



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 38 OF 2019

JULIUS KIRIMO MWANDORO.....CLAIMANT

- VERSUS -

KCB BANK KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd April, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 15.07.2019 through Sharia Nyange Njuguna & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment was unfair and unlawful.
- b) An order directing the respondent to reinstate the claimant to his previous job without loss of benefits.
- c) In alternative to prayer number 2 above the Honourable Court do issue an order directing the respondent to pay the claimant 12 months' compensation for unlawful termination Kshs. 2, 637, 936.00.
- d) An order that the respondent issue a certificate of service to the claimant.
- e) Any other relief the Honourable Court may deem fit and just to grant to meet the ends of justice.
- f) Costs of the suit.

The claimant's case is that the respondent employed him initially as a clerk effective April 1993 at a monthly salary of Kshs.5, 522.00. The claimant's further case is as follows:

- a) He served continuously for 25 years in various respondent's branches. His last station was Kilifi Branch at last monthly pay was Kshs.206, 748.00 and owner occupier allowance of Kshs. 13, 000.00.
- b) He was unlawfully and unfairly terminated on 19.09.2018 because the due procedure was not followed per the Employment Act, 2007 and the Labour Relations Act, 2007. Further the termination was in breach of the prevailing collective agreement (CBA) binding upon the parties.
- c) The claimant received internal memos from the respondent dated 06.07.2018; 12.07.2018; 14.07.2018; and 18.07.2018 inviting him to give a detailed explanation as to why he was allegedly unprofessional in handling two clients. Further, prior to incidences mentioned in the internal memos he had been very sick and was scheduled for an operation but the respondent failed to understand that claimant's prevailing circumstance.
- d) The reason urged for termination and punishment meted against the him was not at all justified in the circumstances.
- e) The claimant has served the respondent for 25 years and if reinstatement is not granted, the claimant will suffer serious economic hardship.

The respondent filed on 29.10.2019 a memorandum of claim through Muriu Mungai & Company Advocates. The respondent prayed that the

claimant's suit be dismissed with costs. The respondent admitted that it employed the claimant and upon the terms and service history as pleaded for the claimant. The respondent denied that the termination on 19.09.2018 was unlawful. The respondent further stated that the termination was substantively and procedurally lawful and in full compliance with the procedure in the Employment Act, 2007. Further the termination was for fair and lawful reasons since the claimant had improperly handled customers contrary to the respondent's values and bringing the respondent into disrepute. The respondent pleaded that it issued the internal memos as pleaded for the claimant; the claimant did not give reasonable explanation to the allegations made; the claimant's explanations were consistently inadequate, evasive, incomplete and never specifically nor adequately answered the allegations; the respondent took into account and accommodated the claimant's ill health at the material time and the ill health could not justify the accusations as levelled against the claimant; and the termination was justified and lawful. The respondent stated that the claimant was entitled to a certificate of service and not any of the other remedies as prayed for.

The claimant testified to support his case. The respondent's witness (RW) was Bramwel Simiyu Mbirira, the respondent's Manager, Employee Relations. The Court has considered the pleadings, the evidence and the final submissions filed for the parties. The Court makes findings as follows.

To answer the **1st issue** for determination, the Court returns that there is no dispute that the parties were in a contract of service and whose details and history of service is as pleaded for the claimant and admitted for the respondent.

To answer the **2nd issue** for determination there is no dispute that the respondent terminated the claimant's employment by the letter dated 19. 09.2018. The termination letter referred to the correspondence between the parties and the disciplinary hearing held on 12.09.2018 at the respondent's office at Coast Region regarding customer complaints and financial misconduct. The letter stated that the respondent had established as follows:

a) On 20.06.2018 the Head Teacher of Jaribuni Primary School Mr. Nguzo visited the branch with a request for a statement but was not satisfied with the way the claimant served him. He raised a complaint by way of a text message to the claimant and the Branch Manager. The customer's complaint was that while serving him on the material date, the claimant stated in his mother tongue that he was too disturbing and the customer said that amounted to an insult to him – because the customer was a very busy person and he chose to come to the bank because the information he required was important and he was therefore not disturbing the bank.

b) On 21.06.2018 a customer one Job Chilibasi posted on social media that he was kept waiting at the customer care for 3 hours. The customer had accompanied his expectant wife for processing of her ATM card but it took 3 hours to be proposed. The claimant while serving them directed them to be served by the claimant's colleague. That was after that claimant had asked the customer to deposit additional cash to facilitate the processing of the ATM card and the claimant failed to take it upon himself to see the completion of the process as per the customer's expectation.

c) The above two complaints amounted to the claimant's failure to handle the customers therein in line with the KCB Customer Service Charter, KCB Customer Service Standards, KCB Bank Values and the bank's Key Strategic Objective No. 1 "**Building a Customer Centric Organization**" which resulted to customer complaints.

d) The claimant violated HR circular GHRL 108/2017 on STAFF UNPAID CHEQUES, UNPAID DIRECT DEBTS, DELINQUENT STAFF MOBI, KCB MPESA, OUTSTANDING CREDIT CARD DUES AND OVERDRAWN ACCOUNTS by your failure to provide sufficient funds in your account number 1104237861 leading to the unpaying of your two cheques and five (5) unpaid direct debts on diverse dates as was detailed in the termination letter. It was noted that the claimant had a valid 1st warning letter dated 12.10.2017 and a 2nd warning letter dated 21.03.2018 for poor performance of duty.

e) The letter stated that in the circumstances the claimant's conduct had cast doubt on his professionalism and the respondent had lost confidence in the claimant and his service was terminated effective the date of the termination letter, 19.09.2018 per clause A5 (d) of the CBA covering section heads, check clerks, clerical, technical and subordinate staff. The letter stated that the claimant would be paid one month's salary in lieu of notice in due course and further instructed the claimant on steps he was to take in the separation process.

The **3rd issue** for determination is whether the termination was unfair. The claimant's case is that the termination was unfair in substance and procedure.

On procedure, the evidence is that the claimant received the internal memos referred to in the memorandum of claim. The claimant replied in writing to the matters raised in the internal memos. The claimant received the internal memo dated 18.07.2018 inviting him to explain the alleged events of 20.06.2018 and 21.06.2018. The claimant replied by his internal memo dated 21. 07.2018. By the letter dated 01.09.2018 the claimant was invited to a disciplinary hearing scheduled for 06.09.2018. The claimant was informed that he was entitled to representation by another employee of the claimant's choice at the disciplinary hearing and, in that case, the claimant had to inform the respondent to facilitate release of such employee to attend at the disciplinary hearing. Further, per the terms and conditions of service, the respondent would meet the claimant's expenses for attending the hearing. The claimant was absent from duty from 04.09.2018 to 06.09.2018 due to sickness and therefore the respondent being aware as much, by the letter dated 07.09.2018 the disciplinary hearing was rescheduled for 12.09.2018 at 08.00am. The claimant appealed against the termination decision but the respondent upheld the termination as per its letter dated 24.04.2019. The Court has considered the evidence and returns that the claimant was notified about the allegations levelled, he was given an opportunity to reply, he was heard at the disciplinary meeting, he was terminated, he appealed and the appeal was declined. The Court returns that the evidence is that the claimant was accorded due process and in particular the respondent complied with the requirement of a notice, hearing and the claimant appearing at disciplinary hearing with a co-employee or representative as prescribed in section 41 of the Employment Act. The termination is therefore found not to have been unfair in procedure. It was submitted for the claimant that he had not been notified the particulars of the alleged poor performance but the Court has evaluated the evidence and it is clear that the respondent informed the claimant, more than once, by way of internal memos and the invitation to attend the disciplinary hearing, the particulars of the allegations as had been levelled against the claimant. Thus, the Court has found that due procedure had been followed.

Has the respondent established the burden of proving the reasons or grounds of the termination as provided for in sections 43 and 47(5) of the Employment Act, 2007?

The Court has considered the evidence by way of the documents filed for parties and the oral testimony before the Court. The details of the allegations as set out in the termination letter were put to the claimant as per the record of the disciplinary hearing minutes' form dated 12.09.2018. The Court observes that the minutes were signed by the claimant on 19.09.2018 and the claimant failed to establish intimidation at the time of signing the minutes (as alleged in his testimony) so that the Court finds that the minutes represent the accurate record of the disciplinary proceedings. The record shows that the claimant was invited to explain why he failed to handle the two respondent's customers in line with the KCB Customer Service Charter, KCB customer service standards, KCB values and the Bank's Key Strategic Objective No. 1 "**Building a Customer Centric Organization**" which resulted to customer complaints. He was further required to explain why he exposed the bank to potential loss of business by his action of mistreating the said customers leading to complaints. He was further required to explain why violated HR circular GHRL 108/2017 on STAFF UNPAID CHEQUES, UNPAID DIRECT DEBTS, DELINQUENT STAFF MOBI, KCB MPESA, OUTSTANDING CREDIT CARD DUES AND OVERDRAWN ACCOUNTS by your failure to provide sufficient funds in your account number 1104237861 leading to the unpaying of your two cheques and five (5) unpaid direct debts on diverse dates as was detailed in the termination letter. Finally, he was required to explain why disciplinary action should not be taken against him in view of the allegations leveled against him.

The claimant replied to the allegations as follows:

a) He was apologetic for keeping the customer for 3 hours. Further the customer's account did not have sufficient funds to meet the cost of the ATM card. Thus, the customer had to deposit relevant funds and his desk had a queue of other customers. After deposit of the funds the customer completed the ATM request form, the claimant conducted due diligence, ordered for the ATM card and referred the customer to the supervisor for authorization. The authorizing supervisor then went to the back office. In his earlier reply, the claimant stated that at the time he had a lot of pain in his nose and left eye with a bad headache and was due for operation at the Nairobi Hospital on 22.06.2018 – the fact of ill health having been established because the evidence shows, and is not in dispute, that the claimant proceeded for medical procedure in that regard. The Court has analyzed the claimant's account of the events of 21.06.2018. It is clear that the delay in serving the customer who complained of delays of up to 3 hours were due to long queues that the claimant and the authorizing supervisor were attending to, the delay to obtain the authorization of the claimant's order for the issuance of the customer's ATM card, and the claimant's working under extreme pressure due to the ill-health and impending medical procedure. Taking all that into account, the Court finds that on the material day and allegation, had the respondent considered all the surrounding circumstances, it would have been found that there was no culpability against the claimant with respect to the complaint surrounding the issuance of the ATM card. The claimant's explanation was well documented in his reply to the internal memo conveying the allegations but the same was not considered by the disciplinary panel.

b) With respect to events of 20.06.2018 relating application for a bank statement by the head teacher, the claimant replied at the disciplinary hearing that the head teacher requested for the statements from 01.01.2008 to 20.06.2018. He advised the customer to change the date to September 2008 to be in line with T24 system and advised him about the relevant bank charges. The customer then picked another form and then he left while talking on his phone and, he never came back. The head teacher sent the claimant a text message but the claimant did not respond because he saw it late because he was arranging to travel to Nairobi for the medical procedure scheduled effective 22.09.2018 to 25.09.2018. In his earlier reply to the internal memo, the claimant had explained that the head teacher and the claimant belonged to the Mijikenda community and the teacher had greeted the claimant in vernacular. Further he had advised the customer that the operational system had changed three times from 01.01.2008 to 20.06.2018 - the statement period per the customer's request. Further he had advised the customer that the charges per printed page would be KShs. 5.00. Up to that point the Court finds that there is no reason to doubt the claimant's account of the events. The pertinent issue in the alleged customer's complaint is whether the claimant stated to the customer in their mother tongue that the customer was disturbing the claimant in view of the customer's requests. The claimant's written response to the internal memos he received and answers at the disciplinary hearing appear silent on the issue which the allegation as levelled stated that the customer considered that to be an insult. The Court has revisited the evidence including the claimant's detailed written reply dated 21.07.2018. The claimant says that at that time he suffered a blocked nose and was in great pain as he served customers on that material day. He was under great stress because he was not sure if he was going to remain alive after the impending and scheduled procedure. He further states that it could be that due to his blocked nose, it could be that as he advised the customer, the customer may not have heard him properly or he misunderstood him. What were the actual vernacular words that are said to have been uttered by the claimant meaning that the customer was too disturbing? The internal memos, the invitation to disciplinary hearing, and the record of the disciplinary hearing does not state the words or refer to them. The witness statement by RW and RW's testimony in Court does not refer to or state the words. It was the respondent's burden of proof (per sections 43 (1) and 47(5) of the Employment Act, 2007) to show that the claimant uttered the words per the vernacular language and to show that when translated the words meant that the customer was too disturbing. Accordingly, the Court returns that the respondent has failed to establish that reason or ground of termination. While making that finding, the Court follows the holding by the Court of Appeal in **CMC Aviation Limited –Versus- Mohammed Noor [2015]eKLR**, (Karanja, Musinga & Gatembu J.J.A) that the employer must specify the alleged abusive or insulting words that the employee uttered in discharging the burden of justifying the grounds of the termination of employment or wrongful dismissal as per section 47(5) of the Employment Act, 2007.

c) The third reason for termination was that the claimant issued bouncing cheques against his bank account with the respondent. The claimant testified that he issued the bouncing cheques, it was aimed at protecting sale of his property in another transaction unrelated to his employment, and he subsequently settled the related financial liability. He explained to the disciplinary committee that he requested Kenya Bankers to amalgamate his loans and that took a long time to be done so that after it was subsequently done, the repayment amount was higher than it had been agreed. Further, he had guaranteed a friend a loan and who failed to repay the loan with the consequence that his property used as security in the guarantee transaction was due for sale. The sale of property delayed for want of spousal consent. He issued cheques for KShs. 400, 000.00 to the lender to hold as the sale process progressed but the cheques were deposited before the agreed time. The claimant further told the Committee that he had managed to sell another property and cleared the loan in issue. The Court has considered the evidence and returns that in view of the claimant's account, the respondent thereby had established the 3rd reason or ground for dismissal as was alleged. The Court further returns that throughout the disciplinary hearing the claimant never urged that he was not aware of the respondent's applicable policy as had been alleged in the

3rd reason or ground of termination – and the Court returns that on a balance of probability there is no reason to doubt that the claimant knew about the referred HR circular GHRL 108/2017. The Court returns the respondent was therefore entitled to terminate the contract of employment on that ground. The Court further considers that the claimant's suggestion to retire early at the end of the disciplinary hearing and his writing of the letter dated 12.09.2019 did not affect the respondent's prerogative to exercise disciplinary power and control by making the termination decision.

The Court has considered the claimant's appeal letters dated 05.10.2018; 07.11.2018; and 05.04.2019. The thread that flows through the letters is that was a request for leniency and reconsideration based on previous warning letters. It was not denial of the reasons for termination. In the appeal letter dated 05.10.2018 the claimant stated thus, **"4. For the last 25 years I have served this bank diligently without even stealing a single cent. It is very unfortunate that I have lost my job and all my accrued benefits over issues that I feel were blown out of proportion. In fact, I applied for transfer to another branch and even early retirement."** The Court has considered that record and finds that the claimant in the instant case was not urging a case of harshness of the dismissal on account of the principle of proportionality as such was never pleaded at all. While making that finding the Court finds that even if another employer may not have terminated the claimant upon the established reason or ground, as far as the reason or ground for termination was established, the Court will not fault the respondent's decision to dismiss the claimant. In that regard and as submitted for the claimant, the Court is guided by the holding of the Court of Appeal (Visram, Karanja & Koome, JJ.A) in **Reuben Ikatwa & 17 Others –Versus- Commanding Officer British Army Training Unit Kenya & Another [2017]eKLR** thus, in adjudicating non reasonableness of the employer's conduct, the employment Court 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 (called the reasonable responses test as per **Halsbury's Laws of England, 4th Edition, Vol. 16 (1B) para 642** cited by the Court of Appeal and as earlier cited in **CFC Stanbic Bank Limited –Versus- Danson Mwashako Mwakuwona [2015]eKLR**. Applying that test in the instant case, the Court finds that the respondent was entitled to terminate the claimant's employment upon the established third ground or reasons and more so in view of the claimant's record of service which showed alleged misconduct culminating in the warning letters that were on record.

The 4th issue for determination is whether, as submitted for the claimant that there was no proper statement of response on record because under rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016, a party who wishes to challenge and defend a claim under the rules must file a reply to the memorandum of claim within twenty-one (21) days after service of summons. The claim was filed on 15.07.2019 and served on 22.07.2019. Appearance was entered on 09.08.2019 and the response to the claim filed on 29.10.2019 which was outside the prescribed time of 21 days from service. The Court has perused the Court file and finds that the claimant has not filed the relevant affidavit of service of the summons to enable the Court to put in to perspective the belated objection as raised for the claimant. The Court observes that as submitted for the respondent, on 09.12.2020 the Court ordered by consent of the parties that the response, the respondent's list and copies of documents and witness statement were allowed on record and orders given on 11.12.2019 (declining belated filing of witness statement and documents) were reviewed accordingly. However, in consideration of the claimant's consent allowing the respondent's belated filing of its documents and witness statements, the Court considers that each party will bear own costs of the suit.

In answer to the 5th issue for determination, the Court returns that in view of the findings, the claimant is not entitled to the remedies as prayed for except the certificate of service as the rest of claims and prayers collapse as the termination was not unlawful or unfair.

In conclusion, judgment is hereby entered for the respondent against the claimant for:

- a) The dismissal of the memorandum of claim filed on 15.07.2019.
- b) The respondent to deliver to the claimant the certificate of service within 14 days from the date of this judgment.
- c) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 23RD APRIL, 2021.

BYRAM ONGAYA

JUDGE