



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 837 OF 2011

BETWEEN

MIRIAM SIWA CLAIMANT

VERSUS

KENYA POST OFFICE SAVINGS BANK LIMITED..... RESPONDENT

Rika J

CC. Mr. Kidemi

Ms. Othelo instructed by Ochieng, Onyango, Kibet & Ohaga Advocates for the Claimant

Mr. Okeche Advocate instructed by the Federation of Kenya Employers [F.K.E] for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Miriam Siwa filed her Statement of Claim on 31st May 2011. The Respondent filed its Statement of Response on 10th May 2012. Miriam testified and closed her case on 30th November 2013, while the Respondent's Director of Operations Banking, Anne Karanja, testified on 4th December 2013 when the hearing closed. The dispute was last mentioned on 27th January 2014 when the Parties confirmed the filing of their Final Arguments, and were advised by the Court Award would be delivered on notice.
2. The Claimant's position is that she was employed by the Respondent as a Management Trainee, effective from 2nd June 1993. She was confirmed on 21st November 1995. She worked in various capacities within the Respondent. She last held the Position of Regional Manager for Nairobi South and North Regions, and earned a gross monthly salary of Kshs. 180,896. On 11th August 2010, she received a Memorandum from the Senior Manager Operations, detailing loss of Kshs. 20.7 million from the Respondent's Afya Centre Branch. The Claimant was asked to prepare a Report explaining the loss. She sent her Report to the Senior Manager Operations on 13th August 2010, detailing how the fraud occurred.

The Claimant was interdicted on 20th August 2010. She wrote to the Director of Operations on 16th September 2010 explaining her role. On 30th November 2010, the Respondent through its Managing Director terminated the Claimant's contract of employment. She holds this decision to have been unfair and unlawful, and seeks the following Orders-:

- a) A declaration that termination of the Claimant's employment by the Respondent was unlawful;
- b) General Damages for unfair and unlawful termination of employment to the equivalent of the Claimant's remuneration of 12 months at Kshs. 2,170,752;
- c) 3 months' salary in lieu of notice at Kshs. 542,688 in accordance with the Respondent's Staff Rules;
- d) General Damages for unfair and unlawful termination of employment;
- e) Interests at Court Rates on [b] and [c] above from the date of filing the Claim until payment in full; and
- f) Costs of the Claim.

3. The Claimant testified she was based at the Head Office. About 40 Branches reported to her. The Branch was under a Branch Manager. Money was distributed to various Outlets. The Bank would close at 4.00 p.m. and reconciliation done. The fraud was alleged to have been executed by Acting Senior Cashier, through transfers of cash to the ATM. The same money would neither be loaded to the ATM physically, nor credited to the ATM. The transaction required use of Code 98 and the corresponding Code 40. The cash without the corresponding Code 40 was stolen. Both Codes were not automatic and required human intervention.

4. The Claimant was interdicted to allow for investigations. This was in August 2010. She was called by the Management on 15th November 2010 for a meeting. She was hosted by the Human Resources Manager and the Director of Operations. She was advised her services would be terminated. She was issued with the letter of termination dated 30th November 2010. She testified that after interdiction, she ought to have been involved with the investigations, and given a chance to respond. She unsuccessfully appealed to the Respondent against the decision.

5. She told the Court on cross-examination that her immediate controlling Officer was the Senior Manager Regions, Mr. Charles Muge. Her contract Clause [h] stipulated that her employment would be regulated by the Bank's Rules and Regulations. She did not sign the Job Description Document. She oversaw business development in the Branches. She regularly inspected them. She would visit Branches and discuss policy. Her services were terminated because of the loss of Kshs. 20.7 million at Afya Branch. It was also alleged that she failed in setting up of a Compliance Unit. She denied that she was responsible for the loss.

6. The Report dated 10th August 2010 by Felix Rerimoi of the Audit and Inspectorate Section indicate Kshs. 20.7 million was lost. The Claimant saw the Report before termination. The loss was within a span of 3 months. Her Supervisor said this happened because the Claimant had failed in ensuring there was compliance with the Bank's Regulations. The money was not lost in a single day.

7. There were systems in place. She was not part of the day-to-day system administration. She took care of the matters under her responsibility. Her Supervisor C.K. Muge blamed her for not taking deliberate actions to ensure that all the controls put in place were applied and worked as expected. Even if the Compliance Unit was in place, fraud would still have taken place. The Management had made a circular on verification of transactions at the Branches. It required there be established Regional Compliance Units. The Unit was not in place at the time the fraud occurred. Miriam explained to the Management why this had not been done. She told the Respondent that it needed to have Employees, who were fully

informed on the new business model. There were such fully informed Employees in the Branches, but they could not be moved from there.

8. She answered the letter to show cause on 13th August 2010. She stated she was not able to look at the details every day for each Branch. Nothing was detected as the fraud unfolded for 3 months. Miriam insisted she did not neglect her work. She met the Managing Director briefly at the point she was informed she was being interdicted. It was for about 10 minutes. The letter of interdiction stated that the Claimant had acted contrary to the Postbank Code of Conduct. Part 6, paragraph 6.1.1.4 defined failure to perform properly and carefully any work assigned to an Officer, as an employment offence and misconduct. She did not think she was involved in an offence or misconduct under this clause at all.

9. Miriam testified further on cross-examination that she ought to have been supplied with the Investigation Report before she was asked to defend herself and before she was dismissed. It was not in doubt how the money was stolen. She did not know the specific person who stole the money. She was not negligent. 3 months' salary in lieu of notice was granted by the Code of Conduct. It was part of the offer made to the Claimant by the Respondent in its letter of 30th November 2010. She prays for two sets of damages- one on character and the other for unfair termination. She lost some of her friends as a result of the termination. She joined the Lake Basin Authority in July 2011 as the Chief Manager Planning, Research, Investment and Promotion. She testified on redirection that the Bank was aware its system could be manipulated. She prays the Court to grant her Claim.

10. The Respondent does not dispute that the Claimant was employed by the Respondent in 1993. It does not dispute that her contract was terminated on 30th November 2010. At the time of termination which was initiated by the Respondent, the Claimant held the position of Regional Manager responsible for Nairobi South and North Regions. Termination was for valid reason and fair. She was heard before the Respondent's Board on 30th November 2010. Termination was on the ground that she was negligent in the performance of her duties. She failed to establish an effective Compliance Unit, and failed to detect irregularities at the Afya Branch which went on for 3 months, leading to the loss of Kshs. 20.7 million.

11. Anne Karanja testified she is responsible for the Branch Operations. Miriam was in charge of Nairobi South Region, which included the Afya Branch. Between April and August 2010, the Bank lost Kshs. 20.7 million. It was as a result of non-compliance with procedures. She was to ensure a Compliance Unit was in place and functional. She did not do so. The Unit was meant to ensure daily transactions were genuine. Kshs. 20.7 million which was supposed to be loaded to the ATM was lost at the Afya Branch, between April and August 2010. There was no reconciliation at the end of the day. Cash control at the Branch was weak. It was Miriam's duty to ensure the Compliance Unit was in place, and check all the summaries.

12. Immediately the loss was detected, the Claimant was issued a letter by the Respondent calling on her to explain herself. She responded and admitted the lapses. She stated she failed to set up the Compliance Unit owing to the shortage of staff. This issue was not brought to Anne's attention earlier. She was advised that her omission was a specific offence under the Postbank Code of Conduct clause 6.1.1.4. It relates to 'failure to perform properly and carefully any work which is assigned.' Her job description defined her responsibilities to include administrative matters. Clause 5 of the job description required her to carry out regular Branch Inspections. She failed to do so and failed to ensure Branches understood the Bank's Policies and procedures. She alleged Symbol SB3 was in use at the Afya Branch, and did not capture all the information. Anne explained that SB3 is a complete record, and supposed to be summarized within the Compliance Unit. She was heard, and gave no new line of defence beyond what she had explained earlier in her letters. It was for these reasons that her contract was terminated.

13. Cross-examined by Ms. Othelo, Anne stated that before Miriam was dismissed, there were two Regional Managers. Some responsibilities were handled by the Branch Managers and others by the Regional Manager. Loading of the ATM was at the time, manual. Cash movement was handled by the Branch Manager and the Senior Cashier. The Branch Manager and the Branch Cashiers did the reconciliation reports. The Regional Manager through the Compliance Unit was supposed to ensure reports were in order. Miriam was supposed to set up the Compliance Unit from May 2010. The money

was lost from April 2010. The Unit was just an additional mechanism. Even without it, Miriam was supposed to ensure there were no flaws. If manual entry was wrong, it would be captured in the system. Compliance Unit was to be set up from the existing staff. She was placed on interdiction to allow for further investigations. Further investigations took place. She was heard by the Disciplinary Panel. She had the opportunity to give evidence. If she had been diligent, the money would not have been lost. The Respondent preferred criminal charges against the Officers who were implicated in the loss of the funds. Anne testified on redirection by Mr. Okeche that the Claimant never complained that she was overwhelmed by her oversight of 13 Branches. She was given the reasons for the decision in the letter of termination. She did not complain about the disciplinary meeting of 15th November 2010. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards-:

14. The Claimant was employed by the Respondent Bank as a Management Trainee, on 2nd June 1993. She held several positions in the Bank, the last which was Regional Manager, Nairobi South Region. She oversaw 13 Branches, including the Afya Branch. It is agreed by the Parties that the Claimant's contract of employment was terminated by the Respondent with effect from 30th November 2010. Her salary at the time of termination was Kshs. 180,896 per month.

15. Section 43 and 45 of the Employment Act 2007 require the Employer to demonstrate valid reason or reasons in justifying termination, while Section 41 of the Employment 2007 requires the decision be carried out fairly. If the Court finds termination was unfair, it must then consider what remedies suit the Claimant, as intended under Section 49 of the Employment Act 2007, and Section 15 of the Labour Institutions Act Number 12 of 2007 [Part 3 now repealed].

16. On substantive justification, the Respondent's evidence is that the Claimant was the Regional Manager responsible for Nairobi South Region. She was in charge of 13 Branches, among them, the Afya Centre Branch. She was bound by her contract and the code of conduct, to render diligent service to the Respondent, and perform her role properly and carefully. Her duties were described in a written document availed to her, Respondent's annexure '1B.' She was to ensure transactions at the Branches were authentic and accurate. She was to set up a Compliance Unit, as an additional mechanism, in ensuring the accuracy of the daily transactions. Anne Karanja, the Respondent's Director of Operations Banking, explained that Miriam failed in the proper and careful performance of her role under clause 6.1.1.4 of the code of conduct.

17. Between April 2010 and August 2010, the Respondent lost Kshs. 20.7 million at the Afya Branch, a loss which the Respondent attributed to the Claimant's negligence. An Audit carried out by the Bank's Audit and Inspectorate Section found that the cash from the Senior Cashier supposedly transferred to the ATM, had no corresponding entries in the ATM TAC. The Audit concluded that end of day reconciliation through SB3 was not checked, and cash control at the Branch was weak.

18. Following this Audit, the Senior Manager Operations C.K. Muge wrote to the Claimant on 11th August 2010, calling for a full Report on the loss.

19. In her Report dated 13th August 2010, the Claimant conceded there was fraud at Afya Centre, which she explained, was executed by the Senior Cashier. She suggested that transfer of cash to the ATM should be automatic. She had visited all the Branches, discussed controls and where weaknesses were noted, advised the Head Office. Start of the day and End of the day reconciliations have always been carried out, but at Afya Centre the Branch Manager left the task of checking the End of day documents to the Senior Cashier. Symbol SB 3 in use at the Branch did not capture all the details. Lastly, Miriam confirmed there was no Compliance Unit in place, which she attributed to shortage of staff.

20. The Court finds the Respondent had valid reasons to justify its decision to terminate the Claimant's contract of employment. The Claimant worked under a written contract. Her duties were well defined in a comprehensive job description. The code of conduct was part of her contract of employment. Clause [h]

of the contract states “*during your employment with the Bank, you will be governed by the Bank’s rules and regulations which are in force or may be amended from time to time.*” The preamble to the Postbank Code of Conduct states that “*the Bank has issued this separate document on Employees Code of Conduct, which constitutes an integral part of the Terms and Conditions of Service and must be read alongside them.*” Part 6 of the Code, Clause 6.1.1.4, defines “*failure to perform properly and carefully any work that is assigned,*” to be an offence and misconduct. Clause 6.3.4 makes it an offence warranting summary dismissal if an Employee willfully neglects to perform any work, which it was his/ her duty to have performed, or if he carelessly and improperly performs any work, which from its nature, was his duty under the contract to have performed carefully and properly.”

21. These rules and regulations adopt the minimum disciplinary standards contained in the Employment Act 2007, in particular section 44[4] [c] on the employment offence of failure to perform duty carefully and properly.

22. The Claimant worked at the head of a Bank, and was expected to provide leadership to over 13 Branches. The Senior Manager Operations had prior to the period of theft, April to August 2010, written circulars and memos, emphasizing the need for Start of the day and End of the day reconciliations. There were specific instructions for the Claimant to set up Compliance Unit, to add weight to the control mechanisms at the Branches and minimize the risk of fraud. She was to do this from May 2010. Theft of the ATM funds by Senior Cashier at the Afya Centre Branch, took place from April 2010. Theft took place in April 2010 to the tune of Kshs. 4.3 million; May 2010 at Kshs. 6.6 million; and June 2010 at Kshs.9.8 million. The Claimant stated she did not fulfill her obligation to set up Compliance Unit because of the shortage of suitable staff.

23. The amounts involved were large, and the crime was not a one-off, but stretched for 3 months. The amounts progressively grew larger over the 3 months, indicating the growing confidence in the fraudster in avoiding detection. Careful and proper performance by the Claimant of her supervisory role, even without setting up of the Compliance Unit, ought to have detected and stopped the crime and the huge loss occasioned to the Respondent. The Claimant did not raise the issue of shortage of staff with the Management. She was not overwhelmed by the 13 Branches under her supervision. The Respondent was justified in holding her accountable. The decision was substantively justifiable, and reasons given for the decision valid reasons, based on the contract, the code of conduct and the law governing the Parties’ relationship.

24. There is considerable doubt as to whether Miriam was granted the full opportunity to be heard in the manner contemplated under the Employment Act 2007. The fraud at Afya Centre was discovered in a surprise Internal Audit, and Interim Report dated 10th August prepared. The Claimant was asked to give her Report on the issue by her Supervisor C.K. Muge, in a letter dated 11th August 2010. She wrote her Report dated 13th August 2010. Muge wrote to her on 16th August 2010 asking the Claimant to show cause why she should not be held responsible for loss of Kshs. 20.7 million. She replied on 16th August 2010, but the Respondent was not satisfied with her reply, and placed her on interdiction, pending further investigations.

25. There is no evidence that further investigations took place after the Interim Audit Report of 10th August 2010. The Claimant wrote to the Director of Operations on 16th September 2010 requesting for the lifting of the interdiction. The next communication availed to the Court between the Parties was the letter of termination dated 30th November 2010. Parties alluded to a meeting held between the Claimant and the Respondent on 1st November 2010, but it was not clear if this was a disciplinary hearing, carried out in conformity to Section 41 and 45 of the Employment Act 2007.

26. The Code of Conduct Part 9 required the Claimant’s Supervisor to draw specific charges if it was considered necessary to charge the Claimant. There are no specific charges in the record, drawn after the interdiction as envisaged under Part 9. There was no clear evidence of an ad hoc Committee convened by the Managing Director, no evidence of hearing and review of evidence, and no evidence of findings and recommendations forwarded to the Managing Director regarding the forms of punishment. The

Respondent did not follow the rules of disciplinary hearing, laid down under the Employment Act and under its own Code of Conduct. There are no minutes recording any disciplinary hearing.

27. The Claimant wrote an Appeal against the termination decision on 2nd December 2010. Clause 7.7.2 of the Code states that the Appeal, “ *shall be heard and decided on as early as possible.*” There is no indication that the Appeal was heard, either in the presence or absence of the Claimant. The letter communicating the rejection of the Appeal is dated 22nd February 2011, and merely alluded to “*careful consideration accorded to your letter.*” It is not shown when the Appeal was heard, where it was heard, and whether the Claimant was invited for the hearing. It is not shown who heard the Appeal. The Respondent merely advised the Claimant that “*all the concerns raised in your letter had adequately been addressed before meting the action on you.*” The Respondent ought to have given the Claimant a hearing. An Appeal is not just a formality, but must be given the seriousness any other disciplinary hearing deserves.

28. On these grounds the Court finds that the Respondent did not observe fair procedure in carrying out the termination decision. Termination was unfair on account of these procedural lapses.

29. The Respondent offered to pay to the Claimant 3 months’ salary in lieu of notice in the letter of termination. The Court has no reason to deny the Claimant what was offered by the Respondent. ***The Claimant is granted 3 months’ salary in lieu of notice at Kshs. 542,688.***

30. The prayers for general damages are repetitively pursued, and no explanation was given by the Claimant why the Court should grant her general damages for unfair and unlawful termination the equivalent of 12 months’ salary at Kshs. 2,170,752, and a separate general damages for unfair and unlawful termination of employment. There is only one injury, which does not merit double compensation. ***The Claimant is granted 4 months’ salary in compensation for breach of fair procedure, at Kshs. 723,584*** under Section 49 of the Employment Act 2007 and Section 15 of the repealed Labour Institutions Act 2007.

31. The Claimant’s contract was terminated on justifiable ground, and there is no basis to warrant an Award for exemplary damages for malicious termination. Termination was not malicious, but based on valid reasons. If termination had in any event, been found to have been actuated by malice on the part of the Respondent, it would only mean the Respondent did not act fairly, with justice and equity under Section 45 of the Employment Act 2007, and the remedy would be compensation in terms of Section 49 of the Employment Act 2007 and Section 15 of the Labour Institutions Act 2007. There is no reason why malicious termination should be remedied by other forms of damages outside the statutory compensation given under the Statutes. *In sum-*

[a] Termination was unfair on account of procedure;

[d] The Respondent shall pay to the Claimant 3 months’ salary in lieu of notice at Kshs. 542,688 and 4 months’ salary in compensation for unfair termination at Kshs. 723,584 – total Kshs. 1,266,272 – the full amount to be paid within 30 days of the reading of this Award; and

[c] No order on the costs and interest.

Dated and delivered at Nairobi this 4th day of April 2014

James Rika

Judge