



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 362 OF 2016

(Before Hon. Justice Mathews N. Nduma)

MICHAEL WASONGA OPERE..... CLAIMANT

VERSUS

THE CO-OPERATIVE BANK OF KENYA.....RESPONDENT

JUDGMENT

1. The suit was filed by the claimant on 8th December 2016 in which the claimant prays for the following reliefs:

- (a) Declaration that the termination of employment of the claimant by a letter dated 18th June 2016 was unlawful and unfair.
- (b) An order for reinstatement to the employment without loss of benefits and in the alternative maximum compensation for the unlawful termination.
- (c) Terminal benefits comprising:
 - (i) Payment for prorata leave earned Kshs. 88,102.10.
 - (d) Lost medical benefits in the sum of Kshs. 2,150,000.
 - (e) Loss of subsidized interest on mortgage for 12 months.
 - (f) Interest and costs.

2. The claimant testified as CW1 that he was employed by the respondent for 6^{1/2} years from 13th April 2010 until June 2016. The claimant was based at the Mbale Branch of the Bank as credit officer at the time of termination. The claimant started as a Graduate Clerk and rose through the ranks to position of Credit Officer and was promoted and transferred to Nairobi as Branch transformation Champion with effect from 18th May 2015. The claimant was directed to report to the bank's training centre in Karen Nairobi effective 6th May 2015 for training for the new role. The training ended on 8th May 2015 and the claimant was advised by the Director Transformation that he would not report back to Mbale but was to proceed to the new station at Nairobi immediately.

3. The claimant reported at Nairobi on 11th May 2015 at Kimathi Street Branch.

4. The claimant secured a residential house in Tewa Estate and embarked on plans to move his household goods to Nairobi, the cost of which would be borne by the bank as advised in the letter of transfer.

5. The claimant was required in terms of the bank's staff manual to identify and submit six quotations, three from the bank's approved list of transporters and three from local transporters from around the transferring station for consideration and approval by management of the branch, in this case Mbale.

6. The claimant was already in Nairobi and so he requested a former colleague at Mbale branch, Wycliffe Onyimbo to help him identify three local transporters while the claimant was to source the other three from the approved list of transporters. The claimant engaged different colleagues for referrals and was helped to identify Transweb Company, Cube Movers Limited and Compas Limited from the approved list. The three companies provided the claimant with quotation which the claimant forwarded to Wycliffe at Mbale branch to submit on his behalf.

7. Wycliffe, informed the claimant that he had on his part identified two local transporters at Mbale namely Carlways Limited and Musimbi Investments and that the claimant could look for a 3rd local transporter.
8. The claimant proceeded to contact another colleague by the name Humphrey Opondo who was also on transfer to Nairobi at the time for a referral. Humphrey recommended Carrey Mee Hum Ltd and gave the claimant contracts.
9. Wycliffe collected all the six quotations and submitted on behalf of the claimant.
10. The claimant was informed subsequently that the Branch had awarded the transportation tender to Carrey Mee Hum Ltd as it was the lowest bidder at Kshs. 125,000. The claimant was advised by management to go ahead and instruct them to transport his household goods from Mbale to Nairobi. The claimant did the above and the goods were transported to Nairobi. The claimant testified that he was not involved in the payment arrangements between the bank and Carrey Mee Hum Ltd but he believed the transporter was duly paid.
11. The claimant settled at Nairobi in his new role for about 7 months, the Claimant in December 2015 received a call from the bank's security department asking for some clarification regarding the transfer from Mbale to Nairobi. The claimant answered the questions in a written statement as far as he could remember.
12. On 18th February 2016, the claimant was issued a show cause letter dated 16th February 2016 on allegations of irregular claim of transport of household chattels. It was alleged in count one (1) that the tender for transportation of household goods was manipulated to favour Carrey Mee Hum Ltd who were awarded the contract. That the claimant had presented forged quotations as the signature of Carrey Mee Hum Ltd director Aggrey Opondo appended on the quotation differed with his specimen signature on their account number 01148471150800 held by the Bank and the postal address indicated on the quotation as P. O. Box 321-50300 Maragoli differed with the address on the invoice and receipt indicated as P.O Box 8321-00200 Nairobi. Further the signature on the quotation by Musimbi Agencies differed with the specimen signature of Alice Mutembeyi as held in the Bank system and that of Wilberforce Sibiri of Carlways Investments differed with the signature as signed in a previous quotation presented by another staff.
13. Count two (2) was that investigations had revealed that on 22nd May 2015, Kshs. 125,000 was credited to Account Number 01148471150800 of Carrey Mee Hum Ltd and on 23rd May 2015 a withdrawal was made through user C213 of Mbale and Kshs. 125,000 deposited to joint account number 01108472866600 jointly operated by the claimant and his wife Emma Anyango by the same user C213 of Mbale Branch, a clear indication that the claimant was involved in activities that defrauded the Bank through forged transportation quotations.
14. In his explanation in response to the show cause letter, the Claimant had given a statement similar in most respects to his testimony before court. The Claimant however also confirmed that account 01108472866600 I.N.O Michael Opere/Emma Anyango was an account jointly held by himself and his wife at the Mbale Branch. The claimant admitted also that Kshs. 125,000 was deposited in that account on 23rd May 2015. The claimant explained that the amount was deposited by his wife Emma as contribution to a project they were undertaking together. That the amount originated from a soft loan Emma had taken with her savings self-help group. The claimant denied that he knew the directors of Carry Mee Hum but stated that he had spoken to them over the phone while arranging for the transportation of his house hold goods.
15. The claimant testified that he was called to a disciplinary hearing on 7th March 2016 which he attended as scheduled and explained himself on the charges levelled against him. The minutes of the hearing were produced before court. On 18th May 2016, the claimant received a further show cause letter dated 15th April 2016 with the same accusation that on 23rd May 2015, the claimant received Kshs. 125,000 credited in his wife's account number 01148471150800 of Carry Mee Hum Ltd by teller Ezra Onyango who carried the transaction using a pre-signed cheque issued to him by Humphrey Opondo. That investigations had revealed that Carry Mee Hum Ltd was a company owned by Humphrey Opondo through his proxies Aggrey Owino and Brian Opondo who are his close relatives, a clear indication that the claimant was involved in activities that defrauded the bank through forged transportation documents.
16. The claimant was invited to a second disciplinary hearing on 16th May 2016 which the claimant attended and gave explanations regarding the above charges. The minutes of the second hearing were also produced by the Claimant.
17. On 16th June 2016, the claimant received a letter of termination of employment dated 8th June 2016 on the grounds of irregular claim of transport of household chattels.
18. The claimant appealed the decision on 22nd June 2016. The appeal was not responded to.
19. The claimant prays for the reliefs set out in the suit.
20. CW2 Wycliffe Onyimbo testified that he worked with the claimant. That claimant was transferred to Nairobi. That the claimant requested him for transport quotations. That CW2 got two transport quotations for household goods on behalf of the clamant. That CW2 did not disclose the quotations to the claimant. That CW2 subsequently received a call from security department on the issue. CW2 said that it was not important to know the owners of the transport companies and that a company only needed to be a registered one. CW2 was not employed just like the claimant. CW2 admitted that he had filed cause number 305 of 2017 before E&LRC which was due for hearing at the time. That his employment was terminated by the respondent on 12th April 2016 for conflict of interest. CW2 stated that he had applied for the transport of claimant's goods vide a company called Carlways investment but was not awarded the tender. That the company is owned by himself and his wife. CW2 stated that the claimant's employment was terminated for similar reasons.

Defence

21. The respondent filed memorandum of response on 3rd March 2017 and called RW1 and RW2 to testify in defence of the claimant's case.
22. RW1 Joseph Mwano Kinyanjui testified that he worked for the Respondent as fraud analyst. That he was involved in investigations of this matter. That investigation revealed that there were irregular transportation claims by staff members colluding with others. That the claimant was one of the staff members involved in the irregular transportation claims. That upon his transfer from Mbale to Nairobi, the claimant was involved in presenting fictitious quotations from local transporters namely Musimbi Enterprises, Carlways Investments and Carrey Mee Hum Ltd. That the claimant had colluded with two other staff members in this action. That the alleged transporter Carrey Mee Hum was paid Kshs. 125,000 on 22nd May 2015 and curiously on 23rd May 2015 a day after, a cash withdrawal was made from the account of the company no. 01148471150800 and Kshs. 125,000 was deposited to account 01108472866600 jointly operated by the claimant and his wife Emma Anyango. The same teller named Ezra Onyango posted the two transactions. The investigations report was submitted to the Human Resource Director and recommended disciplinary action to a number of the respondent's employees including the claimant.
23. RW2 was Simon Munii Maina, the Head of Employee Relations Department of the Respondent Company testified and corroborated the testimony by RW1 in all material respects. RW2 added that he was involved in the disciplinary action that led to termination of employment of the claimant on 8th June 2016. RW2 confirmed the employment particulars and record of the claimant from date of his employment as Graduate Clerk on 12th April 2010 until the termination date when he held the position of Branch Transportation Champion Supervisory Grade 2. That he had been transferred from Mbale Branch to Nairobi on 4th May 2015. RW1 testified that the claimant was served a show cause letter regarding irregular procurement of transportation quotations for his household goods and fraudulent receipt of Kshs. 125,000 in respect thereof irregularly.
24. That the claimant made unsatisfactory explanations to the charge levelled against him in his written response to the show cause letter and during the disciplinary hearing of the case on two occasions. That the claimant was dismissed on the charges levelled against him having failed to explain himself to the satisfaction of the respondent. That the claimant submitted his appeal against termination on 22nd June 2016 and the appeal was considered and dismissed. The result of the appeal was communicated to the last known address of the claimant being P.O Box 82 Kandiege since he had not provided any other forwarding address. That the postal address that was indicated in his letter of Appeal belonged to the respondent.
25. That at the time of termination the claimant owed the respondent an education loan in the sum of Kshs. 90,265, house loan in the sum of Kshs. 2,880,051 and furniture loan in the sum of Kshs. 99,740.
26. That the claimant upon termination was paid terminal benefits comprising one month salary in lieu of notice; payment in lieu of leave days not taken totaling Kshs. 145,325.60 and pension benefits in the sum of Kshs. 669,754.84. The claimant was also issued a certificate of service dated 16th June 2016.
27. Respondent submitted that the termination was for a valid reason and was done following a fair procedure and the suit be dismissed with costs.

Determination

28. The issues for determination are:

- (a) Whether the termination was for a valid reason and was effected following a fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought.

29. We shall proceed to deal with the two issues together and shall not regurgitate the evidence set forth in this judgment in my final analysis. The court has however carefully considered the evidence by the claimant *vis avis* that by RW1 and RW2 and has come to the following findings of fact:

- (a) That the claimant had served the respondent in various capacities for a period of about 6^{1/2} years.
- (b) That upon transfer from Mbale to Nairobi on promotion, the claimant was involved in irregular procurement of a transport provider for his household goods.
- (c) That the respondent has proved on a balance of probabilities that the transport company that was provided by the claimant by the name Carrey Mee Hum Ltd and was awarded the transport tender for a sum of Kshs. 125,000 was a proxy of the claimant and upon payment of the sum of Kshs. 125,000 to the account of the transport provider the money was after two days transferred to an account held jointly by the claimant and his wife.
- (d) It is apparent that the claimant and his work mates with others provided factious quotations from three (3) local companies with the aim of irregularly enriching themselves to the loss and detriment of the respondent.

30. Accordingly, the respondent has proved on a balance of probabilities that it had a valid reason to terminate the employment of the claimant as provided under *Section 43(1) and (2) of the Employment Act, 2007*.

31. Furthermore, the respondent has satisfied the court that it followed a fair procedure in terminating the employment of the claimant in terms of *Section 41 of the employment Act* in that the claimant was given a show cause letter to which he responded. The claimant was invited to attend a disciplinary hearing twice where he explained his case fully. The respondent was not satisfied with the explanation given

by the claimant and the employment of the claimant was lawfully and fairly terminated in terms of *Section 44 and 45 of the Employment Act, 2007* and the staff manual of the respondent.

32. Furthermore, the court is satisfied that the claimant was paid in lieu of one month notice for leave days not taken and also was paid his pension. The claimant owed monies to the respondent at the time which money was partly deducted from his terminal dues.

33. Accordingly, the suit by the claimant lacks merit and is dismissed in its entirety.

34. On the issue of costs, the claimant had hitherto served the respondent well for a period of 6^{1/2} years before he went astray and misconducted himself in the manner described in this judgment.

35. The court finds this an appropriate case for each party to bear their costs of the suit.

Judgment Dated, Signed and delivered this 9th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Obati for Claimant

Mr. M.C. Ouma for the Respondent

Chrispo – Court Clerk