therefore not be an issue to consider or an appropriate remedy to grant in this case.

56. On that finding, where the Claimant remained an employee of the Respondent until 30th November 2010, her withheld salaries until such termination were due and owing at the time to termination. The claimant's pay withheld as at 10th May 2010 was Kshs.71, 755.00 until October when it was increased. This is due together with salaries withheld from October to November 2010 at kshs.78, 214.00. The Claimant is awarded Kshs.443, 448.00.

57. Where there is no hearing and an employee is terminated without notice, pay in lieu is due. Under the contract the termination period was outlined but in the letter of termination, the Respondent offered to pay three (3) month pay in lieu of notice. Such pay is hereby confirmed and will be awarded to the Claimant based on her last pay of Kshs. 220,843.00 all being Kshs.662, 529.00

58. The Claimant is seeking possible salary increments pending retirement. The claimant did not lay any contractual or statutory basis for this particular head of claimant. The position at Common Law is well known and the Court of Appeal has gone into the same especially in Rift **Valley Textiles Ltd v Edward Onyango Oganda in Nakuru Civil Appeal No. 27 of 1992** on the basis that such payments are not due the only exception would be where the contract of employment provides for payment of salary for unserved part of the contract. I find no good cause, evidence or justification for this claim. This is declined.

59. Severance pay/gratuity pay is not due in a case that does not address redundancy. I did not find any evidence in this regard. This is declined.

60. The Respondent stated that the claimant's dues were withheld noting that the amounts of 2.67 million has not been recovered but a sum of kshs.500, 000.00 has since been paid. The withholding to the terminal dues on the grounds that were subject of her termination and particularly where the Respondent has not filed a counter-claim for the same is double punishment. These dues should be unconditionally released to the claimant. Equally her Certificate of Service is a right the Claimant enjoys under section 51 of the Employment Act, and should have been released together with the letter of termination and the continued withholding the same is against the applicable law. For this reason, the claimant's costs will be awarded together with interests on the withheld salaries.

In conclusion, I enter judgement for the Claimant in the following terms;

- 1. A declaration that the termination of the Claimant was procedurally unfair;**
 - a. The Claimant is awarded Kshs.662,520.00 in compensation;**
 - b. Notice pay awarded at kshs.662,520.00;**
 - c. Withheld salaries at Kshs.443,448.00;**
- 2. Interest is payable on 1)(c) above at Court rates;**
- 3. Costs of the suit;**
- 4. The Respondent is to release the Certificate of Service to the Claimant within 7 days; and**
- 5. Amounts payable herein are subject to section 49(2) of the Employment Act.**

Delivered in open court at Nairobi this 19th day of February 2015.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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