



Mwitumi v Rafiki Microfinance Bank Limited & another (Cause 845 of 2017) [2023] KEELRC 565 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 565 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 845 OF 2017
L NDOLO, J
MARCH 2, 2023**

BETWEEN

WILSON WAGATHIRU MWITUMI CLAIMANT

AND

RAFIKI MICROFINANCE BANK LIMITED 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The delay in concluding this matter merits an explanation. Hearing of the main claim proceeded on February 21, 2019 and December 16, 2019.
2. Thereafter, the 1st Respondent raised a preliminary objection by notice dated January 28, 2020, challenging the jurisdiction of the Court to hear and determine the claim on account of limitation of action under Section 90 of the *Employment Act*. A second issue raised in the preliminary objection was that the Memorandum of Claim was incompetent for want of a verifying affidavit.
3. Because the preliminary objection was raised at the tail end of the trial, I directed the parties to submit on it as a first issue in final submissions.
4. In a ruling delivered on March 5, 2020, I overruled the 1st Respondent's preliminary objection with costs to the Claimant. Soon after this ruling, the Covid-19 pandemic hit the Country leading to a major disruption of court operations. It would appear that the 1st Respondent was unable to document its intention to appeal against my ruling on the preliminary objection by filing a Notice of Appeal within the prescribed time.
5. By a subsequent Notice of Motion dated April 20, 2020, the 1st Respondent sought leave to file its Notice of Appeal out of time. I allowed this Motion in a ruling delivered on May 6, 2020 and thereby stayed delivery of judgment pending determination of the intended appeal by the Court of Appeal.



6. By its judgment delivered on July 22, 2022, the Court of Appeal dismissed the appeal thereby upholding my ruling on the preliminary objection. The coast is therefore now clear for me to render judgment on the main claim.
7. At the trial, the Claimant testified on his own behalf and the Respondent called three (3) witnesses; Stephen Kanake, Hilda Nyambura Kiarie and Jacob Munyaka Wafula.

The Claimant's Claim

8. By a Memorandum of Claim dated and filed in court on November 8, 2017, the Claimant seeks compensation for unfair termination of employment, terminal dues and damages for wrongful arrest, detention and malicious prosecution.
9. The Claimant states that on August 20, 2014, the 1st Respondent, without lawful justification or reasonable cause, made a complaint at the Central Police Station, Mombasa upon which the Claimant was arrested, detained and arraigned in court. He was charged before the Chief Magistrate's Court at Mombasa (Criminal Case No 1505 of 2014), with the offence of stealing by servant, contrary to Section 281 of the *Penal Code*.
10. The Claimant further states that he was acquitted on January 17, 2017 under Section 87(a) of the *Criminal Procedure Code*.
11. The Claimant avers that as a result of the arrest, detention and prosecution, the 1st Respondent unlawfully terminated his employment. He adds that he was not reinstated to his position after the acquittal by the criminal court.
12. The Claimant accuses the 1st Respondent of malice and cites the following particulars:
 - a. The 1st Respondent made complaints to the police purporting that the Claimant had stolen money to the tune of Kshs 5, 200,000;
 - b. The 1st Respondent made a complaint at the Central Police Station, Mombasa, when it knew or ought to have known or had reason to believe it was untrue, malicious and in bad faith;
 - c. The Claimant was arrested in broad daylight thus causing him embarrassment and humiliation and in the circumstances lowering the Claimant's dignity in the eyes of right thinking members of the society;
 - d. The dignity of the Claimant and that of his family members was lowered;
 - e. The Claimant's harassment lowered his esteem in the eyes of friends, family members and the public.
13. The Claimant states that the 2nd Respondent, being the Chief Legal Advisor to the Government, failed in his duty of advising the Director of Public Prosecutions and the National Police Service, to exercise their powers with diligence and thus sustained a trial in which they knew or ought to have known there was no evidence.
14. The Claimant therefore seeks the following remedies:
 - a. 1 month's salary in lieu of notice.....Kshs 110,000
 - b. 12 months' salary in compensation for unfair termination.....1,320,000
 - c. Service pay @ 1 month's salary for 2 years.....220,000



- d. General damages for wrongful arrest, detention and malicious prosecution
 - e. Aggravated and exemplary damages
 - f. Costs plus interest
15. In the course of the trial, the Claimant withdrew his claim as against the 2nd Respondent. Prayers (d) and (e) were thus dropped.

The 1st Respondent's Case

16. The 1st Respondent filed a Response dated March 6, 2018. In its Response the 1st Respondent admits that the Claimant was its employee, having been engaged on September 3, 2012, as a Senior Officer-Central Processing Unit and later as a Service Delivery Manager under the terms and conditions of an employment contract dated July 31, 2012.
17. The 1st Respondent avers that the Claimant was summarily dismissed on August 19, 2014, following due process in accordance with the *Employment Act*.
18. The 1st Respondent admits having lodged a complaint at the Central Police Station, Banking Fraud and Investigation Unit, Mombasa on August 19, 2014.
19. The 1st Respondent maintains that its complaint was justifiable and made with reasonable cause. It avers as follows:
- a. On August 18, 2014, its personnel reported a suspected fraud at its Moi Avenue, Mombasa Branch;
 - b. On August 19, 2014, the 1st Respondent's Head of Delivery visited the Moi Avenue, Mombasa Branch and conducted a snap check of the treasury books and on reviewing the vault treasury books from 9th August to August 18, 2014, he noted anomalies on the entries made by the Claimant and found a deficit of Kshs 5,200,000;
 - c. The 1st Respondent commenced internal investigations headed by a Mr Jacob M Wafula who recorded statements from the 1st Respondent's staff, including the Claimant, who admitted having taken the sum of Kshs 5,200,000.
20. The 1st Respondent therefore avers that its report at the Central Police Station-Banking Fraud Unit was as a result of its independent investigations and admission by the Claimant of having stolen the sum of Kshs 5,200,000 which was under his custody. The 1st Respondent adds that the Claimant's arrest and arraignment in court was done with reasonable cause and without malice.
21. The 1st Respondent admits that the Claimant was acquitted under Section 87(a) of the *Criminal Procedure Code* but avers that the acquittal was contrary to the law as the 1st Respondent's two witnesses, Stephen Kanake and Hezron Munga had testified on the matter and thus judgment ought to have been rendered based on their evidence.
22. The 1st Respondent asserts that the acquittal does not connote malicious prosecution.
23. The 1st Respondent denies the allegations that it unlawfully terminated the Claimant's employment and states that the Claimant failed to diligently and faithfully administer his duties.
24. The 1st Respondent claims to have followed due procedure in executing the Claimant's dismissal and states that a Staff Disciplinary Committee was constituted on August 19, 2014 where the Claimant appeared and having admitted stealing the sum of Kshs 5,200,000 was summarily dismissed.



25. The 1st Respondent denies the particulars of malice enumerated in the Memorandum of Claim and in particular denies that the report to the police was actuated by malice.

Findings and Determination

26. There are three (3) issues for determination in this case:
- a. Whether the Claimant's claim is properly before the Court;
 - b. Whether the Claimant's dismissal was lawful and fair;
 - c. Whether the Claimant is entitled to the remedies sought.

Competence of the Claim

27. The question whether the Claimant's claim is properly before the Court was the subject of a preliminary objection raised by the Respondent on the main ground that the claim was statute barred. In a ruling delivered on March 5, 2020 I overruled the objection for the reason that there were contested facts to be ascertained at full trial.
28. The matter went on appeal and in its judgment delivered on July 22, 2022, the Court of Appeal stated the following:
- “The date of termination is therefore not evident nor admitted from the said statement of claim, and is a contested fact that needs to be ascertained by the ELRC.”
29. There is therefore unfinished business on the issue of limitation of action and I will consequently begin by looking at the available evidence on this issue.
30. In my ruling dated March 5, 2020, I held that time did not begin to run until communication was made to and received by the Claimant regarding the termination of his employment. The Claimant was consistent that he did not receive the dismissal letter filed by the 1st Respondent. On its part, the 1st Respondent was unable to prove that the said letter had actually been delivered to the Claimant.
31. Consequently, the Respondent cannot use the date on the dismissal letter as the accrual date of the cause of action.
32. Regarding the second limb of the preliminary objection which is premised on the 1st Respondent's averment that the Memorandum of Claim as amended was not supported by a verifying affidavit, I reiterate my finding that the proposition that after dropping the claim against the 2nd Respondent, the Claimant ought to have filed a fresh verifying affidavit is not supported by any law.
33. That said, I find and hold that the Claimant's claim is properly before the Court and proceed to determine it on merit.

The Dismissal

34. The Respondent produced a letter dated August 19, 2014 addressed to the Claimant as follows:

“Wilson

Summary Dismissal



We refer to previous correspondence on the above matter culminating in your appearance before the Staff Disciplinary Committee on August 19, 2014. The Staff Disciplinary Committee found you liable as follows: -

- i. That you failed in your core duties, as the Service Delivery Manager, to safe guard the company's funds and thus occasioning the loss of Ksh 5,200,000;
- ii. Misappropriation and or embezzlement of the Bank's funds to the tune of the sum of Ksh 5,200,000.00;
- iii. Failure to follow the laid down policies and procedures when executing your duties;
- iv. Failure to perform duties as per the terms of your employment contract;
- v. Collusion to defraud the Bank;
- vi. Defrauding the Bank in the course of your duties;
- vii. Making or causing to be made dishonest entries in the bank records when you knew and or ought to have known that the same was false.

All the above issues results (sic) to a gross misconduct and which in turn warrants a summary dismissal as stipulated under the Employment Act, Laws of Kenya. As such, you are hereby summarily dismissed from your employment.

Subject to your full clearance with the institution, your dues shall be worked out in full and final settlement, as hereunder, less any liabilities to Rafiki Microfinance Bank:-
Days worked till August 19, 2014. Prorated balance leaves (sic) days of 11 days. Less: Chase Bank Loan of Kes 1,395,749.15/-

You must surrender all the company properties in your possession for purposes of clearance.

You will be issued with a certificate of service.

Yours Faithfully,

For: Rafiki MFB Ltd

(signed) (signed)

May Nyaga Daniel Mavindu

Senior Manager Talent & Od Chief Executive Officer”

35. This letter makes a raft of accusations against the Claimant, ranging from failure to perform his duties to outright theft of the Respondent's funds.
36. In its Response to the Memorandum of Claim, the 1st Respondent states that the Claimant admitted having stolen the sum of Kshs 5,200,000 and was therefore dismissed. The Claimant denied having made any such admission and the 1st Respondent did not adduce any evidence to support its averment in this regard.
37. The Court took note of the 1st Respondent's attempts to get the Claimant to admit to the theft charge but there was no formal admission on record. It was therefore incumbent upon the 1st Respondent to take the Claimant through the mandatory disciplinary process defined in Section 41 of the Employment Act.



38. Although the dismissal letter refers to the Claimant's appearance before the Staff Disciplinary Committee on August 19, 2014, none of the 1st Respondent's witnesses could confirm the nature and content of the alleged meeting. It was also not lost on the Court that the dismissal letter was issued on the same day the meeting is alleged to have taken place. Even assuming that a meeting took place on August 14, 2014, such a meeting could not pass the threshold of a disciplinary process as defined in law.
39. In the final submissions filed on behalf of the Claimant, reference was made to the decision in *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR where the Court of Appeal rendered itself as follows:
- “Section 45 of the [Employment] Act makes provision inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for termination was valid, that the reason for the termination was a fair reason and the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer...”
40. Apart from an alleged meeting on August 19, 2014 and a dismissal letter of the same day, which the Claimant denied ever receiving, there was no evidence of the Claimant being subjected to any disciplinary process. The reason for his dismissal was therefore not established at the shop floor.
41. Cumulatively, I find and hold that the Claimant's dismissal was substantively and procedurally unfair and he is entitled to compensation.

Remedies

42. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the 1st Respondent's unlawful conduct in executing the dismissal.
43. I further award the Claimant one (1) month's salary in lieu of notice.
44. No basis was established for the claim for service pay which therefore fails and is dismissed.
45. The claims for general, aggravated and exemplary damages were abandoned in the course of trial.
46. Finally, I enter judgment in favour of the Claimant as against the 1st Respondent as follows:



- a. 6 months' salary in compensation.....Kshs 540,000
- b. 1 month's salary in lieu of notice.....90,000
- Total.....630,000

47. This amount will attract interest at court rates from the date of judgment until payment in full.

48. The Claimant will have the costs of the case.

49. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MARCH 2023

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JUDGE

Appearance:

Mr. Kirui for the Claimant

Miss Kavili for the 1st Respondent

