



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 904 OF 2013**

**SAMSON THUKU MUTISO.....CLAIMANT**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. This cause was consolidated with cause numbers 905, 906 and 907. This judgment therefore decides the above causes as well. Further the factual background in these causes were adequately covered in Cause No. 907 of 2013 which although was decided separately, had facts and circumstances similar to these causes. This judgment will therefore not delve deep into the factual background of these claims unless where necessary as the same can be found in the judgment in Cause No. 908 of 2013.

2. The claimant in Cause No.904 Mr. Samson Thuku Mutiso informed the Court that he was at the material time working for the respondent as a Manager Systems and Business Development. His services were terminated based on accusation of involvement in fraudulent act which led to loss of respondent's money to the tune of Kshs.7 million (approx). He denied anything to do with it and that he was not shown any evidence of his involvement. In his response to the show cause letter he asked for more information on his alleged involvement so that he could respond better. It was further his testimony that he was questioned by the top management but had no prior notice for the session as he was prior to that called to come and see the Managing Director. He still maintained that even at this session he was never given any evidence of complaints against him.

3. In cross-examination he admitted that he was aware of the terms of the Human Resource Manual and Policy of the respondent and that he was bound by it.

4. It was his testimony that Mr. Nelson Keng was his colleague though not under him. It was his evidence that problems in MTS would be reported to him and that on 8<sup>th</sup> April, 2013 he became aware of a problem on the MTS-Western Union involving Kshs.7 million (approx). He further admitted that on 6<sup>th</sup> April, 2013 he increased limit for out-bound transactions. This was after one of the tellers, Yvonne had placed a request for the same. He increased the limit by USD10,000/=. It was his evidence that to change limit one had to log on and the return confirmation was an email from Western Union.

5. According to him Kennedy Nyangweso brought the fraudulent transaction to his attention and the he (Nyangweso) had already taken remedial measures by reducing limits and shutting

down the system. Regarding procedure for increase in limit he stated that the request can be by call or email. He referred the Court to the information flow chart at page 97 of the respondent's bundle of documents. In this particular case Yvonne called him to increase limit.

6. The claimant in cause number 905 of 2013, Mr. Matthew Chirchir testified that he used to work for the respondent as an IT officer. On 13<sup>th</sup> April, 2013 he received a suspension letter and later appeared before a 2 member panel of Ms. Ngala and Keroro to explain what he knew about the fraudulent transaction. He responded to the show cause letter and denied knowledge of the fraud. He was further questioned over the same on 8<sup>th</sup> June, 2014 and still denied any involvement in the fraud.

7. In cross-examination by counsel for the respondent he stated that he used to do set up for computers at Nation Centre Branch and service agents. He became aware of the fraudulent transactions on 8<sup>th</sup> April, 2013 and that he was at work on 5<sup>th</sup> and 6<sup>th</sup> April, 2013. It was his evidence that Mr. Keng' (Cause No. 908 of 2013) made a request to him to check his computer as it was too slow and kept hanging. He resolved the problem and Mr. Keng' was able to resume work. On 5<sup>th</sup> April, Mr. Keng' did not have a problem with his computer but his certificate for Western Union. He reinstalled the same for him at around 2.00 p.m. and was able to access the Western Union System. It was his evidence that one could not access the Western Union System without a certificate and that he had a certificate of access allocated to him.

8. Mr. Chirchir further stated that he used to clear his computer of temporary files but did not delete Western Union files or non-temporary files from his computer.

9. The 3<sup>rd</sup> claimant in Cause No. 906 of 2013 Mr. Jacob Muli Kilavi who was working for the respondent as a teller testified that on 8<sup>th</sup> may, 2013 he was called to the audit office and issued with suspension letter. Before being issued with suspension letter, Ms. Ngala and Mr. Keroro questioned him and his colleagues about what they knew concerning the fraud. On 24<sup>th</sup> May, 2015 he was called again and met a Mr. Olande who informed him that he had been implicated in the fraud and should resign. He refused to do so and left the meeting.

10. In cross-examination he admitted that he had prior to the alleged fraud been issued with a warning letter but the issue was resolved. It was his testimony that to access the Western Union System one had to have a Certificate and a password and that he was never issued with any certificate. It was further his evidence that on 7<sup>th</sup> April, 2013 his computer went down and Mr. Nyangweso told him he could log in using his computer and serve clients who were getting impatient. When he printed his transaction log he discovered that some transactions were from another computer at customer service. The transactions had Mr. Keng's ID as the one who carried them out.

11. The claimant in 907 of 2013 Mr. Humphrey Mungari informed the Court that he was working for the respondent as manager in charge of Nation Centre Branch. His duties included supervision of tellers. On 13<sup>th</sup> April, 2013 he was suspended by his immediate boss Mr. Kennedy Nyangweso. He was given the history of the lost money by Mr. Nyangweso who informed him that some of the lost money was withdrawn in Russia. He was on 8<sup>th</sup> May, 2013 issued with a show cause letter but was not provided with any evidence of his involvement in the alleged fraud. He responded to the show cause letter denying his involvement. According to him the fraud occurred from a computer that was used for training and not his unit. It was his evidence that he followed all the procedures in his line of duty and had nothing to do with the fraud.

12. In cross-examination he stated that his duties included cash flow management through tellers. He had four tellers under him. Two were under Western Union System and two under moneygram. According to him he reconciled and balanced his float on 5<sup>th</sup> and 6<sup>th</sup> April, 2013 and that the alleged fraudulent transactions were not done by his tellers. After reconciliation he

handed over his report to reconciling officer. According to him, none of his tellers undertook the transactions. They were originated by Mr. Keng' and that Mr. Keng' did not report to him. He stated that if the fraud emanated from any of his tellers he would have taken responsibility.

13. The respondents called two witnesses, Mr. Naftally Mwangi and Ms. Lillian Ngala. Regarding the claimant in 904 of 2013 Mr. Mutiso, Mr. Mwangi stated that the limit for the Nation Centre Branch was set at Kshs.3million however this was increased to Kshs.3.85million. He reviewed the email correspondence that triggered the increase and established that the increase was done by Samson Thuku Mutiso. Mr. Mutiso conceded to the increase in limit which he said was as a result of a request by Yvonne Muthamia who was one of the tellers. Ms. Muthamia confirmed making the request to enable her send money to Zambia on behalf of a customer. The 1<sup>st</sup> transaction was for Kshs.87,600 and the second was for Kshs.50,000/=. Mr. Mwangi informed the Court that when he compared what Ms. Muthamia told him and what Mr. Mutiso said, he realized that the increase in limit was done before a request was made. This according to him raised suspicion as to how Mr. Mutiso came to know the limit would be exceeded without being prompted by a teller. Regarding the claimant in Cause No. 905 of 2013, Mr. Mwangi stated that he interviewed Mr. Chirchir who told him that he recalled Mr. Keng's computer had a problem connected to Western Union and he assisted him.

14. According to him Chirchir was the one who was in charge of installing Western Union Certificates and on 8<sup>th</sup> April, 2013 when asked about the transaction he deleted files from his computer including certificates. Regarding Mr. Jacob Kilavi it was his evidence that Kilavi's informed him that he knew nothing about the fraud but admitted assisting some West Africans with Western Union transactions. It was his report that formed the basis of terminating Kilavi's contract and that apart from the whistle blowers report nothing in the report implicated Mr. Kilavi.

15. Concerning Mr. Humphrey Mungori (907), he stated that he was the location manager and could have seen the fraudulent transactions and stopped them. According to Mr. Mwangi, as location manager, he was also in charge of money transfer.

16. The respondent's second witness Ms. Ngala testified that Mr. Mutiso was dismissed because he was on duty on the material day and increased limit without mandate and when asked why, he stated that he had done so severally before. Humphrey Mungori was the location manager and was on duty on the material day. According to her, he denied being in charge of his colleagues implicated in the fraud. Mr. Kilavi admitted that he had connection with other fraudsters outside the Bank but was not involved in fraud in question. Concerning Mr. Chirchir, it was her evidence that he was the custodian of all the Western Union Certificates. He deleted files from Mr. Keng's computer and said he had always done so. She stated that she was present during all the disciplinary committee meetings and that the claimants were dismissed from respondents service after disciplinary hearings. According to her due procedure was followed in dismissing the claimants and that the hearings were fair.

17. Termination or dismissal from employment is a two tiered process. That is to say prior to dismissal or termination an employer must have valid and justifiable reasons for doing so. Once this is satisfied, in carrying out the dismissal or termination an employer must as much as possible adhere to the separation procedures prescribed in the contract of employment and or human resource manual and policy where available and the Employment Act.

18. An employer has the duty to ensure both stages are complied with as much as possible and failure to substantially adhere to either or both of the stages would lead to a finding that the dismissal or termination was unfair and or wrongful.

19. The validity or justification for reasons for dismissal is for the employer to decide. The reasons must be matters that the employer at the time contemplating termination or dismissal must have genuinely believed to exist and reasonably justify dismissal or termination. The validity or justification for dismissal is however not measured on the same standards as those required for a

finding of guilt in criminal cases. In fact the standard might even be slightly lower than that required in civil cases as well.

20. Termination or dismissal from employment is a management decision which in most cases is informed by internal procedures and operations which are couched to safe guard and guide on organizations performance and operations. In construing them, the Court ought to bear in mind the nature of the organization and its operating environment including its business strategy and competition. The Court must therefore be careful not to substitute or impose its own views on validity or justification for termination. The proper test is usually that, would a reasonable employer confronted with the issue an employee is implicated in, consider termination or dismissal as the most appropriate sanction? If the answer is in the affirmative, then the dismissal would be upheld.

21. The respondent in this case is a Bank entrusted with its clients money and financial affairs. Trust, integrity and confidentiality are some of the values that are highly expected of players in such a field. In order to win the confidence of its existing customers and attract new ones the respondent through its staff and agents must display these values at all times. Suspicion and or involvement in any activity that might compromise these standards would therefore be a valid reason for dismissal or termination.

22. The respondents became a victim of a financial fraud in which the claimants were suspected to have been involved. Therefore, subject to reasonable proof of involvement of each of them, the respondent had valid and justifiable reason to dismiss or terminate the claimants services.

23. Regarding procedure, the claimants all conceded that they were issued with notice to show cause letters, after being put on suspension. They all responded to the show cause letters and asked for evidence showing how each of them got involved in the financial fraud in the respondents' Western Union Money Transfer Service. They further conceded that on 8<sup>th</sup> of May, 2013 they were called to see the respondent's Managing Director but upon arrival they were directed to meet the respondents top management who interviewed them and questioned each of them what they knew about the fraud. They all denied involvement and were subsequently terminated from employment. From the point of being suspended and issued with the show cause letters, the claimants were aware of the reason from their suspension. What they claimed not have been given was the extent of involvement of each of them in the fraud. They however individually responded to the show cause letters and denied any involvement.

24. Ms. Ngala and Mr. Mwangi for the respondent informed the Court that at the meeting of 8<sup>th</sup> May, 2013 they discussed with the claimant the forensic audit report and showed each of the claimants the extent to which they were implicated in the fraud but the report was not availed to them in hard copy because of the sensitivity of the issue at that time. The claimants further admitted to recording statements with BFIU regarding the fraud in which they gave their individual versions of the events and exonerated themselves from any involvement. This far it cannot be true that the claimants were kept in the dark over the accusations against them and that they were never given an opportunity to defend themselves against the said accusations. What the claimants appear to have been demanding to be furnished with was conclusive evidence that would find each of them guilty as accused. As observed earlier, termination or dismissal from employment is a management process and not a Court trial. The reasons for dismissal and the process of carrying it out does not have to take the format and procedure of a Court trial.

25. What an employer requires to have before terminating the services of an employee are valid and justifiable reasons relating to employees conduct, capacity, or compatibility and the termination must be carried in accordance with a fair procedure. Fairness of procedure does not entail a trial akin to the Court process. It is a procedure in reasonable compliance as much as possible to the employer's disciplinary procedure or in absence the Employment Act or rules of natural justice generally. There is bound to be omissions and missteps in carrying out the process but such omissions and missteps will be overlooked if they do not occasion the dismissed

employee injustice or prejudice since there cannot be a perfect process. Having reviewed the evidence as a whole in this matter and more particularly the testimony of the claimants; I am persuaded that their services were generally terminated following a fair procedure and if there were any omissions or missteps, it did not occasion them any prejudice or injustice.

26. I now turn to the reason for which each of the claimants in the four suits consolidated herein were terminated in order to establish whether they were valid and justifiable reasons to warrant the termination of each of them.

**(a) Samson Thuku Mutiso**

Mr. Mutiso was the respondent's manager in charge of Systems and Business Development. In cross-examination he admitted that on 8<sup>th</sup> April, 2013 he became aware of the fraud. He further stated that on 6<sup>th</sup> April, 2013 he increased limit for outbound transactions for Western Union after one of the Tellers Ms. Yvonne Muthama made a request. It was his evidence that to increase the limit one had to log in and get a return confirmation via email from Western Union. He stated that to increase the limit he could receive a request from the teller through telephone or email. In this particular case Yvonne called him to increase the limit. Mr. Mwangi for the respondent however questioned the action by Mr. Mutiso. Whereas he confirmed with Ms. Yvonne that she requested for limit increase from Mr. Mutiso, the increase had been done earlier before the request was made by Ms. Yvonne which raised suspicion as to how Mutiso knew the limit would be exceeded without being prompted by a teller. On this point Ms. Omondi for the respondent submitted that if Mr. Mutiso had not increased the limit without prompting some of the fraudulent transactions would have not succeeded.

27. As observed earlier the respondent is in financial services industry where trust, integrity and due care are some of the industry's core values. Procedures involving funds are quite sensitive hence must be strictly observed. If increase in limits which was entrusted to Mr. Mutiso could only be done upon request by a teller, the increase of the limit by Mr. Mutiso prior to request and consequential loss of funds was negligence on his part hence a valid reason for termination of his services. The Court will therefore uphold his termination and dismiss his claim with costs.

**(b) Matthew Cheruiyot Chirchir**

Mr. Chirchir was employed as an IT officer by the respondent. In his evidence he stated that he used to set up computers at Nation Centre Branch and service agents of the respondent. He became aware of the fraud on 8<sup>th</sup> April, 2013. On the material day he was asked by Mr. Keng (claimant) in cause No. 908 of 2013) to check the latter's computer as it was slow and kept hanging. He stated that the problem was not with the computer but Mr. Keng's Western Union Certificate which he reinstalled for him at around 2.00 p.m. and Keng was able to access the Western union System.

Mr. Chirchir further informed the Court that he used to delete temporary files from his computer but not Western Union files. Mr. Mwangi for the respondent however testified that he interviewed Mr. Chirchir and he admitted that he was the one who was in charge of installing Western Union Certificate. Mr. Mwangi however stated that Mr. Chirchir deleted files from his computer including Western Union Certificates when questioned about the fraud. Deletion of computer files around the time when the alleged fraud occurred raises a lot of questions on the integrity and honesty of Mr. Chirchir. In the ICT age computer files are the modern ways of data storage. They are the safest form of storing essential data. Their deletion at the material time was therefore justifiable reason for termination of Mr. Chirchir's services and the Court will uphold the same with the consequence that the suit is

dismissed with costs.

**(c) Jacob Kilavi Muli**

Kilavi used to work for the respondent as a teller. On 8<sup>th</sup> May, 2013 he was called to the Audit office and issued with a suspension letter. On 24<sup>th</sup> May, 2015 Mr. Olande informed him that he had been implicated in the fraud and should resign but he refused to do so and left the meeting. It was his evidence that to access Western Union Systems one had to be issued with a certificate and password and that he was never issued with such certificate or password. On 7<sup>th</sup> April, 2013 his computer went down and he was asked by Mr. Nyangweso to use his computer to serve customers who were getting impatient. When he printed his transaction log he discovered that some transactions were from another computer at customer's service. The transaction had Mr. Keng's ID as the one who carried them out. Mr. Mwangi on his part stated that Kilavi told him he knew nothing about the fraud but admitted assisting some West Africans with Western Union transactions. It was Mr. Mwangi's evidence that apart from the whistle blowers report, nothing in his report implicated Mr. Kilavi. To this extent termination of Mr. Kilavi cannot be said to have had a reason since it was based on mere suspicion and on unsupported evidence of a whistle blower. His termination is therefore found to have been unfair and he is awarded 6 month's salary as compensation for unfair termination of services. He shall further have costs of the suit.

**(d) Humphrey Mwenda Mung'ori**

Mr. Mungori was employed by the respondent as Manager in charge of Nation Centre Branch. His duties included supervision of tellers. According to his evidence the fraud occurred from a computer that was used for training and not his unit. It was his evidence that he followed all the procedures in his line of duty and had nothing to do with the fraud. In cross-examination he stated his duties included cash-flow management through tellers. He had four tellers under him. Two were Western Union Tellers while two were under Moneygram. According to him he reconciled and balanced his float on 5<sup>th</sup> and 6<sup>th</sup> April, 2013 and that the alleged fraudulent transactions were not done by his tellers. After reconciliation he handed over his report to a reconciling officer. According to him, the fraudulent transactions were originated by Keng' and that Keng' did not report to him. Mr. Mwangi on the other hand testified that Mr. Mungori was the location manager and could have seen those fraudulent transactions and stopped them. According to Mr. Mwangi, as location manager Mr. Mungori was also in charge of money transfer.

From the evidence analysis done in cause number 908 of 2013, it would emerge that the IP address and terminals as well as the password used in one of the fraudulent transaction was traceable to Mr. Keng'. It would therefore seem to me that those who seem to have colluded with Mr. Keng' in the fraudulent transaction have been identified and isolated and the roles they played. Mr. Mungori denied his unit was involved in the fraud. None of his tellers were implicated as well. It was his evidence that Mr. Keng' was not under him. No evidence was put forward by the respondent to show that Mr. Keng' who appeared to be the main suspect in the fraud was under him. The termination of Mr. Mungori's services was therefore on invalid and unjustifiable cause and the Court finds the same to be unfair and awards him six month's salary as compensation for unfair termination of services. He shall further have costs of the suit.

Dated at Nairobi this 2<sup>nd</sup> day of October 2015

Abuodha J. N.

Judge

Delivered this 2<sup>nd</sup> day of October 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge