



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 717 OF 2010

EVANS KAMADI MISANGO.....CLAIMANT

VS

BARCLAYS BANK OF KENYA LIMITED..... RESPONDENT

AWARD

Introduction

1. Evans Kamadi Misango, the Claimant in this case worked for the Respondent Bank for a period spanning over twenty (20) years. Following the termination of his employment in January 2009, he filed a Statement of Claim on 23rd June 2010 seeking compensation for wrongful termination. The Respondent filed a Memorandum of Defence on 22nd November 2010.

2. The matter was initially handled by **Madzayo J** who heard the Claimant's case and when the parties appeared before me on 19th February 2015, I heard the Respondent's case. The Claimant testified on his own behalf and the Respondent called its Branch Manager, Patricia Mburu and Employee Relations Manager, Odhiambo Ooko.

The Claimant's Case

3. The Claimant was employed by the Respondent Bank as a messenger on 19th September 1988. He rose through the ranks to the position of Customer Advisor from 24th December 2002.

4. In October 2008, the Claimant was notified by a Mr. Mwangi of the Banking Fraud Department that he was required to explain the circumstances under which he had issued a cheque book which was used to defraud a customer's account to the tune of Kshs. 9,684,200. The customer went by the name Stephen Kungu Kagiri and the fraudulent cheque was drawn in the name of Lolwe Designers, a customer of Equity Bank. The Claimant testified that he had observed all the required procedures before issuing the cheque book.

5. It is the Claimant's case that the termination of his employment was without any lawful cause. He claims the following:

- a. 1 month's salary in lieu of notice.....Kshs. 62,944
- b. Compensation for loss of earning.....328

- c. Terminal dues.....629,440
- d. Pending leave for 2008.....25,000
- e. Costs and interest

The Respondent's Case

6. In its Memorandum of Defence filed on 22nd November 2010, the Respondent admits having employed the Claimant as a messenger effective 19th September 1988 at a monthly salary of Kshs. 29,376.
7. On 14th October 2008, the Respondent received a report from its Manager at Moi Avenue Branch, Patricia Mburu on a disputed cheque No. 100339 used to withdraw Kshs. 9,684,200 from the account of the Respondent's customer, Stephen Kungu Kagiri held at the Branch. The said cheque was drawn in favour of Lolwe Designers, a customer of Equity Bank. Stephen Kungu Kagiri who learnt of the fraudulent withdrawal upon receipt of his bank statement in September 2008, stated that he had not ordered the cheque book from which the fraudulent cheque was drawn.
8. Investigations into the fraud were carried out between 14th and 21st October 2008 and a final report was presented on 12th January 2010. The investigations revealed that the Claimant had filled in the requisition form for the subject cheque book on 14th February 2008 and that he issued the cheque book on 19th February 2008. At the material time, the Claimant was working at the cheque book counter at the Respondent's NIC Branch.
9. The investigations further revealed obvious discrepancies between the genuine customer's signature and the person who applied for and collected the cheque book. According to the Respondent, had the Claimant been a little bit more diligent, he would have stopped the fraud.
10. The Claimant was required by the Respondent to explain the circumstances under which the fraudulent transaction had taken place but his statement was general and devoid of any value to the issue at hand. The Claimant was then suspended on 22nd October 2008 to pave way for investigations. He was thereafter invited to a disciplinary hearing on 4th December 2008 at which he was accompanied by a union representative, Pius Mutua.
11. The disciplinary panel concluded that the Claimant was culpable in that:
 - a) He did not follow the established procedures of ordering and issuance of cheques;
 - b) His explanation of what had transpired was inconsistent especially when subjected to further probing;
 - c) He seemed to understand some of the operational weaknesses at the NIC Branch e.g. lack of Closed Circuit Television (CCTV) cameras and system vulnerabilities which he capitalised on;
 - d) The investigations conducted by BASIS had implicated him in the fraud.
12. Following recommendation by the disciplinary panel, the Claimant's employment was terminated on 31st January 2009. He was advised of his right of appeal which he did not exercise.
13. The Respondent submits that the Claimant was guilty of the following negligent acts and omissions:
 - a) He failed to detect that the cheque requisition was being made by a customer of a non domiciled branch contrary to Bank rules and procedures requiring that such requisition be made at the domiciled branch only;
 - b) He failed and neglected to notice and/or deliberately ignored the fact that the signature

on the cheque requisition form was different from the customer's specimen signature held by the Bank.

Findings and Determination

14. The issues for determination in this case are as follows:

- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in effecting the termination the Respondent observed due procedure;
- c) Whether the Claimant is entitled to the remedies sought.

The Termination

15. On 22nd October 2008, the Claimant was issued with a suspension letter stating the following:

“The bank is currently conducting investigations in respect to the fraudulent cheque withdrawal on a/c 075-1668058 of Kshs. 9,684,200.00 in which you have been mentioned.

In order to facilitate the investigations, it has been decided to suspend you from employment. You are therefore with effect from today's date hereby suspended from employment under Clause A 5 c) i) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical and Subordinate staff for a period of thirty (30) days.

During the period of suspension, you will receive salary at half your basic pay. You are also required to report to the branch once a week on Tuesdays to sign the attendance register.

Yours sincerely,

Isaac Mwaura

Branch Manager”

16. On the Claimant's culpability, the BASIS investigation report concluded as follows:

“This is the staff that would have stopped this fraud if he was keen in checking the signature. There were obvious discrepancies of the signature signed by this fraudster as he picked the cheque book which he could have spotted. He however indicated that he was convinced that that was the genuine customer and its the reason why he issued the cheque book. Indeed this signature was different from the one that was signed during the requisition of the cheque book. This clearly indicated that the other signature was not made in the presence of the bank staff.”

17. This was confirmed by the Claimant during the disciplinary hearing on 4th December 2008 where he stated that:

“I should have called the customer to check whether he had placed the cheque book order and I should have reconfirmed the ordering signature. The signature used during the ordering of the cheque book differs and this would be possible because overtime signatures change...even my own signature that I used when opening my account has changed over time.”

18. The Claimant's termination letter dated 31st January 2009 reads *inter alia*:

“Following the disciplinary hearing that you attended on 4th December 2008 regarding the case

where you negligently issued a cheque book that was used to defraud a customer's account to the tune of Kshs. 9,684,200.00, I am satisfied that you failed to follow the Bank's laid down procedures.

In view of this, the bank is not prepared to have you continue in its service and with effect from today's date; your services are terminated for gross misconduct/negligence in accordance with the provision of Clause A 5(a) iv of the Collective Agreement covering Section Heads, Clerical, Technical and Subordinate staff, by payment of one month's salary in lieu of notice. You will also be paid for 15 outstanding leave days accrued to date but not utilized.

If you feel this decision is unfair you can appeal against it by writing to the Employee Relations Advisor, Mr. Chris Huka stating clearly the reason for the appeal within 5 working days of receiving this letter.

Yours sincerely,

Isaac Kamau Mwaura

Branch Manager-NIC House

19. By this letter, the reason for the termination of the Claimant's employment was narrowed down to negligently issuing a cheque book that was used to defraud a customer's account. In the submissions filed on behalf of the Claimant on 17th February 2015 it is submitted that in terminating the Claimant's employment, the Respondent acted in a discriminatory manner because the other staff involved in this transaction were not terminated. According to the Claimant, his role in this matter was minimal and he ought not to have been terminated.

20. Section 43 of the Employment Act, 2007 provides that:

(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.

21. To my mind, the burden placed on the employer by Section 43 is to demonstrate a valid reason which would cause a reasonable employer to terminate the employment of an employee. The *Halsbury's Laws of England (4th Edition Vol 16) at page 482* expounds this principle as follows:

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

22. It is not the role of the Court to re-enact the internal disciplinary process already undertaken at the workplace. The responsibility of the Court is to examine the legality and reasonableness of the action taken by an employer against an employee and if the set standards are satisfied, then the Court will not

interfere.

23. By his own admission at the disciplinary hearing whose record was not challenged, the Claimant failed to take certain precautionary measures at the time he issued the subject cheque book to the fraudster. In his words: *“I should have called the customer to check whether he had placed the cheque book order and I should have reconfirmed the ordering signature.”*

24. This Court has stated in the past that banks operate in a highly sensitive environment requiring the highest degree of prudence and probity to which their employees must adhere (see *Agnes Murugi Mwangi Vs Barclays Bank of Kenya Limited [2013] eKLR*).

25. The Claimant failed to live up to this standard and the Court finds that the Respondent had a valid reason for terminating his employment. The termination was therefore substantively fair.

Termination Procedure

26. I will now consider the procedure adopted by the Respondent in effecting the termination. The reason for the termination of the Claimant's employment falls under what is commonly known as misconduct. The procedure for handling such cases is set out under Section 41 of the Employment Act, 2007 as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

27. I have examined the disciplinary procedure to which the Claimant was subjected prior to the termination of his employment and am satisfied that it was in compliance with the law and the applicable Collective Bargaining Agreement. Consequently, I find that the termination was procedurally fair as well.

Remedies

28. In light of my finding that the termination of the Claimant's employment was substantively and procedurally fair, the claim for compensation on account of unfair termination fails and is dismissed. The claims for one (1) month's salary in lieu of notice and fifteen (15) days' leave pay are admitted and are payable. The claim for terminal dues was not proved and is dismissed.

29. In the final analysis I make an award in favour of the Claimant in the following terms:

- a) 1 month's salary in lieu of notice.....Kshs. 62,944
- b) 15 days' leave pay (62,944/30x15).....31,472

Total.....94,416

30. Each party will bear their own costs.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF
APRIL 2015**

LINNET NDOLO

JUDGE

Appearance:

Mr. Koceyo for the Claimant

Molenje for the Respondent