



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 193 OF 2012

GIDEON MVURYA DALLU.....**CLAIMANT**

VERSUS

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

JUDGMENT

1. The Claimant filed this suit on 9th February 2012 seeking the resolution of a dispute he framed as i) the unfair, unlawful termination of employment and ii) non payment of outstanding terminal dues. He averred that he was an employee of the Respondent at all material times to this suit and earned Kshs. 40,458/- a month and the Respondent unlawfully/unfairly dismissed him on 29th November 2010. He sought 1 month salary in lieu of notice, payment of untaken leave, payment of unpaid salary for days worked, refund of Kshs. 140,000/- deposited with the Bank. He also sought compensation, certificate of service and costs of the suit. To his pleadings he attached the letter of employment, the payslip for February 2010, the demand letters written by his advocates, his dismissal letter and reply to the demand letter by the Respondent.
2. The Respondent defended the suit and averred that on 6th November 2010 the Respondent received an email from Western Union requesting the Taveta Branch to reverse an entry of 140,000/- which had been duplicated. The Respondent averred that inquiries undertaken revealed that the same M-pesa transaction number was used for two different transactions for 140,000/-. The Respondent further averred that the Claimant was asked how he made the two payments and he explained that the second payment was an erroneous duplicate of the first. The Respondent thus averred that the dismissal of the Claimant was for gross misconduct and merited. The Respondent urged the Court to dismiss the suit with costs to the Respondent. To the pleadings the Respondent attached copies of documents relating to the transaction, the statement of the Claimant and a handwritten statement from the M-pesa Agent who transacted, the demand letters, dismissal letter and reply to the demand letter.
3. The Claimant also filed an Amended Memorandum of Claim on 30th October 2013 pursuant to leave granted on 29th October 2013. In the amended Memorandum of Claim, the Claimant indicated his last salary was computed as Kshs. 45,388/- and the sums sought in compensation and as notice pay were therefore also affected. There were no new attachments to the pleadings as the Claimant reproduced the earlier set of documents attached to the original Memorandum of Claim.
4. The Respondent did not file an Amended Response though leave had been granted on 29th October 2013. The matter was subsequently set down for hearing on 6th November 2013 and the Claimant testified. He testified that he was employed by the Respondent in 2008 and served in various positions – back office, cash office and later as teller and earned a salary of Kshs. 45,388/-

a month. He was dismissed on 29th November 2010 for gross misconduct. The Claimant testified that on the material day, a Saturday, he had been assigned to help as a teller. He proceeded straight to the teller position where he had handed over to Patrick Wambua a colleague the tools which included a phone for M-pesa transactions. He posted cheques though cheques were normally posted on Mondays, Wednesdays and Fridays. He was given the phone by his colleague to serve an M-pesa client which he did. He noted the amount, the transaction and posted the withdrawal of that amount to the M-pesa Agent. He stated that the Branch would close at noon on Saturday and when the Branch closed there were some customers still within the Banking hall. Among them was the M-pesa agent who had come in earlier. He said this was normal as they could come as many times as they liked if they needed float. At 12.30pm his colleague Patrick Wambua once again gave him the phone and asked him to serve the customer. He took the phone and read the message and took down the details which included the person withdrawing, the transaction number and the amount. He posted the same on the system, counted the money and gave it to the Agent. He testified that after work he then proceeded to depart for Nairobi and it was on 9th November 2010, which was a Tuesday, that the Manager called him requiring him to return to work because of the shortage of 140,000/-. He went back with great difficulty. He stated that when he reached the Branch it is when he realised what had happened on that Saturday. The agent had made only 1 withdrawal but he had paid out twice on the basis of the first withdrawal. He went to the M-pesa agent who denied having entered the Bank twice. The Bank manager told him that he would be arrested such that he misses the wedding on Saturday if he did not normalise the M-pesa account. He borrowed money from his mother and a friend and was able to deposit 140,000/- to normalise the M-pesa account. After this the Manager did not release him but held him for about an hour and a half as he drafted another Memo which he was to respond to. He was under intense pressure and had many calls coming through from the bride to be, the pastor and friends. He was due for a wedding rehearsal that day. He replied to the Memo and still was not released as he was given another Memo to respond to. He responded but was not released until 5.00 pm. He made it back to Nairobi at about midnight and reported back to work on 29th November 2010 only to be served with a dismissal letter. On cross examination he denied filling two withdrawal slips at the same time. He stated that the message was on the phone when Wambua handed him the phone and that each time he transacted Wambua gave him the phone with the message. He admitted that he posted the transaction twice and admitted that the error was on his part. He denied that the agent was made to sign twice at the same time. He testified that the agent signed at two different places which were at different times. He maintained that he was threatened and the dismissal was not fair.

5. The Respondent called Samuel Ngure Njoroge the Manager at Kengeleni Branch. He testified that he was the Manager when Dallu was a teller at Taveta branch. He testified that a shortage was noted on Monday for an amount of Kshs. 140,000/-. He denied that the teller was not aware of the shortage. He stated that it is not possible to have the same number for two transactions as each transaction has to be unique. He testified that it was the work of the teller to confirm there were different transactions. He testified that he was not at the branch when the money was refunded. He testified that the Claimant was given a hearing and a chance to respond. The Claimant did not appeal. In cross examination the witness testified that he was not the one who dealt with the issue and it was the first Memo that was written by him and the subsequent ones were from the Operations Manager. He was not aware whether there were threats. He testified that he was not aware whether an investigation was conducted before the Claimant was dismissed. He testified that the bank does not allow two tellers to transact on M-pesa on the same day. He testified that he cannot for sure state that no investigations were carried out. He stated that the branch carried out investigations and made a report. That marked the end of the Respondent's case.
6. Parties were to file submissions and the Claimant filed submissions on 15th November 2013 and the Respondent filed submissions on 9th December 2013. I have considered the pleadings, evidence adduced, testimony of the witnesses, the submissions and the authorities cited in coming to this decision.

7. The Claimant was dismissed after the loss of Kshs. 140,000/- from the M-pesa account. The Claimant states that he paid the M-pesa agent twice on the material day Saturday 6th November 2010. The Claimant states that at both times his erstwhile colleague Patrick Wambua gave him the phone to transact and the message was already on the phone. The Respondent's witness testified that each transaction generates a unique number and the Claimant was required to confirm the transaction before payment. It was clear the Claimant was either complicit in the fraud or was duped by a criminal enterprise involving the agent and Patrick Wambua. While I cannot discount entirely the version of the Claimant, it would seem that given the payment was signed for at two different places, there is a possibility the Claimant is telling the truth. Be that as it may, the loss was attributed quite rightly to him. He failed to confirm that the transaction the M-pesa agent had allegedly initiated was genuine. He was thus dismissed for good cause. However, even in cases where dismissal is merited the dismissal must accord with the law. The Claimant was entitled to a fair hearing and it would seem that there was none. A decision was made to release him and he was not even aware that the matter had been escalated to the point of dismissal. In the premises, Section 41 of the Employment Act 2007 is crystal clear.

41. (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.

8. Considering the grounds of dismissal as per the letter of 29th November 2010 was gross misconduct, the Respondent was bound by law to have the safeguards available to the Claimant under Section 41. None were availed to the Claimant and for that he is entitled to recover. He will thus be entitled to:-

- a. One month notice
- b. Payment of leave earned and not taken
- c. Salary for November 2010
- d. 2 months compensation
- e. certificate of service
- f. Costs of the suit

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of January 2014

Nzioki wa Makau

JUDGE