



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

**CAUSE NO. E004 OF 2020**

**PHILIP KIMOSOP TUITOEK.....CLAIMANT**

**VERSUS**

**KINGDOM BANK LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant was employed by the respondent vide the letter dated 27<sup>th</sup> May 2013 as an Intern in the respondent's Asset Recoveries Department upto 26<sup>th</sup> November, 2013. Thereafter he was employed to work as a Treasury Money Market Dealer Grade 2 from 10<sup>th</sup> November, 2015, until 2<sup>nd</sup> October, 2020 when he was dismissed from service. His salary then was Kshs.100,000 per month.

2. On 20<sup>th</sup> July, 2020 he was suspended from work vide the letter dated even date. The letter accused him of involvement in fraudulent activity in the Bank which allegedly caused a loss of Kshs338,140 to the bank. On 4<sup>th</sup> September, 2020 he received a show cause letter requiring him to explain why disciplinary action should not be taken against him for the said fraud and he responded to each and every allegations both verbally and vide the letter dated 11<sup>th</sup> September, 2020. On 21<sup>st</sup> September, 2020 he was called for a disciplinary hearing and thereafter he received a dismissal letter dated 2<sup>nd</sup> October 2020.

3. On 16<sup>th</sup> December 2020, he brought this suit seeking the following reliefs:-

**a) A declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.**

**b) Special Damages of Kshs 1,200,000 and the amount as pleaded in paragraph 17 above.**

**c) An order directing the respondent to reinstate the claimant to his employment without loss of position, status or benefits or in the alternative amount of Kshs. 100,000 x 12 x 29 years (60 years of age of retirement less 31 years current age of the claimant) = 34,800,000/-.**

**d) Costs.**

**e) Interest on (ii), (iii) and (iv) above at court rates from the date of filing this claim until payment in full.**

**f) Any other relief that this Honourable court may deem fit to grant in the interest of justice.**

4. The respondent filed defence and counter claim on 23<sup>rd</sup> February 2021 admitting that it had employed the claimant as pleaded in the Claim. However, it denied that the dismissal of the claimant was unfair and averred that it was indeed fair and lawful. It further averred that in June 2020 it discovered that a fraud had been perpetrated and upon investigations it was revealed that the claimant's computer was used to introduce a malware into the Bank's network, that was used to perpetrate the fraud.

5. The respondent further averred that it served the claimant with a suspension letter on 20<sup>th</sup> July, 2020 to allow investigations, invited him to record statement with security and investigations office on 6<sup>th</sup> August 2020, served him with show cause letter on 4<sup>th</sup> September, 2020 and he was accorded a disciplinary hearing on 21<sup>st</sup> September, 2020 after his response to the show cause letter on 11<sup>th</sup> September 2020.

6. The respondent then averred that it dismissed the claimant on 2<sup>nd</sup> October 2020 for his failure to comply with its ICT Policy. The termination letter gave the claimant a right of appeal and invited him to collect his certificate of service. In its view, the claimant was fairly dismissed and as such is not entitled to any relief. Therefore it prayed for the suit to be dismissed with costs.

7. On the other hand, the respondent averred that it gave the claimant loan facilities of Kshs2,000,000 on 28<sup>th</sup> January, 2019, Kshs150 000 on 4<sup>th</sup> October, 2019 and Kshs300000 on 6<sup>th</sup> March, 2020. The loan balance as at 12<sup>th</sup> January 2021 was Kshs 2,072,493.55 and it continues to attract interest at the rate of 10% until payment in full. Therefore, it prayed for judgment for the sum of Kshs2,072,493.55 plus costs.

8. The suit proceeded to full hearing but only the claimant gave evidence and thereafter filed written submissions.

### **EVIDENCE**

9. The claimant testified as CW 1 and basically adopted his written statement dated 10<sup>th</sup> December, 2020 and fortified the same by 14 documents in the list dated 10<sup>th</sup> December, 2020.

10. In brief the claimant reiterated that after working for the respondent well he was served with suspension letter dated 20<sup>th</sup> July, 2020 accusing him of involvement in fraudulent activity in bank which allegedly led to loss of Kshs 338140.

11. He further testified that on 11<sup>th</sup> September 2020 he responded to each and every allegation raised in the show cause letter but vide the letter dated 14<sup>th</sup> September 2020 he was still invited to a disciplinary hearing on 21<sup>st</sup> September, 2020. During the hearing, he was shocked that no evidence was brought to his attention nor was there any complainant who made any representations either in person or paper to prove that he installed a computer malware.

12. He maintained that his dismissal was not based on evidence of wrong doing but purely malicious and in bad faith. According to him the dismissal was not justified by valid reason and therefore unfair and contrary to section 45 of the employment Act. He prayed for reinstatement because three years have not lapsed after the dismissal.

