



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 706 OF 2012

BANKING INSURANCE &

FINANCE UNION (KENYA) APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTDINTERESTED PARTY

JUDGMENT

The Claimant herein is a trade union registered in Kenya to represent unionsable employees in the banking sector. They have filed this claim against the Respondent Cooperative Bank of Kenya on behalf of their members Boniface Mwaura Gitachu and David Musiomi Milimu whose employment was terminated on 14th January 2011 on grounds of negligence. They seek orders of reinstatement of the Grievants to their former jobs without loss of benefits or break in service.

The Respondent filed its Memorandum of Defence on 9th August 2012 in which it denies that the termination of the Grievants employment was unfair and allege that the Grievants were negligent in the performance of their duties and the Respondent was entitled to terminate their employment under common law, the Employment Act and Article 5 of the Collective Bargaining Agreement.

The case was heard on 24th May, 1st July and 30th July 2013. The Grievants testified for the Claimant and the Respondent called 2 witnesses, RW1 SAMUEL MAGATI OSERO, the Manager in charge of Investigations and RW2 SIMON MURIITHI MAINA, the Respondent's Employee Relations Manager.

The main facts of the case are not in dispute.

The 1st Grievant Boniface Mwaura Gitachu was employed by the Respondent on 20th March 2006 as a graduate clerk. At the time of termination of his employment on 14th January 2011 he was a Section Head.

The 2nd Grievant David Musiomi Milimu was employed on 8th December 2005 as a graduate clerk and at the time of termination of his employment he was also a section head.

Both Grievants were at the time of termination of employment working as checkers in Central Operation Unit (COU) and Business Support Service (BSS). Their duty was to print partitions i.e specific transactions entered in the bank system and check them against entries in vouchers received from the staff who made the entries. The purpose of checking was to ensure that the manual vouchers tallied with the entries that were printed. Partitions are authorizations given to specific employees allowing them access to specific functionalities in the Bank electronic system.

According to the Grievants they were supposed to print transactions in partitions 16, 28 and 37 and later 25 at COU and partitions 13, 26 and 40 at BSS. According to the Grievants, they were supposed to be informed whenever there was change regarding partitions through written communication from the officer in charge of manual payments. This included situations such as when a new partition was created, when any data staff went on leave or when there was one-off or temporary rights over specific partitions.

The Grievants allege that they were never informed when partition no. 27 was created. Boniface Mwaura alleged that he learnt about partition 27 on 11th November 2010 when Kennedy Kiura submitted to him vouchers posted under that partition. David Milimu Musiomi alleges that he never printed the partition. The Grievants further allege that they were never tasked with reconciling BSS internal accounts and would therefore not have noticed any irregular activities in the account. The Grievants denied that they were negligent in the performance of their duties. Although there were 3 checkers only the Grievants were terminated while the 3rd checker Jacqueline Muga who had been suspended with them was reinstated back to work.

The Respondent on the other hand alleges that the Grievants were aware about partition No. 27 and were negligent in failing to print and check the partition, that the Grievants knew the existence of partition No. 27 because Bonface Mwaura had printed it on 29th October 2010 while David Milimo had printed it on 11th November 2010.

I have considered the evidence adduced for both the Claimant and the Respondent, the pleadings together with annexures and the written and oral submissions.

The issues for determination are the following;

1. Whether there was valid reason for termination of the Grievant's.
2. Whether the procedure adopted was fair.
3. Whether the Grievants' are entitled to the Prayers sought.

1. Was there valid reason for termination of the employment of the Grievants?

The Grievants' employment was terminated for reasons that while discharging their duties as checkers they negligently failed to print and check the partition prints No. 027 for the period from 1st December 2010 to 23rd December 2010 belonging to Kennedy Gachogu Kiura as expected of them, thereby facilitating a loss of Shs.10,269,649/= to the bank.

Both Grievants replied to the show cause letters served upon them on 6th January 2011 to the effect that they had not been advised about the opening of partition No. 27 and therefore were not aware that they were expected to print and check the vouchers against the partition. They further stated that they were not responsible for reconciling the BSS income accounts whose monitoring is done on a daily basis, that the partition was in respect of a Commission account which has a debit restricted password and could not allow for debit postings. David Milimu Musiomi was on leave from 10th November to 3rd December 2010 while Boniface was in COU between 8th and 23rd December 2010.

RW1 testified that he carried out investigations and prepared a report. The report was however never submitted during conciliation or the hearing. The conciliator specifically commented that at the end of the first meeting the parties agreed that the respondent would produce the following documents which the Respondent failed to produce

1. Documents showing partition 27 had posting functionalities since 2006 (including printings).
2. Jacqueline's record to show where she had worked since 2009.
3. Daily posting register checked by the supervisor.

The conciliator's findings were as follows;

1. **The management failed to prove that partition 27 had posting functionality as they stated.**
2. **The management failed to produce the demanded employment records to show that Jacqueline Munga was being trained by the two complainants.**
3. **Treating Jacqueline Munga differently from the other two amounts to discrimination contrary to section 5 of Employment Act, 2007 and Article 27 of the Constitution.**
4. **Failure by the management to produce the demanded documents casts doubts in its submission.**

RW1 confirmed that the account from which the money was debited is debit restricted. He could not explain why this account was not restricted thereby making it possible for Kiira to debit the account. He further stated that he recommended disciplinary action against all 3 checkers yet only the 2 Grievants were terminated while Jacqueline Muga was reinstated.

I have considered the evidence and find there is no explanation why the investigation report which was obviously not shared with the Claimant or the Grievants was not brought to court to enable the court assess if based on the investigation report, there was valid reason for termination of the employment of the Grievants. The Respondent also did not explain why Jacqueline Muga who was a checker during the period when the fraud was committed was reinstated while the Grievants were terminated. Further Boniface was not in BSS Department from 8th to 23rd December 2010 when he had been transferred to COU Department.

Both Grievants were suspended on 27th December 2010. Their suspension letter did not state why they were suspended.

The letters read as follows;

Thro'

The Head

Central Operation Unit

RE: SUSPENSION FROM DUTY – THEFT OF SKSHS.10,181,092 BY KENNEDY GACHOGU KIURA AT BSS

We refer to the above mater and have to inform you that the Bank has decided to suspend you from duty with immediate effect in accordance with the provision of Clause A5 of the Collective Agreement to facilitate investigations.

You will cease to perform the duties of you office and will be placed on half basic pay for the period you will be on suspension. You will also be required to report to the Head Security Services on every business day at 9.00 a.m to sign the attendance register until further notice. In addition, during the period of your suspension you are not allowed to access the Bank offices.

Signed

PETERTHA

FOR: DIRECTOR

HUMAN RESOURCES DIVISION

The suspension letters only referred to theft by Kennedy Gachogu Kiura at BSS and did not link the Grievants to the theft. They were issued show cause letters on 6th January 2011 which for Boniface stated that between 1st December and 7th December 2010 he negligently failed to print and check the

partition no. 27 belonging to Kennedy Gachogu Kuira at BSS thereby facilitating loss of Ksh.10,269,649 to the bank.

Milimu was asked to show cause why between 1st December 2010 and 23rd December 2010 he negligently failed to print and check partition no. 027 thereby facilitating the loss of Kshs.10,269,649 to the Bank. In spite of Boniface being asked to explain his liability for the period 1st to 7th December 2010, he was terminated for negligence between 1st to 23rd December 2010 which period he had not been asked to explain. This is further in spite of the fact that he was not working in BSS from 8th to 23rd December 2010 when he had been posted to COU.

For Milimu the period he was accused of negligence included 1st to 3rd December 2010 when he was on leave.

During cross-examination RW2 stated the following ***“Kiuria was working on partition 26 then changed to 27. The checkers were not informed about the change. Individual employees were taking vouchers to the checkers individually... The 3rd checker was Jacqueline Muga. She was not treated as Claimants because she was new. I attended the conciliation. We did not produce the documents referred to in the report. Jacqueline was the oldest in the department but new in the role. Mr. Kiura was moved to partition 27 on 23rd October 2010. Boniface had left the department on 27th December 2010. He left on 6th December 2010. His part was from 6th December. I do not know who replaced him. I do not know if the person who took over from him was sacked for not printing partition 27. I cannot confirm that David Musiomi was on leave up to 9th December 2010. I did not interview the Grievants. The Grievants were not called for disciplinary hearing before or after termination. The Grievants did not have any warning letters in their records...”*** And during re-examination ***“Kuira could not debit... He was not able to debit. I do not know how he managed to debit. An individual staff member was supposed to place the forms in the tray. The checkers are supposed to allocate themselves from the vouchers printed. Jacqueline had been transferred 3 months before the fraud occurred...”***

I have quoted at length from the testimony of RW2 who is the Employee Relations Manager of the Respondent and who indeed is supposed to be responsible for the disciplinary process of the Grievants. His testimony clearly shows the contradictions between the accusations levelled against the Claimants and their role in the whole process. It casts a lot of doubt on the nature of investigations that were carried out and the contents of the investigation report that the Respondents declined to produce in spite of being requested to do so during conciliation and agreeing to produce the same. The evidence of RW2 further shows the discrepancy between the treatment of the Grievants and their fellow checker Jacqueline Muga.

Section 43 of the Employment Act provides that an employer shall be required to prove the reason(s) for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

Section 45 (2) (a) provides that termination of employment shall be unfair if the employer fails to prove that the reason for termination is valid. From the foregoing, the Respondent failed to prove that the reasons for termination of employment of the Grievants was valid.

2 Where the procedure adopted was fair.

In the Memorandum of Defence the Respondent stated that the termination of employment of the Grievants was fair according to common law, the Employment Act and Article 5 of the Collective Bargaining Agreement.

I wish to point out that according to the Judicature Act the common law principles are not applicable where there is provision in legislation on any legal matter. Secondly the Employment Act at Section 12 provides that it is mandatory for every employer with a minimum of 50 employees to have a statement on disciplinary rules. Section 41, 43, 45 and 46 provide for the procedure before termination of employment while section 49 provides for remedies in the event of unfair termination.

Clause 5 of the Collective Bargaining Agreement applicable between the Claimant and the Respondent provides for grounds of dismissal, dismissal after warning, suspension and termination notice. The same does not provide for the disciplinary handling procedure required by Section 12 of the Employment Act.

Both Grievants testified that they were never given a hearing. They received notices to show cause which they responded to and the next communication they received were the letters of termination. This was confirmed by RW2.

Section 41 is specific about the procedure for termination. An employee must be informed of the reasons for which the employer intends to terminate his employment in the presence of a fellow colleague of his choice or a union official. He must be given an opportunity to be heard if the grounds for termination are those under section 44(3) or (4) of the Act.

The Claimants were never given a hearing. Section 45 states that failure to prove that the employment was terminated in accordance with fair procedure amounts to unfair termination.

Having failed to prove both validity of reason and fair procedure the termination of employment of the Grievants amounts to unfair termination.

3. Are the Grievant's entitled to the prayers sought?

The Claimant prayed for only one remedy, that the Grievants be re-instated to their former position without loss of benefits or seniority. They have not sought any other or alternative remedy.

Having found that the Grievants were terminated unfairly, on both validity and procedural grounds they are entitled to remedy as provided in section 49 of the Employment Act. The Respondent submitted that the duty of the Respondent has already been discharged as all terminal dues owed to the claimants have been paid and received by the employees, and that therefore there is no cause of action against the Respondent. The Respondent further submitted that having severed the relationship the prayers sought by the claimants cannot be granted.

RW2 in his testimony stated that banking relationship is one of trust and confidence and this trust was broken by the claimants failing to do what they were supposed to do. The breach of trust and confidence has not been disclosed in the evidence adduced before the court.

The Respondent has referred me to 2 cases.

1. **Industrial Court Cause No. 955 of 2011; Walter Ogal Anuro v Teachers Service Commission** where Justice Ndolo declined to grant the Claimant's prayer for re-instatement as the stringent conditions set out for issuing such an order under section 49(4) of the Employment Act had not been met; and
2. **Industrial Court Cause no. 1050 of 2011; Loice Otieno V. Kenya Commercial Bank Ltd** where Justice Radido in declining to grant

re-instatement held that the Respondent must prove the reasons for the termination or whether the reasons were fair and valid. The present case is distinguishable from the 2 cited by the Respondent. In **Walter Ogal Anuro's** Case, the court found that the Claimant was taken through some disciplinary procedure but the Respondent did not take its investigations full circle. The court found that the Respondent had failed only the test of procedural fairness.

In the case of **Loice Otieno** the court stated that it did not venture to consider whether the respondent proved the reasons for the termination or whether the reasons were fair and valid, and on those grounds declined the prayer for reinstatement as inappropriate in the circumstances.

I have considered the fact that in the present case both the reasons and the procedure were wanting. The

Claimants were never taken through any disciplinary procedure. They were suspended without being given any reason, then given show cause letters which they responded to and were terminated based on such response. Having not been heard the court found that the reasons for termination were not proved. I further found that the Grievants were selectively punished even for periods when they were not at work in the section where the offences were committed, that they were not aware of the partition which they were accused of not printing as it had never been brought to their attention. Their colleague who had all the time been at work and who had served in employment for a longer period than the Grievants was reinstated back to work. The people who were supervising the Grievants were not questioned. The person who replaced Bonface Mwaura Gitachu at COU during the period when the offence took place was never punished. The supervisor of Kennedy Kiura who was supposed to check his work on a daily basis was never disciplined. There was no explanation how Kiura debited the lost funds from an account which had no debit functionality. The Respondents acted in bad faith by failing to submit relevant documents during conciliation and the same documents were not produced in court. In fact the Respondent never produced any documents at all. The only documents available for the court to consider were those submitted by the Claimant. Section 10(7) of the Employment Act lays the burden of proof on the employer where there are no employment records. I have also considered all the factors set out in section 49(4), the manner in which the Grievants left employment, the fact that they were singled out for dismissal, the fact that the Grievants had no warning letters in their files and their wish being to be taken back in employment. I have also considered the Respondents reasons as submitted.

I find that this case meets the conditions for an order giving the Grievants their jobs back. I order that the Grievants be re-engaged by the Respondent in the same or comparable position as they were before termination and be given the terms they would have been earning now had they not been terminated from employment. That the re-engagement be with immediate effect and in any event not later than 1st April 2014.

I further order that the Claimant be reimbursed all expenses incurred in the prosecution of this case including the expenses incurred by the Grievants such expenses to be assessed by the Registrar. For the avoidance of doubt, the Claimant is not entitled to professional fees payable to advocates.

Orders accordingly.

Read in open Court this 10th day of March 2014

MAUREEN ONYANGO

JUDGE

In the presence of:

Mwaura h/b for Munoru for Claimant

Mathai h/b for Mrs Macharia for Respondent