



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NUMBER 1 OF 2019**

**BETWEEN**

**RUKIYA ABDUL JABBAR..... CLAIMANT**

**VERSUS**

**DIAMOND TRUST BANK LIMITED...RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

J.S. Kaburu & Company Advocates for the Claimant

Oraro & Company Advocates for the Respondent

**JUDGMENT**

1. The Claimant filed her Statement of Claim, on 10<sup>th</sup> January 2019. She states she was employed by Habib Bank Limited, on 20<sup>th</sup> September 1989. Habib bank Limited was taken over by the Respondent, vide Gazette Notice dated 24<sup>th</sup> July 2017.
2. She rose to the position of Manager at Respondent's Mombasa Branch. She directed all operational aspects of the Branch, and oversaw administration, marketing and building of customer relations.
3. She was paid a basic monthly salary of Kshs. 3,334 and house allowance of Kshs. 760 at the beginning. Her gross monthly salary had risen to Kshs. 298,833 by the time her contract was terminated in June 2017. She used to work excess hours, without overtime pay. She only took annual leave once, in the year 2017.
4. The Claimant states that, termination was unfair. She was suspended in April 2017, pending investigation. She was not privy to the investigation. She was aware there was a Criminal Case No. 741 OF 2017 at the Chief Magistrate's Court Mombasa, which involved some Employees of the Bank. The Claimant was not an accused person or a witness in the criminal proceedings. The Respondent wrote to her in June 2017, advising her that she had been summarily dismissed.
5. She prays for Judgment against the Respondent, on the following terms: -
  - a. Declaration that termination was unfair.
  - b. Certificate of Service to issue.
  - c. 1-month salary in lieu of notice at Kshs. 298,833.
  - d. 21 days of annul leave for 2017, at Kshs. 261,479.
  - e. 12 months' salary in compensation for unfair termination at Kshs. 3,585,996.

f. Gratuity for every year worked at Kshs. 8,666,157.

g. Monthly salary for the period between the date of dismissal and the date of demand at Kshs. 4,183,622.

Total...Kshs. 16,996,087.

h. Costs.

i. Interest.

j. Any other relief.

6. The Respondent filed its Statement of Response, on 25<sup>th</sup> March 2019. The description of the Parties is conceded, as is the existence of an employer-employee relationship. The Respondent denies that it terminated the Claimant's contract unfairly. The claim for overtime has no basis. She was compensated for untaken annual leave. She was suspended for irregular release from the Bank, of Client's import collection documents. She agreed in a meeting held on 15<sup>th</sup> March 2017, to have received the documents with Branch Operations Manager Suwad Salim Fadhil, and that they released the documents in collusion with the Customer, one Ali Abdulkaldir Mohammed, alias Adawe, contrary to the Bank's Procedures. The documents had been received from CIMB Bank of Malaysia, in respect of a consignment of import goods worth Kshs. 160 million. The Claimant and her Colleague released the documents to Adawe, without having received the sum due.

7. The Claimant was suspended on 17<sup>th</sup> March 2017 in accordance with the Bank's Industrial Relations and Disciplinary Policy, to facilitate investigation. Adawe admitted in a meeting attended by the Claimant, to have received the documents and undertook to make payment proposal by 20<sup>th</sup> March 2017. The matter was reported to the Banking Fraud Investigation Department. It was confirmed that the Bank stood to lose Kshs. 160 million. The Bank carried out its own internal investigation, and issued letter to show cause to the Claimant, dated 17<sup>th</sup> May 2017. Her Advocates replied, stating that the Claimant was overseas, and that the Bank must wait for the outcome of the criminal proceedings. The Claimant was subsequently invited to a disciplinary hearing, to take place on 16<sup>th</sup> June 2017. She opted not to participate in the hearing. It was concluded that her actions amounted to gross negligence and gross misconduct, warranting summary dismissal. Her contract was lawfully and fairly terminated. The Respondent prays the Court to dismiss the Claim with costs.

8. Parties gave their evidence, and closed their respective cases, on 26<sup>th</sup> February 2020. The Claimant gave evidence, as did Respondent's Legal Officer, Francis Kimwea Kariuki. Proceedings appear to have slowed down for about 1 year, probably over Covid-19 concerns. The matter was last mentioned in Court on 28<sup>th</sup> January 2021, when Parties confirmed filing of their Closing Submissions and the file transmitted to the Trial Judge, sitting at Nairobi, for preparation of the Judgment.

#### **Claimants' Evidence.**

9. The Claimant adopted her Witness Statement and Documents on record, in her evidence. She restated her employment history and the terms and conditions of employment. She highlighted the circumstances of her dismissal. She acknowledged that there was fraud at her Bank. Import documents were received. They were normally received by the Officer who receives mail. They would be forwarded to the Operations Manager, who would then forward to the In-Charge, Imports Department. The Claimant was only involved, if she received a message from the importer. The Malaysian Bank sent a swift message saying payment had not been received. There was a criminal case, involving Respondent Bank Employees. The Claimant was not among them. The Importer, Mail Recipient and the Operations Manager were charged.

10. She received the notice of disciplinary hearing. She was out of the country and engaged her Advocate to write to the Respondent. The Advocate wrote, advising the Respondent should await the outcome of the criminal proceedings. The criminal trial closed on 13<sup>th</sup> June 2018. The Respondent went ahead and summarily dismissed the Claimant. She was only paid staff provident funds. She did not receive any other terminal benefits. She worked for 28 years. She was 50 years old, at the time of dismissal. She was to serve up to the age of 55 years.

11. Cross-examined, the Claimant told the Court that she was employed by Habib Bank. Diamond Trust took over the assets and liabilities of Habib Bank. The letter of employment had a summary dismissal clause. The Claimant's pay slip shows her basic salary was Kshs. 149,893 and house allowance of Kshs. 67,452. Termination was based on alleged fraud at the Bank. The Investigator was drawn from Nairobi Head Office. The Claimant recorded a Statement with the Investigator. She stated that she released the documents to the importer, Adawe. Import documents cannot be released without payment. Payment had not been made. Documents could only be released against payment. It was agreed with the Head Office that Adawe is followed up, to make payment. He kept giving false promises. The Claimant was suspended. She was given reason for the decision to suspend her. She was issued letter to show cause. She did not attend disciplinary hearing. She gave reason for not attending. The letter of summary dismissal disclosed the reason for the decision. She was advised to lodge an Appeal to Respondent's Head Office in Pakistan. Her Advocates appealed, but she did not come to know the outcome. She did not have any outstanding loans with Habib Bank. She did not receive the sum of Kshs. 52,462 from the Bank. She had 21 days of pending annual leave at the time of termination. It could have been 28 days. She was not sure. She merits gratuity based on her gross pay. She merits salary, up to the date she issued letter of demand before action. Redirected, the Claimant told the Court her salary was last paid, in May 2017. She was advised by her Advocates that arrears of her salary would be paid at the end of the criminal trial. Trial ended in June 2018. She recorded her Statement with the Investigator, according to the Investigator's dictation. She did not release the documents to Adawe.

#### **Respondent's Evidence.**

12. Legal Officer Francis Kimwea Kariuki, similarly relied on his Witness Statement and Documents filed by the Respondent, in his evidence before the Court. He confirmed that the Respondent is a successor of Habib Bank. The Claimant was an Employee of the Respondent, and was dismissed in June 2017. Between December 2016 to February 2017, the Respondent received import documents from

CIMB Bank of Malaysia. CIMB gave instructions on how payment was to be made, and collection of the documents made. Documents were to be delivered against payment. They were released without payment. CIMB complained about this anomaly.

13. The Claimant was the Mombasa Branch Manager, which received the documents. She conceded that she received and released the documents. She was suspended. The matter was investigated and a report made. Letter to show cause issued. She was invited to disciplinary hearing. She did not attend. She said through her Advocates, that there was a criminal case pending, whose outcome should have been awaited, and that she was overseas. She was not an accused person in the criminal proceedings. She went into hiding and avoided disciplinary hearing. The facts at the disciplinary hearing, as captured in the minutes on record, were uncontroverted. She was summarily dismissed. She was advised on her right of appeal. She did not appeal. The Respondent drew out a cheque in her name for terminal dues, tabulated at Kshs. 52,462. It was posted to her last known address. It was not cashed.

14. Cross-examined, the Legal Officer told the Court that anyone could receive documents at the Bank. Security Officer received, and gave them to the Claimant. The Claimant/ Branch Manager and Operations Manager released to the Client. The Claimant's Advocates wrote to the Respondent, saying she was out of the Country, and that she was waiting for the outcome of the criminal trial. Redirected, the Legal Officer stated, in issue was irregular release of the documents, not their receipt. The Claimant conceded releasing the documents.

15. The issues for determination, as traditionally is with cases of unfair termination, are: -

- a. Whether termination was based on valid reason, or reasons, under Section 43 and 45 of the Employment Act.
- b. Whether it was carried out fairly, under Section 41 and 45 of the Employment Act.
- c. Whether the Claimant merits the prayers sought.

**The Court Finds: -**

16. It is not contested that the Claimant was employed by Habib Bank Limited on 20<sup>th</sup> September 1989. Habib Bank was inherited by the Respondent, Diamond Trust Bank, on 24<sup>th</sup> July 2017. The latter continued to employ the Claimant. It is agreed that import collection documents had been received by the Respondent from CIMB Bank of Malaysia, through Habib Bank of Pakistan. The documents related to a consignment of goods valued at Kshs. 160 million, imported by one Ali, also known as Adawe. The documents were to be released to the importer against payment. It is common evidence that release, was made without payment.

17. It is agreed that based on the incident, the importer, Abdulkadir Mohamud Ali, alias Adawe, and 2 Officers from the Respondent, Suaad Ali Fadhil and Alex Tsuma Sanga, were prosecuted in Mombasa Chief Magistrate's Criminal Case No. 741 of 2017, with the offence of conspiracy to effect unlawful purpose, contrary to Section 395[f] of the Penal Code. The Claimant was not among the accused persons; neither was she a witness in the proceedings.

18. It is agreed that the Claimant was suspended, asked to show cause why she should not face disciplinary action for her role in release of the import documents, and was invited to disciplinary hearing subsequently. She did not attend hearing, because in her view the matter was subject of criminal proceedings. She wrote to the Respondent through her Advocates, stating that the Respondent should abide the outcome of the criminal proceedings. Further, she made it known that she was overseas, and would not therefore attend hearing.

19. The hearing went on *in absentia*, and recommendation reached in the end, by the disciplinary committee, to have the Claimant summarily dismissed. The letter of summary dismissal followed, on 28<sup>th</sup> June 2017. These facts are not contested.

20. Was summary dismissal decision, based on valid reason or reasons?

21. The Claimant was the Branch Manager, Mombasa. She describes her responsibilities, at paragraph 4 of her Statement of Claim, to include: direction of all operational aspects of the Branch; administration; marketing; and building customer relations, among others.

22. Receipt and release of import documents, would in the respectful view of the Court, fall within this broad managerial role of the Branch Manager. It was unhelpful to split hairs, over who received the documents. Ultimate responsibility over release, rested with the Branch Manager.

23. The documents did not relate to an everyday transaction, but a huge import transaction, where the businessman Adawe, was bringing in goods worth Kshs. 160 million, to Kenya from Malaysia. The documents had been received from CIMB Bank in Malaysia through Habib Bank Pakistan. They included bill of lading, invoices, packing lists, insurance policy, certificate of origin, and certificate of analysis. The Malaysian Bank instructed clearly: **deliver documents against payment**. They were to be released only once payment was made by Adawe. The Claimant and her Operations Manager Suaad Fadhil, released the documents to Adawe, without payment, exposing the Respondent to loss of Kshs. 160 million. The Claimant did, on 16<sup>th</sup> March 2017, record a handwritten statement under enquiry, conceding that she released the documents. She stated: -

I Rukiya Abduljabbar, admit the following-

- The documents were delivered to the customer in good faith and assurance that payments will be received in a month.
- I therefore agree and confirm that the documents were delivered knowingly and understanding the consequences.
- This is the only customer accommodated.
- No other staff is involved in regard to this matter apart from Suaad Fadhil.

- The No. of document is 14, totalling to 1.295 [m] US.

She cannot turn around and shift blame to her juniors. Even if release, was done by any of her juniors, the Claimant would still take managerial responsibility.

24. There were investigations carried out by the Respondent internally, and externally through the Banking Fraud Investigation Unit, confirming release of the import documents, and exposure of the Respondent to loss of Kshs. 160 million.

25. The Claimant was aware about the Bank's Procedure regulating import collection documents, and the Uniform Rules for Collection [1995] of the International Chamber of Commerce. She disregarded these sensible and time-honoured rules of international commerce, in favour of accommodating Adawe, and placed her Employer at the risk of loss of a considerable amount of Kshs. 160 million.

26. The Claimant did not give a rational explanation for this default. She was a banker, with a wealth of experience of 28 years. She was persuaded by Adawe, through his word of mouth, that he would make payment in due course, and released the import documents without payment.

27. She was clearly engaged in conduct which under Section 44 [4] of the Employment Act, amounts to gross misconduct. Under Section 44[4] [c], she neglected to perform her managerial role, which it was her duty to perform under her contract, carefully and properly. Under Section 44[4] [f], she committed, or on reasonable and sufficient ground was suspected of having committed a criminal offence against, or to the substantial detriment of her Employer, or her Employer's property. The Claimant, through her conduct, indicated to the Respondent that she had fundamentally breached her obligations arising under her contract, and the Respondent would be justified in dismissing her summarily, under Section 44 [3] of the Employment Act. Valid reason, or reasons, justifying termination, under Section 43 of the Employment Act, are matters that the Employer genuinely believes to exist, at the time of termination, and which cause the Employer to terminate. The Respondent had valid reason, under Sections 43 and 44 of the Employment Act, to summarily dismiss the Claimant.

**28. Was procedure fair?** The Respondent held an initial disciplinary meeting at the Branch, on 16<sup>th</sup> March 2017, presided over by Regional General Manager Salman Malik. The Claimant was in attendance. It was confirmed that the Claimant and Suuad had conceded release of import documents to Adawe. No payment had been received from Adawe. It was observed that the Claimant and Suuad had committed to follow up payment with Adawe. The Committee resolved at Branch level, to have the Claimant and Suuad suspended for 1 month, to allow for investigations.

29. It is on record that the Claimant was given the added benefit of a hearing, *before* suspension. The Employment Act does not require Employers to hear Employees before administrative suspension.

30. The letter of suspension issued on the same date of the preliminary disciplinary sitting, 17<sup>th</sup> March 2017.

31. The Respondent convened another meeting at its Head Office in Nairobi, again attended by the Claimant and Suuad. This was on the following day, 18<sup>th</sup> March 2017. It was chaired by Regional General Manager Salman. Adawe was invited to this meeting, attended and confirmed that he received import documents from the Branch without making payment, and had cleared and received his consignment from the Port, without making payment. He undertook to pay. It was the second meeting the Claimant was accorded, prior to the actual disciplinary hearing. Adawe was availed to her, and stated the facts as he knew them, in the presence of the Claimant.

32. Suspension of the Claimant was extended for 30 days through a letter from the Respondent, dated 13<sup>th</sup> April 2017, to allow the Respondent complete investigations.

33. Investigations were carried out internally and externally.

34. On 11<sup>th</sup> May 2017, 2 Officers of the Respondent, and the importer were arraigned in Court in CM's Court Criminal Case No. 741 of 2017.

35. For reasons not stated, or suggested to this Court, the Claimant was not involved in the criminal proceedings.

36. The Respondent issued her a letter to show cause, on 17<sup>th</sup> May 2017.

37. She replied on 25<sup>th</sup> May 2017 through her Advocate. She stated that she was out of the Country and secondly, told the Respondent that the Respondent caused other people to be charged over the same matter, and that the Respondent '*must therefore await the outcome of the Court process.*'

38. The Respondent wrote to the Claimant on 12<sup>th</sup> June 2017, notifying that a disciplinary hearing would be held on 16<sup>th</sup> June 2017. The charge was communicated on the hearing notice. She was also advised that failure to appear would result in *ex parte* proceedings and decision. She did not attend and hearing went on in her absence, resulting in her summary dismissal.

39. She states that she appealed in accordance with the Respondent's Staff Service Rules. Appeal was made to the Head Office in Pakistan, through the Claimant's Advocates. She however did not have a copy of the Appeal, before the Court.

40. Procedure was fair and in strict adherence to minimum statutory procedural standards of fairness, under Section 41 and 45 of the Employment Act. The Respondent bent over backwards, to ensure procedural justice was served. The Claimant was given the benefit of a

disciplinary sitting before suspension; she was suspended; extension of suspension was communicated to her; the importer appeared before a committee convened in Nairobi, in the presence of the Claimant, and conceded he received import documents without making payment; the Claimant conceded from the outset, that the documents were released to the importer without payment; she was issued a notice to show cause; she replied, stating that she was out of the Country and that the Respondent must abide the outcome of the criminal trial; the matter was fairly and comprehensively investigated internally and externally; it was established that the Claimant released import documents, exposing the Respondent to loss of Kshs. 160 million; the Claimant was invited to a disciplinary hearing; the charge was clearly put to her on the disciplinary hearing notice; she did not attend on the same ground she stated in responding to the notice to show cause; hearing went on in her absence; it was established that she was engaged in an act of gross misconduct warranting summary dismissal; and, she was summarily dismissed on 28<sup>th</sup> June 2017.

41. She was offered, upon summary dismissal, salary and allowances up to, and including 28<sup>th</sup> of June 2017; gratuity payment as per Bank Policy; and the option of refund of her pension contribution, and 50% of the Respondent's contribution or 100% transfer, to her new Employer or Private Pension Scheme.

42. The Respondent advised the Claimant on her right of appeal after dismissal.

43. The Claimant opted not to participate in the disciplinary hearing. She could have sent her Advocate to the hearing, if she was outside the committee's jurisdiction, and asked for deferment of the hearing. The criminal proceedings did not involve her. There was no reason to require the Respondent to abide the outcome of the criminal proceedings. The Claimant's failure to submit ultimately, to the disciplinary hearing, gave credence to the evidence of Respondent's Legal Officer, that the Claimant was a Lady on the run.

44. Termination was based on valid reason, and was executed fairly. The Claimant was offered terminal dues, as required under Section 18 [4] of the Employment Act. She did not satisfy the Court that she merited more than was offered. She did not pray for overtime, although she testified that she worked excess hours. The Regulation of Wages [General] Order, which regulates overtime pay, does not apply to Bank Managers. If she was entitled to overtime pay, it would have to be through her contract. She did not exhibit such a contract. She left employment on 28<sup>th</sup> June 2017. Mutual obligations ended on this date. There is no foundation in the prayer for arrears of salary, from the date of dismissal, to the date the letter of demand issued. The Claimant was no longer in employment. There is no prayer for reinstatement with back pay, to justify an order for payment of arrears of salary after dismissal. She did not specifically show to the Court gratuity clause, warranting payment of Kshs. 8 Million. She said nothing in her evidence on the mode of computation of gratuity. She did not discount gratuity offered to her by the Respondent. She similarly failed to adduce evidence, adequate to establish her prayer for annual leave. She did not show that she merits more than was offered to her. The Court can offer her no more. The Respondent cannot be faulted on any front.

IT IS ORDERED: -

**a. The Claim, save the prayer for Certificate of Service, is declined.**

**b. No order on the costs.**

**Dated, signed and released to the Parties electronically, under Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 26<sup>th</sup> day of February 2021.**

**James Rika**

**Judge**