



Mongate v African Banking Coorporaton Ltd (Employment and Labour Relations Cause 137 of 2018) [2024] KEELRC 1054 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1054 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 137 OF 2018**

MN NDUMA, J

MAY 9, 2024

BETWEEN

ABEL SAMORA MONGATE CLAIMANT

AND

AFRICAN BANKING COORPORATON LTD RESPONDENT

JUDGMENT

1. The claimant filed memorandum of claim dated 6th June 2018 seeking compensation for unlawful and unfair termination of employment. The suit was consolidated with a lower court suit earlier filed by the claimant against the respondent to determine the rate at which the claimant should continue paying an outstanding loan against the respondent.

The issues for determination are:

2.
 - a. Whether the termination of the employment of the claimant was unfair and wrongful.
3.
 - b. What rate should be used in repayment of outstanding loan, and
4.
 - c. Whether the claimant is entitled to the reliefs sought.
5. The claimant (CW1) relied on a substituted witness statement dated 14th October 2022 as his evidence in chief.
6. In addition he relied on a further witness statement dated 8/2/2018 in consolidated suit.



7. The claimant testified that he was employed as a personal banker on 6/3/2010 on probation and was confirmed on 14/10/2010. That claimant was appointed as a customer service officer on 19/10/2011. The claimant served continuously until 9/2/2015. The claimant was paid a basic salary of Kshs.50,000/= and a housing allowance of Kshs.10,000/= and utility allowance of Kshs.4,000/=.
 8. On 3/11/2014, the respondent invited the claimant to a disciplinary hearing in relation to an alleged fraudulent transaction.
 9. The disciplinary hearing took place on 4/11/2014 in which he denied the charges. On 12/11/2014, the claimant was suspended from duties and was asked to pay the outstanding staff loan of Ksh.350,000/=.
 10. The claimant responded in writing to the allegations of fraud by a letter dated 13/1/2015.
 11. The claimant states that the accusation was false and selective. That the people who were associated with the transaction and in particular the cashier and operations manager were absolved yet the claimant had no role in the identification of customers.
 12. The claimant said he was singled out and his employment was wrongfully terminated on 9/2/2015.
 13. Under cross-examination, the claimant stated that he had received notices to show cause between May and October 2014. That he was invited to a disciplinary hearing in which he was allowed to call a witness but did not call any. That he was suspended without pay and so was unable to service the staff loan. That he is entitled to repay the loan on staff rates at 8% per annum. That he has not gotten alternative employment because he was listed with the credit bureau. That he had been interviewed twice for employment but was not recruited. That he was now staying in his rural home doing small scale farming.
 14. That he suffered anguish, pain and lack of financial support for self and his family. That he was not paid any terminal benefits.
 15. That as a customer service officer he had no role in identification of customers. The role was by the cashier and operations manager. That a fraud was allegedly committed on 28/11/2014 and he was not involved at all in that transaction. Claimant said he has not repaid the loan since his suspension. That Kshs.160,401/= was taken from his terminal dues to offset the outstanding loan.
- Defence
16. RW, Lucy Mariana Ngethe testified that she was the Group Head of Human Resource.
 17. That she relied on a witness statement dated 7/8/2018 as her evidence in chief and produced bundle of documents dated 5/6/2018 marked exhibits '1' to '15'.
 18. RW1 stated that the claimant worked for the respondent from 6/3/2010 as a personal banker and became customer service officer on 19/10/2011 subject to a job description.
 19. That the claimant's performance was continuously wanting and the probation period was extended by a letter dated 20/4/2012. He was confirmed as customer service officer on 2017/2012.
 20. That on 16th and 17th June 2014, the claimant failed to verify the identity of a suspected fraudster and caused the withdrawal of Kshs.200,000/= and Kshs.1,850,000/= respectively at his place of work against his express contractual obligations and instructions by the respondent.
 21. That following investigations, the claimant was invited to show cause by a letter dated 18/10/2014. That he responded to the notice to show cause and was invited to a hearing on 3/11/2014. The claimant attended a disciplinary hearing on 4/11/2014, and was afforded opportunity to present his



case challenging the charges made against him. The claimant was sent on suspension thereafter and the claimant was surcharged Kshs.350,000/=

22. The respondent subsequently made a decision to terminate the claimant's employment by a letter dated 9/2/2015.
23. That the respondent subsequently made a decision to terminate the claimant's employment by a letter dated 9/2/2015.
24. That the respondent paid all the terminal dues to the claimant and gave the claimant certificate of service.
25. RW1 referred to the summary of job description of customer service officer – Westlands branch to which the claimant was appointed and the job summary was as follows:

“ The purpose of this job is to:

Maintain and retain customers Attract new ones through provision of quality after sales service Grow our wallet share of existing customer cross-setting.”

26. Under cross-examination, RW1 said that the claimant failed to verify details of a customer before issuing him with a counter cheque. RW1 said this was part of the job responsibilities of the claimant at no. 8 of the job description.

“ 8 Assist customers in applying for all the counter services.”

27. RW1 said verification of the identity of customer was an implied service under item 8 above. That a counter cheque is issued upon confirmation of the cash balance in the customer's account. That this was a responsibility of the claimant. That the customer was paid Kshs.200,000/= and Kshs.1,850,000/= respectively on two sub-sequent dates. RW1 stated that the counter cheque limit was higher than the mandate of the claimant.
28. That the operations manager was contacted and had approved the process.
29. RW1 said that the customer identified himself at the teller's counter by producing his national identity card. The teller contacted the operations manager at that point while the customer is in his cubicle.
30. RW1 said subsequently, the respondent asked the claimant to call the customer number in the bank system and the customer said he was in Mombasa and had not withdrawn the said monies. That is when the fraud was discovered. RW1 said that the claimant was found guilty of misconduct and his employment was terminated.
31. RW2, Deborah Muthoka testified that she was the recoveries manager of the respondent. She adopted a witness statement dated 14/10/2022 as her evidence in chief and produced exhibits marked '1' to '6' dated 19/7/2017. He said that the claimant's loan account was not fully settled. That Kshs.160,401.41 was recovered from the terminal benefits due to the claimant. That the balance left unpaid was Kshs.164,370/=. That repayment was reverted to commercial rates upon termination.

DETERMINATION

32. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1, RW1 and RW2. The issues for determination are:
- 33.



- i. Whether the respondent has discharged the onus placed on it vide sections 41 and 43 of the Employment Act 2007, by proving that it had a valid reason to terminate the employment of the claimant and that it followed a fair procedure before the termination.
 - ai. Whether the claimant is entitled to the reliefs sought.
34. In answer to issue (i) above, the court has considered the show cause letter dated 28/10/2014 written to the claimant in respect of an incident that had occurred on 16th and 17th June 2014 when a man who purported to be Nobert Njeru Njagi walked into the ABC Bank Westlands Branch and withdrew Kshs.200,000/= and Kshs.1,850,000/= respectively. The claimant was accused of

“Failure to verify the identity of the claimant’s passport photo stored in the financial system with that of the person who was physically present at the bank as from the CCTV footage it was discovered that the two faces did not match. This action facilitated the occurrence of the fraud on the two dates mentioned above.”
35. The claimant responded to the show cause letter and said that he had taken time and verified the client’s details from both the financial system and the ID card client had presented to him. That the photograph of the person before him and the one in the system was similar. That the client signature was the same as per what is captured in the system.
36. That before the client was paid, the laid down procedure of confirmation from the domiciled branch was done by the operations manager and the teller was given a green light to pay. The claimant said he did due diligence in regards to the payment but unfortunately the client turned out to be a fraudster.
37. RW1 presented the minutes of the hearing that took place on 11/11/2014. The minutes of the hearing show that the chairman read the charges to the claimant and then the claimant was asked to explain himself, which he did by stating that he had done due diligence when the customer presented himself before him by confirming that his image and signature matched that in the system. That the operations manager later also requested for his telephone number and upon doing further verification the customer was duly paid by the teller who was not the claimant.
38. From the record, there was no evidence adduced against the claimant at the hearing specifying the matters he was supposed to verify in the verification which was humanly possible for him to do before handing over the customer to the cashier and the operations manager for further verification and approval.
39. The court has also considered the responsibility of the claimant at item 8 of his letter of appointment as a customer service officer which the respondent relied upon to find that the claimant was guilty of misconduct. The item reads for emphasis that “Assist customers in applying for all the counter services.”
40. The respondent did not adduce any specific evidence on what the claimant was supposed to do before issuing a counter check to a customer who presents himself at the banking hall. The court understands the role of the claimant not to include any approval of payments for that is clearly the role of the teller up to a certain level and further approval by the operations manager if the sums involved were high and beyond the limit of the teller.
41. In the case of the alleged two fraudulent transactions the uncontroverted evidence is that the approval limit was that of the operations manager.
42. From the record, the teller who paid the two cheques and the operations manager who approved payment of the transactions were not present at the hearing nor did they adduce any evidence against



- the claimant to point out what the claimant failed to do to facilitate their subsequent approval and payment of the counter check.
43. The court finds that the respondent has failed to place any cogent evidence before court to discharge the onus placed on the respondent in terms of section 43(1) and (3) of the Employment Act, by proving that it had a valid reason to terminate the employment of the claimant.
 44. To the contrary the explanation given by the claimant tended to wholly exonerate him from any blame vis a vis the responsibilities placed on him by the respondent in the position of customer service officer which is truly a front desk service as opposed to a banking counter service offered by a teller and the approval and supervisory role played by the operations manager.
 45. The court finds that the disciplinary process was flawed and did not meet the requirements of section 41 of the Employment Act, 2007 and the respondent in the whole failed to prove that it had a valid reason to terminate the employment of the claimant.
 46. The court finds that the respondent violated sections 41, 43 and 45 of the Employment Act, 2007. The termination of the employment of the claimant was unlawful and unfair. The claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the Act.
 47. Flowing from this finding, the claimant is entitled to continue enjoying the bank loan repayment at staff rate of 8% from the date of termination.
 48. The claimant failed to pay the loan due to the wrongful conduct of the respondent who unlawfully denied the claimant employment and income. The respondent in that respect breached the payment arrangements between the bank and the claimant. The claimant is to resume payment of the loan as it stood from date of termination till payment in full at staff rate of 8%.

Compensation.

49. The claimant had served the respondent from the year 2010 to 2014 a period of about four (4) years. The claimant upon promotion was kept on further probation for a period of six months. The respondent clearly placed responsibilities on the claimant which are evidently beyond the express mandate stated in the contract of service and job description and in particular under item 8 of tasks and responsibilities.
50. The claimant had no express verification and approval responsibilities discernable from his record. The court has found that the claimant was made to carry the burden of the teller and the operations manager as he clearly testified before court.
51. The claimant suffered mental anguish, financial loss and inability to support self, his family and to meet his financial obligations as between himself and the respondent. The actual loss suffered by the claimant is compounded by his listing on the credit bureau and therefore unable to secure another job despite his effort to get one.
52. The court in its finding has relied on the case of Power Group Technology versus Samuel Maina Kibugi Civil Appeal No 109 of 2017, firstly in finding that the action of the respondent violated section 41, 43 and 45 of the Employment Act 2007 and that the claimant is entitled to compensation for the unlawful and unfair termination.
53. The claimant received no terminal benefits upon termination since the amount payable was used to partly offset the outstanding loan. The claimant was not compensated for the job loss. The claimant no doubt would have wished to be reinstated to his job but it is not plausible in the circumstances of this case nor has he prayed for that relief.

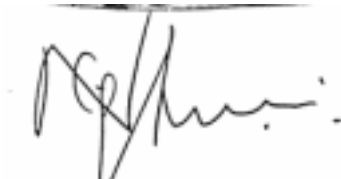


54. The claimant attended interviews twice for a replacement job but was unsuccessful. It is not easy to secure a job in the banking sector once the employment is terminated by one bank for alleged misconduct. This is the plight of the claimant.
55. In the final analysis the court finds this an appropriate case to award the claimant the equivalent of twelve (12) months' salary in compensation for the unlawful and unfair termination in sum of (Kshs,192,850 x 12) = Ksh.1,114,200/=.
56. RW1 testified that the terminal benefits paid to the claimant and offset against the loan included one monthly salary in lieu of notice. The court, will not award payment in lieu of notice thereof.

In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- a. Kshs.1,114,200/= in compensation for the unlawful and unfair termination of employment.
- b. A declaration that the outstanding loan payable to the respondent by the claimant is payable at staff rates of 8% from the date of termination till payment in full.
- c. Interest on compensation at court rates from date of judgment till payment in full.
- d. Costs of the suit

Dated at Nairobi this 9th day of May, 2024.



Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Nyasimi for claimant

Mr. Kariuki for respondent

Mr. Kemboi, Court Assistant

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