



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI( NAIROBI LAW COURTS)**

**Civil Suit 3025 of 1994**

**ALFRED NEPHAT MWANIKI ..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD ..... DEFENDANT**

**JUDGMENT**

1. Introduction

The Plaintiff was a senior employee of the Defendant for 24 years until 3rd August, 1992 when his employment with the Defendant came to an end. He joined the Defendant Bank as a clerk on 5th September, 1968, and rose steadily through the ranks, serving as Manager in several of its branches, eventually leading to his promotion as Senior Field Services Manager, based at the Defendant's Moi Avenue branch.

On the morning of 3rd August, 1992, at about 8.15 am he was summoned by two officials of the Bank, Mr Ridley Baker, Chief Security Inspector, and Mr Lawrence Musa, Senior Security Manager, and according to the Plaintiff, "subjected to harassing interrogations on false allegations" resulting in his employment coming to an end on that day. What happened on that day, and whether the letter of resignation he wrote was written freely, and without coercion, are issues before this Court, and I will return to the same in due course.

On 19th August, 1994 the Plaintiff filed a Plaint in this court seeking damages and other reliefs for unlawful termination of his employment. That Plaint was amended several times, and the final one was filed in this court on 18th March, 1998, and is called the "Amended Amended Plaint". Paragraph 4 and 5 of that Plaint are relevant, and I will repeat them here:

"4. On 3rd August, 1992 at 8.15 am the Plaintiff was summoned to Mr Riddley Baker's office where he found him in the Company of Mr Musa both of whom subjected the Plaintiff to extensive harassing interrogations on false allegations which he was denied opportunity to seek explanations or verification.

**PARTICULARS OF SOME OF THE FALSE ALLEGATIONS**

(i) That he borrowed Kshs.120,000/= from a customer which operated an Account at Digo Branch of the Defendant where he was a manager.

(ii) That he gave a loan of Kshs.400,000/= to a Company in which they claimed he was a shareholder.

(iii) Why he was a holder of Diners Club Credit Card.

(iv) That he owed a certain garage Kshs.20,000/= since 1987.

(v) That he owed a certain electrical supply shop some money.

5. At about 1.00 pm on the same day without being given a chance to seek any independent advice or reference to enable him to explain accusations made against him by Mr Riddley Baker and Mr Musa, the Plaintiff was threatened with dismissal and coerced to sign his resignation from the Defendant's service on a piece of paper which was handed over to him there by Mr Riddley Baker."

That, essentially, is the basis of his claim – that he was forced to resign; that he was denied the opportunity to "retire" with full benefits; that he was subjected to humiliation, embarrassment; and that he has suffered loss and damage amounting to Kshs.3,209,584.80 which is particularised in paragraph 10 of his Plaint.

The Defendant, by its Amended Defence filed in this court on 30th March, 1998, withdrew its counter-claim and set-off; denied the allegations made by the Plaintiff; and offered the following answer in paragraph 4 of its Defence:

"4. On or about 3rd August, 1992 the Defendant's employees and/or agents, at an interview confronted the Plaintiff with evidence showing the Plaintiff's complicity in various irregularities in the discharge of his duties as a bank employee and that he was guilty of breaches of his terms of employment which in themselves would have enabled and entitled the Defendant to dismiss the Plaintiff summarily for gross misconduct. In view of the evidence the Plaintiff offered to resign his employment and the Defendant accepted the resignation written by the Plaintiff himself."

## 2. Issues

Based on these pleadings, both parties agreed and identified the following three issues for determination by this Court:

1. Whether the Plaintiff validly resigned from his employment with the Defendant.

2. If the answer to (1) is "No" whether his resignation was as a result of any coercion and/or undue influence upon him by the Defendants through its agents and or employees.

3. If the answer to (2) is "Yes" whether the Plaintiff is entitled to Judgment for wrongful termination of employment. This case turns essentially on facts.

## 3. Facts and Analyses

As I have noted before, the Plaintiff has alleged that on 3rd August, 1992 he was harassed, intimidated, and coerced to resign from the Defendant's employment; that he was forced to write the letter of resignation dated 3rd August, 1992, and as a result he has suffered loss and damage.

In his examination-in-chief before this court, the Plaintiff testified that on the morning of 2nd August, 1992, he was summoned to the office of Ridley Baker at the Defendant's Market Branch. There he met Baker and Musa who interrogated him for four hours regarding various allegations and accusations that had been levelled against him by various customers. These allegations related to a loan he had taken from a customer; a loan that he had advanced to a company in which he had an interest; and amounts he owed to a garage and an electrical supplier. The Plaintiff said that he was intimidated, humiliated and threatened with sacking; that the language used was very bad. He testified that at the end of his interrogation he asked that he be allowed to consult his lawyer, and that the accusations against him be put to him in writing. Both these requests were denied. He was then given a piece of paper to write his letter of resignation (See P Exhibit 4).

In cross-examination by Mr Ojiambo, Counsel for the Defendant, the Plaintiff confirmed that the letter of

resignation was written by him, in his own words, in his own handwriting, and without anyone forcing him, or telling him what to write. This is what he said:

“Resignation letter was written at 1 pm in my hand-writing. Only I held the pen. There was no gun to my head. I was not threatened with violence. I composed the letter – words were mine. I decided on what to write and how many paragraphs. The only reason for writing was threat of sacking. It is not correct that I sacked myself. I was terminating my employment. If I had been sacked my employment would have been terminated. The difference is that I walked out on them. I agree I decided to resign. I admit I was given option – to resign or they would sack me. I agree employer had the right to give such option, provided right procedures followed. Procedures are in the bank’s books, but I don’t have copies. I knew I would say this to court, but did not obtain copies. I can produce this later.” What is manifestly clear from this part of his cross-examination is that he was given a choice – to resign or be fired. Now, why he exercised the choice of resigning, and whether in the circumstances he was forced to do so, may become clearer from his further cross-examination.

One of the allegations against him involved a conflict of interest situation whereby he authorized a loan to Two-thirds Investments Ltd, a company in which he was a shareholder. He admitted that he was a shareholder in that company, and that he knew that it was contrary to his contract of employment to authorise such lending without making a full disclosure to his employer. His excuse for not doing so was that he was only a “small” shareholder in that company. He also admitted that he had an interest in another company called “Mumwanjeshi Company” which he failed to declare to his employer. He admitted having an account with Kenya Finance Corporation, contrary to his terms of employment. He admitted that there were allegations regarding moneys he had borrowed from H. P. Motors, and an account he had had with Diners Club without disclosing the same. He admitted owing money to Noorani Electricals, but denied owing any to Mombasa Development Ltd. He agreed that his contract of employment did not allow him to engage in any other business, and these alone would have been grounds for summary dismissal. Finally, he admitted advancing a loan of Kshs.400,000/= to Twothirds Investment, without security and contrary to instructions.

Based on all these allegations against him, some of which he admitted are true, and in contravention of his terms of employment, he was given a choice – to resign or be sacked. He made a choice. Was that choice made freely? Now let us examine what the defendant’s witness had to say about the events of 3rd August, 1992. The defence called Lawrence Odhiambo Musa, their Security Manager at the time, and one of the two people who was present during that four hour meeting on the material day. Mr Musa came across to me as a candid and forthright person, who had no axes to grind, no bones to pick, and who simply was doing his job. He said he had since retired from the Bank, and acknowledged the Plaintiff as his “senior”, who he respected and against whom he had no malice.

Musa testified that he was instructed to investigate the Plaintiff following a complaint from a customer, a Mr Gachanja, who claimed to have lent Kshs.120,000/= to the Plaintiff and was unable to recover the same. Musa travelled to Mombasa to investigate this complaint, and stumbled upon several other irregular dealings involving the Plaintiff. He and his senior, Baker, then met with the Plaintiff on 3rd August, 1992 when they confronted him with those issues. They confronted him on seven issues, and invited the Plaintiff to respond to each in writing (See D Exhibit 1). Plaintiff did so, admitting some and denying others.

According to Musa, the Plaintiff then requested for a piece of paper, and wrote his resignation. This is what Musa said:

“His allegation that he was coerced into writing this is not true. No one applied duress. We were only three in the room – my boss, me and Plaintiff. After interrogation, we left him alone in the room to write his response. The entire process took from 8.30 to 12.30. Plaintiff did not ask for permission to go out. We did not carry weapons. We treated him with a lot of respect. We did not do anything bad. Plaintiff was not my enemy, but my colleague. He was my senior. So I could not have humiliated him. I did not humiliate him. Plaintiff was senior to Baker. Resignation was not obtained by force. We did not oppress or humiliate him.”

This is Musa's testimony. It is candid. I believe him. There were only two witnesses presented to this Court – the Plaintiff himself and Musa. I must analyse their respective testimonies to determine the issue: Was the resignation freely given? Was there any force used? This case turns on facts, and on facts alone, and given the two accounts of the events of 3rd August, 1992 leading to the issue of the letter of resignation, I must prefer the testimony of one witness more than the other, and I must take into account the totality of the evidence, all other factors, including the environment, and the context within which the letter of resignation was given.

I prefer the testimony of Musa to that of the Plaintiff and I am satisfied that on a balance of probability there was no duress or coercion used to obtain the letter of resignation, and that it was given freely. My reasons for this conclusion are as follows:

1. The Plaintiff was candid in his admission during cross-examination that no one actually forced him to write the letter of resignation.
2. The said letter is in his own handwriting, it was composed by him – the words are his. And the words do not appear to be of a person who was under duress. For example, it is sufficiently detailed, and talks about how he has served the Bank faithfully for 24 years, and asks the Bank “to consider my benefits”. The focus on “benefits” is significant, and I will return to it.
3. Musa, who had since left the Bank and who had nothing personal to gain from giving this testimony, can be regarded as a fairly independent witness – certainly more “independent” than the Plaintiff, who has everything to gain from the outcome of this case. But it goes beyond that. Musa was a candid and forthright witness, his demeanour solid, his testimony unwavering, and consistent, both in examination-in-chief and cross-examination. I prefer his testimony to that of the Plaintiff when he said that the Plaintiff was given ample time to write the letter of resignation, and was left alone to do so, and that he never asked for permission to go out or consult a lawyer.
4. If, indeed, the Plaintiff wanted to consult a lawyer, he could have done it the following day, and his lawyer could have written to the Bank repudiating the letter of resignation.
5. However, on the following day, the Plaintiff went to the Bank essentially in my view, to obtain the Bank's commitment on his “benefits”, and when this was not forthcoming, he had second thoughts about his letter of resignation.
6. That brings me to the reference in his letter of resignation to “benefits”. His main concern, I believe, was his benefits. He wrote the letter freely believing that his “benefits” would not be an issue. But that was not to happen. However, that does not change the fact that there was no duress exercised in obtaining the letter.
7. Given all the circumstances of this case, and the fact that the Plaintiff chose to resign following seven accusations against him, it is reasonable to believe that he exercised his choice freely. Clearly, some of the accusations were true, and those were grounds for his dismissal. Instead of facing dismissal, he chose resignation – a much more honourable thing to do. I am convinced that he made that choice freely.

Finally, in his written submissions to this Court, Mr Kibuthu, Counsel for the Plaintiff has asked me to consider the following factors which would lead to the conclusion that the Plaintiff's resignation was not voluntary:

- (i) THAT the Plaintiff was not furnished with any formal complaint or charges by his Accusers.
- (ii) THAT he was not forewarned of the nature of the charges or complaint that he was going to answer to before the meeting of 3rd August, 1992.
- (iii) THAT the event was not at the Plaintiff's office but rather that he was summoned to the Defendant's Market Branch, Nairobi by DW 1 and Mr Ridley Baker.

(iv) THAT he was (in DW 1's own words) "interrogated" for four (4) hours between 8.30 am to 12.30 pm.

(v) THAT he was faced with seven accusations (see exhibit MFI DW 1) circumstances of which had not occurred immediately before the interrogation but rather dating as far back as 1986.

(vi) THAT there is no evidence that the Bank suffered any financial loss arising out of the accusations.

(vii) THAT the Plaintiff's testimony that he requested to consult his Lawyers after the interrogation was denied was not controverted by "DW 1". (viii) THAT although it is the Bank that provided stationery for the Plaintiff's statement, DW 1 alleged that the Plaintiff specifically requested for a piece of paper to write exhibit 4.

(ix) THAT contrary to the Defendant's assertion that it is the Plaintiff who voluntarily left his services, the Defendant went ahead to pay to month's salary in lieu of Notice yet exhibit 4 purport that the Plaintiff's resignation was with immediate effect!

(x) THAT exhibit 4 is addressed to the Executive Committee of the Defendant.

(xi) THAT immediately after exhibit 4, the Plaintiff appealed and thereafter wrote several letters to the Defendant's Head office in Nairobi and the United Kingdom to no avail.

I have considered all these factors in arriving at my conclusion. The fact that the Plaintiff was not furnished with formal charges ahead of the meeting, or that the meeting took four hours and it was in a different location, or that the Bank had suffered no financial loss, or that the Bank made gratuitous payments etc are not relevant to the finding I have made that in my view the resignation was voluntary, and freely given, and accepted.

I have also read all the cases cited, but nothing stated therein would have affected my conclusion. In fact, one of the authorities cited to me by the Plaintiff, Halsbury's Laws of England, Volume 16 Page 666 on "undue influence" argues against the position taken by the Plaintiff. The paragraph on "undue influence" talks about situations when "undue influence" may be "presumed", but specifically excludes employer-employee relationships.

Accordingly, and for reasons outlined, the Plaintiff's suit fails and is dismissed with costs to the Defendant.

**Dated and delivered at Nairobi this 8th day of August, 2005.**

**ALNASHIR VISRAM**

**JUDGE**