



**Nyandiko v Kenya Commercial Bank Limited (Cause 165 of 2011)
[2013] KEELRC 979 (KLR) (8 February 2013) (Judgment)**

Neutral citation: [2013] KEELRC 979 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 165 OF 2011
NZIOKI WA MAKAU, J
FEBRUARY 8, 2013**

BETWEEN

JANET NYANDIKO CLAIMANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

JUDGMENT

1. The case had proceeded before the predecessor of this Court and on 19th September 2012, the parties appeared before me as follows:- Miss Guserwa for the Claimant, Mr. Okeche for the Respondent. Cross- Examination proceeded at 11.30 a.m. where the Witness was reminded she was still on oath. She testified that the first warning was the one she received in July. She was shown the Supplementary Response Appendices 16, 17, 18, 19, 20. She stated that the signature at bottom was not hers. On the dismissal letter – she said that she had not been dismissed before and therefore the letter is not accurate. She did not remember re-applying on 17th August 1998. The signature at bottom was not consistent. She denied being absent or being informed she was absent. She denied ever seeing the letters before. She testified that she had never been disciplined. She stated that her services were terminated on account of system failure. She said she was sick and was treated in Kitale and later came to Nairobi Hospital and hospitalized. She denied being paid salary in lieu of notice.
2. She was re-examined by Mrs. Guserwa and her testimony was that she was sent home because of discrepancies due to system failure. She stated that she fell ill in Kitale and was attended to by a doctor there. She denied the signatures on the document were hers and stated that she did not receive any documents. She stated that the letter is to Jane Nyandito while she is Janet Nyandiko and so the letter was not to her. She said she was wrongfully dismissed. She said that she gave evidence to support her illness and system failure. She had worked for Kenya Commercial Bank for 25 years and she had not had any issues before she was sacked and she thus prayed for the orders sought.



3. Mr. Okeche sought an adjournment as his witness was unwell and the Court set the Defence hearing for 11th October 2012 at 10.00 a.m. Mr. Okeche called one witness Mrs. Fatuma Amakobe. She testified that she was working with KCB at the Jogoo Road Branch at the material time and was now Manager Service Quality and Compliance. She thus was familiar with the Claim before Court. She testified that Janet Nyandiko served under her as a teller. Janet's services were terminated because of:
 1. Lack of accountability with cash
 2. Insubordination
 3. Absenteeism which was not properly explained.
4. The witness was referred to Appendix 3, 4 and 5 and she testified that the first – Appendix 3 is a letter she wrote and it was for money differences. Appendix 4 is about non-balancing and reconciliation of cash. The Claimant did not account for the cash difference. The witness was referred to Appendix 4 and said that having dealt with the Claimant through the Memo of 20th the matter was taken up by the boss to all staff who had cash differences. They were to address the cash differences. 6 names are there. Janet was one of them. She signed in receipt of the Memo. 4 of the staff accounted for the differences but 2 failed including Janet. The other person who did not account was Margaret Nyamweya. Appendix 5(a) is a Memo on accountability. This was another difference in December 2008. There were normal surprise checks conducted fortnightly. The witness checked Janet's cash and got a difference of 120/= which may have been due to change etc. When checking was finalized they went to keep the cash in the vault. When the witness did the reconciliation instead of the closing balance which she had seen when checking Janet's cash had changed. The regulations are that cashier should remain with a balance of 250,000/= for next day's operation. Janet had violated this regulation by having 401,464/=. This was not okay. Out of this the witness did not let her start as she needed to confirm whether Janet had the 401,464/= or not. It was on Saturday when the difference was noted and on Monday Mr. Munyaka did a surprise check. Mr. Munyaka confirmed there was a cash difference of 165,000/=. The witness kept checking on Janet's work to find out how her balance had migrated from 236,000/= to 401,464/=. After checking the witness found that after checking Janet had performed other transactions. Janet had debited other units in the Bank that is Western Union and by doing so she had reduced the balance to 236,000/=. The other departments also do their reconciliation and to avoid detection Janet re-entered the sums to her till. This is tantamount to suppression. Janet was giving a false account that she had the money but she did not or alternatively she has a lot of money but was not declaring the correct amount. The queries the witness had put to Janet were not responded to entirely. There were differences noted and Janet did not address the issues and never accounted for the loss. The migration from old system to the new system could not have led to difference. The system was not faulty. It was erratic, it could be up or down. Janet's colleagues had difficulties. Those who embraced change and were focused resolved their problems. The difference in the real cash and the cash in the system would be if the customer's account is not debited or a customer has been credited twice. The corrective measures would be for a customer who has not been debited you debit for customer who has been debited twice you credit them with one of the entry. Janet never did that. The defence she raises on these accusations is not a reasonable defence. There were also had cases of absenteeism. The witness was aware Janet was absent on several occasions. On the occasion in question Janet went for a long time. She went away and did not say where she was and did not inform the Bank. She was informed of the accusations of insubordination. The witness as her boss discussed with Janet her shortcomings. Janet said that she did not ask for permission at the time because she was seeking medical attention. The witness testified that one can bring a sick sheet or call from where she was being attended to. She stated that she had never seen Janet's personal file and only knew of the cases she had with Janet. The



witness was Janet's boss from 2008. She did not know what warnings Janet may have had since she did not see Janet's file.

5. In Cross-Exam by Mrs. Guserwa the witness confirmed that she never saw the personal file to confirm if Janet was working well. She said she worked with Janet for 1 year before sending her away. The witness testified that she did not find out when Janet joined the bank. She did not know Janet joined the bank in 1995. She testified that she had not seen Janet's Claim. She knew Janet had filed the Claim but did not read it. She testified she had no reason to doubt Janet joined in 1995. She made a correction, she did not send people home at the bank. The witness testified that Janet had shortcomings. She admitted that the dismissal letter does not state Janet was dismissed for lack of accountability. It does not state she was dismissed for absenteeism or insubordination. She stated that the letter was not written by her. The letter would have been different she had written it. The reasons she had talked about were not given on the letter and the dismissal was summary. She testified that her three reasons are based on the interactions she had with Janet. She testified that Janet was trained on the new system but no certificates were given. She said that the system had challenges, it was erratic and it affected other tellers as well and that is why the Bank issued Appendix 4. The migration to new system is what gave the problems in September to October when there were hiccups. The figures would not always tally with the system. Janet was there when the witness checked the physical cash and locked till and locked the money in cash. There is data from the bank, but she had not carried the data to Court. As to how do we know there were differences? The witness referred to Appendix 5(b) where the explanation is given partly. The witness testified that people react differently to different situations. She did not blame Janet. When Janet came back she told the witness she was in Kitale sick. The witness did not doubt it. Janet refused to reconcile her accounts in August 2008 and December 2008. She had been given time to put those differences properly. The difference was to to be reported. The reasons given by bank are adding up to the reasons why Janet was dismissed. Before termination Janet was on suspension. She would have been given 1 months salary or notice for 1 month. Leave is per the records. She testified that the bank had reason to terminate Janet. In Re-Exam by Mr. Okeche the witness stated that she had worked for the Respondent for 23 years. She testified that if she is unable to balance cash amounting to 1,000/= she will be requested to make reconciliations and the sum if not accounted for, it can be written off. The amount of 100,000/= would be escalated to head office. Janet had shortage of cash. Bank tellers are disciplined for cash differences by caution, memos and at times summary dismissal. That is common at Banks. She testified that on basis of Appendix 13, Janet knew she was terminated for absenteeism and cash differences. On the first correspondence was on difference at point of migration and second was for difference of 165,000/= and the third was on the difference between cash received from customer and amount banked. She referred to Appendix 15 which was the final payments/benefits for Janet. She testified that she did not prepare it as it is prepared from Head office. She stated that she would not be aware if Janet had been paid notice or not but records would be available from head office.
6. The parties filled their respective Submissions. Mrs. Guserwa relied totally on the submissions. She submitted that the Issues that arise are 2.
 - a) Whether or not the claimant was lawfully or justifiably dismissed
 - b) Is she entitled to remedies?
7. Mrs. Guserwa submitted that the letter dispatched to Claimant dismissing her did not cite any reasons save for the statement that the Bank had lost confidence on her. That statement on its own is not valid unless it is grounded on other factors which lead to loss of confidence. During the hearing there were issues of negligence and absenteeism which were attempted to be brought up. These were not brought up in the letter and were thus an afterthought and should be ignored when deciding the case. S.45 of Employment Act not satisfied. No valid reason was given for claimant's dismissal. That reason



