



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1551 OF 2013

BANKING, INSURANCE & FINANCE UNION (KENYA) CLAIMANT

VERSUS

TRANSNATIONAL BANK LTD RESPONDENT

Mr. Odera for the Claimant

M/S Mwangi for the Respondent

JUDGMENT

1. By a Statement of Claim dated 20th September 2013 and filed on the same date, the Claimant Banking Insurance and Finance Union (Kenya) seeks an order of the Court in the following terms;

- i. reinstatement of the Grievant M/S Kiptanui to her former position in the Respondent Bank without any loss of seniority and employment benefits;
- ii. Respondents to pay all the pecuniary loss of salaries and allowances which the Grievant has lost as a result of wrongful, unfair and unlawful dismissal;
- iii. in the alternative the Grievant be paid 12 months salary being compensation for the wrongful, unlawful and unfair dismissal;
- iv. such further orders as the Court may deem fit in terms of **Section 12** of the **Industrial Court Act No. 20 of 2011**.

2. The Respondent filed a statement of response dated 19th December 2013 wherein is denied all the particulars of claim save for admitting the following;

- (i) That the Grievant was an employee of the Respondent vide a Contract of Employment dated 8th March 2005.
- (ii) The contract was renewed on 1st September 2006.

That on 1st October 2008, the Grievant was promoted to the position of a supervisor while at the Eldoret Branch and was on permanent and pensionable terms until the date of her summary dismissal.

Summary of Facts

3. It is not in dispute that the Grievant was summarily dismissed from employment in terms of **Section**

44(3) of the *Employment Act*, following allegations of misconduct in that she had borrowed from a customer of the Respondent Bank Ksh.130,000/= contrary to the Respondents policy and the terms and conditions of her contract of employment.

4. The Grievant denies these allegations stating that the alleged customer was a business partner in a Blue Gum Sales Enterprise of long standing between the two.

5. However, upon the summary dismissal, in her letter of Appeal dated the 9th February 2011, the Grievant admits to having borrowed the Kshs.130,000/= from one **Robert Sang t/a Tegat Enterprises** being part of a loan advanced to this customer.

On 1st December 2010, the Branch Manager wrote to the Grievant to explain why she had borrowed money from a customer. She did not respond to the letter. On 10th December 2010, the Human Resource Officer wrote a reminder to her to respond by 15th December 2010.

6. The Grievant Pamela Kiptanui responded to the letter on the said 10th December 2010 as follows:

- i. the Grievant did not borrow money from the customer Mr. Robert Sang, but instead both entered into a business deal of supplying firewood to Kaisugu Limited;
- ii. that she had contributed Kshs.350,000/= to the venture;
- iii. Kshs.100,000/= borrowed from Mr. Robert Sang was to be utilized towards transportation of the wood to Kaisugu Limited;
- iv. that the transportation of the wood had commenced and the Grievant awaited a cheque from Kaisugu Limited in the sum of Kshs.400,000/=;
- v. she apologised for the disclosure from Mr. Sang who was her business partner.

7. It is common cause that the loan account of the customer, Mr. Robert had fallen into arrears hence the disclosure to the Respondent the circumstances that led to his failure to repay the loan. He blamed the Grievant for the failure, stating that the Grievant had refunded only Kshs.30,000/= but had failed to repay him the balance.

8. This allegation is contained in a 2nd letter written on 10th December 2010, by the Branch Manager Mr. Christopher Rono to the Grievant in addition to the letter of the same date written to the Grievant on the subject matter by the Human Resource Officer, M/S Dorcas Mwendwa.

9. By a letter dated 15th December 2010 written by M/S Dorcas Mwendwa to the Grievant, the Grievant was sent on compulsory leave effective 18th December 2010. She was informed that she will be required to appear before the Bank's Disciplinary Committee at Head Office on 20th December 2010.

10. On the 20th December 2010, the Grievant appeared before the Disciplinary Committee. She did not bring any union representative with her inspite of the fact that she was a union member. She told the Court that she did not inform the union at the time of the on-going disciplinary matter against her.

11. On 28th January 2011, the Grievant received a letter of summary dismissal from the Chief Executive Officer of the Bank.

The letter provided the reasons for the summary dismissal as follows;

- i. borrowing Kshs.130,000/= in April 2010 from a bank customer, Robert Sang trading as Tegat Enterprises, contrary to **Section 20(g)** of the Human Resources Policy which prohibits "accepting of or soliciting for any reward, fee, inducement or commission from whatsoever source;
- ii. borrowing of an asset finance to finance the purchase of a truck for use by third parties.
- iii. refusing to promptly respond to the Branch manager's letter of 1st December 2010 only to respond following Human Resources intervention on 10th December 2010. This was said to be in

contravention of **Section 20(d)** of the Human Resources Policy which provides sanctions for **“failure or refusal to obey a lawful and / or proper instructions issue to him / her by any person placed in authority.”**

- iv. carrying a business of transportation of firewood without informing the Bank in contravention of **Section 20(1(c)** and **(i)** of the Human Resources Policy which act amounts to gross misconduct.

