



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI, J.J.A.)

CIVIL APPEAL NO. 53 OF 2017

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

THOMAS NYANGI MWITA.....RESPONDENT

*(An appeal from the Judgment of the Employment and Labour Relations Court at*

*Nairobi (M. Mbaru, J.) delivered on 17th December, 2015 in Cause No. 464 of 2012)*

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JUDGMENT OF THE COURT

**Section 43** of the **Employment Act, 2007** requires that in a claim arising out of termination of a contract, it is the duty of an employer to prove the reason or reasons for termination and where the employer fails to do so, such termination is deemed to have been unfair within the meaning of **section 45** of the said **Act**. By the said **section 45** termination of employment by an employer is deemed to be unfair if the employer fails to prove that the reason for termination is valid and that the reason for termination is a fair reason. Further, by **section 47** of the said **Act** where there is a complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

It is our duty as the first appellate court from a decision of the High Court in its original jurisdiction to re-examine the record and re-evaluate the evidence as required by **rule 29** of the rules of this Court and to come to our own conclusion whether the findings of the trial court are correct. The substance of that rule and the said duty was well enunciated in the oft-cited case of **Selle v Associated Motor Boat Company Limited [1958] E.A. 123** in the following powerful words that have stood the test of time:

*“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

We shall revisit the record and retrace the evidence to enable us carry out the said duty we have set out of this Court acting as a first appellate court.

The respondent **Thomas Nyangi Mwita** was offered employment by the appellant **Kenya Commercial Limited** through a letter of employment dated 4th December, 2007. He was employed as the Retail Manager of the appellant and was posted to the Bungoma branch on terms and conditions set out in the letter. In the course of time he became the Branch Manager at Bungoma where he served in that capacity until the following events took place.

The appellant received a letter dated 5th April, 2011 by an entity called Makwata Construction and Engineering Company based in Bungoma. That entity was the appellant’s customer with an account at the Bungoma branch. It was stated in that letter amongst other things that the customer had submitted an application for financial assistance to the appellant but the application had not been approved. It was

further stated that the respondent as manager of the Bungoma branch had requested that customer for financial assistance to enable the application to be approved. Further, that the respondent had telephoned the said customer on 1st August, 2009 where he instructed the customer to go to the branch to discuss its case and be assisted. When the (proprietor of the) customer reached the branch he was advised to open a new account which he did and that while he was doing so the respondent called him on telephone and told him that an advance of Shs.200,000 would be approved subject to the customer releasing Shs.100,000 from the said sum to the respondent. The customer stated that he opened the account as instructed, was allowed to withdraw the said sum of Shs.200,000 and that he had forwarded Shs.100,000 to the respondent through the appellant's employee called Judy Nekoye of Bungoma branch. The customer further stated that his relationship with the respondent had thereafter become strained when the customer requested a refund of the said sum from the respondent. Further, that the respondent had abused client-customer relationship by sharing confidential information with third parties to the detriment of the customer. Also that the respondent had filed a case against that customer using external lawyers and it led to the customer's properties being attached by auctioneers.

This letter led to various events. Detailed statements were taken from **Shadrak Musani** who was the appellant's Operations Manager at Bungoma, **Judy Nekoye** who was a teller, **Gladys Malanga**, a clerk at the said Bungoma branch and **Patrick Anyango Makwata**, the Director of Makwata Construction Company Limited which had made the complaint. Mr. Makwata repeated his allegations against the respondent and Judy Nekoye confirmed that she had opened the account on instructions of the respondent when Makwata's account with the bank held a nil balance. She further stated that the respondent as Branch Manager instructed her and her colleague the Operations Manager Mr. Musani to regularise the account of Makwata Construction Company Limited when issues were raised on the way it had been opened and operated.

Gladys Malanga confirmed paying the said customer Shs. 200,000 after confirming that the transaction had been authorised by the respondent although that customer had an account with a nil balance which she stated was against the bank's operations procedures. The Operations Manager Mr. Musani, of the transaction involving Shs.200,000 paid to Makwata Construction and Engineering Company Limited, stated that on the said date 1st August, 2009 he had received a telephone call from the respondent who had since been transferred to another branch asking him to authorise the said payment. Musani was then serving as manager but seemingly still received instructions from the respondent who had been temporarily transferred to the appellant's Rongo branch. He confirmed that the said sum was paid to the said customer.

The respondent wrote a statement where he denied any irregularity in what had taken place.

On 25th May, 2011 the appellant wrote to the respondent through its Regional Business Manager - Western Region setting out various irregularities that had been noted at the Bungoma branch. One such irregularity involved the said Makwata Construction Engineering Company and a related company, Makwata Construction and Engineering Company Limited which entities held two accounts. It was stated amongst other things that the customer held a non-performing debt which was in debit and that the respondent had failed to recover the debit sums in the account. It was further stated that despite the said customers being in debt, the respondent had on 1st August, 2009 authorised opening of another account for the customer without the necessary approval from head office and well knowing that the first account was non-performing which was contrary to provisions of the Central Bank of Kenya Prudential Guidelines, 2006. It was also stated that on the said day, the respondent had authorised the said withdrawal of Shs.200,000 without lending discretion or authority from discretion holders; that the debt remained outstanding in the bank's books but that the respondent had without reference to the Legal Department of the appellant instructed lawyers to file a civil suit without following due procedures of the appellant. There was also a case of the appellant's customer Mwezangu Hardware Limited which held an account with a nil balance where it was said that the respondent had authorised opening of a new account and on the same day had authorised payment of cash Shs.300,000 to that customer without lending discretion or any authority from discretion holders. It was also stated that the respondent had authorised other payments to be made to that customer contrary to prudential guidelines. There was a case of a customer called **Peter Miyianda** and the respondent was accused of opening accounts and lending money without following prudential guidelines. The same was the case on the company called **M'Big Limited**, **Gordon Sewe Okelo** and of SME Loan contracts it was stated that the writer of the letter had on various occasions demanded comments and response from the respondent on 8 SME Loan contracts but that he had failed to respond. The letter concluded:

*"I am yet to receive your response to the said email to date despite the seriousness of the irregularities and the potential risk of loss the bank is facing as a result of the said irregularities.*

*I now expect you to send your comprehensive response on the SME's together with the other accounts highlighted above.*

*You are hereby required to show cause why disciplinary action should not be taken against you for the above breaches.*

*Your response should reach me by 27th May, 2010, without fail."*

The respondent wrote a comprehensive response to that letter by his letter of 28th May, 2011. He gave explanations on each of the matters raised but it would appear that this did not satisfy the appellant because it decided to launch forensic investigations which were carried out by its **Forensic**

**Investigator, Alloys Ombui.** Forensic Report which was produced in court signed on 5th July, 2011 recommended amongst other things:

*"That the Branch Manager Thomas Mwita the respondent be terminated from employment for gross abuse of office and his disregard to operational guidelines as exemplified by the irregular authorization of the overdrafts, suppression of information on the non-performing debt, usurping the functions of the Legal Department, receiving the irregular inducement from the customer and for coercing staff to un-procedurally regularize the customer's account."*

There were recommendations against the Operations Manager Mr. Musani who it was recommended should be reprimanded for acting on the respondent's instructions without authority and it was recommended that Judy Nekoye be reprimanded for acting irregularly.

Acting upon the circumstances and the report, by a letter of 20th July, 2011 the appellant dismissed the respondent from employment. It was stated in the letter that the respondent had committed acts of gross misconduct details which it was said were within his knowledge. He was therefore dismissed from the appellant's employment with immediate effect.

The respondent appealed against the said dismissal through a letter dated 22nd July, 2011 but the appellant's Appeals Committee upon consideration did not find any merit in the appeal which was dismissed.

In a suit filed at the Industrial Court of Kenya at Nairobi (today called "**The Employment and Labour Relations Court**") the respondent restated the case we have set on his employment stating that he was entitled upon employment to work upto the retirement age of 60 years. He further stated that his employment was unlawfully, irregularly and prematurely terminated; that there was malice in that termination and that he had suffered special loss and damage. He prayed for a declaration that the dismissal was unlawful and wrongful; reinstatement to previous job without loss of benefits; in the alternative pay in lieu of 3 months notice at Shs.266,603 per month (Shs.799,809), pay in lieu of leave for 11 years at Shs.266,603 (Shs.2,932,633), loss of earning for 11 years at the rate of Shs.266,603 (Shs.35,191,596). He also prayed for damages for premature and unlawful termination of employment.

The appellant denied the claim in a detailed statement of defence. The defence repeated the issues we have discussed in this judgment on the complaint by customers, the forensic report that had been carried out and the decision reached against the respondent to terminate his services.

The suit was heard by **Mbaru, J.** who in a judgment delivered on 16th December, 2015 found that the appellant had not followed due process in dismissing the respondent from employment. The judge reached the conclusion that a reinstatement order was not a proper order being 4 years after the respondent had been dismissed from employment. The judge found that the respondent was entitled to reliefs which she granted as follows:

*i) A finding that the respondent was unfairly dismissed from employment.*

*ii) An award of loss of salary was given at Shs.9,597,708 being 3 years salary.*

*iii) Compensation was awarded at Shs.3,139,236 being 12 months salary.*

*iv) Notice pay was given at Shs.799,824.*

Those are the orders that provoked this appeal premised on the memorandum of appeal drawn by the appellant's advocate **Grace Kanyiri** of Federation of Kenya Employers where 5 grounds of appeal are set out. It is said that the judge erred in law and fact by not appreciating the evidence of the appellant hence arriving at a wrong decision; that the judge erred in holding that the respondent was unfairly dismissed and awarding him loss of salary at the said sum of Shs.9,597,708 which award to the appellant was not specifically pleaded in the memorandum of claim. It is also said that the judge erred in law and fact by not appreciating the evidence of the appellant hence arriving at a wrong decision of finding that the respondent was unfairly dismissed and awarding him 12 months salary. Further, that it was wrong to award the respondent notice pay; that the judge considered extraneous circumstances and facts which were not pleaded and finally that the judge erred in law by disregarding the evidence adduced in court in that the respondent facilitated opening of new accounts for customers and proceeded to issue overdrafts on the same contrary to the appellant's procedures and giving unauthorized orders to his juniors. We are asked to allow the appeal and set aside the judgment of the lower court in its entirety in effect dismissing the suit.

The appeal came up for hearing before us on 14th May, 2019 when **Miss Grace Kanyiri** advocate appeared for the appellant while **Mrs. Judith Guserwa** advocate appeared for the respondent. Both parties had filed written submissions and case digest which they relied on. In a brief highlight of the written submissions Miss Kanyiri submitted that the judge was wrong to award the respondent 3 years salary for the period he had been out of work. According to counsel, that was not prayed for in the memorandum of claim. Counsel also faulted the learned judge for awarding 12 months salary as compensation which was the maximum allowed in law when no basis had been laid for awarding the maximum allowed in law. Counsel further submitted that the respondent had participated in the investigations carried out by the appellant where he was found to be culpable of gross misconduct. According to counsel the respondent as Branch Manager had a fiduciary duty to the appellant. Counsel also stated that it was wrong to award notice pay when dismissal was regular because the respondent had been served with a notice to show cause and was accorded a hearing and also a hearing on appeal.

Mrs. Guserwa pointed out to us that grounds 2 and 3 of the memorandum of appeal did not lie because the respondent had since been paid for notice and 12 months compensation. On the remainder of the grounds 1, 4 and 5 counsel submitted that the award of about Shs.9,500,000 was justifiable because it was pleaded where the respondent asked for earnings for 11 years. According to counsel, the award of 3 years salary was reasonable for loss of earning. According to counsel, the respondent was not accorded a fair hearing by the appellant because investigations were conducted after he had been dismissed. For all that we were urged to dismiss the appeal.

In a brief reply Miss Kanyiri submitted that the payments made to the respondent after judgment were made *ex gratia* but not to compromise the appeal. According to her, payment of salary can only be made for work done but not for an employee on suspension or who had been dismissed.

We have considered the whole record and the submissions made by counsel before us.

We have set out in detail the circumstances that led to the termination of employment of the respondent by the appellant. The respondent served as the appellant's Branch Manager in Bungoma and the appellant being a bank the respondent was expected to maintain the highest standards of integrity to the appellant while serving as its manager. It was established through evidence of other employees of the appellant and through the forensic investigations that were conducted, that the appellant had conducted himself irregularly by engaging with the appellant's customers in a manner that he was not allowed by set guidelines. He opened accounts for customers whose accounts were in debit

or with nil balances when prudential guidelines did not allow him to do so. He authorised opening of such accounts without authority and for what may appear to have been for personal gain because for example in the matter of M/S Makwata Construction and Engineering Company it was established through a complaint made by them to the appellant that the respondent had received cash from the said customer which he was not allowed to do. The respondent had fiduciary duty to the appellant which he breached. The appellant was entitled to terminate his services and on the facts in the record the appellant cannot be faulted for dismissing the respondent from employment.

We began this judgment by citing various provisions of the **Employment Act, 2007**. The Act lays down strict procedural steps that an employer must follow to remove an employee from employment. Apart from the provisions we set out **section 41(2)** of the Act requires in mandatory terms that an employer before terminating the employment of an employee or summarily dismissing an employee under **section 44 (3) or (4)** of the Act must hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub section (1) make.

As we have seen in this judgment a complaint was received by the appellant against the respondent by a letter dated 5th April, 2011 and it provoked various actions including statements being taken from various employees and the said complainant. The respondent was given timelines within which to respond to allegations or otherwise respond to allegations made in the forensic report and he did so. We have not seen on the record any proceedings where the respondent was asked to attend any meeting to respond to the allegations. It is also not on record whether the forensic report was availed to the respondent and a perusal of the same does not show whether the respondent was confronted with the allegations by the investigators or asked to comment on the adverse report that had been made before the report was concluded and handed over to the appellant. To that extent we agree with the respondent that his fair hearing rights before termination of employment may have been breached by the appellant contrary to the provisions of the Act. Having reached that decision we examine the awards that were made to the respondent to see whether they were justified or not. The judge found that reinstatement was not a proper remedy the respondent having left employment four years earlier. That was a correct reading of the law.

The judge awarded the respondent salary for 3 years. The appellant complains that this was an erroneous decision as the respondent was not entitled to the same.

**Section 49** of the **Employment Act** provides the remedies which an employee is entitled to on wrongful dismissal and unfair termination. Such employee is entitled to wages which he would have earned had he been given the period of notice to which he was entitled under the Act or his contract of service; the dismissal terminates the contract before the completion of any service upon which the employee's wages became due, such employee is entitled to a proportion of the wage due for the period of time for which he had worked; and any other loss consequential upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice. Such employee is also entitled to the equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee by the time of dismissal.

In the appeal before us the judge awarded the respondent salary for a period of 3 years in the sum of Shs.9,597,708. With due respect to the judge we have not found any material or law on which such an award could be made. That award was made in error and we hereby set it aside.

As we have shown an employee whose employment is wrongly terminated is entitled to a compensation award not exceeding 12 months of salary. The judge awarded 12 months salary compensation. We have enumerated the circumstances under which the respondent's employment was terminated. He acted irregularly in fact engaging in acts which bordered on criminal conduct. He could not be entitled to maximum compensation in those circumstances. Looking at the whole picture and the circumstances we think that an award of 4 months salary is adequate compensation and this finding is based purely on the fact that the appellant did not follow the strict process that is required for termination of employment. We substitute therefore (four) 4 months salary in place of the 12 months salary awarded which we hereby set aside.

The respondent was entitled to notice as per his contract of employment which gave a right to either party to give the other 3 months' notice of termination of employment or payment in lieu therefore we do not find any substance in the complaint by the appellant on the aspect of the award of notice pay. In sum therefore we substantially allow the appeal to the extent that we set aside the award for loss of salary and interfere with compensation and substitute orders that the respondent shall be awarded:

- (i) 4 months salary as compensation for wrongful termination,
- (ii) 3 months salary in lieu of notice, and
- (iii) That each party shall meet their own costs in this appeal and in the High Court.

**Dated and delivered at Nairobi this 27th Day of September, 2019.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**