



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 977 OF 2011**

**MARGARET WANJIRU MBUTHIA.....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant's memorandum of claim was filed on 20<sup>th</sup> June 2011 and through it, the Claimant sought relief against the Respondent for wrongful termination of employment. The Claimant averred that she was employed by the Respondent on 27<sup>th</sup> April 1991 and worked until her promotion as manager operations Tom Mboya branch. She averred that she earned a basic salary of Kshs. 147,789/-. She averred that on 30<sup>th</sup> March 2010 the Claimant was acting as the temporary custodian of cash as the person in charge was on leave. She averred that she checked the ATM machine no. 0167 and that Andrew Maritin was the custodian of the keys to the ATM lobby and that he was to supervise the cleaner Anne Wambui Thuo. She averred that about 9.45am she received a call from the ATM service center that ATM machine no. 0167 was not dispensing money and she called Andrew Maritin and they both established that the top cassette was missing. The cleaner was missing and she was found at Mlango Kubwa with 149,000/- and was subsequently charged with theft of the cash. The Claimant averred that investigations were carried out by the Respondent's Fraud Unit and the Claimant was asked to explain what had transpired and why disciplinary action should not be taken against her. The Claimant averred that she gave an explanation on 6<sup>th</sup> April 2010 and was transferred to Moi Avenue and was issued with a reprimand dated 4<sup>th</sup> July 2010. She was invited to a disciplinary interview on 4<sup>th</sup> October 2010 and was suspended on half pay on 4<sup>th</sup> November 2010 and dismissal letter on 14<sup>th</sup> December 2010. She averred that she appealed the decision to terminate her services and the request was rejected by the Respondent through letter dated 28<sup>th</sup> January 2011. The Claimant thus sought an order of reinstatement with the Respondent effective the date of dismissal with full benefits or an order of re-engagement in a position similar to the one previously held effective date of dismissal with full benefits and in the alternative three months notice pay, 12 months compensation, interest at Court rates from date of termination and general and aggravated damages including exemplary damages for libel, costs of the suit and interest at Court rates.
2. The Respondent filed a memorandum of defence on 4<sup>th</sup> October 2012 and in it averred that the Respondent received a report on 30<sup>th</sup> March 2010 that ATM no. 0167 at its Tom Mboya branch had been opened and an amount of Kshs. 841,000/- in 1000/- denominations was missing. The Respondent averred that investigations revealed that the Claimant, who was one of the branch

custodians, had received a call from the Respondent's ATM centre to the effect that ATM no. 0167 at Tom Mboya branch was not dispensing cash and the Claimant was asked to check on the problem and that she instructed her fellow custodian Andrew Maritim to check and he found the ATM door was open and Kshs. 841,000/- had been removed. The Respondent averred that the investigations revealed that the Claimant and Maritim left the cleaner unsupervised in the ATM lobby and did not scramble their combinations to lock the ATM door. The Respondent averred that the theft was facilitated by the failure by Claimant and her fellow custodian to scramble their combinations. The Respondent averred that investigations revealed that the Claimant had on two separate occasions while loading ATMs left her fellow custodian Andrew Maritim to undertake the process of locking the ATM alone contrary to basic procedures. The Respondent admitted suspending the Claimant on half pay on 10<sup>th</sup> November 2010 and on 30<sup>th</sup> November 2010 the Respondent's Disciplinary Committee held a meeting and resolved that the Claimant should be terminated for gross misconduct for having left the ATM's combination unbroken while aware that ATM 0167 contained substantial amount of money. The Respondent averred that the Claimant's services were terminated on 14<sup>th</sup> December 2010 and on 30<sup>th</sup> December 2010 the Claimant appealed her termination. The Respondent averred that the appeal was considered on 18<sup>th</sup> January 2011 and on 28<sup>th</sup> January 2011 communicated to the Claimant that after careful consideration of the issues raised in her appeal the decision to terminate was upheld. The Respondent averred that the law permitted the summary dismissal of an employee who willfully neglected to perform any work it is his duty to perform, or if he carelessly or negligently performs such work. The Respondent averred that the Claimant's actions were contrary to the terms and conditions of service and that the termination was lawful and fair. The Respondent averred that the Claimant was given an opportunity to defend herself in writing and before the disciplinary committee and also on appeal. The Respondent averred that the Claimant failed to exonerate herself and that she failed to follow laid down procedures of ATM's dual custodianship leading to loss of Kshs. 841,000/-. The Respondent submitted that the Claimant's prospects of employment were not reduced and also that reinstatement or payment of compensation was not tenable as termination was fair and procedural.