ought to have been fair. Having submitted there was no reason there was no fairness in the purported reason for termination. On issue of procedure, it is on record that the Respondent sent Claimant on suspension in month of May 2009. She remained on suspension for 7 months till when she was sacked. The suspension had not been lifted as at the time Claimant was sacked and no reason was given for either suspension or termination. Suspension was for purposes of investigation. This is at pages 2 and 3 of the Claimant's Submissions.

Before the Claimant was sent packing she was not given a show cause letter warning her of the consequences of not doing what she was to do. Mrs. Guserwa submitted Janet was not told what to do. Section 46 was not complied with. On the remedies she urged the Court to find the Claimant suffered unlawful termination and thus seeks reinstatement to her position without loss of benefits as she is at sunset years. She worked for 26 years without any blemish in her record. In the alternative if Court is unwilling to order that she should be granted the compensation tabulated for suffering the unfair termination. Reliance was placed on the case of *Liberata v. Magadi Soda* 664 of 2010 and case 583 of 2010 *Rita Shako v. Youth Agenda*. These were authorities of the predecessor of the Court. She submitted that these support the Claimant's case on the issue of unprocedural dismissal. She submitted that if there were reasons for dismissing the Claimant touching on poor performance there was no difficulty in stating it on the letter. The Court should analyse and discern why the Claimant was dismissed. No notice was shown to show cause. When employer talks of correspondence unless it amounts to notice to show cause is amounts to mere letters. The record will bear this out, there was no notice to show cause. The Court has been asked to distinguish case of *KRA v. Murgian*. Fair hearing means being given adequate notice. The Claimant was not given any show cause letter to forewarn her more specifically on the termination of her services in February 2010. Failure to reconcile – we refer to Appendix 12 Statement of Response – The reconciliation is year 2006-2008. The discussions were on part of Claimant's shortcomings and she was absent. Prejudicial resolutions were made and 2 years later she is sent packing. She submitted the Claimant suffered unlawful termination and is entitled to compensation and all the prayers set out in Claimant's submissions.

8. Mr. Okeche submitted on behalf of the Respondent and stated that he concurred that the issues are the same as cited by the Claimant. He proceeded to address the issues thus:-

Looking at the letter of termination at Appendix 2 it speaks for itself. The letter refers to various correspondence. The Claimant was not lost as to the reasons for termination. In her evidence she testified she was aware. In her response (see appendix 15 of Memorandum) the letter of appeal refers to the issues which were the central focus of her termination. She cannot say she is unaware as she replied to them. The suspensions she had was for 7 months. It is not true she was fired without her knowing why. See appendix 9, 10 and 11 of the Memorandum of the Respondent. Appendix 10 is on transactions in September and October. The recall in August 2010 she was allowed to return to office and even committed further breaches. He stated that there is a litany of letters and these are on cash differences which she was unable to reconcile. The other staffs were able to reconcile, she could not. There is write-up on this, the reason is there. The procedure is faulted on account of S. 45. There is allegation there was not calling the Claimant for hearing. Hearing contemplated under S. 45 and 41 is basically is in a situation where the Claimant is unaware of the circumstances. It is not to be employed mechanically. That was not the intention of the section. The words as appear under S. 41 should be considered. This is not a mechanical application. If the employee is aware like in this case there is no requirement to call employee. There was absenteeism, no medical certificate, no reconciliation etc. We rely on authority [CA 108 of 2010](#). It is critical. Refer to page 6 of the decision. The decision was made in 2010 at the Court of Appeal was aware of the application of *Employment Act*. The cases cited



