



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO 2071 OF 2012**

*(BEFORE: D.K.N.MARETE)*

**BANKING, INSURANCE & FINANCE UNION.....CLAIMANT**

***VERSUS***

**CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter comes to court vide a memorandum of claim dated 5th October, 2012. The issue in dispute is therein cited as;

**‘Wrongful dismissal of employment of Helen Nduta Ngugi’**

The respondent vide a memorandum of reply dated 15th May, 2013 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that it is a trade union representing the respondent’s employees. The grievant was employed by the respondent on 17th May, 2007 as a Graduate Clerk. She was, upon completion of probation, confirmed on permanent employment. On 29th March, 2011, she was promoted to Section Head where she was confirmed after probation on 29th June, 2009.

The claimant, while working as an accounts service officer received an email from Nkrumah Road Branch requesting her to verify signatures on A/C No. 01136135896700 which she did. On 19th June, 2011 she was issued with a show cause letter accusing her of negligence in approving payments. She was dismissed on 2nd November, 2011. Her appeal against dismissal was rejected.

The claimant submits that the respondents failed to observe disciplinary procedure as laid down in the Collective Bargaining Agreement. The claimant is a victim of circumstances as the perpetrators of the fraud were left in employment. She had acted in good faith and should have been awarded a fair hearing in the circumstances. The claimant also brings out a case of breach of substantive and procedural justice contrary to S.43 of the Employment Act, 2007 and a denial of the right to representation as provided for in the Collective Bargaining Agreement. She prays as follows;

3.1 *The claimants wish to pray this Honourable Court to find that Ms. Hellen Ngugi’s dismissal was unfair and therefore we request that the grievant be re-instated back to her former position in the bank without loss of employment benefits or seniority in service.*

3.2 *All salaries and allowances which the grievant has lost as a result of this uncalled for*

*dismissal should be paid back to her in full since the date of dismissal to the very date of the award (Actual pecuniary loss).*

3.3 *The Court should also compensate the grievant for having suffered unfair loss of job.*

3.4 *The Claimants finally pray to the Honorable Court to award any other appropriate relief that the court may deem justifiable.*

3.5 *The costs of this suit.*

The respondent denies the claim and reiterates the position as elicited by the claimant. The claimant confirmed the signatures as correct and an amount of Kshs.2,481,856.00 was paid out. It later emerged that these signatures were not the actual signature of the bank account and therefore this fracas.

9. *The employee duly responded to the Notice to Show Cause letter through her letter dated 22<sup>nd</sup> July 2011 in which she expressly admitted that:*

(a) *She went ahead to confirm the signatures forwarded to her notwithstanding that she had difficulty opening some of the attachments forwarded to her for verification;*

(b) *She did not do a call back and only verified the signatures presented to her for the reasons inter alia that the original documents were not with her at the time;*

(c) *Apologized for the oversight on her part which had led to substantial loss to the bank and committed to be more careful and committed in future transactions. She requested for a pardon from the bank*

Her employment was terminated on the following grounds;

a. *The employee violated the bank's operating manual volume VI sections 3 and 26;*

*and*

b. *The employee violated section 13 of the bank's business code of conduct and ethics.*

The issues for determination in the circumstances are;

1. Was the dismissal of the services of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination/dismissal of the claimant's services was wrongful, unfair and unlawful. The claimant's case is that while working as an Accounts Service Officer on 19th July, 2011 received an email from Nkrumah Branch requesting her to verify signature on AC NO. 01136135896700 so as to enable effecting of the transaction at the Head Office where it was originated. She did. She was later issued with a show cause letter dated 19th July, 2011 that accused the claimant of negligently approving payments. Despite giving a detailed explanation, she was dismissed vide a letter dated 2nd August, 2011. Her appeal against dismissal did not bear fruit either.

The central staffing committee of the union appealed against the termination to the respondent but this was again dismissed without any hearing. The dispute was thereafter reported to the Minister for Labour who appointed a conciliator but the process ended in a stalemate. The conciliator recommended that the dismissal be reduced to normal termination and the claimant be paid six (6) month's salary for unfair termination but she disagreed and hence this suit.

The respondent reiterates her case and submits that she lost Ksh.2,81,856.00 through the irregular verification of signature by the claimant. It was later confirmed that these were indeed not the true signatures and that she did not do a call back to the client as per the requirements of process. She also made confessions in response and admitted doing. She had her services terminated.

Appendix 3, respondent's Memorandum of Reply are the enquiries on verification of signatories of the grievant all dated 22nd June, 2011. It is not in dispute that, these were verified on the same day by the grievant. This was accordingly communicated to the enquiry office.

The instructions on the email dated 22nd June, 2011 asked the grievant to, and I quote, '*kindly confirm*

- i. *signatures so that we can effect the payments*
- ii. *Hi, below mail please refer*

*Look at the 3rd attachment*

- iii. *Kindly ignore the previous instructions and act as per the attached files for payment sorry for the inconvenience*

The gist of these instructions was a search for verification of account signatures to facilitate the payment. This was done to the best of the ability of the grievant. It was also done in consultation with the available data on the subject. Why then are we accusing the grievant of default?

The grievant in the claimant's submissions ousts herself out of the procedure of a call back. The operations of the respondents operating manual (Page 19, 3.1) debars the grievant in the circumstances from doing a call back.

4. *The grievant is accused of not doing a call back on a transaction involving a customer's account. The procedure of doing a call back is well defined in the Respondents operating manual. The manual details all the procedures of doing a jumbo link transaction which was totally ignored by the persons working at the Respondents Central Operations Unit (COU). (Main Respondents memorandum App. 9-3.0)*
5. *The issue of doing a call back was imposed on the grievant by one Samuel Osero via an email sent to her. (Refer to App. 5 of the Respondents main memo of reply)*
6. *The Respondents operating manual page 19 at 3.1 states very clearly who should not do a call back. "The call back should not be done by the person who received the instructions for the same person who did the KYC and signature verification." The grievant had received instructions via email from Peter T. Ndzai, she had done signature verification, so she was not the person to do a call back. In fact, if she did a call back as she is accused of not doing, she would have done a greater mistake. APP. 1*

All witnesses testified on oath in this issue that arose out of the Jumbo Link System which system is tamperproof. Those who interfered with the same must have been introduced into the system by insiders from the respondents Central Operations Unit (COU.) The claimant therefore faults the termination as being malicious and vindictive and lacking in any moral foundations. Two, the respondent backs the termination on investigations which investigations report was not availed or tabled in evidence so as to answer the salient issues belying the fraud as hereunder

10. *An appeal was lodged on behalf of the grievant by a letter dated 11<sup>th</sup> August 2011 and the properly constituted committee duly convened in the presence of the grievant and a union representative. See the appeal letter dated 11<sup>th</sup> August, 2011 minutes of the meeting of the 30<sup>th</sup> August 2013 and the letter from the bank dated 21<sup>st</sup> September 2011 denying the appeal. See appendix 10 of the memorandum of reply. The appeal was subsequently disallowed.*

The claimant faults the procedure for termination as set out by the respondent where the magnitude of the problem to the respondent was insurmountable and the amount of loss colossal. No equivalent amount of energy is expended in unearthing the root or truth of the problem. The grievant only appears a scape goat.

The dismissal of the claimant does not encompass the provisions of S.44, Employment Act on summary dismissal. If this was never the case, the respondent in his case does not form a good case for termination in contrast to S.45 of the Act. All ways lead to a clear case of unfair termination whereby the procedures for hearing were not observed but applied only as of course - casually.45.

(1) *No employee 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 employees 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.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

a. *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) *the conduct and capability of the employee up to the date of termination;*

(c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

e. *the existence of any previous warning letters issued to the employee.*

*Section 43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons 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.*

(2) *The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

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.*

The grievant did not in any way participate in the plan to defraud the respondent and this was nurtured elsewhere. There is no observance of the requirements of a fair termination as per S.45 or even articulate procedural observations as required under S.41, Employment Act, 2007. The defence therefore faults.

16. *In the case of Alphonse Machanga Mwachanya versus Operation 680 Limited [2013] eKLR, the court held that employers must comply with their internal disciplinary procedural rules. The claimant in his case further relied on Article 50(2) (j) of the Constitution on the right to everyone having a fair trial and having reasonable access to evidence against them to be able to prepare their defense.*

The respondent in the cause of discipline abrogated agreed processes under the Collective Bargaining Agreement and Staff Operations Manual on the subject.

The grievant signing limit was Ksh.750,000.00 and even here, the grievant only signed to verify the signatures. Who signed in authorization of this figure?

All this leads to one smart conclusion. The grievant was wrongly, unfairly and unlawfully terminated by the respondent. No serious attempts were set to bring out a case against her. She at all times appears a scapegoat or victim of ill motive and circumstances. This is unfair and unlawful. It offends her basic rights as expressed under Articles 41 and 47 of the Constitution of Kenya, 2010 that call for fair labour and administration action to our citizenry as a basic non-negotiable human right. The respondent having abrogated this should not go scot-free.

Having established a case for unfair and unlawful termination of employment to an innocent employee whose record was blemish free and performance exemplary, I find that the claimant is entitled to the relief sought. I am therefore inclined to order re-dress and declare as follows;-

- i. **THAT** the termination of the employment of the grievant, Helen Nduta Ngugi, be and is hereby declared wrongful, unfair and unlawful for all intents and purposes.
- ii. **THAT** the respondent be and is hereby ordered to reinstate the grievant, Helen Nduta Ngugi, to her former position and office in the respondent's bank without loss of benefits, seniority or service.
- iii. **THAT** the grievant, Helen Nduta Ngugi reports to her work station tomorrow 25th April, 2014 at 800 hours for deployment.
- iv. **THAT** the respondent be and is hereby ordered to pay to the grievant all salaries and allowances lost as a consequence of the unlawful dismissal from 2nd August, 2011 to date

$$= 84,822.00 + 6,055.00 \times 33 \text{ months} = \text{Ksh.2,998,941.00}$$

v. **THAT** the respondent be and is hereby ordered to pay to the grievant 8 months compensation for unlawful termination of employment =  $\text{Ksh.}84,822.00 + 6,055.00 \times 8 = \text{Ksh.}727,016.00$

vi. **THAT** the costs of this suit shall be borne by the respondent

Delivered, dated and signed the 24th day of April, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Mwaura Ngage instructed by Banking Insurance and Finance Union for the claimant.
2. Mr. Nyambo instructed Muthaura Mugambo Ayugi and Njonjo Advocates for the respondent.