13. On cross-examination, he admitted that he signed a confidentiality agreement. He denied that he had been issued with a query in 2018 about overdrawing his account.

14. He admitted that he was served with a show cause letter, a letter asking him to record statement and a further letter inviting him to a hearing. He also confirmed that he was heard by a disciplinary committee and that he never appealed against its decision. However, he denied that he was issued with a show cause letter dated 5<sup>th</sup> February.2019 for low performance.

15. He admitted that he was issued with a certificate of service after the dismissal and he was paid his terminal dues and signed a confirmation that he had no other claim in respect of his terminal dues only. He cleared with bank after the dismissal.

16. He denied knowledge of the Haid Company and stated that he never came across it in his employment.

17. He admitted that the computer was secured with a password and that he was the only one at the work place who had access to the computer. He denied being aware of the fraud he was being accused of.

18. As regards the counterclaim, he admitted that he borrowed the Kshs 2,000,000 on 28<sup>th</sup> January, 2019, Kshs 150,000 on 4<sup>th</sup> October, 2019 and Kshs 300000 on 6<sup>th</sup> March, 2020. He further admitted that the loan balance is Kshs 2,072,493.55 but has since the dismissal, he has been unable to repay due to lack of income.

19. On re-examination he maintained that he was never served with any investigations report or any complaint from any customer or even the forensic audit Report. He was also not shown any evidence supporting the reason for his dismissal during the disciplinary hearing.

20. As regards the loan, he contended that he was given the same at staff interest rate of 10% but six months after the termination, they reverted to commercial rate of 13%. Finally, he contended that he has not secured another employment since his dismissal by respondent and as such he has also not been repaying the loan.

### **SUBMISSIONS.**

21. The claimant submitted that the employer has not proved that it had a valid reason for dismissing him as required by section 43, 45 and 47 of employment Act. He contended that the reason for the dismissal was failure to observe the terms of the IT policy which has not been shown to the court.

22. Further, the claimant submitted that the respondent also did not provide sufficient evidence during the disciplinary hearing and in this suit to prove fraud against him. He contended that the employer did not adduce any evidence to prove when and how the malware was introduced into his assigned computer, and the nature and extent of his involvement in fraudulent activity if any.

23. hE relied on *Nainna Kharmis v exford university press (EA) Ltd [2017] e KLR* whereHe relied on **Naima Khamis v Oxford university Press (EA) Ltd [2017] eKLR** where the court held that the reason for termination should be supported by evidence.

24. As regards procedure, he submitted that he was not provided with the requisite evidence, devices and ICT expert to explain to him during the disciplinary hearing, the alleged malware, the hacking and access to his computer. Consequently, according to him he was not accorded a fair hearing as required by section 41 of the Employment Act which provides that before the termination the employer must explain to the employee in a language he understands, the reason for the intended termination.

25. For emphasis, he relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where the court emphasized that an employer must follow a fair procedure before terminating the employment contract of his employee which in essence means according the employee a fair hearing.

26. As regards the relief sought, he urged the court to order for reinstatement considering that it was his desire to continue working for the Bank. He contended that there are also special circumstances warranting reinstatement including the fear that it will be impossible for him to secure another job in the Banking industry because of the dent put on his character by the impugned dismissal.

27. Finally the claimant submitted that the respondent did not adduce any evidence to prosecute its counterclaim for outstanding loan of Kshs 1,231,520.42. Therefore he prayed for the counter claim to be dismissed as with costs. For emphasis, he relied on **Banque Indosuez, DJ Lowe and Company Ltd [2006] e KLR** where the court of Appeal held that special damages must not only be claimed specifically but proved strictly.

#### **ISSUES FOR DETERMINATION**

28. I have carefully considered the pleadings, evidence and submission. It is clear that the claimant was employed by the respondent from 13<sup>th</sup> March 2013 to 2<sup>nd</sup> October 2020 where he was dismissed for misconduct. The issues in dispute are:-

- (a) **Whether the reason for the dismissal was valid and fair.**
- (b) **Whether a fair procedure was followed before the dismissal**
- (c) **Whether the reliefs sought in the suit should issue**
- (d) **Whether the counter claim should be allowed.**

#### **REASONS FOR THE DISMISSAL**

29. **Section 43 of the Employment Act** provides that in every legal proceedings challenging the termination of employment of an employee the employer shall be required to prove the reason for the termination and where he fails to do so the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. The latter section bars an employer from terminating the employment contract of an employee unless there is a valid and fair reason related to the employees conduct, capacity or compatibility or based on the operational requirement of the employer.

30. In this case the reason for the dismissal is set out in the dismissal letter dated 2<sup>nd</sup> October 2020 thus: -

***“This is in referenced to the disciplinary meeting held on Monday September 21<sup>st</sup> 2020 in regard to fraudulent Digifile transfers and Elma transactions from account number 0011837518002 of Rutere and Kalu Associates and Account number 5061841146005 of Jowaki to account number 10118556567002 of Javan Simiyu Makokha amounting to Kshs 318,140.***

***It was established that a gadget was used on your computer to introduce a malware to access the bank system, which was used to perpetrate fraud and in the process the bank lost money.***

***Consequently, the Bank has lost confidence in you due to your failure to comply with the Banks ICT policy. You are hereby dismissed from employment with Kingdom Bank Ltd with effect from 2<sup>nd</sup> October, 2020.”***

31. The respondent did not adduce any evidence before this court towards proving the validity and fairness of the above cited reason for dismissing the claimant. The respondent had all the opportunity to prosecute his defence and counterclaim but it deliberately refused to do so.

32. I have also considered the evidence by the claimant which has not been rebutted, that even during the disciplinary hearing the employer did not present any evidence from an IT expert or investigations report or forensic Audit report to prove the alleged fraud against him. According to the claimant he is a stranger to the alleged fraud and no evidence has been tabled before this court to connect him with the same.

33. In **Pius Machafu Isiundu v Lavington Security Guards Limited [2017] e KLR** the court of Appeal held that:-

***“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for the termination/dismissal (section 43); prove that the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5))...”***

34. Having considered the unrebutted evidence by the claimant, I find and hold that the respondent has failed to prove that the alleged fraud did occur and the claimant was involved. It did not call any witnesses in this suit and it also did not file the minutes of the disciplinary hearing to show that it had sufficient evidence to prove the validity of the alleged fraud and the claimant’s involvement.

## **PROCEDURE FOLLOWED**

35. Section 41 of the Act provided that:-

***“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”***

36. In this case the claimant was served with a show cause letter and he made a written defence. He was thereafter invited to an oral hearing before a committee and he also defended himself. The letter inviting him to the hearing, gave him the right to call witnesses, produce documents and also be represented by another employee at the hearing. Finally, he was given the right of appeal after the dismissal but he chose not to appeal.

37. Having considered the foregoing evidence, I would find that the employer followed a fair procedure before dismissing the claimant. Although the claimant contends that the employer did not call an IT expert to explain to him how the fraud occurred and how he was involved, I would deem that to be an afterthought because he never raised that concern during the disciplinary hearing or by way of an appeal.

38. In any event the claimant stated in paragraph one on page 2 of his written statement that he responded to each and every allegation raised in the show cause letter in his response dated 10<sup>th</sup> September, 2020 in an effort to exonerate himself. The said responses could only be possible after the claimant read and understood the charges as explained by the employer in the show cause letter.

## **RELIEFS**

39. Having found that the respondent did not prove that the dismissal was grounded on a valid reason, I make declaration that the dismissal was unfair and unlawful within the meaning of section 45 of the employment Act. The claimant seeks reinstatement but the employer has already lost trust in him according to the dismissal letter. Therefore, the only remedy for him is damages.

40. Flowing from the above, the claimant is entitled to salary in lieu of notice plus compensation for the unfair dismissal by dint of section 49(1) of the Act. His letter of appointment dated 8<sup>th</sup> September 2015 entitled him to one-month salary in lieu of notice. However, the same is declined because it is not pleaded.

41. As regards compensation, I note that he did not cause the dismissal through misconduct, he had worked for 7 years without any warning letter, and his chances of getting any other employment in the banking industry are minimal. Consequently, I award him 12 months' salary as compensation for the unfair termination.

42. The claimant further prayed for anticipated salary for the 29 years he would have worked before normal retirement age of 60 years. It is now trite law that such prayer cannot be granted by the court unless it is grounded on a written law or contract of employment. The claimant has not demonstrated that his claim is founded on the law or his contract of employment. Consequently, it is declined.

## **COUNTERCLAIM**

43. As submitted by the claimant the counter claim was not prosecuted as the respondent refused to tender evidence in support. It is therefore dismissed. However, the court notes that the claimant has admitted that he received the said loans from the bank. He is therefore bound by the loan agreements to settle the same with or without a court decree otherwise the said prayer is declined because it lacks basis in law and his contract counter claim

## **CONCLUSION**

42. For the reasons, findings and observation made herein above, I enter judgment for the claimant in the following terms:-

- a) Compensation Kshs 1,200,000**
- b) The respondent's counterclaim is dismissed.**
- c) Costs of the suit and the counter claim**
- d) Interest at court rate from the date hereof**
- e) The award is subject to statutory deductions**

**Dated, signed and delivered at Nakuru this 28<sup>th</sup> day of April, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

In view of the declaration of measures, restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE