



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 427 OF 2011**

**KENNETH OUMA OGUTU .....CLAIMANT**

***VERSUS***

**CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT**

Mr. Maluti for the Claimant

Mr. Echesa for Respondent

**JUDGMENT**

1. This suit was brought vide a Memorandum of Claim on 22<sup>nd</sup> March, 2011 seeking the following reliefs;

- a. 1 month salary in lieu of notice
- b. maximum compensation being salary of 12 months
- c. general damages for breach of contract
- d. terminal benefits

In the alternative,

- e. reinstatement to employment, and
- f. payment of salary from date of dismissal to date of reinstatement
- g. costs of the suit and interest.

**2. Brief Facts**

The Claim is based on the following facts which are common cause;

The Claimant was employed as a Graduate Clerk on 22<sup>nd</sup> November, 2006. He was confirmed on permanent and pensionable status on 23<sup>rd</sup> May, 2007.

3. The terms of employment were governed by the letter of appointment, and the Collective Bargaining Agreement between Kenya Bankers Association and Banking Insurance and Finance Union (Kenya).

4. The claimant worked in various departments including the following;

- i. a teller
- ii. Systems Administrator
- iii. promoted to section head being custodian of ATMs

In the role as the Custodian of ATMs, the Claimant was the contact person between the Bank and Service Providers and between departments that dealt with ATM.

- iv. appointed to a Task Force for conciliation of payments to IDPS made by the Bank. In this role, he resolved payments worth Ksh.49,35 Million out of Ksh.51.82 Million disputed claims. He was given a commendation on 5<sup>th</sup> October, 2007 for the good work which had taken 4 months.
- v. appointed as a Credit Administrator

5. On 5<sup>th</sup> November, 2009, he was confirmed as a section head and worked at the ATM desk up to the month of March, 2010.

6. On 26<sup>th</sup> March, 2009 the Claimant went on annual leave. Upon return, he was deployed to the Desk In Charge of Kenya Revenue Authority (KRA) Payments Unit till end of June 2010 and had a letter to that effect.

7. The Claimant was then redeployed to assist at the ATM desk without a letter to that effect. He worked until 24<sup>th</sup> September, 2010, and proceeded on sick leave on 25<sup>th</sup> September, 2010.

8. He was treated for acute Amnesia and diagnosed with low blood count. He was given four (4) days sick leave by the Operations Manager.

9. The sick leave was extended for three (3) more days since the Claimant was still unwell. He returned to work on 2<sup>nd</sup> October, 2010.

10. Upon return he was asked by the Security Officer to record a statement regarding theft of Ksh.80 Million that had occurred at the Bank while he was away. The Claimant had learnt of the theft from the press.

11. The Claimant was taken to the Nairobi Area Police Post to record a statement. He was held overnight by the police. He was asked to leave his phone for a week, with the police. The same was later return to him.

12. The Claimant was suspended from work on 5<sup>th</sup> October, 2010. He was given a notice to show cause on 17<sup>th</sup> December, 2010. He responded to the same on 21<sup>st</sup> December, 2010 and attended a disciplinary hearing on 4<sup>th</sup> February, 2011.

13. He was charged for violating procedure, hence contributing to the lapses that led to the theft in that he had failed to avail an identity list of G4S crew authorized to collect cash from the Bank to the co-custodian who had taken over as the custodian of the ATM during his absence. In the alternative, he had willfully or negligently facilitated loss of Ksh.80 million stolen by unknown persons by failing to ensure that copies of duly stamped duplicate requisition letters were always presented to him.

14. In his defence, the Claimant stated that he was not at work when the theft took place, and was not aware of the said requisition letters. That no lapse in his work had been brought to his attention. That he had learnt the job of ATM custodian on the job and had not received any formal training on it.

15. That the co-custodian was a new lady who had joined him and was also learning on the job.

16. The Claimant denies having caused any procedural lapses and/or participated in any way in

the theft of Ksh.80 Million. Claimant states that he was unlawfully and unfairly victimized and summarily dismissed without notice. That he had a good work record. He had no previous record of misconduct and/or any previous warnings. That he was shocked by the developments and had appealed to the Respondent to reinstate him back to work in vain.

17. The persons who participated in the release of the money including the co-custodian, the cashiers, and Operations Manager, were charged with the criminal offence of theft and were also dismissed from work. The Claimant prays the court to grant him the relief sought.

18. The Claimant was closely cross-examined by counsel for the Respondent on the various aspect of this case and presented candid answers which were consisted with his version in chief. He appeared to be a credible witness in court.

## 19. **Defence**

The Respondent filed a Reply to the Claim on 19<sup>th</sup> April, 2011 in which it admitted paragraphs 1, 2, 3 and 4 of the Memorandum Claim regarding the particulars of employment of the claimant including that the claimant was a union member, covered by the Collective Bargaining Agreement.

20. The Respondent states that as a result of collusion between certain individuals as well as a dire security lapse caused by deliberate acts of omission, the bank sustained a loss of Ksh.80 Million taken by unidentified persons imposing themselves as Agents of G4S.

21. That the Claimant was given a letter to show cause and appeared before a disciplinary committee alone though he had been given an opportunity to bring a representative of choice. That he was found guilty upon admitting that;

- a. he had not made use of the photo list with respect to instances where cash was collected at the bank which was contrary to the manual
- b. the Claimant only made use of introductory/requisition letters which would insufficiently identify the persons collecting the cash from bank whereas the proper use of the photo list would have enabled the identification of the persons seeking to collect the cash which would have prevented any impersonators from accessing and making away with the cash.

22. That these acts of omission and commission amounted to gross misconduct justifying the summary dismissal. The acts and omission were listed as follows;

- a. willfully neglecting to perform work which it was his duty to perform by failing to avail a photo list of G4S persons authorized to collect cash from the bank or bringing this to the attention of his co-custodian.
- b. careless and improper performance of work which was his duty by failing to adhere to the bank's procedure with respect to introduction of agents prior to collection of cash.
- c. failing to properly perform his duty by not ensuring that a duly stamped requisition letter was presented by the collecting crew before the cash was released
- d. the Claimant committed a security breach relating to the collection of cash form the respondent's vault thus leading to a loss ultimately affecting the respondent's banking business.
- e. that the failure by the Claimant to properly and procedurally make use of photo list facilitated the misidentification and eventual loss of cash at the Respondent's main branch
- f. that as a result of the Claimant's failure to discharge his contractual duties resulted in a security lapse and a series of events leading to the loss of Ksh.80 Million to the substantial detriment of the Respondent.

## 23. **Determination**

The court fully sympathizes with the Respondent for the loss of large amounts of cash. It is apparent that the theft of Ksh.80 Million was planned and executed by persons within and without of the Bank. It is also true that there were deliberate and probably negligent acts of omission and commission that enabled the theft to take place. The issues for determination however are as follows;

- i. was the Claimant guilty of any acts of omission or commission either deliberately or negligently that culminated in the theft of Ksh.80 Million by security imposters?
- ii. was the Claimant lawfully and fairly summarily dismissed from work?
- iii. if not, what remedies are available to him?

#### 24. Issue I

The Claimant was not at work when the theft took place. The Claimant had worked continuously in various departments of the Bank and at the time the theft took place, he had been internally re-deployed to the ATM Custodian Section. That he worked with a co-custodian.

25. That 14 persons including the co-custodian, cashiers/tellers/ and the Operations Manager, *inter alia* were charged with others who were not employees of the Bank with the offence of stealing contrary to **Section 275 of the Penal Code** *inter alia*. That the Claimant was not one of those charged with the offence and indeed was released by the Police upon investigations.

26. That the Respondent did not aver in the Memorandum of Response that it had at any one time trained the Claimant in the specific areas and procedures, it was now accusing him of failing to implement either deliberately or negligently.

27. That as a matter of fact, no documentary evidence by way of an operations manual or terms and conditions of service contained in the letter of appointment were produced by the Respondent to show the job requirements of an ATM Custodian and job requirement of all the other capacities in which the Claimant served.

28. Alleged admissions by the Respondent are not supported by any documentary evidence including but not limited to a statement admitting the offence or minutes of the proceedings in which the claimant admitted the said offence.

29. Furthermore, the Claimant pleaded innocent of the alleged infractions from day one, in his response to the notice to show cause and in his sworn testimony before court.

30. It is undisputed that the Claimant was taken ill during the time of the theft and people probably took advantage of his absence to commit the offence.

31. It is disingenuous for the Respondent to blame the Claimant for the Bank's own failure to train its staff, especially, the co-custodian and the failure by the Operations Manager, who was in charge of all cash transactions in and out of the Bank to put in place acceptable security systems to avert the kind of theft that took place.

32. This indeed is the kind of infraction which should have seen the entire management of the Bank, including the Managing Director take responsibility for the system's failure that occurred on the material day.

33. The court in the circumstances, accepts the evidence by the Claimant that he was targeted in bad faith and used as a scape goat for a system failure which occurred from the top most management of the bank all the way to the bottom.

34. The Claimant was a unionisable employee, and not in any managerial responsibility. Lack of evidence to associate him with the conspirators ought to have satisfied the Bank to let him free

and in the event of doubt, accord him the benefit and release him on normal termination with payment of terminal benefits.

### 35. **The Law**

**Section 43(1)** of the **Employment Act, 2007** provides

*“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.”*

36. The requirement for the employer to prove the reason entails the employer showing on a balance of probability that it had a valid reason to terminate the employment of the employee.

37. This is in rebuttal to the primary averments by the employee that the employment was terminated unlawfully and unfairly (for no valid reason at all and in terms of unfair procedure).

38. **Section 47 (5)** casts the burden of proof as follows;

*“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 the employment or wrongful dismissal shall rest on the employer.”*

39. The Claimant has in this respect discharged his burden of proof on a balance of probabilities that the summary dismissal was wrongful, whereas the Respondent has failed to justify the grounds for the summary dismissal.

40. Accordingly, the court finds that the summary dismissal of the Claimant was contrary to **Section 45(1)** as read with **Section 45(2)(a)** and **(c)** of the **Act** in that the summary dismissal of the Claimant was not for a valid reason and was unfair.

### 41. **Remedies**

The remedies available to an employee are guided by **Section 12** of the **Employment and Labour Relations Court Act**, as amended and read with **Sections 49 and 50 of the Employment Act, 2007**.

42. In this case, the Claimant seeks reinstatement to his previous job. The Claimant was dismissed on 23<sup>rd</sup> February, 2011 and three years are to expire on 23<sup>rd</sup> February, 2015 from date of termination.

43. The Act empowers the court to reinstate the Claimant within three years from the date of termination.

44. Other considerations include those set out under **Section 49(4) a – m** of the **Employment Act**.

The relevant ones for the purpose of this case include;

- a. the wishes of the employee
- b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination
- c. the practicability of recommending reinstatement or re-engagement
- d. the common law principle that there should be no order for specific performance in a contract for services except in very exceptional circumstances

- e. the employee's length of service with the employer
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination
- g. the opportunity available to the employee for securing comparable or suitable employment with another employer
- h. the value of any severance payable by law.

45. All these factors except (b) above appear to be favorable to the Claimant for the purpose of reinstatement. However, criteria (b) regarding the circumstances of the termination present a gloom picture in that, a most serious theft took place at the Bank and the Bank had suspected the Claimant of complicity in the commission of the offence. It would therefore be difficult to revive the trust relationship between the employer and the employee. For this reason, the court is hesitant to make an order for reinstatement. Each case is to be judged on its own merit in this respect. There is no rule of thumb as it were.

#### 46. **Award of Compensation and Terminal Benefits**

**Section 49(4)** also provides the process of awarding damages in terms of **Section 49(1)(c)** of the **Act**. The maximum compensation set under the pension is twelve (12) months' salary.

47. The length of service by the employee and reasonable expectations of continued employment by the employee; the circumstances of the dismissal including the contribution if any by the employee to the dismissal; opportunity for alternative employment, including efforts made to mitigate the loss; and value of any severance pay payable are relevant factors, *inter alia*, in determining the amount of compensation to be awarded.

48. In the present case the Claimant had a very good record of service at work; he had very good prospects of rising in the ladder of employment within the structure of the Respondent as he had shown good leadership skills and had received commendation in that respect. The claimant had served for a period of about six (6) years and was a relatively young man with many years to serve the Respondent.

49. The court has found that there was no evidence at all showing complicity by the Claimant in the theft that took place. He was a victim of circumstances since this took place while he was at home on sick leave. His career prospects in the banking industry were virtually curtailed by the wrongful suspicion and association with the theft. The court finds it appropriate to award the Claimant twelve (12) month's salary as compensation for the wrongful, unlawful and unfair summary dismissal of the claimant in the sum of Ksh.1,147,152.00.

50. The court further awards the Claimant one (1) month salary in lieu of notice in the sum of Ksh.95,596.00 which was the monthly gross salary earned by the Claimant at the time of his summary dismissal.

51. The court further awards the Claimant other terminal benefits due to him by virtue of his letter of appointment and Collective Bargaining Agreement forfeited by virtue of the summary dismissal. The respondent is to compute the said terminal benefits and file with the court within 30 days from the date of the Judgment.

52. The Respondent is to pay the award with interest at court rates from the date of the Judgment till payment in full.

53. The Respondent is also to pay the costs of the suit.

**Dated and Delivered at Nairobi this 4<sup>th</sup> day of March, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**