



REPUBLIC OF KENYA



KENYA LAW
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**Musyoka v Diamond Trust Bank Limited (Cause E057 of 2022)
[2023] KEELRC 2276 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2276 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E057 OF 2022
M MBARÚ, J
SEPTEMBER 21, 2023**

BETWEEN

MERCY MIMA MUSYOKA CLAIMANT

AND

DIAMOND TRUST BANK LIMITED RESPONDENT

JUDGMENT

1. The claimant is an adult . The respondent is a limited liability company registered as a bank
The respondent employed the claimant as a marketing officer in coast region Mombasa in January 2023. The claimant worked until 16 March 2022 when her employment was terminated through summary dismissal and the last net salary earned was Kshs. 125,000 per month.
2. The claim is that the respondent unfairly terminated the claimant’s employment unfairly on the grounds that there was no notice, hearing or payment of terminal dues. The claimant is seeking the following dues;
 - a. Notice pay at Ksh. 125,000;
 - b. 12 months’ compensation Kshs. 1,500,000;
 - c. Costs of the suit.
3. The claimant testified that she is a banker by profession and the respondent employed her as the marketing officer and the work station was Nyalı Branch in Mombasa. The respondent alleged that the claimant was absent from work on 22 February 2022 which was not true since she had communicated through the human resource manager, Yvonne Murichu who had called her with instructions to report at the head office in Nairobi on 4 October 2021 which she did and met with human resource manager Khairunnissa Jadvji and Caroline Mugo. A meeting was held and the claimant was asked to sign a warning letter but she asked for time to read it but instead, she was asked to get out of the office.



4. The claimant testified that on 5 October 2021 she had a medical appointment because she was not feeling well and she requested the human resource manager to be allowed to travel back to Mombasa for treatment.
5. The claimant testified that On 3 December 2021 the human resource manager called security officers to remove her from the respondent's premises and never to step back in this office on any other branch of the respondent on the reasons that she had not been at her work station but she had been seeking medical treatment. The claimant pleaded to be given reasons for such action without success. This greatly embarrassed the claimant as the eviction was done in full view of other employees of the respondent at the head office in Nairobi. The claimant opted to immediately write to the human resource, Yvonne Murichu with regard to the mistreatment and harassment and she copied the security department, Stephen Ogolla.
6. On 22 April 2022 while the claimant was passing by the postal office to check her mails, she was surprised to find a letter from the respondent sent through registered mail and dated 1st March 2022 stating that she had absented herself from work and should show cause within 5 days and which letter had been posted on 8 March 2022 from Nairobi. The claimant was not aware of such letter which required her to show cause by the same date it had been sent on 8 March 2022. The respondent had all along been communicating through her email address and telephone and such matters were never brought to her attention.
7. On 26 April 2022 the claimant responded to the show cause through email and noted when she had received the notices but on this same day she received another communication dated 9 March 2022 from Nairobi directing her to attend disciplinary hearing on 16 March 2022 but the letter had been posted on the same date, 16 March 2022. The claimant had been directed to attend disciplinary hearing at Nairobi but never received the notice in time and this was not brought to her attention.
8. This resulted in unfair termination of employment through summary dismissal which was without the due process and the claims made should issue.
9. Upon cross examination, the claimant testified that she was aware of the counter-claim, she had secured a loan facility but has not secured new employment to be able to settle the same. Termination of employment has affected her employability, and the sector is very sensitive and due to the unfair process applied, her claim should be allowed.

Response and counterclaim

10. In response, the respondent's case is that the claimant was an employee of the respondent as marketing officer and the position was not restricted to Mombasa branch office but to any office in the organisation. The employment of the claimant was terminated through the due process and for a just cause. The claimant was invited to a disciplinary hearing through letter dated 9 March 2022 to attend on 16 March 2022 and upon failure to attend, summary dismissal issued and there was full payment of terminal dues.
11. In counterclaim, the respondent's case is that while in employment, the claimant failed to comply with Section 35 and 40 of the *Employment Act*. Part of the employment benefits was access to loan facilities at preferential rates. By application dated 26 June 2021 the claimant applied for a loan facility of Kshs. 1,640,000 and proposed to repay it within 60 instalments of Kshs. 34,043.70 inclusive of interests monthly. The application was approved on 6 July 2021. The claimant executed the loan agreement to repay the loan facility in full.



12. On its part, the respondent disbursed the loan to the claimant in full at Kshs. 1,640,000 through her bank account. Following summary dismissal on 21 March 2022 the claimant has not repaid the full loan and she has since stopped the monthly repayments and as a result there is an outstanding loan of Kshs. 1,977,437.86 as at 28 March 2022 and the same continues to accrue.
13. The counterclaim is for a declaration that the claimant is in default of her obligations under the Staff Loan Agreement dated 8 July 2021 and judgment do issue for the sum of Kshs. 1,977,437.86 as at 28 March 2022 together with interests thereof at commercial rates until payment in full with costs of the suit.
14. In evidence, the respondent called Yvonne Murichu the Assistant Chief Manager, Human Resource who testified that the claimant was employed by the respondent through letter dated 5 December 2012 as Marketing manager and was attached to one of the respondent's branches in the coast region. The claimant was retained under annual contracts with renewals and the last salary paid was Kshs. 125,000.22.
15. In the year 2019 the claimant was posted to work from the Moi Avenue Branch in Mombasa but she breached the policy by absconding work on several occasions and by an email dated 12 January 2019 the claimant was required to respond as to why she had been absent from duty for 3.5 days from 9 to 2 January 2019 but she did not respond.
16. Through letter and notice dated 14 July 2020 the claimant was issued with warning by a senior officer, Yasin Sumar at the Jomo Kenyatta branch requiring her to improve on a raft of issues among them punctuality at work, client relations and improving turnaround timelines.
17. The claimant's action strained working relations with her colleagues which the branch manager tried to address without success. The claimant did not exhibit any client care skills which had resulted in complaint made against her through reports at customer care desk and the manager proposed that the claimant be transferred to the Mombasa main branch.
18. Through email dated 14 January 2020 the general manger coast region wrote to head of human resource and proposed the claimant be transferred and to receive counselling before any disciplinary action could be taken against her. Further, through email dated 15 July 2020 the general manager wrote to the human resource at head office advising that he had held conversations with the claimant who requested to be retained at the Jomo Kenyatta branch and that she would work on the noted issues raised. But by email dated 30 July 2020 the claimant's colleagues at the branch complained about her negative attitude and it was proposed that she be transferred to Mombasa Corporate Marketing department and through letter dated 11 August 2020 the claimant was transferred with effect from 17 August 2020.
19. Following the new posting, the claimant did not improve on her work etiquette with the branch manager and members of staff. On 4 October 2021 the claimant was issued with a notice to show cause and was also suspended from duty for exhibiting negative attitude towards her colleagues, habitual lateness, absenteeism and other reasons. The claimant was required to respond by 9 October 2021 but she declined to respond.
20. Murichu testified that a decision was taken on 30 November 2021 to transfer the claimant to the Compliance Department and through a letter of the same date, the claimant was notified that she was be required to report to the head office in Nairobi effective 30 November 2021. Also, the claimant was issued with a warning letter dated 30 November 2021 setting out the issues that had been raised by her supervisors in Mombasa and required of her to avoid recurrence of the same and failing which, disciplinary action would be taken.



21. By letter dated 1st March 2022 the claimant was issued with a show cause notice for failing to report to work on 22 February 2022 to 1st March 2022 without notice to the immediate supervisor. There was no response. The claimant, through her purported response on 26 April 2022 alleged that she had not received these notices which is not true since on 4 October 2021 she declined to accept the notice issued. Subsequently, the claimant failed to attend disciplinary hearing on 16 March 2022 leading to summary dismissal which was lawful and procedural.
22. In counterclaim, the claimant had a loan facility which she has stopped in repayments and this is not challenged and should be allowed as prayed.
23. At the close of the hearing, both parties filed written submissions which are analysed and the issues for determination are whether there was unfair termination of employment; whether the counterclaim should be allowed and what reliefs should issue and who should pay costs.
24. Termination of employment through summary dismissal is allowed where the employee has breached the employment contract and is of gross misconduct. However, before such sanction can issue, the due process of Section 41(2) of the *Employment Act*, 2007 (the Act) is mandatory. That;
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) 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 subsection (1), make.
25. Whatever the misconduct or gross misconduct, the due process of Section 41 of the Act is imperative as held in *John Ngatia v Kenya Commercial Bank Limited* [2014] eKLR. The employee must be notified of her misconduct and allowed to make her representations. Where an employee is invited to attend and show cause and fails to address, the employer has the duty to demonstrate how such failure arose and leading to the sanction of summary dismissal.
26. On the record, there seems to have arisen various matters of the claimant's work conduct while at various branches in Mombasa particularly while at Jomo Kenyatta Branch. Various resolutions were passed leading to summons at head office and need for a transfer from the branch,
27. Through letter and notice dated 4 October 2021, the respondent suspended the claimant from her duties and issued a notice to show cause on the grounds that;

... we refer to the numerous discussions between yourself and senior management regarding your negative attitude towards your colleagues, habitual lateness, absenteeism from work and failure to obtain approval from your immediate supervisors before proceeding on leave.

...

... Management has decided to suspend you from work with immediate effect on half salary effective October, 4, 2021. In the meantime, you are called upon to show cause why severe disciplinary action should not be taken against you for contravening the Bank's laid down policy & procedures. Your written response should reach us on October 9, 2021. ...

The claimant refused to take this notice.

In her evidence, the claimant testified that;

... on 4 October 2021 I met with two human resource managers Khairunnissa Jadvji and Caroline Mugo in the afternoon. ... we met in the office meeting room and they told me to



leave my phone behind not to enter with them in the meeting room, I did as they advised, was then told by the two human resource managers to urgently sign a warning letter insisting they had no time for me, I humbly requested them to give me the letter so I can read and understand the content but they refused and repeatedly told me to sign they did not have time for me. I did not sign the letter and was ordered to get out of the meeting room and sit in a desk outside the meeting room. ...

28. First, upon suspension and notice to show cause, the claimant declined to accept or acknowledge receipt. However, the record does not address what action was taken. It was not clarified by the respondent as to whether the claimant was ever recalled back to work upon her suspension through letter dated 4 October 2021.

The required response by 9 October 2021 is also not addressed.

29. Secondly, the refusal and failure to accept the show cause show notice and suspension letter being a lawful direction of the employer is not gone into.

The next action(s) taken by the respondent focus on 30 November 2021;

- a. The claimant was transferred from Mombasa to Head Office in Nairobi on the same date, 30 November 2021;
- b. The claimant was required to report to Nairobi on 30 November 2021;
- c. A warning letter was issued with regard to the claimant's conduct while at Mombasa.

Again, there is no record as to how the above matters were addressed.

Was the claimant recalled back from her suspension?

Did the claimant report to the new station upon the transfer?

Did the claimant address the warning issued?

30. What followed was a warning letter dated 1st March, 2022 over allegations that the claimant had absented herself from duty from 22 February 2022 to 1st March 2022. The letter is sent to the claimant through P.O. Box 740-80100 Mombasa.

31. Where indeed the claimant was transferred from Mombasa through letter dated 30 November 2021 from Mombasa to Head Office in Nairobi and she was allowed to resume duty after her suspension, which matter is not clarified, the necessity to issue letter over alleged absence from duty does not apply. The contra to this, where the claimant reported to work at Head office in Nairobi, if at all, the need to post her letter to an address in Mombasa while she was in Nairobi was not necessary.

The myriad of notices is not logical.

The apparent contradictions do not aid the respondent's case.

32. As the employer, the respondent had the full control of all disciplinary matters against the claimant. Where warnings and show cause notices issued, while employment subsisted, the claimant had internal communication addresses, communication through work email address and her phone number and her personal postal address.

33. The necessity to post letters to the claimant through registered mail over dates and timelines that were so close and practically impossible for her to receive such notices is hereby found unreasonable.



34. Sending important notices to the claimant through registered mail led to a serious gap in terms of receipt dates. Posting a disciplinary notice dated 9 March 2022 from Nairobi with a hearing date notice on 16 March 2022 to an address in Mombasa while the claimant's work office was head office in Nairobi effectively meant that the claimant would not see this notice until she visited Mombasa post office or notice issued from the post office to her to collect such letter. This was effectively an unfair labour practice.
35. But the claimant is equally not without blame. An employee who is issued with a warning letter by the employer and fails to accept, declines to receive it or acts in a manner that is in rejection of lawful instructions and directions by the employer commits a serious breach of the employment relationship and is of gross misconduct in terms of Section 44(4) (e) of the Act;
 - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
36. Such an employee commits gross misconduct and such conduct is subject to summary dismissal. In the case of *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR, the court held that when considering what is gross misconduct, the circumstances of each case must be put into account based on the parameters set out under Section 44 of the Act and the employer workplace practice.
37. Without any record as to what steps were taken upon the suspension of the claimant through letter dated 4 October 2021, the due process outlined under Section 41 of the Act with regard to any disciplinary action taken against her is marred. Upon her suspension, the claimant was transferred to Head office in Nairobi and the alleged failure to attend work on various dates without the suspension being gone into taints the entire disciplinary process.
38. This resulted in unfair termination of employment. Notice should have issued and in tabulating terminal dues, notice pay is due at one month based on the last salary earned at Ksh. 125,000.
39. In assessing compensation, section 45(5) (b) of the Act directs the court to consider the conduct and culpability of the employee leading to termination of employment. As noted above, the claimant was issued with notice dated 4 October 2021 and declined to accept it. Such should have resulted in summary dismissal in terms of her failure to take lawful directions and instructions from her employer in terms of Section 44 of the Act. She was however suspended to allow her to show cause why her employment should not be terminated due to her conduct. On 26 April, 2022 the claimant in her responses goes back to the same notice she declined to receive on 4 October 2021 which reflect on her full knowledge of its contents even though she declined to accept it. such conduct put into account, the same attracting a sanction of summary dismissal, to award any compensation would be to reward gross misconduct. From 4 October 2021 to 21 March 2022 the claimant remained on a salary despite her gross misconduct. Such is a generous compensation. Zero (0) compensation is awarded.
40. On the counterclaim, it is not in dispute that the claimant enjoyed the loan facility with her employment. Upon termination of employment on 21 March 2022 a balance of Ksh.1,977,497.86 remained unpaid.
41. The claimant testified that she has not secured new employment since and hence unable to repay the loan facility. However, such employment benefit came with agreement to repay the loan. The approach that the claimant can only repay the loan upon securing new employment negates the agreement reached with the respondent.



42. The loan facility is due save, on the finding that employment terminated unfairly, the claimant shall repay the loan facility based on the staff loan rate under the agreement entered into while in employment and at the monthly rates of Kshs. 34,043.70 and until payment in full. All the due and unpaid installments shall be paid upfront and within 90 days' failure to which, the respondent shall be at liberty to secure the balance due at commercial rates until full payment with the attendant costs.

Accordingly, judgment is hereby entered in the following terms;

- a. The claimant is awarded notice pay at Ksh. 125,000;
- b. Compensation at zero (0) amount;

And

The counterclaim is hereby allowed in the following terms;

- a. the claimant shall pay the entire loan facility at monthly instalments of Kshs. 34,043.70 at the agreed terms of 60 equal instalments until payment in full;
- b. the unpaid loan dues to date shall be pad upfront within the next 90 days;
- c. failure to pay at (b) above, the loan facility shall convert to commercial rates as directed by the respondent.

Each party shall meet own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