The provisions read;

“1(c) engages in, without the consent of senior management in any other business which the company considers could conflict with his / her duties as a full time employee of the company”; and

(i) if suspected to commit theft, fraud, forgery or acting in collusion with any other” .

12. The Respondent found the Grievant guilty of the aforesaid infractions which Constitute gross misconduct and

“in accordance with the terms of your letter of employment with reference to the Bank’s Human Resources Policy and in compliance with Clause A5 of the Collective Bargaining Agreement the Bank has decided to terminate your services based on the aforementioned grounds effective 1st February 2011.”

Determination

13. The Court notes that, contrary to the contention by the Claimant and the Respondent that the Grievant was summarily dismissed by the Respondent, the letter of separation clearly shows that, this was a normal termination as opposed to a summary dismissal. Therefore as it is clearly stated in the letter dated 28th January 2011, the Grievant was entitled to payment of terminal benefits which included;

- i. one (1) month salary in lieu of notice;
- ii. salary for days worked; and
- iii. payment for accrued leave days;

Payment of the terminal benefits was however subject to off-setting any loan money given by the Respondent to the Grievant.

Issues for determination

14. From the foregoing, the following issues fall to be determined in this matter:

- i. Was the termination of the employment of the Grievant for a valid reason?
- ii. If the answer to (i) above is in the affirmative, was the termination done in terms of a fair procedure?
- iii. What remedies if any are applicable to the Grievant?

Was the termination for a valid reason?

15. I have perused the Human Resource Policy Document of the Respondent and the Contract of Employment between the Respondent and the Grievant and the Court is satisfied that the employees of the Respondent are prohibited from borrowing money from customers and also are prohibited from engaging in any business outside the work place without express authority of the management.

16. The Grievant has expressly admitted that she had borrowed Kshs.130,000/= from a customer. As a direct consequence of this transaction, the customer had failed to timeously pay a loan owed to the Respondent Bank. Furthermore, the Grievant has expressly admitted engaging in business of selling

firewood with the said customer. It is evident that the Grievant had no express authority from management of the Respondent to engage in such business activity.

17. The Respondent has on a balance of probabilities proved that the Grievant had committed dismissible offences and her employment was terminated for a valid and justifiable reason in terms of **Section 47(5)** as read with **Section 45(2)(a)** of the **Employment Act 2007**.

Was the termination done in terms of a fair procedure?

18. **Section 45(2) (c)** obliges an employer who has a justifiable and valid reason to terminate the employment of an employee to do so in terms of a fair procedure. The fair procedure contemplated is in terms of **Article 47** of the **Constitution of Kenya, 2010** as read with **Section 41** of the **Employment Act 2007**.

19. The facts of this case shows that the Grievant was given a show cause letter to which she responded in writing partly denying and partly admitting the offence complained of by the Respondent. The Grievant was given notice to appear before a disciplinary committee to explain her case and was subsequently found guilty of the offences for which her employment was terminated. The Grievant did not avail herself a union representative at the disciplinary hearing.

20. The Court notes that an employee has an obligation to bring a representative of choice to a disciplinary hearing if she / he wishes to do so. It is not the obligation of an employer to bring such a representative to the disciplinary hearing. Where a request is made by an employee to have a representative of choice at a disciplinary hearing, reasonable time must be afforded by an employer for the purpose, including allowing a postponement of the hearing to allow an employee to get a representative. It is clear from the facts of this case that no such postponement was requested for the purpose.

21. The Court is satisfied that the disciplinary process was conducted in a fair manner and therefore the termination of employment was in conformity with **Section 45(2)(c)** of the **Employment Act 2007**.

22. For the avoidance of doubt, the Collective Bargaining Agreement operational at the time and in particular **Clause A5** is applicable to the termination of the Grievant and therefore the notice period and any benefit provided for in the said CBA is applicable to the Grievant in as far as the finding of the Court that the Grievant's employment was curtailed by a normal termination and not a summary dismissal.

23. To this extent, terminal benefits in terms of the CBA, be computed by the Respondent and paid within 30 days of the judgment and / or be applied to off-set any outstanding loan owed to the respondent by the Grievant. The computation be filed with the Court within 30 days from the date of this judgment to allow closure of this matter.

On the issue of costs, given that the Court has reduced the summary dismissal to a normal termination, the claim is partly successful and the Respondent is to pay the costs of the suit.

Dated and Delivered at Nairobi this 19th day of Sept. 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE