



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 908 OF 2013

NELSON KEN KIPKEMEI.....CLAIMANT

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....RESPONDENT

JUDGMENT

N/B – This cause is closely related to cause numbers 904-907 hence the evidence in it applies in substance to these other causes.

1. The claimant in his memorandum of claim filed on 13th June, 2013 contends that his dismissal from the respondents service was unlawful on the grounds that the respondent failed to provide valid reasons for his dismissal and that in dismissing him, he was not given proper hearing or an opportunity to defend himself. The claimant therefore sought from the Court Orders that his dismissal by the respondent be declared illegal, null and void and that he be reinstated to employment in the alternative the respondent be ordered to pay him general damages for unlawful dismissal amounting to his salary to retirement.

2. The respondent in refuting his claim filed a memorandum of response stating that the claimant's dismissal was as a result of unlawfully and deliberately effecting or allowing to be effected irregular and unauthorized transactions which were acts of gross negligence and fraud on his part. According to the respondent, the claimant's action were in breach of and contrary to the provision of the standing rule and regulations of conduct, human resource manual, letter of employment as well as provisions of the employment Act, 2007. The respondents further averred that the claimants actions exposed the respondent to financial loss amounting to Kshs.7,294,025. According to the respondents therefore, it acted lawfully, procedurally, fairly, and equitably in terminating the claimant from employment and therefore sought that the claim be dismissed with costs. In his oral evidence in Court the claimant relied on his memorandum of claim and supporting documents.

3. He further stated that prior to his termination he had no disciplinary issues. He admitted knowledge of fraudulent transaction which gave rise to his suspension n 13th April, 2013. He stated that there were investigations over the alleged fraud however he was never furnished with the outcome of the investigations.

4. It was his testimony that he was at some stage called by Human Resource Officer, Lillian Ngala and issued with a show cause letter. This was on 9th May, 2013. The show cause letter

asked him to respond to allegations contained therein which he did. He stated however that up to this stage, he was still not furnished with any evidence linking him with the fraud. Therefore in his response to this show cause letter he requested for evidence and more time. He further stated that he recorded a statement with BFIU as per the questions put to him by the investigator.

5. According to the claimant at the time of alleged fraud, he was in charge of training. He used to train tellers. It was his evidence that he was informed that two terminal were used to fraudulently transfer money. One was Mr. Nyangweso's and the other his. He stated that after recording the statement he was asked to wait. On 4th June, 2013, he was called and given a termination letter. According to him the dismissal letter did not give reason for his termination. The letter only referred to a paragraph in the employment letter.

6. The claimant denied ever sharing his password and that the same was allocated to him like anyone else. It was his evidence that he was not a teller but a field officer and that his computer could not transact money and was only for training purposes.

7. In cross-examination he stated that he was initially appointed as a teller handling Western union Money transfer Services and was extremely trained in that regard. He admitted that he was conversant with the respondents Human Resource Manual and was aware that it emphasized observance of secrecy, integrity, honesty and confidentiality. He admitted signing the standing rules. He further admitted that he had access to Western Union Money Transfer Service but for training purposes only. He denied receiving money from customers to put in the system. He admitted that his user identity was NC2 and that J6L9 was his terminal. To access the system, he needed a certificate to be installed in his computer. This was done by either Mr. Thuku or Mr. Chirchir. It was his evidence that user Id was not confidential but password was strictly confidential and could not be disclosed to anyone.

8. On 5th April, 2013 he was at work and conducted some training. At around 10.00 a.m. Mr. Chirchir informed him that his computer had a problem with hid digital certificate. He was therefore away from his computer between 10.00 a.m. and 12.00 noon as Chirchir was checking it. He resumed on it at around 12.00 noon. It was his evidence that only Chirchir and himself used his computer on 5th and 6th. He further stated that he came to know of the fraud on 9th when Naftally came to interview him. Naftally wanted to know about his use Id NC2 ad how it came to be used in a fraudulent transaction.

9. He admitted that he was placed on suspension to pave way for investigation on the fraudulent transaction. The show cause letter asked him if he was involved in his fraudulent transaction.

10. On 24th May, 2015 he received a call to appear before the Managing Director but when he got there, he instead appeared before a committee which questioned him on the fraudulent transaction.

11. The respondent on the other hand called two witnesses namely Mr. Naftally Mwangi and Lilian Ngala. Mr. Mwangi (DW1) informed the Court that he became involved in the matter on 8th April, 2013 when he was called by the Head of MTs Stella Mulandi to go to the respondent's officers at Nation Centre because there was suspected fraudulent transactions involving Western Union MTS. Upon arrival he was given the details of the transactions. They were 21 and had been paid in Russia from terminal Ids located at Nation Centre Branch. (NCB). The two terminals were for Mr. King (the claimant) and Mr. Nyangweso. The user Id for all the transactions were for the claimant.

12. He got the IP addresses of the computers used and found out the one was located at Cyber Café at Kemu House and another at NCB. The IP address 41.215.84.238 located at Kemu House was shared with other companies while the IP 195.202.76.85 was located at the respondent's offices at NCB. According to him the transactions for 6th April 2013 were from this computer.

He was unable to establish the internal IP address that communicated with this computer as 192.168.3.6 and the machine concerned was WUBWKS26 assigned to the claimant.

13. According to Mr. Murangi, he further reviewed the CCTV footage of the articular machine and was able to see the claimant and Chirchir were at the machine during this period. He consequently asked the IT people to give him the activity logs of the particular machine to check if it carried out activity on the Western union Portal and this was confirmed. He therefore concluded that the claimant was the one accessing the machine and his password was the one used to access the Western Union portal. According to him the claimant's terminal was J6L9 and was installed with a Western Union Certificate for Kennedy Nyangweso's computer. He stated that it was possible for certificates to be installed on any other terminal, but user Id and password for the computer would not change.

14. In cross-examination by the counsel for the claimant Mr. Mwangi stated his evidence was based on investigations documented in his reports which was before the Court. He was the one who authored the report. Concerning signature, he stated that it was transmitted electronically hence did not have his signature.

15. He stated that the found in issue were withdrawn elsewhere and that it was possible to find those who withdrew the funds but his required police intervention. He further stated that the claimant was not at work on Sunday but he was implicated in the fraud because his password and computer was used in perpetrating the fraud. Passwords were individual and no one else should have had access to another's password. He denied that the respondent's system was hacked.

16. The respondent's second witness Ms. Lilian Ngala testified that she was the head of Human Resource at the Respondent's. it was here evidence that the claimant was dismissed based on the magnitude of the offence. His password was used in the fraud which was serious. According to her, the respondent carried out internal investigation and found out that the claimants were at work during the material time. They were suspended and that the suspension was guided by the investigation. The reason for suspension was stated in the suspension letters.

17. It was her evidence that the forensic audit adversely mentioned the claimants hence the decision to dismiss them. The show cause letter was issued after the suspension and after receipt of the forensic audit report. The claimants responded to the show cause letter. She further stated that as disciplinary hearing was constituted for the claimant's twice. At the feedback session they were briefed on the findings of the forensic audit and asked to respond. A second disciplinary hearing was constituted thereafter and in both of them the claimants were given a chance to answer to the charges. The claimant in this particular case, was asked to show how come his password was used but denied his password was used.

18. In cross-examination she maintained that respondent's human resource policies were followed in terminating the claimants. According to her the claimants requested for the forensic investigation report during the show cause stage and the reports were discussed with the claimants but were not given to them in actual paper due to sensitivity of the matter.

19. In his closing submissions Counsel for the claimants Mr. Mukele submitted that it was clear from the evidence that his clients were never given a proper hearing before they were summarily dismissed. According to Counsel, the hearing alluded to by the respondent's witnesses did not pass the minimum tests as brought out in the Employment Act. The claimants only came to learn of the particular complaints against them when the incomplete and unsigned report was served upon their advocate when the matter was already in Court. According to counsel therefor, his clients never had an opportunity to defend themselves. Counsel further submitted that the circumstances of his clients suspension and being asked to show cause were generalized and vague as brought out in the show cause letter.

20. Concerning remedies, counsel submitted given the nature of the summary dismissal and the

unique circumstances of the case and the considerations enumerated in the case of **Mary Chammweno Kiptui v. Kenya Pipeline Company Ltd** his client ought to be reinstated.

21. In the alternative, counsel submitted that his client was employed on permanent terms and his position was termed as senior manager hence he had hoped to work for the respondent until retirement. Counsel therefore submitted that taking into account the state of the country's economy his client's unlikelihood of getting alternative employment, the Court should award as damages, salary to retirement.

22. Mrs. Omondi for the respondent on her part submitted that her client had a valid and fair reason to terminate the claimants employment. According to Counsel, investigations discovered that the claimant deliberately used his access permissions and certifications to irregularly and or fraudulently transfer funds through the Banks Western Union System to unknown parties. According to Ms. Omondi, the respondent's witness RW1 testified that of the two terminals that were used to carry out the fraud, one belonged to the claimant and that the IP address at DTB used was from the machine WVBWKS26 assigned to the claimant and further that the transactions were done using the claimant's terminal Id being NC2. Counsel therefore submitted that the claimant was terminated because his password was used for the fraud yet the password was supposed to be confidential and secret. This according to Mrs. Omondi showed, the claimant was negligent and careless in handling his password which was a subject of confidentiality and secrecy.

23. Regarding reason and procedure for termination, counsel submitted that throughout the disciplinary process and termination, the claimant was fully aware and had knowledge of the Banks standing rules and instructions on secrecy and confidentiality. The claimant both in the show cause letter and the disciplinary hearing failed to give a satisfactory defence or explanation to the use of his terminal ID, user ID and password in the carrying out of the fraudulent transaction.

24. Counsel further submitted that on 24th April, 2013 the claimant was invited for a disciplinary hearing which took place in the presence of the Respondent's Head of Internal Audit, Head of Human Resource, Head of Money Transfer and Legal. According to Counsel, the claimant was aware and/or notified of the disciplinary hearings, attended and was given an opportunity to be heard. In cross-examination the claimant accepted that he requested for a committee hearing through his response to the show cause letter.

25. Mrs. Omondi submitted that under section 47(5) of the Employment Act, the burden of proving the unfairness of termination of employment rests with the employee and the claimant in this case being the employee has not discharged the burden.

26. Regarding reinstatement as a remedy, counsel submitted that the reason for terminating the claimants employment was based on fraud which is a ground for dismissal as a subject of gross misconduct. It would therefore not be practicable to reinstate the claimant as prayed.

27. Regarding the relief of general damages counsel submitted that this was discretionary but subject to a maximum of 12 months' wages. The claim for salary to retirement was therefore unsustainable according to Mrs. Omondi.

28. Two questions only emerge to be determined in this dispute and a third one is a mere corollary. First were there justifiable or valid reasons to warrant the summary dismissal of the claimant? Second, if such reasons did exist, did the respondent follow due process as stipulated in its human resource manual, Employment Act or natural justice generally. Thirdly as a corollary, what would be the measure of damages if any, payable to the claimant.

29. Regarding the first question, it is undisputed that certain transactions were processed through Western Union Money Transfer portal resident with the respondent. These transactions according

to the respondent were unauthorized hence fraudulent. The respondent's key witness regarding these fraudulent transactions was one Naftally Mwangi (DW1). He informed the Court that he conducted investigations and established that one of the IP addresses that is IP 195.202.76.85 was located at the respondent's offices at Nation Centre Branch. According to him, the transactions for 6th April, 2013 showed that IP 195.202.76.85 communicated on the material day with IP.192.168.3.6 and that this machine was identified as WUBWKS26 assigned to the claimant.

30. It was not disputed by the claimant that this machine belonged to him. It was further not in dispute that to operate the machine and access the Western Union Money Transfer Service, one had to use a password which was secret and highly confidential. Whereas the claimant denied giving out his password. It became inexplicable how access was gained to his password to execute the fraudulent transactions from his computer. No complaint was raised by him over the possibility of unauthorized access to his password. It is however noteworthy that on the 6th April, 2013 the claimant was at work and that Mr. Chirchir allegedly reinstalled for him his certificate for Western Union which according to him Chirchir said had a problem.

31. It was his evidence that Chirchir handled his computer between 10a.m and 12p.m. on the material day. As observed earlier and as conceded by the claimant, to access one's computer and Western Union Money Transfer Service, one had to log in using a secure password. The password was supposed to be personal and secret and would under no circumstances be shared with anyone other than the user. Only two possibilities emerge therefore. First, the claimant logged into the Western Union Money Transfer Service himself prior to letting Mr. Chirchir install the certificate or second, the claimant shared his password with Mr. Chirchir for that purpose. The second scenario would be contrary to respondent's staff regulations concerning secrecy and confidentiality and in view of the ensuing fraud, be a valid ground for summary dismissal. If it be that the claimant did not share his password with Chirchir, the curious question would be why would if his Western Union Certificate was having problems, he allows Mr. Nyagweso's certificate to be installed in his computer? What reason was there to inhibit reinstallation of his own certificate? These questions were neither answered by the claimant or Mr. Chirchir who like him faced a similar fate from the respondent.

32. Mr. Mwangi, informed the Court that a review of the CCTV footage showed the claimant and Mr. Chirchir seated in front of the claimant's computer at the material time when the fraudulent transactions were executed from it.

33. Dismissal from employment is in no way akin to conviction for a criminal offence. The reason for which an employer would dismiss does not have to meet the standard of proof in criminal cases which is beyond reasonable doubt. All an employer needs to satisfy himself or herself is whether there is more probability than not that the employee is responsible for the act or omission which goes contrary to staff rules and regulations or is in breach of his contract of employment or Employment Act. It must further be noted that employment relationship largely thrives on trust and confidence on the part of the employee which once eroded the relationship cannot practically exist. This becomes more critical in the industry such as where the respondent is involved which is sensitive or it entails handling of clients' money and financial affairs.

34. The claimant in this matter was suspected by the respondent to have been involved in fraudulent transaction which occasioned the respondent financial loss. The grounds for his suspected involvement was that his computer and password was used in some of the impugned transactions. He failed to satisfactorily explain to the respondent how and under what circumstances his password which was supposed to be secret and only known to him became used in the transactions. There was also evidence before the Court that around the time the fraudulent transaction occurred the claimant and Mr. Chirchir were at the claimant's computer where it turned out that a Western Union Certificate belonging to another colleague was installed in the claimant's computer and used to execute what turned out to be a fraudulent transaction. In the Court's view, these were justifiable and valid reasons for claimant's dismissal.

35. the second question therefore is, in dismissing the claimant, did the respondent adhere to its disciplinary rules and regulations and or relevant provisions of the Employment Act?

36. According to the claimant, he was on 9th May, 2013 called to Human Resource Office and issued with a show cause letter. The letter asked him to respond to allegations contained in it which he did but asked for evidence linking him with the fraud. It was his evidence that he further recorded statement with BFIU based on questions put to him by the investigators.

37. According to respondent's second witness Ms. Lillian Ngala, upon being suspected of being involved in the fraud, the claimant was suspended from duties and later issued with a show cause letter. According to her, the suspension was to allow for investigations and that the reasons for suspension was stated in the letter itself. A disciplinary hearing was subsequently constituted twice. At the feedback session the claimant and his colleagues were briefed on the findings of the forensic audit and asked to respond. According to her the forensic audit report was discussed with the claimant and his colleagues but it was not possible to furnish them with a copy due the sensitivity of the matter. The suspension letter read in part as follows:-
REF.DTB/04/13

Date: April 13, 2014
Mr. Nelson Kipkemei

Assistant Manager – MTS field

Head Office

NAIROBI

Dear Mr. Kipkemei

RE: SUSPENSION

Reference is made to the meeting between you and Senior Management following the fraudulent transactions that occurred at Money Transfer Services Unit between 5th April, and 7th April, details of which are well within your knowledge.

The investigations into the matter are on-going and to establish the extent of your involvement in the said fraudulent activity which led to a financial loss of Kshs.7,294,025.00.

Arising out of the aforementioned management has decided that you be suspended from the service of the Bank on a half salary to pave easy for investigations effective today the 13th April 2013.

In the meantime, you are required to sign a copy to this letter and return to HRD signifying that you understand and accept the terms and conditions set hereinabove.

Yours faithfully

Fred Olande

GROUP HEAD – HUMAN RESOURCES

38. The show cause letter read in part as follows:-

REF: DTB/RHR/05/13

DATE: May 08, 2013

Dear Mr. Kipkemei

RE: SHOW CAUSE

Reference is made to the on-going investigations and our letter of suspension dated on April 13th, 2013 regarding the fraudulent transaction that led to a financial loss of Kshs.7,294,025.00 at Money Transfer Services, the details of which are well within your knowledge.

Management has reviewed the incident with serious concern and has noted that your lack of due diligence led to the fraudulent transaction and the financial loss to the Bank. As a Senior Bank Officer, it is your responsibility to ensure that due processes and Procedures are adhered to at all times.

Arising from the above, you are hereby asked to show cause why severe disciplinary action should not be taken against you for negligence in the discharge of your work that led to the loss of Kshs.7,294,025.00.

Your written explanation should be submitted to the undersigned by close of business May 9, 2013 on the latest and will form the basis of the final decision that management will take against you in the matter.

Yours faithfully

FRED O. OLANDE GROUP HEAD – HUMAN RESOURCES

39. In response to the show cause letter the claimant stated as follows:-

“ I have not involved myself in any fraud. In reference to the letter, I wish to be given an opportunity to be heard by a duly constituted disciplinary committee. I have not been given enough time to respond to any evidence that they may have against me in which evidence has not been availed to me. I have been interrogated (sic) by forensic and I would like them to show evidence of my credentials being used to perprate my involvement.”

40. The unsigned minutes of the disciplinary hearing held on 24th May, 2013 which the claimant conceded to attending was annexed at page 101 of the respondent’s bundle of documents. It was minuted that the claimant indicated he was not privy to the fraud however he was not able to justify his actions bearing in mind CCTV footage. He was not able to demonstrate how his password had been compromised and used to carry out the fraudulent transactions.

41. As at 9th May, 2013 when the respondent issued to the claimant the show cause letter, he was aware that the main accusation against him was that he allowed his password and computer to be used in the fraudulent transaction. In his response to the show cause letter he stated that he had been interrogated by the Forensic Auditor over the compromise of his credentials that is to say password. Although he denied being notified in advance that the meeting of 24th May, 2013 was a disciplinary hearing, the issue of use of his password and computer to execute the fraudulent transactions was already known to the claimant. It was therefore his duty to offer satisfactory explanation to the respondent on the issue. Clause 5.3 of the respondent’s Human Resource Policy and Procedures Manual states as follows:-

PROCEDURE IN CASE OF DISCIPLIANRY ACTION

- (i) All cases involving termination of employment must involve the HRM.
- (ii) It is desirable that nay case of disciplinary action, which may lead to involuntary termination or dismissal, be preceded by a detailed inquiry into all the relevant circumstances.

(iii) At such an inquiry, the employee involved should be fully advised of the charges against him and should be given the opportunity to fully explain his side of the story in his defence.

(iv) The responsible supervisor or other inquiry officers appointed for the charge and defence shall make a recommendation to the next higher level of management.

(v) If practicable, a Human Resources representative should be present at such an inquiry.

(vi) Upon receipt of the recommendations of the inquiry officer, management shall in consultation with the HRD decide the appropriate action to be taken and the employee should be advised accordingly.

42. The Court has considered the above clause vis-à-vis pleadings, documents in support of the pleadings and evidence by both sides and is of the view that the respondent followed a fair procedure in dismissing the claimant. The Court having so found will not consider the corollary question of compensation with the consequence that the claim herein is hereby dismissed with costs.

43. It is so ordered.

Dated at Nairobi this 2nd day of October 2015

Abuodha J. N.

Judge

Delivered this 2nd day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge