



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1374 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th October, 2015)

JANE A. OGOTI.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED..... RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant Jane A. Ogoti filed her Memorandum of Claim on 13.8.2012 through the firm of Nyabena Nyakundi and Company Advocates. The Claimant avers that she was employed by the Respondent with effect from 26th November, 1991, as a waitress. She was later promoted to the position of clerk and posted at the Respondent's Moi Avenue Branch.
2. The appointment letter dated 26th November, 1991, is attached as **App 1**. It is the Claimant's case that she served the Respondent well and did his work diligently until the 23rd February, 2011, when the Respondent wrongfully terminated her employment on alleged acts of gross misconduct. The letter of termination is attached as **App 2**. At the time of termination her salary was Kshs. 75,000.00.
3. The Claimant avers that according to the letter of termination her employment was being terminated in terms of Clause 5 (d) of the collective Agreement attached as **App 3**. That before the termination the Respondent sent her on suspension from duty vide a letter dated 25.6.2010 attached as **App 4**. Reasons advanced by the Respondent for the suspension were irregularities in dealing with customer accounts but the letter did not contain the particulars of the said irregularities.
4. On 2.02.2011 she received another letter from the Senior Administration Manager stating that on diverse dates when she worked as a clerk she had credited and debited various customer accounts. The Claimant wrote back to the Respondent explaining that the debits had been authorized by the account holders who had even written to the Respondent confirming the instructions.
5. It is the Claimant's case that there was no valid ground for the termination for she was never accorded a fair hearing contrary to principles of natural justice and Section 41 of the Employment Act 2007. The Claimant seeks reinstatement to her former position without loss of any benefits or in the alternative compensation.
6. In cross examination the Claimant stated that she joined the Respondent in 1991 as a waitress and she was taught the Respondent's policies and procedures. She admitted that once she took on a new role the Respondent would introduce her to new policies and procedures appurtenant to the

- role. She admitted receiving a suspension letter dated 26.10.2010 which indicated the reason for suspension being irregularities of which she was aware of.
7. The Claimant also admitted writing a statement dated 27.09.2010 whereby she raised issues about credits and debits which according to her was an explanation to the forensic unit of the work she was doing for the Respondent. The Claimant further contends that she did not write to the Respondent asking for particulars of the irregularities because she was outside.
 8. It is the Claimant's case that the manager of the bank in CPC authorized her to transfer funds after the customer, one Reginald Omare, confirmed instructions to him. The said customer did not sign anywhere and neither did she have written authority to operate Reginald Omare's account but she claimed to have been operating it informally since he was her brother in law. The letter of instructions by the said Reginald Omare is dated 28.09.2010 which date is after she had already been dealing with the account. The said letter does not have a stamp to show that it was received by the Respondent and was an afterthought.
 9. The Claimant admitted that it was the Respondent's policy that she should not borrow or receive money and was expected to live on her salary breach of which would lead to her termination. She claimed that she was entitled to gratuity because she was wrongfully terminated.
 10. The Claimant further contends that the authority to operate the account belonging to Reginald Omare was kept at the bank branch which the Respondent failed to produce in Court and in any event she was not aware of any complaint by Mr. Omare about his account. The Claimant avers that the Respondent never lost any money as a result of her actions and that debits and credits are normal transactions in the bank. The claimant stated that the letter of reprimand produced by the Respondent was ten years old and was not relevant to her termination.
 11. The Respondent did not call any witnesses.
 12. Having considered evidence of the Claimant plus submissions filed by both parties, the issues for determination are as follows:
 1. ***Whether there were valid reasons to terminate the Claimant's services.***
 2. ***If so whether due process was followed before the termination.***
 3. ***If the Claimant is entitled to remedies sought.***
 13. On the 1st issue, the Respondents in their letter terminating the Claimant aver that she committed acts of gross misconduct which are within her knowledge. They also stated that they had lost confidence in her as a result of the said acts and were therefore terminating her in terms of Clause 5(d) of Collective Bargaining Agreement covering her cadre of employees.
 14. From the evidence adduced on record it is evident that the Claimant was involved in funds transfer vide use of Data Capture (CD) at the Respondents CPC. This is evidenced from Appendix 3 of Respondents documents which is a report into the irregular funds transfer at the CPC by a departmental staff. The moneys were apparently transferred by the Claimant from Account No. 1109838557 into her account on diverse dates and thereafter to other staff accounts.
 15. The Respondents submitted that was contrary to Operations Manual Section No. 1053:10, Circular No.95/749 dated 16/3/1995 regarding the processing of money transfer on strength of customers' letters of instructions.
 16. In her evidence, the Claimant had stated that all the transactions she did were duly authorized by the staff members as per Appendix 6. The circular for which Claimant is said to have breached forbids transfer of money on strength of customers letters of instructions unless in certain conditions. In some instances branch managers many authorize for current Account holders.

There were also certain limits from savings accounts.

17. The Claimant's position is that she explained herself in relation to the Account No. 1103165372 which were duly authorized by the customer (Appendix 7). Her position was that all transactions she made were duly authorized and that the Respondent never lost anything.

18. Though the Respondent avers that the Claimant erred, they have not produced any documents to show where the Claimant erred in relation to the circular. There were various provisions concerning the circular which allowed transactions to be made with certain approvals.

19. The Claimant avers that she got the necessary approvals. The Respondents are unable to prove that there were not such approvals. The vouchers they alleged were not signed were not produced in court as exhibits.

20. The Claimant submitted that the letter terminating the claimant did not state the reasons for the termination. The letter stated as follows:

“This has reference to correspondence exchanged with you and the discussions held with you on your acts of gross misconduct.

We advise that it has been established that you committed acts of gross misconduct, details of which are well within your knowledge.

As a consequence, the bank has lost confidence in you and your services with the bank is hereby accordingly terminated with effect from today's date in terms of Clause 5(d) of the Collective Agreement covering Section Heads”

21. In previous communications, the Claimant had been served with a letter of suspension which had set out details of what the Claimant was said to have committed and which the Claimant explained away. It is therefore apparent that the reasons for which the Claimant was terminated for were well within her knowledge.

22. The question is then to the validity of the said reasons which it is this Court's finding that if they did exist, they were valid reasons in terms of Section 43 of Employment Act 2007.

23. However, proof of the failure to get necessary approvals on voucher is not produced in court and therefore what remains is the fact that there were necessary approvals evidenced from the letters from the Account holder annexed in Claimant's documents. As to transfer to other staff accounts, the Claimant stated she didn't need approval from anyone being the Account holder.

24. I therefore find that there was no valid reasons to warrant dismissal of Claimant for gross misconduct.

25. On the 2nd issue, the Claimant submitted that she was not subjected to fair procedures before termination. The Respondents on their part submitted that the Claimant was given a fair hearing. However, there are minutes of the alleged disciplinary hearing where the issues complained of were put to the Claimant and she was asked to respond. Respondent annexed Appendix 15, minutes of a disciplinary committee held on 16/2/2011. However from the membership, the claimant was not present at the meeting and so it is evidence that she was not given a hearing. The hearing envisaged is that contemplated under Section 41 of Employment Act 2007 which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

26. Given that the Claimant was not given any formal hearing, her rights to be heard were flouted and it follows that her dismissal was unfair and unjustified in terms of Section 45 of Employment Act 2007 which states as follows:

“(1) No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove:

- a. **that the reason for the termination is valid;**
- b. **that the reason for the termination is a fair reason:-**
 - i. **related to the employee’s conduct, capacity or compatibility; or**
 - ii. **based on the operational requirements of the employer; and**
- c. **that the employment was terminated in accordance with fair procedure.**

27. It is the finding of this Court that the Claimant’s case has merit and I therefore find in her favour and award her as follows:

1. **1 months salary in lieu of notice = 85,002/=**
2. **12 months salary as compensation for wrongful and unfair termination = 85,002 x 12 = 1,020,024/=**

TOTAL = 1,105,026/=

Less statutory deductions and what was paid to her account. She is also entitled to be issued with a Certificate of Service.

Respondents will pay costs of this suit.

Read in open Court this 14th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Gitonga holding brief for Nyabena for Claimant

Ouma for Respondent