3. The Claimant sought to amend her suit and included severance pay as she averred that she was entitled to a voluntary exit package for early retirement which she was eligible for had she not been wrongfully terminated.
4. The Claimant testified on 10<sup>th</sup> December 2013 and 15<sup>th</sup> April 2015. She was led in her testimony by Mr. Kanjama. She basically reiterated her averments - she was employed in 1991 and was diligently serving the Respondent until December 2010 when she was dismissed. She testified that she was asked to explain about the incident and that she stated that Maritim was the custodian in charge of ATM when the cash got lost. She testified that she was suspended and went through the disciplinary process and was given a letter of reprimand dated 24<sup>th</sup> July 2010 by Mr. Gerishom Mbui her immediate supervisor. She testified that she signed the reprimand and Maritim was dismissed for his role in perpetuating the theft. She stated that she was reprimanded and transferred to another branch and was surprised to receive the letter of interview dated 4<sup>th</sup> October 2010. The letter required her to appear at Human Resources in respect of the cash. She testified that the matter had been concluded and wondered what had happened. She stated that there was a concurrent case for the Bank where she was a witness. She was asked questions about her former colleague and there were no complaints against her. She testified that the panel of 5 asked her how easy it was for an outsider to access the ATN lobby and wondered how a cleaner could access and operate ATM machine. She stated that she reported to Moi Avenue and was assigned audit duties and after two weeks received her letter of suspension. She was to be on half salary and on 17<sup>th</sup> December 2010 she was contacted and was given the termination letter dated 14<sup>th</sup> December 2010. She testified that she was not told why they revisited the matter that had been concluded. She stated that the Respondent periodically gave a retirement package and there was a package available that year. She testified that she lost her benefits for 19 years of service. She stated she could have applied for retirement under the package by 15<sup>th</sup> March 2010. She testified that she could have applied in June and that the only hold was the ongoing process and she would have

received 1½ months consolidated salary for each year worked, 3 months salary for notice, a once off medical benefit of 150,000/-, 40% loan rebate for immediate settlement or 20% rebate for maximum 4 years. She paid the debt owed of Kshs. 1.4 million with help from her husband but got no rebate as she did not enjoy the benefits of the package. She testified that on pension she did not take the employers contribution. She stated had she taken the package she would not have undergone the matters she went through, being called a thief and a person who cannot be trusted. She testified that she suffers from hypertension. She stated that a good reputation is better than silver or gold especially in the banking sector.

5. The Claimant was cross examined by Mr. Molenje for the Respondent on 16<sup>th</sup> June 2015. She testified that she was terminated for negligence. She stated that there was an incident in March 2010 in the branch where she worked and money in ATM machine was lost. She testified that when she was notified of the non-dispensing ATM she went there immediately and found the top cassette was removed. She tried to locate the cleaner but the cleaner had left. She testified that she could not confirm that she had failed to close the lobby to ATM machine and that she left Maritim to supervise the cleaner after they had made sure the other ATM machines were working and dispensing. She stated that there is a key to the door and there is a dial combination one scrambles. She had her own combination and she would scramble it and the other manager would do so as well. She testified the ATM is always closed by two people. She was referred to her statement and stated that it came to her realization that they had not scrambled the ATM and that there was no other explanation why machine was open other than the failure to scramble ATM. The Claimant testified that if she had not scrambled her password the other manager could open the ATM machine. She stated that from the statement that was the only explanation. She conceded that she may have omitted to scramble the ATM and that it was a possibility there was no scrambling. She testified that investigations were undertaken and the other guardian Andrew Maritim had participated in the theft. She stated that ATM had to be scrambled and closed by 2 people. She testified that it was her custom to scramble her password. She stated that she was given show cause letter and responded and was later called for disciplinary hearing after matter was concluded. She confirmed that she appeared before a committee and that the committee was on a fact-finding mission if Maritim could be reinstated. She testified that the branch manager wrote her a reprimand letter and that she was not aware that the decision of branch manager was unprocedural. She was not aware of the process at disciplinary as this was her first time to appear there. She testified that she amended her claim to include severance pay and this was because had these incidents not taken place, she would have enjoyed the benefits. She stated that she never took the opportunity for early retirement but it was an option she could have taken but did not exercise. She testified that she did not take the early retirement package as she was going through the disciplinary process and termination was the consequence. She stated that she was not told why she was being suspended as the case was already closed. She did not apply for early retirement but wanted to be paid as her colleagues had applied and left under the package. She testified that her termination was contrary to procedure. She confirmed that on termination she was given one month salary as notice.
6. In re-examination by Mr. Kanjama she testified that the investigations concluded that the custodian Andrew Maritim colluded with Anne Wambui Thuo, the cleaner. She stated she was not involved and was given a reprimand letter and that she never was responsible for the loss. She stated that under the early retirement programme there was 3 months salary in lieu of notice among other benefits.
7. The Claimant called Gerishon Wanjohi Mbui the supervisor of the Claimant at the material time. He testified that he is now a pensioner of the Respondent having worked from 1976 till 2008 and thereafter was on contract because of the good work he had done for the Bank. He testified that he was posted to Tom Mboya branch and the Claimant was his number two and reported to him. He testified that he was in the branch on the day the incident took place and he was required to initiate investigations. He stated that the bank has a Fraud Unit and he also has to report to the Police. He reported and investigations started immediately. He testified that he was suspicious of the cleaner and Maritim as the two were left in the ATM area. He stated that when the cleaner was arrested she had some money and stated the money was given to her by Maritim. He testified that a

committee met and came up with a decision and a reprimand was proposed in respect of the Claimant. He stated if there was a lapse then more severe disciplinary action could be taken. He testified that the reprimand he issued was actually a HR letter which is signed by the person heading the particular branch. He testified that he had left the branch by the time the Claimant's services were terminated as his contract had ended. He stated that retirement packages come and go and that staff were to send their request before 15<sup>th</sup> March 2010. He testified that this was an option the Respondent could have given the Claimant.

8. In cross-examination by Mr. Molenje, he testified that once the retirement package was open staff who were interested would apply. He stated that if your conscience tells you there is a bright future you don't go on the negative side. He was referred to the investigation report and confirmed that it indicated that on two occasions custody of cash was entrusted to one supervisor which was contrary to procedures. He testified that the person left behind was left behind to supervise the cleaner. He was referred to the recommendation section of the report and testified that severe disciplinary action was taken and to one it was sacking and the other a severe reprimand. He stated that it was a mistake to leave Andrew Maritim loading ATM machines alone.
9. In re-examination by Mr. Anyona for the Claimant, he testified that severe disciplinary action was given to both employees and for the Claimant it was reprimand and Maritim was sacked.
10. The parties consented to filing submissions and the Claimant filed her submissions on 13<sup>th</sup> June 2015 while the Respondent filed submissions on 27<sup>th</sup> July 2015. The Claimant's submissions reiterated her case and that of the Respondent and submitted that she was reprimanded as recommended by the disciplinary committee and was in fact transferred while the custodian who had colluded with the cleaner to steal the money was dismissed. The Claimant submitted that her evidence and that of her witness was clear that she had been punished and that the dismissal was double jeopardy. The Claimant submitted there was wrongful dismissal as the employer had failed to prove there was basis for the termination. The Claimant relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and submitted that the termination did not meet the threshold in Section 45 of the Employment Act. The Claimant sought the maximum award for compensation and relied on the case of **Fred A. Odhiambo v Attorney General & Anor [2013] eKLR**. The Claimant submitted that she was entitled to benefit from the early retirement package and relied on the case of **Zahida Yasin v Barclays Bank of Kenya [2012] eKLR** where the Claimant was subjected to unlawful disciplinary process and missed the opportunity to apply for the exit package. The Claimant submitted that the termination letter of 14<sup>th</sup> December 2010 was defamatory and that the letter had limited her opportunities. She relied on the case of **University of Nairobi v Mbuthia [1985] KLR 821** on libel and the case **Jimi Masege v Kenya Airways Limited [2010] eKLR** where damages of Kshs. 1,500,000/- were awarded for libel. The Claimant thus submitted that the Court grants the prayers in her claim.
11. The Respondent submitted that the Claimant was dismissed from employment on a valid, fair and justifiable reason and that the Respondent adhered to all procedural requirements before terminating the Claimant's services. The Respondent submitted that at the time of termination the Claimant was employed in the position of Operations Manager at a monthly salary of Kshs. 129,819/-. The Respondent submitted that three issues were for determination.
  - a. Whether the Respondent had a reason to terminate the Claimant from employment
  - b. Whether the Respondent followed due process before terminating the Claimant's services
  - c. Whether the Claimant is entitled to the reliefs sought

The Respondent submitted that it received report of loss of money from ATM no. 0167 and that at the time of the theft, a cleaner by the name Anne Wambui Thuo was left unsupervised at the ATM 0167 loading area while the 2 custodians went to the vault to get more money. The Respondent submitted that the cleaner stole from the ATM machine due to the failure by the Claimant and her colleague to scramble their combinations. The Respondent submitted this was a basis for termination. The Respondent relied on the authority of **Banking Insurance & Finance Union v Post Bank**

**Limited [2013] eKLR and Moses Chavangi v Barclays Bank Ltd Cause 694 of 2010** where the Court held that if an employee is engaged in dishonesty the employer is within its rights to terminate the services of the employee. The Respondent submitted that the Claimant was found to be grossly negligent in her duties and that despite working for the Respondent for 19 years had failed to follow basic laid down procedures in ATM operations leading to the loss of Kshs. 841,000/-. The Respondent submitted that under Section 44(4)(c) of the Employment Act the Respondent was entitled to dismiss the Claimant for this act. The Respondent also submitted that it followed due procedure in the termination and that the Claimant failed to exonerate herself leading to the decision to terminate her employment. The Respondent submitted that Section 45(2)(c) of the Employment Act provided that termination of employment is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure. The Respondent submitted that the Claimant was given a show cause letter, was allowed to respond, was invited for disciplinary hearing, was terminated and was allowed to appeal but her appeal was unsuccessful. The Respondent submitted that the Claimant was accorded fair procedure before her termination. The Respondent submitted that the Claimant had failed to adduce any evidence to prove her termination was unfair and relied on the case of **David Getare Nyangau v Houseman Genera Contractors Ltd [2013] eKLR** where the Court held that a party seeking a relief from the Court must prove that they are entitled to the relief sought. The Respondent submitted that the Claimant had not proved she was entitled to the retirement package and that the Employment & Labour Relations Court was not a Court that could grant the relief sought for libel. The Respondent submitted that on termination the Claimant ceased enjoying the benefit of rebates and that she was not entitled to receive any rebates on her staff loans taken when she was employed by the Respondent.

12. The issues to determine are well captured by the Respondent. These are:-

- a. Whether the Respondent had a reason to terminate the Claimant from employment
- b. Whether the Respondent followed due process before terminating the Claimant's services
- c. Whether the Claimant is entitled to the reliefs sought

To these I would add the last one,

d. who is to bear the costs of the suit?

13. Theoretically, the Respondent had a reason to terminate the Claimant. From all accounts she had conducted herself in a manner that would have attracted the censure of the Respondent by dismissal. However, the Respondent after the show cause letter was issued determined that the co-custodian Andrew Maritim be dismissed and the Claimant be reprimanded for her failure to scramble her code on the ATM machine. This decision was made by a committee of the Respondent that had sat to deliberate the Claimant's role in the matter. The minutes of the disciplinary committee meeting held on Wednesday 9<sup>th</sup> June 2010 are instructive. The fact that the Claimant had given an explanation leading to severe reprimand, the Claimant was punished and was even sent on transfer to the back office in Moi Avenue branch and was to do audit work. The Respondent therefore was misplaced in subjecting the Claimant to another disciplinary process culminating in her dismissal in December 2010. There was no reason to reopen her case, she was even a witness for the Respondent in the criminal case against Andrew Maritim and the cleaner Anne Wambui Thuo. How could she be culpable twice for the same offence? If she had been charged in Court then a natural consequence would have been dismissal. I would answer the first question in the negative as the matter had been put to bed by the disciplinary process the Claimant had faced in June 2010.

14. The Respondent subjected the Claimant to disciplinary process before her termination. That was in keeping with good management save for the nagging issue of the second disciplinary process as the Claimant was subjected to a second 'trial' so to speak resulting in her dismissal yet she had received what amounted to her very last warning at the bank. A severe reprimand meant that she could be dismissed summarily for the next infraction while serving the Respondent.

15. The Claimant is entitled to some relief. I am persuaded that defamation or libel is a cause of action

that could be best pursued in another forum. In any event the case was preferred on 20<sup>th</sup> June 2011 more than 6 months after the alleged defamation on 14<sup>th</sup> December 2010. The Claimant would therefore not have recovered even if the claim was proper. She could not have applied for the early retirement as the process of enquiry into the theft of Kshs. 841,000/- was ongoing. The theft took place in March 2010 while the last date for submission of request for early retirement was 15<sup>th</sup> March 2010. The Claimant was ineligible for the same and the case of **Zahida Yasin v Barclays Bank of Kenya** (supra) does not fit her case. She was subjected to a second disciplinary process which was illegal in October 2010 whilst the voluntary retirement package offer had expired in March 2010. She could therefore not be said to have missed the opportunity due to an illegal process. The first process was legal and was cause to miss the deadline.

16. The Claimant has complained of inability to secure employment similar to the one she had with the Respondent. The Court is mindful of the provisions of Section 51 of the Employment Act. It provides as follows:-

51.(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

(2) A certificate of service issued under subsection (1) shall contain?

(a) the name of the employer and his postal address;?

(b) the name of the employee;

(c) the date when employment of the employee commenced;

(d) the nature and usual place of employment of the employee;

(e) the date when the employment of the employee ceased; and ?

(f) such other particulars as may be prescribed. ?

(3) .....

(4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both. (emphasis mine)

17. The Claimant has proved that the reason for her termination was unlawful. I reduce her dismissal to normal termination with notice. She would have continued to work for the bank and it is unfortunate that the measure of damages I can award is limited to only 12 months. I cannot order that she enjoys rebates on loans she took as the rebates fell with the illegal termination. I cannot order a reinstatement as the period that has lapsed is beyond the statutory limit within which such order could issue. The Court enters judgment for the Claimant as follows:-

a. Kshs. 1,557,828/- as compensation being the maximum 12 months;

b. Employers contribution on her 19 years pension;

c. Certificate of Service strictly issued in accordance with Section 51 of the Employment Act;

d. Costs of the suit;

e. Interest on the sums a) and b) at court rates from date of filing suit till payment in full.

f. The sums in a) and b) above be subjected to statutory deductions as per the Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this 15<sup>th</sup> day of **October 2015**

**Nzioki wa Makau**

**Judge**