



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 372 OF 2012

BANKING INSURANCE & FINANCE UNION.....CLAIMANT

VERSUS

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

JUDGMENT

1. The Claimant filed the suit on behalf of the grievant Mr. Eric N. Choti on 7th March 2012. The Claimant averred that the grievant was employed by the Respondent on 20th December 2007 and was confirmed as permanent and pensionable staff on 2nd July 2008. It was averred that while working as a corporate teller, the grievant managed to frustrate a fraud and saved the Respondent a sum of 280,000/-. The Claimant averred that the grievant was summoned on 21st September 2010 by the Human Resources Director through the Branch Manager and the grievant was served with a show cause letter requiring him to respond by close of business that day and was issued with a termination letter the same day before the grievant had even replied to the termination letter. The Claimant thus sought an order directed to the Respondent to reinstate the grievant to his former position without any loss of employment benefits, to order the Respondent to pay all the pecuniary loss of salaries and allowances which the grievant has lost as a result of his unfair and unlawful termination, any other orders the Honourable Court may deem appropriate in order to meet the very end of justice to the grievant in this dispute and costs of the dispute.
2. The Respondent filed a Statement of Response and therein averred that the grievant's action in frustrating the fraud was a ploy to deceive the Respondent that he was not a party to the same in the event the said frauds were discovered. It was also averred that the grievant was issued with a show cause letter on 17th September 2010 and to which he replied vide his letter of 21st September 2010 and that he was terminated on 21st September 2010 on suspicion of leaking out the Respondent's customers' account details. The Respondent averred that it was impractical to have the grievant reinstated to his employment as the position requires outmost honesty, trust and integrity.
3. The grievant Eric Nyamating'o Choti was led in his examination in chief by Mr. Mwaura for the union. The grievant testified that he was an Executive teller at the Respondent's Branch at Ngong Road China Centre. He testified that he recalled the material date when he was called by the Operations Manager who told him he was needed at the HR office. He met two officials of the bank Susan Nyaberi and Simon Maina who told him he was suspected of leaking information to outsiders. They stated that several customers had lost their money and they were served by the grievant. He was given a letter to show cause and he replied in writing and was issued with a

termination letter thereafter. The matter was reported to the Claimant and the Ministry and the conciliator called a meeting twice and the Respondent did not appear.

4. In cross examination by Mr. Kimondo for the Respondent the grievant testified that his contract of service provided for termination by giving of one month notice or one months salary in lieu of notice and there was no requirement for any party to give any reason for the termination. He testified that he was given a notice to show cause and the Respondent complied with the requirement of giving him a show cause and time to reply. He admitted that the terms of employment required that he should be a person of integrity and that mere suspicion could lead to termination. He testified that in his response he said that he had not taken part in any of the mentioned identity frauds. In his letter he did not ask for details. He testified that he was paid his dues at the time of termination. He testified that there was no reason to suspect him and the fact that he had caught a fraudster was good. He admitted that an employee employer relationship is not for a lifetime and that he could not continue to work for the Respondent against its will.
5. The Respondent called Susan Tuiyott Nyaberi working in the Respondent's HR Department Employee Relations Unit. She testified that the CBA signed with the Claimant provided that the Respondent could terminate an employee for suspicion of commission of a criminal offence and the Employee Staff Manual also had similar provision at clause 10.5. She testified that the dismissal of the grievant was lawful and due process was followed. She stated that the grievant was given an opportunity to explain the coincidence and that it was not true that the disciplinary meeting was not properly constituted as the Director HR is not required to be a member of the disciplinary committee.
6. In cross examination by Mr. Mwaura the witness testified that she has worked in the Respondent's Human Resource Department for 16 years and she knew what goes on in the branch by virtue of having handled issues in respect of the branch. She testified that one had no option or choice of the customers to serve. She was referred to the show cause letter and testified that prior the transactions were not fraudulent and the grievant had performed his functions according to the instructions of the bank. She admitted there is no signed copy on receipt. She could not tell if the letter was received on 17th September. The reply was received on 21st September. She testified staff could be called by email or memo and could not disagree that the staff could be called by phone. She testified that the disciplinary panel was properly constituted. The recommendations of the investigative report was that the grievant was to be removed from cashiering and moved from Ngong Road branch. She admitted that they did not go by the recommendations.
7. The Respondent then called Mr. Simon Magati Osero an investigation manager with the Respondent. He testified that from January to September 2010 there was an upsurge in identity fraud where fraudsters would get the customers details and present them to the branches and withdraw the funds using the document. He made an analysis and established that there was a trend. The targeted accounts had huge balances and the customers rarely transacted and one way or another all the accounts he scrutinized had one thing in common – they had visited Ngong Road branch and served by a particular cashier. He testified that in one case the customer changed her signature and was served by the grievant and funds were withdrawn from the account fraudulently.
8. In cross exam the witness testified that prior to joining the Respondent he had worked for the Kenya Police CID and Kenya Anti-Corruption Authority from 1999 till 2002. He testified that he had resigned from all the other institutions and was not fired. He testified that he did not investigate the grievant but only analysed how the frauds occurred. He testified that one has no choice on the persons served. He testified that he did not consider the accounts in isolation and considered them as a whole and concluded that it must have been leaked by the grievant. He testified that he made recommendations and did not know why the grievant was not transferred and did not question why the recommendation was not effected.
9. In re-exam he testified that the date 31st September appearing in his report was a typo as there is no 31st September. The Court granted leave to the Respondent to avail the original of the report

but did not avail one ostensibly because none could be traced. Parties were granted time to file written submission which was done. The Claimant submitted that the frauds were committed at different branches and that it was not the grievant who committed them. The Claimant submitted that the investigation report was prepared as an afterthought it wondered why this document which was so dear for the Respondent's defence was not among the other documents in the main Respondent's memorandum of response. It submitted that the Respondent's 2nd witness failed to explain to court the anomalies in the investigation report.

10. The Respondent submitted that the Respondent was permitted by the contract of employment the CBA, the terms and conditions of employment as well as the Employment Act 2007 to dismiss for suspicion for commission of a criminal offence. The Respondent relied on the case of **Dalmas B. Ogoye v. KNTC Ltd Civil Appeal No. 125 of 1996** where the Court of Appeal (Kwach, Akimumi and Shah, JJA) held that the only remedy for wrongful dismissal is damages.
11. In the case before me a lost has hinged on the provisions of the contract of service and the collective bargaining agreement and the staff rules and regulations. All of the relevant provisions governing the grievant's employ took into account the possibility of dismissal for suspicion of criminal conduct. The grievant testified of the manner of his termination and was clear in the testimony he gave that the Respondent was at liberty to terminate his contract of service if commission of a criminal offence was suspected or occurred. The grievant testified how he was called to the head office to the HR department and faced a panel of 2 staff who asked him to show cause and thereafter gave him a dismissal letter. Sometime in 2010 the Respondent was faced with a series of identity frauds which led to the analysis of the accounts that had been affected. The Respondent's 2nd witness testified that he analysed the suspect transactions and came to the conclusion that the grievant was complicit. The Respondent's witness testified that she was in the panel that heard the grievant and he failed to explain the coincidence and that contrary to the recommendation made by the Respondent's 2nd witness.
12. Whereas the Claimant is right in that the report by the Respondent's 2nd witness was not dated properly and was not acted on as per the recommendations, the Respondent's 2nd witness was categorical that he found a nexus between the grievant's service and the frauds committed. The grievant was according to the Respondent's 1st witness unable to explain this sufficiently. I do not ascribe to the notion that the grievant was not aware of the reason for his summons to the head office on 21st September 2010. The Respondent's 1st witness testified that she had dispatched a letter to show cause on 17th September 2010 to the grievant. That the grievant replied to that letter on 21st September 2010. The fact that he actually responded to the letter did not indicate that the letter he was responding to dated 17th September was received on the date of the disciplinary meeting with the panel comprising the Respondent's 1st witness and a Mr. Simon Maina. The meeting recorded by Mr. Maina was to the effect that the agenda of the meeting was to discuss the pending disciplinary matter relating to the identity frauds relating to the six accounts the grievant had served. He was given a chance to explain but failed to do so. His services were terminated that same day.
13. The disciplinary process undertaken was swift and though there could be improvement in the process there is nothing wrong with the said procedure. It is true the grievant did not seek recourse to the remedy available to him which included an appeal. He instead sought the intervention of the Ministry of Labour and the conciliator was unable to progress the matter hence this suit. In the suit he seeks reinstatement which is a remedy that is available if there is sufficient cause for the order to be granted. He was suspected of fraudulent activities and the said suspicions were based on the pattern that emerged in relation to the six accounts he was alleged to have leaked information on. In the premises the reinstatement would not lie as the dismissal was for probable cause and merited. As the second order sought hinged on the first the finding that he has no recourse to the relief of reinstatement means I cannot order payment of the salaries he seeks. The suit is thus dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of July 2014

Nzioki wa Makau

JUDGE