by the Claimant are as a result of mechanical application of S.45 and 46. As to remedy, the issue of remedy is that the Claimant has requested to be reinstated. Her basis is unblemished record. She has been dismissed prior and was reinstated in 1998. She was addressed on improper performance, she was unable to reconcile the cash balances, can we now say the cash customers deposit in KCB can be trusted to someone who cannot reconcile? This is a poor performer and should not see the inside of a bank. There was valid reason for dismissal. The Court should find for Respondent. See S.44(4)(a) of the Employment Act. The Respondent is entitled to dismiss summarily. The procedure followed was proper and Claimant was aware of reasons. Uphold termination, grant costs to Respondent in the case.

9. The pleadings, the law, the evidence on record and that adduced orally in course of proceedings, as well as the submissions and authorities cited guided the Court in coming to the decision herein.

10. In the Claim, the Claimant seeks various reliefs, to wit,

- a) Reinstatement to previous job without loss of benefits
- b) Salary arrears for the entire period the Claimant has been out of employment
- c) Damages for wrongful and/or unlawful termination
- d) In the alternative, payment of all the lawful terminal dues as set out at paragraph 10 herein above
- e) Maximum 12 months compensation for wrongful dismissal f) Costs of the suit with interest thereon

11. Paragraph 10 had the following particulars:

- a) Pay in lieu of 1 month notice Kshs. 100,662/-
- b) Pay in lieu of 2009 leave days – 45 days Kshs. 188,741/- c) Leave traveling allowance Kshs. 5,393/-
- d) Overtime for the year 2008/9 – 95 hours 6,020/-
Total Kshs. 300,816.25

12. The Claims captured above were the claims the the Claimant was pursuing. Some were in the nature of Special damages and as such had to be proved specifically. The dismissal of the Claimant was not denied. The Respondent denied it was for anything other than good cause. The Claimant felt she should have been accorded an opportunity before the summary dismissal. Section 45 of the Employment Act (in the material parts) provides as follows:-

45.

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility;

.....



- (4) A termination of employment shall be unfair for the purposes of this Part where—
- (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider—
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (f) the existence of any previous warning letters issued to the employee
- (emphasis added)

13. The termination was not in contravention of Section 46 of the *Employment Act*. None of the provisions of Section 46 were breached. I do not agree with the Respondent that the application of Section 45 has been mechanical in the decisions cited. More particularly, in this case, the Court will not mechanically apply the provisions of Section 45. The reasons for the termination of the Claimant were valid reasons. The employee had failed to perform, she had failed to improve after the cash differences were pointed out, she was a habitual absentee. The reason for the termination was thus valid, it was for a fair reason and it related to the employees conduct, capacity and compatibility. The only sour portion of the termination was the manner of the termination. The Claimant's employment was terminated in a manner that was unfair as the Employer did not in all the circumstances of the case act in accordance with justice and equity in terminating the employment of the employee. Granted she was asked to give explanations which were considered, granted she was aware of the cash balance issues and the absenteeism, she was of necessity to be accorded some degree of natural justice commensurate with the dictates of the law. She should have been called in and advised of the reasons for her termination. To that extent, the Claimant's termination was unfair. It was lawful but unfair. She therefore would be entitled to the following reliefs:-

- a) One months pay in lieu of notice Kshs. 100,662/-
- b) Leave traveling allowance as she did not go for leave in 2010
Kshs. 5,393/-
- c) Costs and interest on the above from date of judgment till payment in full.

14. The other portions of her claim were unproved. The same are dismissed.



It is so ordered.

DELIVERED DATED AND SIGNED IN NAIROBI ON THIS 8TH DAY OF FEBRUARY 2013.

JUSTICE NZIOKI WA MAKAU

JUDGE

