



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E019 OF 2020

(Before D.K.N.Marete)

ANTHONY KIOGORA MWITI.....CLAIMANT

VERSUS

KINGDOM BANK LIMITED.....RESPONDENT

J U D G M E N T

This matter was originated by way of a Statement of Claim dated 10th December, 2020. The issues in dispute are therein cited as;

Wrongful dismissal

Deliberate withholding of lawful dues of the claimant

The Respondent, in a Response to Memorandum of Claim dated 5th March, 2021 denies the claim and prays that it be dismissed with costs.

The claimant's case is that on or about 1st August, 2019, he was employed by the Respondent as a Relationship Manager in the respondents Business Development Department, Nyeri Branch. This was on a one (1) year renewable contract and at a pay of Kshs.140,000.00 per month.

His other case is that pursuant to his short stint as relationship manager was promoted and became team leader in charge of Nyeri Branch pursuant to an employment contract dated 1st August, 2019.

The Claimant's further case is as follows;

- He was promoted and became team leader in charge of Nyeri branch with effect from 1st October, 2020 on the same remuneration.
- Renewal of contract in August 2020 with effect from 8th August, 2020 to 4th August, 2021.
- 17th August 2020, he received a letter of suspension on allegation of involvement in unspecified fraudulent activity with the bank whereby Kshs.338,140.00 was purportedly lost.
- 14th September, 2020 received a letter summoning him to disciplinary committee to be held on 21st September, 2020 on the said day.
- No evidence or complainant was present on the disciplinary committee.
- He denied and answered the query.
- Notice of termination of employment issued vide a letter dated 2nd October, 2020.
- It is alleged that he never closed, shut down his computer at the end of the day thereby violating the Respondent's ICT policy.

· His termination was actuated by malice and *mala fides*.

· Termination was unfair and in breach of the respondent's statutory duty owed to the claimant and breach of the respondent's own human resource policy/manual for right to hear and determine an appeal within a reasonable time frame. The claimant shall crave leave to rely on the operative provisions of the Employment Act regarding his interdiction and termination from employment for its full meaning and import. Where necessary, the claimant shall rely on the *contra proferentem* doctrine of interpretation of the said provision and any other document relied upon by the respondent, to agitate his cause herein.

He prays as follows;

i) A declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.

ii) Special damages of Kshs.1,680,000.00 and the amount as pleaded in paragraph 16 above.

iii) An order directing the respondent to reinstate the Claimant to his employment without loss of position, status or benefits or in the alternative payment of Kshs.140,000 x 12 31 years (60 years of age of retirement less 31 years current age of the claimant) = 52,080,00.00.

iv) Costs.

v) Interest on (ii), (iii) and (iv) above at court rates from the date of filing this claim until payment in full.

vi) Certificate of service.

vii) Any other relief that the Honourable court may deem fit to grant in the interest of justice.

The Respondent's case is a denial of the claim. She however admits its following aspects;

a) The contract term was for a period of One (1) year, effective 5th August 2019 to 4th August 2021, with renewal thereof based on performance and in accordance with the Respondent's needs.

b) The Claimant was entitled to a gross salary of Kenya Shillings One Hundred and Forty Thousand Shillings Only (KES.140,000.00), inclusive of all statutory payments.

c) The employment would be terminated without notice if (among others):

i) The Claimant committed any serious breach or continues (after written warning) committing any serious breach;

ii) The Claimant was guilty of bringing himself or the Respondent or his office with the Respondent into disrepute;

iii) The Claimant wilfully neglected to perform any work which it was his duty to perform, or if the Claimant carelessly or improperly performed any work which was his duty to perform.

The Respondent's other case is that the IT Acceptable Use Policy Document was codified to protect the information resources which all staff depend on for their work, from inappropriate use as well as deliberate or accidental loss/corruption. The salient terms of the policy provided as follows;

a) An acknowledgment that the Respondent extensively relies on Information Systems for its operational and financial information requirements.

b) Every employee is responsible for taking appropriate care of the company's information to avoid the consequences of a security incident.

c) That access to ICT facilities including computers was restricted to authorized users only.

d) Disciplinary action will be taken against users who breach the policy.

e) Unlawful use may lead to criminal or civil legal action being taken against the individual member of staff.

f) Every employee is responsible for the secure use of his/her assigned user identification and password combination and is directly liable for any activity carried on JBB's systems using the said identification and password.

g) All users must either log off or lock their computers every time they leave their workstations.

h) That the Respondent reserves the right to access and monitor e-mail, websites, server logs and electronic files and any computer or electronic device connected to its network, should it determine that there is reason to do so, including but not limited to suspected

or reported breaches of the policy or breach of other regulations or policies or suspected breached of law.

This matter was heard on 3rd June, 2021 whereby the parties testified in reiteration of their respective cases.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the Claimant entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this.

The claimant in his written submission dated 14th June, 2021 reiterates his case of unlawful termination of employment.

It is his case that his summary dismissal by the Respondent was predetermined, inundated in bad faith and in breach of their statutory and constitutional duty to ensure fair administrative action.

It is the Claimant's further case that the process and decision of dismissal was in breach of the Constitution and contrary to Article 41 (1) and 47 of the Constitution.

It was also procedurally and substantively unfair and in breach of Section 41 of the Employment Act which comes out as follows;

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.*

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).” Emphasis added.*

It is his case that he was never afforded a hearing in the process of his dismissal and therefore the unfairness of such dismissal.

The Respondent in her submissions dated 22nd June, 2021 reiterates her case and comes out as follows;

2.

a) *That Pursuant to an employment contract dated 1st August 2019, the Claimant was employed by the Respondent, then conducting its business under the name Jamii Bora Bank Limited, as a Relationship Officer-Grade 4, working at the Respondent's offices in Nyeri.*

b) *That the employment was for a fixed term of one (1) year, renewable based on performance and on the need of the company. The Claimant's gross monthly salary was KES.140,000/-.*

c) *That pursuant to an appointment letter dated 1st October 2019, the Claimant was appointed as a Team Leader, Grade-4, Nyeri Branch, Business Development Department.*

d) *That the Claimant's employment contract was renewed pursuant to a letter dated 7th August 2020, with the monthly salary being maintained and terms of employment remaining unchanged.*

e) *That the terms and conditions of employment were further documented in the Respondent's Human Resource and Policies Procedure Manual as well at the IT Acceptable Use policy, **both of which were duly acknowledged by the Claimant in cross examination.** (See the documents attached to the Respondent's pleadings).*

f) *That the Claimant was suspended from employment via a suspension letter dated 17th August 2020. It is further not in dispute that the suspension letter advised the Claimant of the reasons for which the latter was sent on suspension. The said reasons are highlighted as follows;*

*“This is to inform you that you have been suspended from employment with Jamii Bora Bank effective August 18th 2020 until investigations are complete. **It has been suspected that you were involved in a fraudulent activity in the bank that happened between 22nd to 25th June 2020 where the bank lost Kshs.338,140/-.** (See letter attached in both the Claimant's and the Respondent's pleadings.)*

g) That the claimant was thereafter issued with a Show Cause Letter dated 4th September 2020. The show cause letter succinctly advised the Claimant of the reasons for which the Respondent was considering taking disciplinary action against the Claimant. The said show cause letter is highlighted below:

“This is in reference to the fraudulent Digilife transfers and Elma transactions from account numbers 001xxxxxxxx of Rutere and Kalu associates and 506xxxxxxxx of Jowaki account number 101xxxxxxxx of Javan Simiyu Makokha, amounting to Kshs.318,140, details of which are known to you.

It was notes with great concern that your computer was used to introduce a malware into the bank’s network that was latter used to perpetrate a fraud. In addition, it was established that you were in constant communication with one of the suspects during the planning of the fraud...” (see letter attached in both the Claimant’s and the Respondent’s pleadings.)

h) That the Respondent responded to the show cause letter via his response dated 8th September 2020. (see letter attached in both the Claimant’s and the Respondent’s pleadings.)

i) The Claimant was thereafter invited for a disciplinary meeting via the Respondent’s letter dated 14th September 2020. (see letter attached in both the Claimant’s and the Respondent’s pleadings.)

j) That following the disciplinary meeting, the Claimant was summarily terminated from employment via the Respondent’s letter dated 2nd October, 2020 and all his dues fully paid up. (see letter attached in both the Claimant’s and the Respondent’s pleadings as well as the Claimant’s final payslip).

It is her further case that the claimant was subjected to open disciplinary proceedings in which he participated. This is not in dispute or at all. This is as follows;

9. Termination procedures are codified under the provisions of the Employment Act 2007. The Respondent confirms the provisions of Section 41 of the Employment Act as highlighted in the Claimant’s submissions. Section 43 of the Employment Act further requires an employer to prove the reasons for termination, **being reasons that the employer at the time of termination of the contract, genuinely believed to exist and which caused the employer to terminate the services of the employee.** The Respondent invites the attention of this Honourable Court to the case of **Bamburi Cement Limited vs. William Kilonzi (2016) eKLR** where the Court of Appeal expressed itself on the nature of proof required as follows:

“The question that must be answered is whether the appellant’s suspicion was based on reasonable and sufficient grounds. According to section 47 (5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing.....The test to be applied is now settled. In the case of the Judicial Service Commission vs. Gladys Boss Shollei, Civil Appeal No.50 of 2014, this court cited with approval the following passage from the Canadian Supreme Court decision in Mc Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expresses in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

Further,

Similar guidelines are to be found in Halsbury’s Laws of England, 4th Edition, Vol. 16 (1B) para 642, thus;-

“...in adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

This matter tilts in favour of the Respondent’s case. She overwhelmingly brings out a case of lawful termination of the employment of the Claimant. This is by demonstrating and adducing evidence of default in the performance of the Claimant’s duties leading to loss by fraud on the part of the respondent’s workers.

The Claimant has failed to establish a case of unlawful termination of employment. He falls short of the expectation of Section 47(5) of the Employment Act, 2007 which comes out as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an 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.”

I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of the employment he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears its costs of the same.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Kihang'a instructed by Mwangi & Kihang'a Advocates for the Claimant.
2. Miss Kiiru instructed by Omosolo Mungai & Company Advocates for the Respondent.