



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1156 OF 2012
RASHID JENEBY.....CLAIMANT
VS
PRIME BANK LIMITED.....RESPONDENT
AWARD

Introduction

1. Rashid Jeneby, the Claimant in this case worked for the Respondent Bank in the position of Operations Manager, with his last station being Industrial Area Branch. Following his summary dismissal by letter dated 1st August 2011 which took effect on 30th July 2011, the Claimant brought this action seeking compensation for unlawful and unfair termination of employment.
2. The parties filed the following pleadings:
 - a. Statement of Claim filed by the Claimant on 6th July 2012;
 - b. Memorandum of Response filed by the Respondent on 16th October 2012;
 - c. Reply to Memorandum of Response filed by the Claimant on 20th November 2012;
 - d. Amended Memorandum of Response and Counterclaim filed by the Respondent on 31st January 2013;
 - e. Amended Reply to Amended to Amended Response and Counterclaim filed by the Claimant on 23rd April 2013.
3. The parties also filed a wide range of supporting documents.
4. The trial took a considerable period of time owing to the detailed nature of the evidence adduced by the parties. There was also an interlocutory application by the Respondent on which the Court was called to render a formal ruling. The Claimant testified on his own behalf and the Respondent called four (4) witnesses; Banu Salyan (Branch Manager) Neekita Solanki (Head of Internal Audi) Stephen Waihenya Mathenge (Security Manager) and Josephine Muthoni Macharia (Human Resource Manager). Both parties then filed written submissions.

The Claimant's Case

5. The Claimant was employed by the Respondent Bank in the position of Operations Manager effective 1st November 2009. He had brief stints in the Westlands and Riverside Branches before proceeding to the Industrial Area Branch where he worked until the termination of his employment.

6. On 1st September 2010, the Claimant was suspended on allegations of negligence and fraud and on 1st August 2011 he was summarily dismissed. In his Amended Reply to Amended Memorandum of Response and Counterclaim filed on 24th April 2013, the Claimant denies the Respondent's allegations that he was part of a staff conspiracy of silence regarding massive fraud at the Respondent's Industrial Area Branch which led to losses.

7. In this regard, the Claimant pleads that he worked with several other Bank Officers who were responsible for different transactions including computer entries relating to customer transactions which he relied upon as part of the working system set by the Respondent Bank.

8. While admitting having signed several vouchers, the Claimant denies having had any knowledge of their being fraudulent. In particular, the Claimant admits having printed a fixed deposit transaction voucher (FDR) in the name of one Yusuf Ali Haji Ibrahim on 11th August 2010 but denies any knowledge of any irregularities regarding the said FDR.

9. The Claimant states that his duties at the Bank were limited to verifying interest rates on fixed deposits, value dates and the amounts payable before printing the FDRs for filing. With respect to the FDR printed for Yusuf Ali Haji Ibrahim therefore, the Claimant relied on information posted by other bank staff. With the full knowledge of his Branch Manager, Banu Salyani, the Claimant rectified the error that had occurred in this particular transaction.

10. The Claimant denies having acted carelessly or fraudulently. He adds that the employees involved in the fraudulent transactions had admitted their involvement in their statements recorded with the Bank. None of them had implicated him in the fraudulent transactions.

11. The Claimant states that he is aware that criminal charges have been preferred against two of the employees; Thomas Ndungu Wainaina and Rita Mukami Miriti as well as a customer by the name Mathew Mwangi Kinuthia. According to the charge sheet, the fraud spanned from August 2008, long before the Claimant had joined the Bank, to July 2010. The Claimant denies any culpability in the loss incurred by the Respondent and asks that the Respondent's entire counterclaim be dismissed.

12. With regard to the disciplinary hearing, the Claimant states that he received the letter of summon on 11th August 2011 long after the scheduled hearing date.

13. He claims the following:

- a. A declaration that his summary dismissal was wrongful
- b. Maximum compensation at 12 months' salary for wrongful loss of employment
- c. 3 months' salary in lieu of notice.....Kshs.600,000.00
- d. 11 months' half pay salary withheld from
1st September 2010 to 30th July 2011.....Kshs.1,100,000.00
- e. Unpaid (20) days' leave.....Kshs.200,000.00
- f. Certificate of service
- g. Costs and interest

The Respondent's Case

14. In its Response as amended on 3rd January 2013, the Respondent admits the Claimant's employment record but states that the Claimant carried out his duties carelessly and/or fraudulently thereby exposing the Respondent to loss and damage contrary to his contract of employment dated 1st May 2010.

15. The Respondent further states that following reported incidences of inexplicable loss of funds at its Industrial Area Branch, it undertook investigations and established that on diverse dates the Claimant negligently and fraudulently carried out his duties and further breached his employment contract as a result of which the Respondent suffered loss and damage. The Respondent adds that the Claimant had admitted his negligent conduct.

16. The Respondent sets out particulars of negligence and/or fraud on the part of the Claimant, including engaging in a conspiracy of silence and connivance, authorisation of fraudulent transactions, dereliction of duty and blatant negligence. The Respondent points out a fixed deposit transaction voucher (FDR) in the name of Yusuf Ali Haji Ibrahim printed out by the Claimant on 11th August 2010 which turned out to have been irregular.

17. As a result of the Claimant's acts and/or omissions, the Respondent lost the sum of Kshs.4,143,537.45 which the Respondent claims from the Claimant by way of counterclaim.

18. Following investigations, the Claimant was interdicted on half pay by letter dated 1st September 2010 and was subsequently summoned to a disciplinary hearing by letter dated 20th July 2011. The letter of summon was sent by registered mail to the Claimant's known address being P.O Box 20474-00200 Nairobi. The Claimant did not appear for the disciplinary hearing scheduled for 29th July 2011 prompting the Respondent to summarily dismiss him effective 30th July 2011.

19. According to the Respondent, there was a valid reason for the Claimant's dismissal. Further, due process was observed in handling the Claimant's case whose failure to appear for the disciplinary hearing could not be blamed on the Respondent.

Findings and Determination

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

- a. Whether the Respondent had a valid reason for summarily dismissing the Claimant;
- b. Whether in handling the Claimant's case, the Respondent observed due procedure;
- c. Whether the Claimant is entitled to the reliefs sought;
- d. Whether the Respondent has made out a proper counterclaim against the Claimant.

The Reason for Dismissal

21. On 1st September 2010, the Respondent issued the following suspension letter to the Claimant:

“ Dear Mr. Jeneby,

We refer to the revelation of the fraudulent incidences that occurred on diverse dates at the Industrial Area Branch. During the hearing on 1st September 2010, you confessed having signed several vouchers pertaining to fraudulent transactions without verifying them.

You also admitted transferring the fixed deposit in the name of Yusufalli Haji Ibrahim A Khana to Mathew Mwangi Kinuthia on 16/8/2010, even though you were aware that head office was

investigating into various fraudulent transactions in fixed deposit accounts of the branch.

In accordance with the Human Resource Policy of the Bank under section 17.3-3 it has been decided to suspend you from employment pending further investigations.

During your suspension;

- You will be paid 50% of your emoluments.*
- You will be called upon to report to Head Office for further questioning.*

Your suspension is indefinite and you will be advised on any further administrative measures in due course.

Kindly acknowledge receipt of this letter by signing on the duplicate copy attached.

Yours sincerely,

A.R. JAGANNATHAN

GENERAL MANAGER”

22. On the same day that the Claimant was suspended, he recorded a statement in which he stated *inter alia*:

“On the 11th/8/10 I was given a voucher to print an FDR for Mathew Kinuthia Mwangi, but in the system was reading Yusufali – Haji Ibrahim. I printed the FDR but did not counter check with voucher and register which all read Mathew Kinuthia. I admit this is a mistake on my part.

After noticing this misprinting, I was informed by Lucy who is a clerk in the bank that the FDR printed was in the wrong name. So I told her that we will rectify this next morning on 12/08/2010.

Unfortunately due to all the investigation going on out of fraud discovered in the branch, I told Lucy not to do any FDR until Monday the 16th /August 2010.

The FDR printed of Yusufali Haji Ibrahim A. Khana was for Kshs.110,291.35 and was signed by me alone.

In the course of investigation which is currently going on, I have noted that I have signed vouchers of various dates which were discovered to be fraudulent.

I may want to inform the bank I signed the said vouchers on trust of the other officers at the branch.

I am deeply remorseful for this because of the damage it has caused the bank.”

23. Further, in an undated letter to Mr. A.R Jagannathan the Claimant states:

“I take full ownership of my negligence, my mistake was trusting staff members as opposed to managing them and verifying their transactions.”

24. From the evidence on record it is not in contest that there was massive fraud at the Respondent's Industrial Area Branch. The Claimant's actual job description was in contention. However, from his own evidence, he was the second in command at the Branch and was responsible for ensuring proper running of Branch operations.

25. The Claimant's 1st and 2nd witnesses, Banu Salyani and Neekita Solanki took the Court through a number of vouchers signed by the Claimant which turned out to be fraudulent. While admitting having signed these vouchers, the Claimant testified that he had no knowledge that they were fraudulent and that he did not benefit from the fraud in any way.

26. Section 43 of the Employment Act, 2007 requires an employer to prove a valid reason for terminating the employment of an employee. In this regard, the burden placed on the employer is to demonstrate, on a balance of probability, the existence of a valid reason that would move a reasonable employer to terminate employment.

27. In *Paul Waigiri Muriuki Vs Nairobi Water and Sewerage Company Ltd [2015] eKLR* this Court rendered itself as follows:

“When the Court sits it does not ask itself what it would have done had it been in the position of the employer. What it asks is whether given the facts and circumstances of the particular case, the employer acted lawfully and in a reasonable manner.”

28. This is an important authority in light of the concern expressed by the Respondent in their final submissions that the Court appeared to be sympathetic to the Claimant.

29. The Claimant's case takes the line that he was an innocent victim in a network of fraud perpetrated by a number of employees at the Respondent's Industrial Area Branch. The Claimant's letter of summary dismissal dated 1st August 2011 held him culpable for negligence in the discharge of his duties, exposing the Bank to fraudulent activities. My examination of the circumstances surrounding the fraud at the Respondent's Industrial Area Branch with particular focus on the Claimant's role reveals an over reliance by the Claimant on staff working under him.

30. From the evidence adduced before the Court the job of Operations Manager in a banking environment entails the whole gamut of back and front office operations in the Bank with the main commodity being customer funds. This Court has stated elsewhere 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*).

31. As Operations Manager, the Claimant held a crucial position in the Branch and his level of prudence and attention to detail should have been commensurately high. It was not enough for the Claimant to trust his staff; he should have verified their word and action. To whom much is given much is required. In view of the foregoing, the Court finds that the Respondent had a valid reason for terminating the Claimant's employment.

Termination Procedure

32. I will now examine the procedural steps taken towards the Claimant's dismissal. On 1st September 2010, the Claimant was suspended indefinitely on half pay. He stayed on suspension until his summary dismissal on 1st August 2011.

33. Ordinarily, suspension is not a disciplinary action nor does it fall within the stages of the disciplinary procedure. It is a neutral action to allow for unfettered investigations into allegations made against an employee and does not attract loss of benefits.

34. More importantly, an employee should not be kept under suspension for too long. In *Cecilia Muthoni Njoroge Vs Nairobi Stock Exchange [2014] eKLR Nduma J* found an eleven (11) months' suspension inordinately long and unfair. I hold the same view because a prolonged suspension acquires the character of disciplinary action meted against an employee without due process. It follows therefore that the Respondent's decision to place the Claimant on an indefinite suspension which ended up being

eleven (11) months was an unfair labour practice.

35. Moreover, the Court did not find any provision in the Respondent's Human Resource Policy Manual for withholding of fifty per cent of the Claimant's salary during the suspension period. Consequently and given my finding that suspension is a neutral action the Court finds that the Respondent's action in this regard was unlawful and unfair.

36. Section 41 of the Employment Act, 2007 sets out the procedural fairness requirements in cases of misconduct, poor performance or physical incapacity 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;

37. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

38. The Respondent produced its Human Resource Policy Manual which sets out the procedures to be followed in disciplinary cases leading to termination of employment. Instructively, the procedures in the Respondent's Human Resource Manual are similar to those set out under Section 41 of the Act.

39. I fully associate myself with the holding of **Mbaru J** in *Kenya Union of Commercial Food and Allied Workers Vs Meru North Farmers Sacco Limited [2014] eKLR* that even in cases of gross misconduct which render an employee liable to summary dismissal, the procedural fairness requirements set out under Section 41 of the Act are mandatory.

40. Prior to his suspension, the Claimant was invited to record a statement on the subject fraud which he did on 1st September 2010 and on 20th July 2011, the Respondent wrote to him summoning him for a disciplinary hearing on 29th July 2011. This letter was sent by registered post to the Claimant's known address P.O. Box 20474-00200 (City Square) Nairobi. A certificate of posting produced by the Respondent shows that it was received at Westlands Post Office on 21st July 2011. However, the Claimant told the Court that he did not receive the letter of summon until 11th August 2011 well after the date for the disciplinary hearing.

41. A disciplinary hearing is a critical stage in a disciplinary process and by the time an employer makes the decision to subject an employee to this stage in the disciplinary chain, disciplinary action is clearly in view. The employer is therefore under a duty to ensure that the employee is duly notified of the date and venue of the disciplinary hearing in good time. The Respondent's Human Resource Manager, Josephine Muthoni Macharia told the Court that the Respondent had discharged this mandate. She was however unable to explain why she did not call the Claimant to pick the letter from the Respondent's office. The Court rejected her explanation that she did not have the Claimant's telephone number given the Claimant's senior position in the Bank.

42. I have examined the Respondent's efforts towards notifying the Claimant of the disciplinary hearing date in the face of the gravity of the charges facing the Claimant and the resultant consequences and find these efforts wanting. For this reason, the Court finds that the Respondent failed to avail the Claimant an opportunity to defend himself and the dismissal was therefore procedurally unfair.

The Respondent's Counterclaim

43. Before addressing the issue of the remedies available to the Claimant, I need to dispense with the

Respondent's counterclaim. The Respondent states that as a result of the Claimant's negligence, it lost the sum of Kshs.4,143,537.45. The Respondents 2nd witness, Neekita Solanki told the Court that this amount was made up of fraudulent vouchers signed by the Claimant as well as a cash shortage of Kshs.1,216,000.00

44. The Court however noted that two former employees of the Respondent namely; Thomas Ndungu Wainaina and Rita Mukami Miriti had been charged with the theft of Kshs.9,814,275.05. More significantly, in their statements to the Bank, these former employees together with John Njoroge who was a Junior Officer in the Bank admitted owing the Bank substantial sums of money. No evidence was led to prove that the amount being claimed from the Claimant was not part of these amounts. Since the Respondent's counterclaim is in the nature of a claim for special damages, specific evidence ought to have been adduced and in its absence, the counterclaim fails and is dismissed.

Remedies Available to the Claimant

45. Having found the Claimant's dismissal unfair for want of due procedure, I award him six (6) months' salary in compensation. In making this award, I have taken into account the Respondent's action of keeping the Claimant in unlawful suspension for eleven (11) months tempered with the Claimant's length of service and my finding that there was a valid reason for the termination.

46. I also award the Claimant three (3) months' salary in lieu of notice in accordance with his employment contract. In light of my finding that the Claimant's suspension was unlawful, I allow the claim for salary withheld during the suspension period. The Respondent did not produce any leave records to counter the Claimant's claim for leave pay which therefore succeeds.

47. Finally I make an award in favour of the Claimant in the following terms:

a) 6 months' salary in compensation for unfair termination.....Kshs.1,200,000.00

b) 3 months' salary in lieu of notice.....Kshs.600,000.00

c) 11 months' half pay salary withheld from

1.9.2010 - 30.7.2011.....Kshs.1,100,000.00

d) 20 days' leave pay (200,000/30x20).....Kshs.133,333.00

Total.....Kshs.3,033,333.00

48. I direct the Respondent to issue the Claimant with a certificate of service and to meet the costs of this case.

49. The award amount shall attract interest at court rates from the date of the award until payment in full

50. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF MAY 2015

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JUDGE

Appearance:

Miss Ouma for the Claimant

Mr. Mwangi for the Respondent