



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL SUIT NO.567 OF 1999

JUSTUS CHANIA

LYUNGA.....PLAINTIFF

-VERSUS-

STANDARD CHARTERED BANK

LIMITED.....DEFENDANT

JUDGMENT

The plaintiff moved the Court by plaint dated **20th December, 1999** and amended on **8th March, 2002**, making a claim based on alleged wrongful dismissal from employment. The plaintiff stated that he had been engaged by the defendant on **3rd January, 1972** as a clerk earning Kshs.740/= per month; but at the material time he had been promoted to the rank of Section Head, earning a salary of Kshs.16,100/= per month. The plaintiff stated that the defendant, on **25th April, 1992** “**wrongfully dismissed [him] contrary to the terms and conditions of service embodied in the collective agreement covering the defendant bank’s section heads, check clerks, clerical, technical subordinate staff**”; and as a consequence, he “**lost salary which he would have derived from continuing in the defendant’s service and has been unable to obtain another job and has remained unemployed up to now.**” The plaintiff pleaded that at the time of the alleged dismissal, “**the defendant failed and/or refused to pay to the plaintiff salary in lieu of notice together with terminal and/or other benefits.**”

The plaintiff stated that, prior to the alleged wrongful dismissal, the defendant had on **22nd February, 1992** caused him to be “**arrested unlawfully and without any reasonable cause and/or excuse**”; thereafter, he was “**falsely imprisoned at the Central Police Station cells until 25th February, 1992 when he was released but later was taken to Court and charged with several counts, two of forgery and one of stealing, in Mombasa Chief Magistrate’s Court Criminal Case No. 710 of 1992**”. The plaintiff asserted that “**the charges were false and malicious and were brought to provide an excuse and/or justification for the said wrongful dismissal.**”

The plaintiff pleaded that while he was in the defendant's employ, he had taken long-term loans, repayable at special concessionary rates; but upon his dismissal, the defendant began subjecting the outstanding loan balance of Kshs.197,000/= to general commercial-rate interest charge; and this gave the pretext to demand immediate repayment of the outstanding loan, culminating in current threats by the defendant to foreclose and auction the security which had been offered by the plaintiff, namely, L.R. No.1022/II/MN. In 1994 the plaintiff made a payment of Kshs.200,000/= to offset the interest on the said loan; this was on the understanding that the outstanding balance would be paid from the terminal dues.

The plaintiff pleads that ***“the defendant is not entitled to take advantage of its wrongdoing to recall the loan in full and sell the plaintiff's said securities in default and should therefore be barred from doing so considering that they still hold the plaintiff's dues.”***

The plaintiff's prayers are as follows:

- (i) a declaration that the defendant is liable to pay and make good to the plaintiff the said terminal dues and other benefits;***
- (ii) an order for the payment of the amount found to be due to the plaintiff, in respect of such dues and benefits, less the defendant's loan-monies with interest-rate considered at staff-rate;***
- (iii) an order of injunction restraining the defendant by itself or by agents, from selling the plaintiff's security and/or property known as L.R. No. 1022/II/MN;***
- (iv) interest on (i) and (ii);***
- (v) any further relief such as the Court may deem it fit to grant.***

The statement of defence, while denying most of the assertions made by the plaintiff, thus proceeds:

“WITHOUT PREJUDICE... the defendant maintains that the plaintiff's employment was lawfully and properly terminated and all dues if any, which are denied, paid to the plaintiff.”

The defendant goes on to assert that ***“no cause of action against the defendant has been disclosed by the plaintiff and the same is frivolous and vexatious.”***

The defendant, lastly, pleads:

“WITHOUT PREJUDICE to the foregoing, the defendant maintains that the loan agreement with the plaintiff was separate and independent of the terms and conditions of the employment contract and that the said employment contract does not in any way vary, waive, rescind, vitiate and/or affect the terms and conditions of the loan agreement.”

Learned counsel, ***Ms. Ngige*** and ***Ms. Mbulika*** represented the plaintiff and defendant, respectively, in this matter, with the first session of the examination-in-chief taking place on ***2nd December, 2009.***

Justus Chania Lyunga (PW1), the plaintiff, confirmed the content of his pleadings, averring that he had been employed by the defendant in **1972**, but was dismissed 20 years later; he had been taken as a clerk, and had joined the defendant's pension scheme. The circumstances of PW1's dismissal entailed allegations of forgery and theft, directed at him, and he was dismissed on **25th April, 1992**; the dismissal was instant, and he had been given no notice. The plaintiff said that his terms of employment were partly contained in a Collective Bargaining Agreement (CBA), and that there was no consistency between the grounds of dismissal set out in the CBA and those set out in the letter of dismissal. The plaintiff's take-home pay as at the time of dismissal was Kshs.16,681/25, and this is the amount he was paid for **February, 1992**.

The plaintiff testified that his dismissal was linked to the conduct of a criminal case brought against him in respect of alleged forgery and stealing, a trial which took six years, involved 51 adjournments, and a trial which ended in acquittal. The following is a passage in the no-case-to-answer Ruling made by the Chief Magistrate [now Justice], **Muchelule** on **7th May, 1997**:

“The witnesses were not availed. The result is that although the witnesses called, that is PW1, Virginia Lila Kichuka, PW2, Catherine Kambe Mwawasi and PW4, Peter Meru Khisa made reference to them in their testimonies and identified them they do not form part of the prosecution evidence. Yet they were the basis of the prosecution case. I find the evidence led, therefore, is not sufficient to warrant the calling of the accused to his defence. I dismiss the charges, and acquit [the] accused [persons] under Section 210 of the Criminal Procedure Code [Cap.75, Laws of Kenya]” – Republic v. Justus Chania, Crim. Case No. 710 of 1992, Chief Magistrate's Court, Mombasa.

The plaintiff testified that his scheduled date of retirement, under his contract of service, was **2003**; and so he was seeking to recover for the 11 lost years; and he sought to have his pension rights restored. He was asking for the medical cover he would have been entitled to; he asked that the defendant be inhibited from auctioning his house; he was seeking leave and housing allowance; and he said he should have been paid half-salary for the six-year period during which the criminal case against him was running.

The plaintiff testified that the defendant had granted him a soft-loan of Kshs.210,000/=, for house-purchase, in **September, 1983**, and the subject-house, LR No.1022/II/MN was itself the security offered, and in respect of which the defendant held a charge. The original interest-rate on the loan was at 2½% (special staff rate), later raised to 6%; and at the time the plaintiff was dismissed, the outstanding balance was Kshs.189,763/70. But, as from the date of dismissal, the defendant began charging at commercial rates, on the plaintiff's loan account. This enhancement of loan-repayment rate, the plaintiff said, was unilateral, as there had been no meeting of the minds between himself and the defendant; and as at **14th October, 1999** the balance being claimed by the defendant had risen from Kshs.189,000/= to Kshs.705,890/65.

It was PW1's evidence that after the decision of the criminal Court in 1997, his name was restored in the listing of staff members; and therefore he should not have been charged loan-interest at commercial rates; in his words: ***“I didn't leave employment; they removed me; so they ought to have applied staff rate.”*** Being threatened with auction of his property, the plaintiff had made a payment of Kshs.253,000/= to the defendant; he said that if the applicable staff rates of repayment are taken into account, then, as of now, he has already completed payment of the house loan. The plaintiff asked for a release of the documents of ownership of the suit property to him.

The plaintiff said he had been dismissed at the age of 44 years, and he should have retired at 55; and that he should have been on pension since 2003.

PW1's testimony was subjected to cross-examination on the next occasion of hearing, on **17th May, 2010**. The plaintiff said on this occasion that he was seeking his benefits for the 10 years he served as an

employee of the defendant; he was seeking the release of his house documents; he was seeking his benefits applicable to the six-year period during which he was undergoing criminal trial. The plaintiff said the termination of his employment was based on the terms of the Collective Bargaining Agreement (CBA), and the CBA specified that he was entitled to salary during the period he was under suspension; by the CBA document, during suspension in connection with criminal trial, the subject is entitled to salary payment, as trial proceeds. The plaintiff said:

“In the six year-period I was not an employee of the defendant. But, so long as the matter was in Court, I was [entitled] to be paid.”

This response was occasioned by the assertion of learned counsel, **Ms. Mbulika**, that the fact that the letter of dismissal was dated **25th April, 1992** would mean that during the six-year duration of trial, the plaintiff was not an employee of the defendant.

The plaintiff contested the *bona fides* of the criminal case that had been brought against him; in his words:

“No investigations were done. Two others and myself were just taken to the Police. I was the only one charged. The Police conducted no investigation...[The] Court found me innocent.”

The plaintiff testified that he had completed making loan-repayment, in respect of his house, in 1996; it is the defendant that owes him money in this regard; he should have his ownership documents rendered to him.

On the third occasion of hearing, on **26th July, 2010** the defendant’s witness, **Florence Aleo Amisi Ndirangu** (DW1) gave her evidence. The witness, who is an employee in the Human Resources Department of the defendant, said she had no personal knowledge of the plaintiff, and could only speak from the formal records held in her office.

DW1 was aware that the plaintiff was contesting the defendant’s attempt to repossess his property; and was claiming his dues in connection with the manner in which he had been discharged from service with the defendant.

What is the defendant’s position on the plaintiff’s claims? DW1 said the records showed the plaintiff to have been dismissed in **April, 1992** for **“gross misconduct, [and involvement in] transactions seen as misappropriation of funds”**; the dismissal letter indicated that the plaintiff, as a Section Head, had been **“involved in fraudulent transactions”**: **“he cashed his cheques even when he had insufficient funds”**. DW1 said the offences in question were serious, and led to the dismissal of the plaintiff under the terms of the Collective Bargaining Agreement.

While the plaintiff had testified that his dismissal was not preceded by responsibly conducted investigations, DW1 said: **“The Bank would not issue such a letter [of dismissal] without proper investigations”**.

DW1 said that the plaintiff had been dismissed summarily, under the CBA; and that where such a dismissal took place, the subject would be paid for his services only up to and including the day of dismissal, and no other benefits would be payable. Such a position, DW1 said, **“was part of the policy, ... not expressly [provided for] in the CBA.”**

DW1 testified that while it is true the defendant had advanced a loan to the plaintiff at subsidized rates, **“upon leaving the Bank’s service commercial rates would be charged”** – and **“the commercial rate was applicable as from the date of separation.”**

The defendant’s records showed, by DW1’s evidence, that the dispute over the plaintiff’s loan-repayment began as soon as he left the defendant’s employ; and his lawyer’s letter of **17th November, 1999** was an objection to the defendant’s attempt to sell the plaintiff’s house; while the lawyer was seeking a deduction of the loan-repayment dues from the plaintiff’s financial entitlement, no moneys were due and payable to the plaintiff.

In cross-examination by learned counsel, **Ms. Ngige**, DW1 said she had no record that the plaintiff was under any investigation, as a Section Head with the defendant; her records only showed that the plaintiff had been dismissed for gross misconduct, under clause 5(a)(i) of the Collective Bargaining Agreement. DW1 said she had no record to show that the plaintiff was ever placed under suspension by the defendant, in connection with the circumstances leading to the dismissal – and so, there was no question of the plaintiff being paid half-salary during suspension. In DW1’s words:

“My understanding is that [his service] was terminated immediately, so there was no suspension.”

As regards the issue of investigations accompanying the alleged misconduct, DW1 said: **“We in Human Resources did not have a report of the investigations”**. The witness relied on supposition: **“The letter of termination would not be written without reports from the Manager [conducting] investigations”**; but she said she had not seen such a report.

DW1 said she had looked at the file on the criminal case which had been brought against the plaintiff, and established that he had been acquitted. All DW1 is certain of is that there had been a misappropriation of funds, and this was the consideration stated in the letter of dismissal. The witness said she had no reports as to the alleged overdrawing of accounts by the plaintiff. The witness knew that forgery was at the centre of the complaint which led to the plaintiff’s dismissal; but she had no record of a request to the plaintiff by the Bank, for an explanation; she merely **“believed”** the plaintiff **“was given a chance to explain.”**

DW1 said that the plaintiff, when dismissed, was paid all his entitlements; and that the terms of the mortgage loan advanced to the plaintiff were that the loan would become repayable on demand, at commercial rates, upon the plaintiff leaving the defendant’s employ.

Learned counsel, **Ms. Ngige** began her submission from the following base-line of facts: the plaintiff had worked for the defendant for 20 years; then, in accordance with Clause 5(a)(i) & (ii) of the Collective Bargaining Agreement, he was dismissed at the age of 43, on **25th April, 1992**; he had enjoyed a house allowance and leave allowance; he became a member of the pension scheme as from **3rd January, 1972**; he was given a house loan of Kshs.210,000/= in 1983, and his house, L.R. No. 1022/II/MN was charged to the defendant; the dismissal was based on the allegation that the plaintiff was involved in fraudulent cash transactions; the plaintiff was charged with two counts of stealing, and one of forgery – but he was acquitted of all these.

Learned counsel urged that the defendant’s sole witness, while testifying that the plaintiff had cashed cheques when he lacked sufficient funds in his account, did not produce the relevant cheques in Court – and so, the allegations remained unsupported.

Counsel acknowledged that Clause 5(a)(i) & (ii) of the Collective Bargaining Agreement provides that –

“Any of the following acts on the part of an employee shall constitute gross misconduct and/or serious neglect and shall justify instant dismissal:

(i) if he is guilty of misappropriating any funds or property belonging to the employer or belonging to any person having business dealings with the employer;

(ii) if he commits a breach of secrecy or security relating to any matter affecting the employer’s business.”

But she urged that no evidence had been led by the defendant to show what loss the defendant suffered on account of the cheques in question; and that there was no evidence called by the defendant on the rules for encashing cheques, such as would show that the plaintiff handled cheques in a manner amounting to gross misconduct, within the terms of Clause 5(a) (i) and (ii) of the CBA.

Counsel urged, besides, that the plaintiff’s acquittal in the criminal case, was for lack of evidence showing any impropriety in the plaintiff’s handling of the cheques in question.

Ms. Ngige submitted that the plaintiff had committed no fraudulent cash transaction as alleged by the defendant: and hence there was no basis for the summary dismissal of the plaintiff.

On the basis that the dismissal of the plaintiff was unlawful, counsel urged that he was entitled to the reliefs sought: he would have worked up to the age of 50 years, and thus, he was deprived of a salary and terminal dues; at the time of dismissal he was earning a net salary of ***Kshs.16,681/55***. Counsel urged that the defendant is liable to pay to the plaintiff terminal dues and other benefits and/or emoluments.

With respect to the plaintiff’s property purchased on mortgage-loan, L.R. No. 1022/II/MN, counsel submitted that, if it were not for the unlawful dismissal from employment, repayment would have continued at the subsidized staff rate – firstly 2½ % and later, 6%; hence there is no basis for the commercial rate of Kshs.23% which the defendant was applying, as from ***June, 1992***.

Counsel submitted that since the plaintiff had paid a balance of Kshs.253,000/= in ***May, 1996***, on the basis of the subsidized staff rate he had made an over-payment, and was entitled to a refund. The defendant, counsel submitted, should be restrained from auctioning the plaintiff’s property, and the title document should be rendered to the plaintiff.

Learned counsel, ***Ms. Mbulika*** for the defendant, laid the burden of the defendant’s case on the fact of a summary dismissal having taken place; she urged:

“The plaintiff...was summarily dismissed due to gross misconduct. The defendant’s witness Florence Amisi (DW1) testified that the plaintiff was dismissed due to gross misconduct and the defendant carried out an investigation before the defendant summarily dismissed the plaintiff on the ground well spelt out [in] the letter of termination.”

The difficulty with the foregoing submission relates to the facts tendered in evidence; it is on record that DW1 had thus testified: ***“We in human resources did not have a report of the investigations”***; and the unascertained nature of the investigations further emerge when DW1 says: ***“The letter of termination***

would not be written without reports from the Manager [conducting] investigations.”

While resting the defendant’s case on gross misconduct having been committed by the plaintiff, learned counsel made no comment on the nexus between such misconduct, and the criminal case that was lodged against the plaintiff, and which ended in acquittal. But counsel strenuously urges the misconduct theme:

“...the contract of employment...and ...the Collective Agreement...both [stipulate] [the]... consequences of gross misconduct – an employee will not be entitled to any terminal benefits whatsoever. Further, clause 5 under...collective agreement states what amounts to gross misconduct. The Trust Deed...clause 18 (b)(1) states that if an employee is dismissed from service on [grounds] of theft, dishonesty or any other act...the employed member shall have no right to such pension in terms of the rules.”

In counsel’s mention of the plaintiff’s acquittal, she urged that, quite irrespective of that fact, the plaintiff still committed some **“unlawful”** act which justified the dismissal; and counsel, though without a report in that regard and without evidence bearing out her position, submitted nonetheless that

“The defendant carried out an investigation and concluded that the plaintiff’s actions...amounted to gross misconduct”. Counsel urged that the plaintiff was not entitled to any benefit.

As regards the suit property, L.R. No. 1022/II/MN, counsel submitted that **“the plaintiff still owes the bank an outstanding loan which amount keeps accruing interest at commercial [rates].”** Counsel urged that **“the letter of offer dated 2nd August, 1983... clearly states that in the event the plaintiff ceases to be the Bank’s employee he will pay the loan interest at commercial [rates].”** Counsel submitted that the subsidized repayment rate was not applicable in this case, because **“the plaintiff ceased being a Bank employee [in] April, 1992; thus his loan was subjected to commercial interest [as] from the said date.”** Counsel stated that, as from the date of filing suit, the plaintiff owed the Bank Kshs.705,890/65 and that, to-date, **“the interest still accrues.”** It was the defendant’s case that **“the plaintiff has been enjoying an injunction for the last 10 years causing the Bank not to exercise its statutory power of sale.”**

The defendant, on 25th April, 1992 served upon the defendant a dismissal letter which reads (in part) as follows:

“After due investigations, we are satisfied that in your capacity as a Section Head at the Treasury Square Branch several times in January you were involved in fraudulent cash transactions...”

Although the dismissal letter states particulars of the alleged fraud, the defendant’s single witness neither substantiated those particulars, nor showed even an awareness that an investigation was indeed conducted which led to and justified the dismissal of the plaintiff.

In place of such probative evidence, DW1 merely argued what she perceived as justifying-grounds for the dismissal: when cross-examined, DW1 said she had no record that the plaintiff was ever under any investigation in connection with fraudulent conduct; she said she had no record of any suspension-directive against the defendant at any time; she had no record of any request emanating from the defendant, requiring the plaintiff to give any explanation of conduct perceived as fraudulent. Nonetheless, the defendant, through its witness and through counsel, invoked the penal clause in the applicable employment document, namely, the **Collective Agreement Between the Kenya Bankers (Employers) Association and Kenya Union of Commercial Food & Allied Workers (1981/83)**, clause 5 of which thus provides:

“(a) Gross misconduct and/or Serious Neglect: Any of the following acts on the part of an employee

shall constitute gross misconduct and/or serious neglect and shall justify instant dismissal –

(i) if he is guilty of misappropriating any funds or property belonging to the employer or belonging to any person having business dealings with the employer.”

While the plaintiff gives evidence that it is precisely the complaint raised by the defendant that led to Mombasa Chief Magistrate’s Court Criminal Case No. 710 of 1992, which ended in acquittal, the defendant is completely silent about that case, and such a position gives the impression that the plaintiff’s dismissal was on account of some independent fraudulent conduct.

In this regard, the entire record shows the plaintiff to have made a case on a balance of probability, that his dismissal arose from allegations which formed the basis of the charge in the criminal case aforementioned. Is it significant, then, that the criminal case ended in **acquittal**? I believe so. And it follows that the grounds raised by the defendant, for dismissing the plaintiff, do not carry validity, in law. I must conclude that the dismissal of the defendant was based on grounds that **have not been established by the evidence** tendered in Court.

Consequently, I will proceed to examine the plaintiff’s individual prayers set out in the pleadings, and to determine them appropriately.

The plaintiff’s claims (set out in the amended plaint of **8th March, 2002**) are as follows:

(i) loss of salary for the period commencing May, 1992 to-date – at Kshs.200,178/60 per annum;

(ii) loss of one month’s salary in lieu of notice at Kshs.16,681/55;

(iii) terminal dues and/or other benefits including 20 years’ service benefits assessed at 1 ¼ annual salary for each year completed;

(iv) leave allowance assessed at one month’s salary per year for the nine years since the plaintiff was dismissed;

(v) lumpsum medical cover of Kshs.80,000/=;

(vi) accounting for loan-monies on the basis of the defendant’s subsidized rates for staff;

(vii) interest on the sums payable;

(viii) any further relief such as the Court may deem it fit to grant.

The record shows that the defendant dismissed the plaintiff from employment on **25th April, 1992**; and as I have already held, the basis of such dismissal was negated, in law, with the plaintiff’s acquittal, in the criminal case lodged against him, on **7th May, 1997**. It means that, for **5 years and 12 days**, the defendant

wrongfully kept the plaintiff out of his job; and consequently, for that period, the plaintiff lost his salary and benefits. I hold that the defendant is to compensate the plaintiff for such loss.

In addition, the defendant deprived the plaintiff of the compensation attached to such termination notice as the plaintiff would have been entitled to, in case the defendant had sought to terminate his employment under the contract of service.

During the 5 years and 12 days when the plaintiff is to be regarded as having been an employee properly in office, he would have been entitled to staff-rate loan repayment; and so, this amount must be calculated and debited upon such loan-amount as would be still outstanding as at **7th May, 1997**.

To the plaintiff's claim for a lumpsum medical cover, in the sum of Kshs.80,000/= I heard no response from the defence; and so I will hold that this sum was due to the plaintiff.

After considering the merits of the plaintiff's case, and examining in context each of the claims made, I hold that this case succeeds on a balance of probability, within the limits of the decree the terms of which I now set out:

(1) The defendant shall pay to the defendant a salary at the rate of Kshs.16,681/55 per month, for the entire period commencing from 25th April, 1992 to 7th May, 1997 – and the same shall be paid with interest at Court rate.

(2) The defendant shall pay one month's salary in lieu of notice at Kshs.16,681/55 to the plaintiff; and the same shall bear interest at Court rate.

(3) The defendant shall pay to the plaintiff terminal dues and/or other benefits including 20 + 5 years and 12 days' service benefits assessed at 1¼ of the annual salary for the entire period thus indicated in this paragraph; and the same shall bear interest at Court rate.

(4) The defendant shall pay to the plaintiff leave allowance, at the rate of one-month's salary per year, for the period of 5 years and 12 days aforesaid; and the same shall bear interest at Court rate.

(5) The defendant shall pay to the plaintiff a lumpsum medical cover in the sum of Kshs.80,000/=; and the same shall bear interest at Court rate.

(6) Loan repayment in respect of the suit property shall be accounted for on the basis that the plaintiff was in employment during the whole of the 5 years 12 days period referred to in this decree; and in the absence of consent on the breakdown of figures, including any outstanding balance, this matter shall be placed before a Judge of the High Court to determine, or to direct a Deputy Registrar to effect a calculation, as a basis for the final orders of the Judge; and should any amount still be outstanding, the plaintiff shall be accorded a reasonable opportunity by the Court to repay it, at the fairest rates on the market.

(7) The defendant shall pay the costs of this suit, costs payable with interest at Court rate as from the date hereof.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and **DELIVERED** at **MOMBASA** this 29th day of September, 2011.

H.M. OKWENGU
JUDGE