



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2275 OF 2012

BANKING INSURANCE & FINANCE UNION.....CLAIMANT

VERSUS

BARODA BANK LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant union sued the Respondent for the wrongful dismissal of the grievant Doreen Vivian Medza Tsuma from her employment with the Respondent bank. The Claimant averred that the grievant was employed on 14th July 2010 and posted to the Respondent's Industrial Area Branch. The Claimant averred that the grievant worked as a teller, customer service clerk, advances clerk and clearing clerk. It was averred that she worked until 31st May 2012 when her contract of service was terminated. She was given instructions by Mr. Owino the head of clearing to debit a certain account and credit a customers account. The letter of termination did not state the reason for termination and the Claimant sought payment of the difference in salary from the agreed sums in the CBA and the sums the grievant was actually paid. The Claimant also sought payment of the grievant's actual pecuniary loss in terms of salaries and allowances, reinstatement to her former position, compensation for wrongful termination.

2. The Respondent was opposed to the suit by the Claimant and averred that the only dispute the Court could competently handle was the issue of termination of the grievant from employment as this was the only issue referred to the Minister in accordance with Section 62 of the Labour Relations Act 2007. It was also averred that the Court has no jurisdiction to entertain a claim for reinstatement as the contract between the Respondent and grievant was for a fixed term which commenced on 15th July 2011 and expired on 14th July 2012. The Respondent averred that the grievant was paid the salary agreed by the parties in the contract of employment. It was also averred that the grievant fraudulently debited the Respondent's bank account and credited the account of Patricia Muthoni Njuguna and the cash was immediately withdrawn. The dismissal was fair and not arbitrary.

3. The grievant testified that she was employed by the Respondent and served in various capacities culminating with the dismissal on 31st May 2012. She testified that she was misled by her boss Mr. Stephen Ouma who gave her instructions to debit the Respondent's account and credit an account held at Thika Branch. The grievant testified that she was innocent and was not involved at all in the scheme to defraud the bank.

4. The Respondent called David Ogega Nyaboga a Senior Manager at the Respondent. He testified that he was in the same position when the grievant worked for the Respondent. The witness testified he was not in on the material day and a colleague Margaret Murithi had stood in for him. He testified that the

transaction took place without verification.

5. The Claimant filed written submissions and reiterated the position taken in the pleadings and the testimony adduced. The Respondent in its written submissions stated that the grievant could only be entitled to damages equivalent to her notice period and no more. The Respondent relied on the cases of **Lulume v Coffee Marketing Board [1970] E.A. 155**, **Rift Valley Textiles v Oganda [1990-1994] EA 526**, **Central Bank of Kenya v King'ori [2009] 1 E.A. 84**, **Central Bank of Kenya v Nkabu [2002] EA 36** and **Githinji v Mumias Sugar Co. Ltd [1995-1998] EA 81**.

6. The issues in dispute can be narrowed down to the following:-

- a. Was the grievant's employment terminated unlawfully?
- b. Are damages payable?
- c. If so how much?

The grievant was dismissed on account of an incident involving the fraudulent transfer of Kshs. 350,000/- to a customer's account held at Thika Branch of the Respondent. The Respondent averred that investigations were carried out but failed to avail any proof of the investigations or the evidence of any action taken such as charges before a criminal Court. Inference can be drawn that the evidence of the investigation could have exonerated the grievant hence the concealment of the outcome. The culprit confessed to his crime and cleared the grievant of any wrongdoing. There is nothing to show that the grievant and the erstwhile manager of the Respondent were accomplices in the crime perpetrated against the Respondent. The witness for the Respondent was not even on duty on the material date and cannot vouch for what transpired. His evidence was pure hearsay. Section 41 of the Employment Act 2007 provides the procedural safeguards the grievant was entitled to. There is no evidence on record that the grievant was accorded the fair procedure under this section of the law whatsoever. No hearing in terms of the Section was held, she was not told the Respondent was contemplating dismissal on account of the misconduct alleged and neither was she given an explanation in the presence of an employee of her choice. In the premises I hold that the termination was unfair within the meaning of Section 45 of the Employment Act. I find that the Claimant proved that the grievant's employment was wrongfully terminated. The Respondent correctly submitted that the grievant's terms and conditions of service were bound by contract. The contract made provision for the payment of salaries which were marginally lower than those in the CBA. The grievant joined the Claimant at the end of her employment and could therefore not benefit from the past payments that would have been due to her had she joined the union immediately she was employed. She therefore could not competently claim underpayments for the period she was not a member of the union. Her claims on underpayment thus fail.

7. The Respondent asserts that damages payable are capped at one month on the strength of the case of **Central Bank v. King'ori** (supra). Let me disabuse the Respondent of the notion that the case is the proper law. The decision of the Court of Appeal made on 29th May 2009 was, with tremendous respect to the appellate Court made *per incuriam*. The Employment Act 2007 made provision under Section 49 and 50 of the Act to compensation for a maximum period of 12 months. This means that clinging on to the decision in **Central Bank v Nkabu** (supra) which was good law at the time it was made is akin to one relying on the former Constitution for breaches of the rights granted to an individual occurring after the promulgation of the Constitution of Kenya 2010.

8. The Claimant has proved that the grievant's termination was not fair. Are damages payable? Most certainly. The grievant was dismissed when she was consistent in that she was only executing lawful instructions given to her by her superior Mr. Owino. The Respondent could have warned her or even suspended her to make its point but it chose the most drastic action and yet the grievant was not an accomplice. She is thus entitled to the payment of 12 months compensation. While the Court has power to grant her reinstatement, it would not accord well due to the bad blood between the parties. In the termination the Claimant was not given notice and it would fall due. I will also grant her costs of the suit.

9. The Grievant is therefore entitled to:

- a. One months salary in lieu of notice,
- b. 12 months salary compensation for unfair and unlawful termination
- c. costs of the suit.

Orders accordingly.

Dated and Delivered at Nairobi this 30th day of June 2014.

Nzioki wa Makau

JUDGE