



IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 48 OF 2013

DAVID KARUME BURUGU.....CLAIMANT

VS

NATIONAL BANK OF KENYA LTD.....RESPONDENT

AWARD

Introduction

1. David Karume Burugu, the Claimant in this case was an employee of the National Bank of Kenya, the Respondent herein for over two decades. He filed a Memorandum of Claim on 16th January 2013 seeking compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Statement of Response on 20th February 2013 but did not call any witnesses. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on 6th August 1990 until 2nd October 2012 when his employment was terminated. On 23rd July 2012, while at work at his normal station at JKIA Branch, the Claimant completed a staff debit voucher for Kshs. 7,500. The debit was immediately reflected in his bank account number 01080058144500. On the same day he banked Kshs. 10,000 to cover the debit.

3. By an internal memo dated the same day the Respondent's Branch Manager asked the Claimant to explain why he had failed to pay back money collected from the Bank for over a week. On 10th August 2012, the Bank Manager issued another memo to the Claimant asking him to explain a transaction of Kshs. 1,125 in the Bank's M-pesa account. The Claimant was suspended on 15th August 2012 and his employment was subsequently terminated on 2nd October 2012.

4. The Claimant claims that there was no valid Reason for the termination of his employment. He therefore claims the following:

- a. Terminal dues at the rate of 15 days' pay per year.....Kshs. 2,127,764.50
- b. 12 months' compensation for loss of employment.....Kshs.2,220,276.00
- c. Leave pay..... .Kshs. 185,023.00
- d. Costs and interest
- e. Any other relief the Court may deem just to grant

The Respondent's Case

5. In its Statement of Response, the Respondent admits having employed the Claimant on 6th August 1990 and terminating his employment on 2nd October 2012 but denies that the termination was wrongful or unlawful. The Respondent further admits that the Claimant was working at its JKIA Branch on 23rd July 2012 and that he operated account number 01080058144500. The Respondent however denies the Claimant's averment that he completed a staff debit voucher for Kshs. 7,500 on 23rd July 2012 and that he banked Kshs. 10,000 in his account on the same day.

6. The Respondent states that during an impromptu check conducted on the morning of 23rd July 2012, it was established that the Claimant had a week before, irregularly completed an undated staff debit voucher vide which he obtained Kshs. 7,500 from the Duty Cashier with the full knowledge that his account had no funds to cover the debit.

7. The Claimant was asked by the Respondent's Branch Manager to explain his action and by letter dated 25th July 2012, he admitted having received the funds in issue with the knowledge that his account had no funds to cover the debit and apologised for his action.

8. On 23rd July 2012, it was discovered that the Claimant had on 20th and 21st July 2012 executed two transactions on the Respondent's M-Pesa account by sending Kshs. 525 and 600 to his sons Ian Karume and Alvin Karume respectively without providing the funds to cover the transactions. On 10th August 2012, the Respondent's Branch Manager issued an internal memo to the Claimant requiring him to explain these transactions.

9. The Respondent further states that the Claimant had previously on 17th July 2012 at about 1.12 am, executed a transaction on the Respondent's M-Pesa account by sending Kshs. 1,525 to his son Alvin Karume without providing the funds and without posting the transaction as required. The transaction was later posted on the night of 18th July 2012 by a night shift teller under unclear circumstances. The Claimant was suspended on 15th August 2012 and on 2nd October 2012 his employment was terminated.

10. It is the Respondent's case that having conducted investigations into the Claimant's actions and having regard to the sensitive nature of its business and the position held by the Claimant, the Respondent lost confidence in the Claimant and decided to terminate his employment. According to the Respondent, the Claimant was paid all his terminal dues. The Respondent further states that as at 17th October 2012, the Claimant was indebted to it to the tune Kshs. 3,192,207.50 in respect of loan facilities which continued to accrue interest.

Findings and Determination

11. The issues for determination in this case are as follows:

- a) Whether the the Respondent had a valid reason for terminating the Claimant's employment;
- b) Whether in effecting the termination the Respondent observed due process;
- c) Whether the Claimant is entitled to the reliefs sought.

Reason for Termination

12. The Claimant's termination letter dated 2nd October 2012 states *inter alia*:

“This letter serves to confirm the Bank's decision to terminate your employment on account of

loss of confidence arising from our being reasonably and sufficiently satisfied of amongst other things, your breach of trust and wilful negligence in the performance of your duties as an officer of the Bank.

Following a surprise cash check on 23rd July 2012 it was discovered that you had taken Kshs. 7,500=00 from the branch against an undated withdrawal debit to be posted at a later date, facts which are well within your knowledge. Similarly on 17th, 20th and 21st July 2012 you irregularly transferred a total of Kshs. 2, 650 from the branch's M-Pesa account to your sons' mobile numbers. Your actions were unauthorized, irregular and in total contravention of the Bank's policies and procedures.

Yours faithfully

JARED KABURU

GENERAL MANAGER

HUMAN RESOURCE & ADMINISTRATION

13. This letter was preceded by internal memos dated 23rd July 2012 and 10th August 2012 requiring the Claimant to explain the incidents in issue to which the Claimant responded on 25th July 2012 and 11th August 2012 respectively. In his response dated 25th July 2012, the Claimant apologised for the action while in the response dated 11th August 2012 he maintained that the transactions in question went through the normal procedure.

14. Section 43 of the Employment Act, 2007 provides that:

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

15. In *Jessy Olukutukei Vs Feed The Children Kenya & Another [2014] eKLR*

this Court held as follows:

“The burden on the employer imposed by Section 43 of the Employment Act, 2007 is to establish a valid reason that would move a reasonable employer to terminate the employment of an employee”.

16. With regard to the Mpesa transactions effected by the Claimant in favour of his sons, Ian Karume and Alvin Karume the Court did not find any clearly defined fault on the part of the Claimant.

17. However, with regard to the debit voucher for Kshs. 7,500 the Court finds that failure by the Claimant to indicate the date of execution was in contravention of the Respondent's Cashier's Guide. The Claimant did not offer any credible explanation for this significant omission which in my view could have exposed the Bank to fraud.

18. In *Agnes Murigi Mwangi Vs Barclays Bank of Kenya Limited [2013] eKLR* the Court rendered itself as follows:

“Banks are in the business of handling other people's money and in order to maintain

customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face.”

19. Given the Claimant's position as a supervisor, the Court finds that failure to date a debit voucher in his favour compromised the position of trust bestowed upon him by the Bank. Consequently, I find that the Respondent had a valid reason for terminating the Claimant's employment.

Termination Procedure

20. I will now deal with the procedure adopted by the Respondent in terminating the Claimant's employment. The reason advanced by the Respondent for termination of the Claimant's employment falls under what is commonly known as misconduct.

21. Section 41 of the Employment Act, 2007 establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative.

22. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

23. Apart from the two memos issued by the Respondent to the Claimant and his responses thereto there was no evidence of the Claimant having been given an opportunity to be heard as required under Section 41. The Court therefore finds the termination of his employment procedurally unfair.

Reliefs

24. Having found the termination of the Claimant's employment unfair for want of due process I award him six months' salary in compensation. In making this award, I have taken into account the Claimant's length of service but also his conduct leading to the termination. The claims for terminal dues and leave pay were not proved and are dismissed.

25. In the final analysis I make an award in favour of the Claimant in the sum of Kshs. 1,110,138. The award amount will attract interest at court rates from the date of the award until payment in full.

26. Each party will bear their own costs.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF OCTOBER 2014

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF OCTOBER 2014

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Ilako for the Claimant

Mr. Sagini for the Respondent