



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.2117 OF 2016

PAUL MAGOTO NYAGARI.....CLAIMANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

JUDGEMENT

The claimant is a male adult. The respondent is a limited liability company.

In an employment contract dated 4th December, 2007 the respondent employed the claimant as Corporate Credit Analyst at a gross salary of Ksh.120, 000 per month. The contract of employment was also governed by the Human Resource Manual and other policies of the bank.

The claimant was entitled to various benefits as an employee of the respondent being staff loans.

The claimant worked diligently and due to good record and performance he was promoted and his salary was reviewed. On 19th March, 2009 the claimant was promoted to Manager Credit and Risk; on 23rd November, 2012 the claimant was appointed to act Head of Finance with a 20% salary increase; and on 27th November, 2013 the claimant was promoted to Senior Manager, Financing and acting Head of Finance and salary enhanced to Ksh.370,000 an additional 20% increase. On 16th May, 2014 the claimant was awarded a salary increment to Ksh.466, 667 per month.

In a letter dated 7th August, 2015 the respondent terminated the claimant employment in disregard of the employment contract and contrary to the law there was no notice issued and he was required to leave office immediately. He was not given a hearing of notice to show cause over any matter contrary to the rules of natural justice. The respondent ignored own human resource policy which defined the procedures to apply in termination of employment.

The claim is that respondent was in breach of the law and malicious on the grounds that no reasons were given, failed to act in justice, failed to give any reason for termination of employment.

The claimant was placed in great hardship and could not secure employment for over a month and was eventually forced to take up employment at a lower salary in an institution seeking to licence to operate a bank in Kenya. As a result of the respondent's conduct, the claimant suffered prejudice, difficulty and anxiety at a family level including being listed in the Credit Reference Bureau (CRB) as a defaulter and not credit worthy, the threat of selling his four facilities that were purchased through a financing arrangement that the respondent was aware of. such difficulties were that he suffered ridicule for being jobless; suffered depression and anxiety; was issued with statutory notices of sale over his charged properties; the listing with CRB and fear of repossession of his motor vehicle led to difficulties in being unable to take care of his family.

The claim is that the claimant suffered loss and damage of his remuneration which he had hoped to earn until age of 65 years and lost the opportunity to earn a living. Such loss was that his income of Ksh.481, 667 per month stopped, loss of professional growth and negative and wrongful listing with CRB all due to the respondents unlawful and unfair action of terminating employment without any notice or reasons.

The claimant is seeking for orders that;

- a) *The court be pleased to declare termination of employment was unfair;*
- b) *An order that the claimant be reinstated to his employment with the respondent with no loss of benefits;*

- c) *An award to the claimant for monthly salary in arrears for the period of August, 2015 until the date of judgement;*
- d) *In the alternative, an award of compensation/damages for wrongful termination and unfair termination;*
- e) *Exemplary damages;*
- f) *A permanent injunction restraining the respondent ...*
- g) *Permanent injunction ...*
- h) *Interests on the sums claimed above from the date of filing suit;*
- i) *Costs of the suit; and*
- j) *Any other order/relief the court may deem fit to award.*

The claimant testified in support of his claim that upon employment by the respondent he worked diligently and was promoted through the ranks to the position of Credit Analyst to Manager an Head of Credit and acting Head of Finance earning ksh.466,667 per month.

On 7th August, 2015 the claimant reported to work as usual and attended a Board meeting until 5PM when the human resource called him together with the general manager and issued him with letter terminating employment. No reasons were given. He had no prior notice. He was directed to hand over his duties and left the office.

The claimant went into shock since no reason was given for the abrupt termination of employment. This was contrary to natural justice sine he was not allowed a hearing save to be directed to hand over his duties.

In reply, the respondent's case is that there was a redundancy but such was without notice and the position the claimant held still stands. To date there is no formal communication as to the reason leading to termination of employment.

The claimant testified that the position of head of credit cannot be removed and for the bank to hold any funds under the CBK regulations which issues licence to banks, such role must exist.

The claimant's terminal dues were released to his bank account but immediately taken up to clear his outstanding loan facilities with the respondent. he was part of the retrenchment cover and as head of credit he knew that all employees with a mortgage had a cover to cover a redundancy and for these reasons the respondent would deduct monies to cover such policy with Jubilee Insurance but the insurance refused to pay since the respondent refused to supply any documents indicating the nature of redundancy and therefore the insurance could not pay under such cover.

The claimant testified that upon termination of employment by the respondent he made all efforts to secure new employment but could not get a similar position and ended up taking employment that had low pay. The respondent wrote to him demanding payment of the due loan and when he questioned why the Insurance had not paid, he was forced to negotiate on how to settle his loans but was called again later and told that the respondent had a new CEO who refused to accept the terms of repayment and the loan facilities were pushed to commercial rates and he court not pay. The respondent threatened to sell the assets that had been used to secure the loan facilities and was then forced to file suit to stop the respondent in taking up such measures. The loan facility payment rates were increased which the claimant could not afford since he had no employment and was eventually listed with CRB. This was without notice, done in haste and based on fair termination of employment.

The claimant testified that all his loan facilities were recalled by the respondent and his new employer could not be able to take them up and he is unable to repay. He was then repaying the loans at Ksh.440, 000 per month which was above his salary at the time and his space was forced to contribute. The summary dismissal affected his employability, he became subject of ridicule and his career stalled. His current employer is paying him Ksh.360, 000 per month which is half of what he was previously earning with the respondent.

The claimant testified that in the year 2015 he had just been married and due to employment problems she suffered a miscarriage.

In the sector of banks, it is a small cycle and he could not fit which affected his capacity to secure similar employment and he is yet to be given reasons leading to termination of his employment. He is seeking reinstatement so as to reconstruct his life as he will never be able to recover.

Upon cross-examination, the claimant testified that he was not aware at any moment of his employment that the respondent was restructuring and as a senior manager he had no knowledge of such matter. There was no notice issued for any redundancy. He had secured loan facility using his two properties in Njoro Nakuru County enjoying a repayment rate for staff at 3% and when the loan was recalled it was placed at 20%. To qualify for the loan, his salary was the basis of the amounts.

The claimant asserted that he is seeking a reinstatement which is practical and his position within the bank cannot be declared redundant. He is seeking to permanently stop the respondent from selling his properties since he is repaying the loans despite the financial challenges he is faced with after the insurance cover could not be accessed due to the actions of the respondent.

Response

In response, the respondent's case comprise mere denials and that the particulars of alleged unlawful termination of employment are denied and the claimant's employment terminated in accordance with section 40 of the Employment Act and the claims made should be dismissed with costs.

In evidence, the respondent called Mabel Kibore the head human resource and who testified that the claimant's employment terminated due to a restructuring and he was paid his terminal dues. The respondent invoked the claimant's contract of employment at clause (d) and the suit should be dismissed with costs.

Upon cross-examination the witness testified that termination of employment should have followed a set procedure but at the time the respondent did not have a human resource manager and she only joined such office in January, 2019 and did not work with the claimant. Under a redundancy, notice has to issue or payment in lieu thereof which was done for the claimant. He was also paid severance pay for 7 years worked. The claimant's position was abolished but it was returned after 3 years.

The claimant had been offered loans which he failed to paid. The terminal dues were applied to offset the loans.

The witness also testified that she was the claimant in **ELRC No.1993 of 2017 – Mabel Mworio v National Oil Corporation** and is aware that her employment contract was terminated since the supervisor had no job description and a former chief officer was paid resulting in termination of employment. She was reinstated and the matter is on-going.

The claimant was not unfairly terminated.

Parties filed written submissions.

The Claimant submitted that his termination was unfair and unlawful as it was done in contravention of section 45 of the Employment Act which requires an employer to prove that there was a valid reason for termination and that it was done in accordance with fair procedure. That section 47(5) of the Employment Act provides that the burden of justifying the grounds for termination of employment rests on the employer. The position was buttressed in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

The Claimant further submitted that in the instant case, the element of redundancy only appeared in the Respondent's Defence and that the Respondent's witness admitted that she did not have any document or proof of restructure in the bank or that the Claimant's position was now redundant. the witness also admitted that the role of a Credit Officer is central to the business of the respondent making it unrealistic to claim that the position is redundant.

On the remedies sought, the Claimant submitted that reinstatement is not an option since more than six years have lapsed since his dismissal. He prays for 12 months' gross salary, 3 months' salary in lieu of notice certificate of service, gratuity, exemplary damages and a permanent injunction restraining the respondent from listing or instigating the listing of the Claimant's name with Credit Reference Bureau.

In the case **Patrick Kariuki Njuguna v Del Monte (K) Limited [2012] eKLR** the court stated that the principles that govern the award of exemplary damages include the reprehensibility of the conduct being punished, the reasonableness between the harm and the award to be made; and the difference between the award and the civil penalties authorized in comparable cases. That in the instant case, the termination of employment was actuated by malice and was not remorseful, or considerate that the Claimant would be deprived of his livelihood, by leaving him jobless. Claimant submits that an award of Kshs 5,000,000.00 would t be reasonable to punish the reprehensible conduct of the Respondent.

The Respondent submitted that the termination was fair as it invoked the contractual right in terminating the claimant's employment, a right distinctly independent of the statutory right under which valid reasons must be given. Clause 10 of the employment contract dated 13th January, 2009 provides that either party may terminate the services with one month notice period, having paid three months' salary in lieu of notice the respondent fully complied with the contractual agreement governing the parties. The respondent was justified in electing to terminate the claimant employment under the contractual terms as it did and it was not strictly bound by statutory provisions. The respondent did not have to assign any reason or justification for the termination and the claimant accepted the termination of his employment by receiving without protest, the final dues paid to him.

On the prayer for reinstatement the respondent submitted that the same cannot be granted as it is statute barred in line with the provisions of **Section 12(3)(vii)** of the Employment and Labour Relations Court Act, 2011 which provides that an order for reinstatement can only be within three years of dismissal. The prayer for an award for salary in arrears since 2015 should also fail as the Claimant was not gainfully employed by the respondent during this time and such an award would amount to unjust enrichment.

In the case of **CMC Aviation Limited v Mohammed Noor 120151 eKLR** the Court of Appeal set aside a 12 months' salary compensation and awarded one month's salary as a reasonable compensation. The Court observed that the contract of employment was terminable by one month's notice as was in the instant matter. The Claimant herein did not substantiate his claim for exemplary damages hence the same should not be awarded. The entire Claim should be dismissed with costs.

Determination

The claimant's case is that upon employment by the respondent he worked until 7th August, 2015 when he was issued with letter terminating his employment without any reasons being given. This was contrary to the rules of natural justice and he has suffered loss and damage and has since been unable to secure similar employment and has been forced to take up employment at half his salary while at the respondent. The banking sector is very sensitive and the fact that no reason(s) were given for termination of employment, he is unable to explain why he lost his employment.

The claim is also that while the claimant worked for the respondent had loan facilities as an employee and had an insurance cover in the event of a redundancy but could not enjoy such cover since this was not the reason leading to termination of his employment. He left the respondent with nothing since all his terminal dues were banked and then taken up to clear the loans which is still unpaid and has been forced to ask his spouse to make part payments since he cannot afford to repay at the commercial rate now demanded by the respondent. He had secured the loans with his properties in Njoro, Nakuru County and the respondent issued notice of sale and seeks the court to permanently restrain the respondent from such action.

The respondent's case is that employment terminated in line with the employment contract. There was a restructuring that led to termination of employment. The claimant had loan facilities which he has failed to repay and which converted to commercial rates and still unpaid. His terminal dues were applied to offset the loans.

Indeed the letter terminating employment dated 7th August, 2015 was direct and to the point that *your services to the Bank are hereby terminated with effect from today, 7th August 2015 in line with your employment contract.*

The defence that there was a restructuring only arose in the pleading and response.

The respondent's witness Ms Kibore admitted that there was unfair termination of employment since the due process of the law was not followed with regard to the claimant's employment termination.

The quintessence of Section 41 of the Employment Act, 2007 (the Act) is that an employer, before terminating the employment of an employee for any grounds must explain to the employee the reasons(s) for which the employer is considering termination and then give the employee a hearing;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

The reason(s) given must be valid, fair and in accordance with fair procedure and what entails substantive and procedural justice. This is aptly captured under Section 45 of the Act thus;

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure.

The legal burden to prove the reasons leading to termination of employment are upon the employer.

In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the Court of Appeal held that;

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

In this case, the claimant was not given any reasons at all save that termination of employment was in accordance with the employment contract.

The Act has since changed the employer's prerogative to terminate employment at will. Such must be for a valid, fair and just cause and pursuant to due process.

The reason that there was a restructuring cannot arise after the fact of termination of employment. Such action only demonstrates the unlawfulness of the act taken by the respondent. It negated substantive and procedural justice leading to unfair termination of employment.

Even where there was a restructuring, which is not the case here, a general notice ought to have issued to all employees which was not done. A specific notice ought to have issued to the claimant that his employment would terminate due to restructuring pursuant to Section 40 of the Act, which was not done. To apply such reason of restructuring is only geared towards escalating the matter of unfair labour practices.

In any event, a restructuring or redundancy cannot apply to target a single employee. See **Jane I Khalachi versus Oxford University Press E. A Ltd, Cause No.924 of 2010**. A redundancy cannot be undertaken to target a single employee. Such would defeat the purpose of the law as set out in section 43(2) of the Act. A notice ought to have issued to the claimant before termination of employment even where the respondent intended to pay for notice as under section 40(1) (f) and which pay is mandatory. Account had to be given as to the reasons and extent of the redundancy process and be justified in accordance with the law by application of fair procedure and ensure substantive justice to the claimant.

A termination of employment clothed as a redundancy which does not exist is apparent in this case and cannot be justified as a fair and valid reason which existed as a genuine reason leading to the claimant being laid off work. The sham behind the exercise is apparent to the court.

... an employer shall not be allowed to simply cite re-organisation [redundancy] as a sufficient reason to lay off an employee, due process demands that consultations be inclusive and documented. Otherwise, there will be nothing to refer back to as to how the decision to lay off staff was arrived at.

In Ernest **Moturi Ogwora v National Cereals and Produce Board Petition No.E066 of 2020** the court held that;

Section 40 of the Employment Act, gave the conditions precedent before one is declared redundant: these conditions outlined in the law are mandatory and not left to the choice of an employer. ... In a case where redundancy was pleaded as the reason for termination [of employment] the law was very clear on the procedure applicable. Employees involved were not the subject but rather the positions. When a position became redundant, the employee could be redeployed, which meant the employee was given another job, or the employee was retrenched, meaning the employee lost the job altogether. ...

I find and hold that the respondent acted wrongfully, unlawfully and it was unfair to terminate the claimant's employment for failure to comply with the procedure set out under section 41 of the Act. It is clear from the pleadings, evidence and submissions by the parties that the respondent acted with malice which resulted in loss and damage to the claimant. The claimant was not allowed to have a hearing to defend his employment record and despite being advanced loan facilities due to his employment and where he had taken a mortgage cover in the event of a redundancy, he could not enjoy such benefits for lack of any reasons(s) being assigned to termination of employment.

The respondent failed to abide mandatory provisions of the law on purpose to hurt and injure the claimant in his career, professional progression and eventually hurt his livelihood through a recall of his loan facilities since he could not repay due to loss of employment together with the attendant insurance cover benefit. See Court of Appeal in the case of **Standard Group Limited v Jenny Luesby [2018] eKLR** and **CMC Aviation Limited v Mohammed Noor, Civil Appeal No. 199 of 2013** where the right to hearing before dismissal for a cause was held to be mandatory or else the separation is unfair and unlawful.

The claimant had worked for the respondent diligently and risen through the ranks from 4th December, 2007 to 7th August, 2015 a period of over 7 years. For lack of substantive and procedural fairness in termination of his employment, a compensation of 12 months is due.

The claimant was last earning a salary of ksh.466, 666 per month and the compensation due is ksh.5, 599,992.

The claimant is seeking reinstatement on the grounds that he has been unable to secure new employment on similar terms and salary and currently earning half what he had with the respondent. Employment terminated on 7th August, 2015 and it has been over three years since, the claimant has new employment and even though not similar to what he had before, he has moved on with his life to the best of his abilities.

The unfairness visited upon him is addressed and redressed as above outlined.

Such shall suffice save to add, the respondent specifically pleaded that termination of employment was due to restructuring. Had such matter been addressed in the letter terminating employment, such would have well covered the claimant with regard to his loan facilities and the insurance cover with Jubilee Insurance. The claimant hence made his contributions in this regard under the legitimate expectation that where such an eventuality arose, all his loan facilities with the respondent would be addressed adequately. This was not to be for the simple reason that the respondent failed to assign any reason(s) leading to termination of employment and hence denied the claimant a fair chance to clear his loan facilities.

Termination of employment having been found to be wrongful, unlawful and unfair, had the claimant been allowed to continue in his employment he would have offered his labours and paid his loan facilities. Had the claimant's employment terminated in terms of section 40 of the Act, the burden of loan repayments to date would have automatically been taken up by Jubilee Insurance.

The claimant was hence placed at cross-roads. He lost his employment unfairly and then made to repay his loan facility that he had otherwise secured in the event of a redundancy.

The respondent must carry that burden.

In the letter terminating employment, the claimant's total terminal dues were Ksh.2, 409,887.11 which were applied to offset the loan with a balance of Ksh.30, 088,178.61.

The claimant has made all efforts to repay this loan including having his spouse contribute to avoid sale of their properties in Njoro, Nakuru County used to secure the loan facilities.

Such burden must be borne by the respondent in full.

The respondent shall refund the claimant the sum of all loan repayments to date and until paid in full. Such repayment to the claimant shall include interests earned on such monies at commercial rates from the date paid and until paid in full. Such shall restore the claimant back to where he ought to have been before the unfair loss of his employment.

This shall be addressed at the shop floor and parties report to court. to address such matter otherwise would be double punishment to the claimant and to allow the respondent enjoy in impunity in terminating employment unfairly and then ripping from a loan facility that ought to have been offset under an Insurance Cover that was not allowed to take effect due to the unfair labour practice. Despite being made aware that Jubilee Insurance required the reason leading to termination of employment, the respondent ignored to address and left the claimant to his own devices. To allow such to stand would be to reward the respondent for gross violation of the law and the claimant's rights at work.

On the claim for exemplary damages, the relief being in the alternative, the above matters shall suffice.

On the claimant's properties at Njoro/Njoro Block 2/102 (Njokerio) and Njoro/Njoro Block 2/146, the findings above, the respondent shall unconditionally discharge these properties at own costs and within 30 days from the date hereon and revert full ownership to the claimant.

The claims made having succeeded; the claimant shall be awarded costs for good cause.

Accordingly, judgement is hereby entered for the claimant against the respondent and the following orders issued;

- a) A declaration that the respondent terminated the claimant's employment wrongfully, unlawfully and unfairly;**
- b) The claimant is awarded compensation at ksh. 5,599,992;**
- c) The respondent shall refund the claimant all the loans repayments made from 7th August, 2015 to date together with interests charged;**
- d) The respondent shall render and account of such loan repayments made and interests charged (c) above, within 14 days;**
- e) Failure to account as (c) and (d) above, the claimant shall render his tabulations within 21 days and which the court shall adopt as owing and due to him by the respondent; such sum shall be inclusive of interests due at commercial rates from the date due and until paid in full;**
- f) The respondent shall unconditionally discharge Land Titles at Njoro/Njoro Block 2/102 (Njokerio) and Njoro/Njoro Block 2/146 and revert the same to the claimant within the next 30 days;**
- g) The claimant is awarded costs of the suit.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF MARCH, 2022.

M. MBAR?

JUDGE