



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. E003 OF 2020

MOSES KOECH KIBIWOTT..... CLAIMANT

VERSUS

KINGDOM BANK LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent vide the letter dated 13th March 2013 and confirmed on 22/7/2013. His position was SME Banker and his starting monthly salary was Kshs 65000. He rose through the ranks to become Credit Analysis Manager Grade 4B on 1st May 2017 earning Kshs 140,000 per month.

2. On 17/7/2020 he was suspended from work vide the letter dated even date. The letter accused him of involvement in fraudulent activity in the Bank and caused the bank to lose Kshs 338,140. He responded to the letter on 10th September, 2020 and on 21st September, 2020 he was called for a disciplinary hearing. Thereafter he received a dismissal letter dated 2nd October 2020.

3. On 16th December 2020, he brought this suit seeking the following reliefs:-

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

b) Special Damages of Kshs 1,680,000 and the amount as pleaded in paragraph 17 above.

c) An order directing the respondent to reinstate the claimant to his employment without loss of position, status or benefits or in the alternative amount of Kshs. 140,000 x 12 x 18 years (60 years of age of retirement less 42 years current age of the claimant) = 30,240,000/-.

d) Costs.

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

f) Certificate of service

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

4. The respondent filed defence and counter claim on 23rd February 2021. It denied that the dismissal of the claimant was unfair and averred that it was indeed fair and lawful. It averred that in June 2020 it discovered that a fraud had been perpetrated and upon investigations it was revealed that the claimant's computer was used to introduce a malware into the Bank's network, that was used to perpetrate the fraud

5. The respondent further averred that it served the claimant with a show cause letter on 15th July, 2020, suspended him on 17th July 2020, invited him to record statement with security and investigations office on 6th August 2020, and he was accorded a disciplinary hearing on 21st September, 2020 after his response to the show cause letter on 10th September 2020.

6. The respondent then averred that it dismissed the claimant on 2nd October 2020 after his failure to explain clearly, why he accessed the Jowaki account before funds were fraudulently withdrawn. The termination letter gave the claimant a right of appeal and invited him to collect his certificate of service. Therefore, it contended that the claimant is not entitled to any relief and prayed for the suit to be dismissed with costs.

7. On the other hand, the respondent averred it advance the claimant loan facilities of Kshs 900,000 on 27th January, 2015, Kshs 680,000 on 18th June 2018 and Kshs 300,000 on 13th January 2020. The loan balance as 12th January 2021 was Kshs 1,231,520.42 and it continues to attract interest at the rate of 10% until payment in full. Therefore, it prayed for judgment for the sum of Kshs 1,231,520.42 plus costs.

8. The suit proceeded to full hearing but only the claimant gave evidence and thereafter filed written submissions.

Evidence

9. The claimant testified as CW 1 and basically adopted his written statement dated 10/12/ 2020 and fortified the same by 14 documents in the list dated 10/12/2020.

10. In brief the claimant reiterated that after working for the respondent well he was served with suspension letter dated 17th July, 2020 accusing him of involvement in fraudulent activity in bank which allegedly led to loss of Kshs 338140. The letter also demanded that he surrenders his laptop to the security department team and he complied.

11. He further testified that on 10th September 2020 he responded to each and every allegation raised in the show cause letter but vide the letter dated 14th September 2020 he was still invited to a disciplinary hearing on 21st September, 2020. During the hearing, he was shocked that no evidence was brought to his attention nor was there any complainant who made any representations either in person or paper to prove that he installed a computer malware.

12. He maintained that his dismissal was not based on evidence of wrong doing but purely malicious and in bad faith. According to him the dismissal was not justified by valid reason and therefore unfair and contrary to section 45 of the employment Act. He prayed for reinstatement because three years have not lapsed after the dismissal.

13. On cross-examination, he admitted that he signed a confidentiality agreement. He denied that he had been issued with a warning letter and a letter dated 6th April 2018 querying his overdrawn account.

14. He admitted that he was served with a show cause letter, a letter asking him to record statement and a letter inviting him to a hearing. He confirmed that he was heard by a disciplinary committee and that he never appealed against its decision.

15. He admitted that he was issued with a certificate of service after the dismissal and he was paid his terminal dues and signed a confirmation that he had no other claim in respect of the withheld salary.

16. He reiterated that there was allegation that his computer was used to commit a fraud. He admitted that the computer was secured with a password but contended that the computer was accessible by him and also the Bank administrator using the password.

17. As regards the counterclaim, he admitted that he borrowed the Kshs 900000 on 27th /1/2015, Kshs 680,000 on 18/6/2018 and Kshs 300000 on 31/1/2020. He further admitted that the loan balance is Kshs 1231520.42 but he has been unable to repay due to lack of income.

18. On re-examination he maintained that he was never served with any investigations report or any complaint from any customer or even the forensic audit Report. He was also not shown any evidence supporting the reason for his dismissal and no criminal charges were preferred against him.

19. He stated that he was not represented in the disciplinary panel and as such he felt that he would not get fair hearing.

20. As regards the loan, he contended that he was given the same at staff interest rate of 10% but after the termination, they reverted to commercial rate of 13%. Finally, he contended that he has not secured another employment since his dismissal by respondent and that has affected his ability to repay the loan.

SUBMISSIONS.

21. The claimant submitted that the employer has not proved that it had a valid reason for dismissing him as required by section 43, 45 and 47 of employment Act. He contended that the reason for the dismissal was failure to observe the terms of the IT policy which has not been shown to the court.

22. Further, the claimant submitted that the respondent also did not provide sufficient evidence during the disciplinary hearing and also in this suit to prove fraud against him. He contended that the employer did not adduce any evidence to prove when and how the malware was introduced into his assigned computer, and the nature and extent of his involvement in fraudulent activity if any.

23. hE relied on *Nainna Kharmis v exford university press (EA) Ltd [2017] e KLR* whereHe relied on ***Naima Khamis v Oxford university Press (EA) Ltd [2017] eKLR*** where the court held that the reason for termination should be supported by evidence.

24. As regards procedure, he submitted that he was not provided with the requisite evidence, devices and ICT expert to explain to him during the disciplinary hearing, the alleged malware, the hacking and access to his computer. Consequently, according to him he was not accorded a fair hearing as required by section 41 of the Employment Act which provides that before the termination the employer must explain to the

employee in a language he understands, the reason for the intended termination.

25. For emphasis, he relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where the court emphasized that an employer must follow a fair procedure before terminating the employment contract of his employee which in essence means according the employee a fair hearing.

26. As regards the relief sought, he urged the court to order for reinstatement considering that it was his desire to continue working for the Bank. He contended that there are also special circumstances warranting reinstatement including the fear that it will be impossible for him to secure another job in the Banking industry because of the dent put on his character by the impugned dismissal.

27. Finally, the claimant submitted that the respondent did not adduce any evidence to prosecute its counterclaim for outstanding loan of Kshs 1,231,520.42. Therefore he prayed for the counter claim to be dismissed as with costs. For emphasis, he relied on **Banque Indosuez, DJ Lowe and Company Ltd [2006] e KLR** where the court of Appeal held that special damages must not only be claimed specifically but proved strictly.

ISSUES FOR DETERMINATION

28. I have carefully considered the pleadings, evidence and submission. It is clear that the claimant was employed by the respondent from 13th March 2013 to 2nd October 2020 where he was dismissed for misconduct. The issues in dispute are: -

- i. Whether the reason for the dismissal was valid and fair.**
- ii. Whether a fair procedure was followed before the dismissal**
- iii. Whether the reliefs sought in the suit should issue**
- iv. Whether the counter claim should be allowed.**

REASONS FOR THE DISMISSAL

29. **Section 43 of the employment Act** provides that in every legal proceedings challenging the termination of employment of an employee the employer shall be required to prove the reason for the termination and where he fails to do so the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. The latter section bars an employer from terminating the employment contract of an employee unless there is a valid and fair reason related to the employees conduct, capacity or compatibility or based on the operational requirement of the employer.

30. In this case the reason for the dismissal is set out in the dismissal letter dated 2nd October 2020 thus:-

“This is in referenced to the disciplinary meeting held on Monday September 21st 2020 in regard to fraudulent Digifile transfers and Elma transactions from account number 0011837518002 of Rutere and kalu Associates and Account number 5061841146005 of Jowaki to account number 10118556567002 of Javan Simiyu Makokha amounting to Kshs 318,140.

It was established that a gadget (Malware) that was used to perpetrate fraud in the bank had been plugged into your computer as per the investigation report. It was also noted that you viewed the Jowaki’s account before funds were withdrawn from the account which was not related to your day to day work.

Consequently, the Bank has lost confidence in you occasioned by your failure to clearly explain why you accessed the Jowaki account before funds were fraudulently withdrawn. In addition the malware was used to perpetrate the fraud was plugged into your computer”

31. The respondent did not adduce any evidence before this court towards proving the validity and fairness of the above cited reason for dismissing the claimant. The respondent had all the opportunity to prosecute his defence and counterclaim but it deliberately refused to do so.

32. I have also considered the evidence by the claimant which has not been rebutted, that even during the disciplinary hearing the employer did not present any evidence from an IT expert or investigations report or forensic Audit report to prove the alleged fraud against him. According to the claimant he is a stranger to the alleged fraud and no evidence has been tabled before this court to connect him with the same.

33. **In Pius Machafu Isiundu 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 the 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 the termination/dismissal (section 43); prove that the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5))...”

34. Having considered the un rebutted evidence by the claimant, I find and hold that the respondent has failed to prove that the alleged fraud did occur and the claimant was involved. It did not call any witnesses in this suit and it also did not file the minutes of the disciplinary hearing to show that it had sufficient evidence before the Disciplinary Committee to prove the validity of the alleged fraud and the claimant's involvement.

PROCEDURE FOLLOWED

35. **Section 41** of the Act provided that: -

“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.”

36. In this case the claimant was served with a show cause letter and he made a written defence. He was thereafter invited to an oral hearing before a committee and he also defended himself. The letter inviting him to the hearing, gave him the right to call witnesses, produce documents and also be represented by another employee at the hearing. Finally, he was given the right of appeal after the dismissal but he chose not to appeal.

37. Having considered the foregoing evidence, I would find that the employer followed a fair procedure before dismissing the claimant. Although the claimant contend that the employer did not call an IT expert to explain to him how the fraud occurred and how he was involved, I would deem that to be an afterthought because he never raised that concern during the disciplinary hearing or by way of an appeal.

38. In any event the claimant stated in paragraph one on page 2 of his written statement that he responded to each and every allegation raised in the show cause letter in his response dated 10th September, 2020 in an effort to exonerate himself. The said responses could only be possible after the claimant read and understood the charges as explained by the employer in the show case letter.

RELIEFS

39. Having found that the respondent did not prove that the dismissal was grounded on a valid reason, I make declaration that the dismissal was unfair and unlawful within the meaning of section 45 of the Employment Act. The claimant seeks reinstatement but the employer has already lost trust in him according to the dismissal letter. Therefore, the only remedy for him is damages.

40. Flowing from the above, the claimant is entitled to salary in lieu of notice plus compensation for the unfair dismissal by dint of section 49(1) of the Act. His letter of appointment dated 13th March 2013 entitled him to one-month salary in lieu of notice However, the same is declined because it is not pleaded.

41. As regards compensation, I note that he did not cause the dismissal through misconduct, he had worked for 7 years without any warning letter, and his chances of getting any other employment in the banking industry are minimal. Consequent, I award him 12 months' salary as compensation for the unfair termination.

42. The claimant further prayed for anticipated salary for the 18 years he would have worked before normal retirement age of 60 years. It is now trite law that such prayer cannot be granted by the court unless it is grounded on a written law or contract of employment. The claimant has not demonstrated that his claim is founded on the law or his contract of employment. Consequently, it is declined.

COUNTERCLAIM

43. As submitted by the claimant the counter claim was not prosecuted as the respondent refused to tender evidence in support. It is therefore dismissed. However, the court notes that the claimant has admitted that he received the said loans from the bank. He is therefore bound by the loan agreements to settle the same with or without a court decree however the said prayer is declined because it lacks basis in law and his contract counter claim

CONCLUSION

42. For the reasons, findings and observation made herein above, I enter judgment for the claimant in the following terms:-

- a) Compensation Kshs.1680,000.**
- b) The respondent's counterclaim is dismissed.**
- c) Costs of the suit and the counter claim**
- d) Interest at court rate from the date hereof**
- e) The award is subject to statutory deductions**

Dated, signed and delivered at Nakuru this 28th day of April, 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures, restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE