



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1109 OF 2014

JOSIAH WANJOHI.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. This suit was filed in the High Court Civil Division on 28th November, 2000 by the claimant who had worked for the Defendant bank for a period of 29 years from 11/3/1970 until 22nd June 1999, when the plaintiff was summarily dismissed from employment.

PLEADINGS BY THE PLAINTIFF

2. The plaintiff averred that the dismissal was unlawful and in breach of his contract of employment and has set out in the plaint particulars of breach, illegality, malice and unreasonableness in that he was never given a hearing and/or adequate hearing to defend himself and an appeal to the defendant to reconsider the dismissal was not heard.

3. That the plaintiff was due to retire in five (5) years and the defendant ought to have given the plaintiff opportunity to retire honourably.

4. That under the defendant Bank's Pension Fund Scheme, the plaintiff would have retired at 50 years old on 1st January, 1999.

5. That the defendant was hell bent to witch-hunt its old staff and get rid of them due to various problems in the Bank. That the plaintiff was one such victim. That the plaintiff was dismissed without notice in an exercise which was malicious and purely meant to save the defendant Bank financial expenses.

6. That the plaintiff had just been appointed to the position of a manager on 10/5/1999 at the Nakuru Branch and was summarily dismissed on 22/6/1999.

7. That the plaintiff had a clear and good record for a period of 29 years and was continuously commended and congratulated for excellent performance but only to be summarily dismissed on 22/6/1999.

8. The plaintiff averred further that had he not been summarily dismissed he was entitled to be paid pension benefits in accordance with the Defendant's Pension Fund Rules Scheme. The plaintiff therefore claims a sum of Kshs. 12,742,461 in special damages made up as follows: -

- (a) 3 months' salary in lieu of notice - Kshs.446,469.00
- (b) Plaintiff own pension contribution – Kshs.404,075.90
- (c) Defendant's 100% pension contribution - Kshs.404,075.90.
- (d) Leave pay for 162 days - Kshs.375,535.00
- (e) Pension benefits under Clause 10 of the Defendant's Pension Fund upon early retirement at age 50 - Kshs.12,12,295,992.00

Less amount paid - Kshs.1,183,686.80.

Total claim Kshs. 12,743,461.

9. The plaintiff averred that the pension payable is to be paid with interest at Bank's rates of 25% per annum from 22nd June, 1999 until full payment.

10. Further the plaintiff claims General damages for breach of contract of the quantum therefore to be determined by the Court and costs of the suit.

PLEADINGS BY THE DEFENDANT

11. In its statement of defence filed on 25th January, 2001, the defendant admits that the plaintiff was employed by the defendant as a clerk in 1970 and he worked continuously for the defendant in various capacity until he became a manager and stopped working in 1999.

12. The defendant pleaded that between the years 1997, and 1999, the plaintiff committed a series of acts of fraud, dishonestly and negligence in the performance of his duties as a result of which the defendant suffered massive financial loss estimated at Kshs.140 million.

13. The Defendant pleaded further that the summary dismissal of the plaintiff was done within the powers of the Defendant as conferred by its rules and regulations which the plaintiff was subject, and was justified therefore.

14. The defendant denied that the summary dismissal was in breach of the contract of employment nor was it unlawful, malicious or unreasonable as alleged by the plaintiff.

15. The defendant denied all the particulars of breach, illegality, malice, high handedness and unreasonableness as set out by the plaintiff under items (i) to (ix) in the plaint and reiterates that the summary dismissal was lawful.

16. The defendant set out particulars of Dishonesty, fraud and/or negligence under paragraph 7 of the Statement of defence that between 1997 and 1999, that the plaintiff in a scheme contrived for purposes of defrauding the defendants, caused the Defendant to incur a loss of Kshs.140, million. That immediately upon discovery of the fraud, the defendant dismissed the plaintiff from its employment.

17. The defendant made three allegations, that on various occasions, the plaintiff as the officer-in-charge of the Bills department, withheld and or deliberately suppressed from the Defendant's accounting system documents relating to transactions which should have been debited to accounts of customers. As a consequence, the Defendant was unable to recover the respective amounts by the debit to the customer's accounts as it should have ordinarily done. The defendant pleaded that the plaintiff did so for personal gain.

18. Secondly, the defendant pleaded that the plaintiff gave credit facilities to customers of the defendant without following the laid down procedures; and without any security and without authority. As a result, thereof, the defendant is unable to recover the monies lent by the plaintiff and has suffered loss and damage.

19. Thirdly, the defendant pleaded that the plaintiff made deliberately false and misleading returns and records of transactions involving the Defendant and third parties as a result of which important transactions in which the Defendant had paid out monies to third parties was concealed and recovery of the monies in question frustrated. The Defendant pleaded that the concealment of the transactions through false returns was deliberate and the Defendant lost substantial sums of money in consequence thereof.

20. The defendant pleads that if the plaintiff has suffered any loss, the same has been occasioned by his own conduct and the defendant is not liable for the same.

21. The defendant denies that the plaintiff is entitled to the sum of Kshs. 12,742,461 or any other sum.

22. The defendant denies all the items claimed by the plaintiff, including 3 months' salary in lieu of notice, pension contribution by the plaintiff and the defendant, and payment in lieu of leave days not taken.

23. The defendant denies that the plaintiff is entitled to payment of pension benefits under Clause 10 of the defendant's Pension Rules. The Defendant avers that the said Rule is not applicable to the plaintiff upon summary dismissal and is only for the benefit of an employee who has retired in accordance with the Rules.

24. The defendant denies that even if the Rule was applicable, the plaintiff would have been entitled to a sum of Kshs. 12,295,992 and denies the sum is payable as claimed or at all.

REPLY BY THE PLAINTIFF

25. The plaintiff filed a reply to the Defendant's defence dated 31/1/2001. The plaintiff joined issue with the Defendant's defence filed on 25/1/2001 and in particular denies all allegations of fraud, dishonesty and negligence contained in paragraph 4 of the Defence.

26. The plaintiff denied the particulars of loss alleged to have been suffered by the Defendant in the sum estimated to be Kshs.140 million on account of alleged fraudulent, dishonest and negligent conducts by the plaintiff.

27. The plaintiff reiterated all particulars of claim as set out in the plaint and in particular that he performed very well between 1970 and 1999 when he worked for the defendant in the position of clerk and ultimately as branch manager and puts the defendant to strict proof of the false allegations the defendant made against him.

28. The plaintiff prays to be awarded special and general damages as per his testimony and pleadings.

29. This suit tells a sorry and checkered story of a matter filed over 21 years ago at the High Court on 28/11/2000. The matter was partly heard by Retired Judge of the Court of Appeal, Waki J. when he was still a judge of the High Court. The matter was also partly heard by justice Waweru at the High Court before it was transferred to the Employment and Labour Relations Court in the year 2014.

30. The matter started *de-novo* before me on 21/5/2015.

TESTIMONY BY PLAINTIFF

31. C.W.1, the plaintiff, Josiah Wanjohi Githiga, testified before me under oath and stated that he relied on the plaint dated 23/11/2000 and filed on 28/11/2000. C.W.1 adduced evidence in line with the averments set out in the plaint that he worked for the defendant back from March, 1970. That he started as a clerk and rose to be manager. That he served the Bank for a period of 29 years and was summarily dismissed on 29/6/1999 while he was Branch Manager at Nakuru.

32. That he got the letter of summary dismissal on 22/6/1999. That he was dismissed for gross negligence in performance of his duties. That the employer alleges vouchers were hidden but the said vouchers had not come from his Branch. That the letter of dismissal does not contain the issue of alleged vouchers and the said letter has no details of the reasons for dismissal. C.W.1 testified that he was not negligent at all but was promoted because of his good work. On 10/5/1999, he was promoted to Credit Manager at Harambee Avenue, Nairobi and was subsequently promoted to full Branch Manager and transferred to Nakuru. That he had gone up the ladder and had no warning letters nor was he ever reprimanded at all.

33. That he joined the Bank in 1970 when he was 21 years old. That he was dismissed when he was 50 years old in 1999. That he appealed the decision to summarily dismiss him including mitigating that he had served the Bank for 29 years but the same was not heeded. C.W.1 produced list of documents in support of his testimony and told the Court that the Bank was at the time experiencing financial difficulties and had embarked on getting rid of old, expensive, staff. That the bank got rid of him to avoid paying his pension as he was eligible to retire at age 50. The bank policy allowed retirement at age 50. The plaintiff also produced a witness statement filed on 10/2/2010 as part of his evidence-in-chief. He adopted the same as his evidence in the matter and same was marked exhibit '1'.

34. C.W.1 testified that he received a show cause letter from the Chief Branch Manager, Harambee Avenue, Mr. Mwangi, in which he was accused of making instructions to hold bulk vouchers for various customers. C.W.1 made explanation in a letter dated 12/6/1999. C.W.1 stated that he was not given opportunity to question the officers serving the alleged department at Nairobi, since he was already at Nakuru.

35. The officers concerned were Mr. Ndunda and Mr. Kariithi. C.W.1 stated that he was not shown the alleged vouchers dating back 1997. That the Bank was just getting rid of him unfairly. C.W.1 stated that on 15/6/1999 he wrote a letter to the Bank asking to be given alleged documents to defend himself. The manager did not provide the vouchers to him nor respond to his request. He then wrote the response on 16/6/1999 denying all allegations made against him.

36. C.W.1 stated that he was never accused or dismissed for fraud and dishonesty. That he only saw this in the statement of defence. C.W.1 stated that no disciplinary hearing was held before he was summarily dismissed. C.W.1 stated that he was paid Kshs. 1,183,686.80 and seeks to be paid special damages set out in his plaint comprising of unpaid pension, notice pay, and payment in lieu of leave days not taken, in the sum of Kshs. 12,742,461. The plaintiff claims in addition payment of general damages for the unlawful summary dismissal.

37. C.W.1 stated that he did not get alternative employment due to the adverse contents in the letter of dismissal. C.W.1 added that it was not easy to get another job at the age of 50 years. That he had 5 more years to date of retirement but could retire early at 50 years.

38. The plaintiff also relied on a supplementary list of documents filed on 10/2/2011. C.W.1 stated that he suffered loss and damages as a result of the unlawful dismissal. That his children were in private universities at the time of dismissal. That he was devastated and continues to suffer to-date. That he had good health but due to stress, he developed diabetes. That he was now struggling. That the reason for the summary dismissal was not valid.

39. The plaintiff faced very close, cross-examination from Mr. Rachuonyo for the Defendant. C.W.1 insisted that the dismissal was out of malice. C.W.1 denied that he was aware of an inspection to be conducted in the Finance Division under the new Managing Director. C.W.1 denied that bulk vouchers discovered in the alleged inspection had to do with him. C.W.1 stated that he was at Nakuru Branch and was not involved in the alleged exercise. C.W.1 admitted that his dismissal was connected to alleged inspection of bulk vouchers, amounting to Kshs. 141,567,000,90. C.W.1 stated that he was not aware if Mr. Ndunda and Mr. Kariithi admitted withholding the vouchers as he was not involved in that exercise. C.W.1 stated that he saw the memos being shown to him for the first time in Court and that nothing was proved against him. C.W.1 stated that in 1997 he was Assistant Manager in Foreign Division which had five Departments. That Accounts Department dealt with bulk vouchers. That he was also in charge of Bills Department; Forex Department; Administration Department and Fixed Deposit Department. That his work was to assist manager in signing vouchers and general administration and correspondence. That Ndunda and Kariithi were his subordinates.

40. C.W.1 denied that bulk vouchers related to letters of credit. That letters of credit are authorized by the manager. C.W.1 stated that he was promoted to Credit Manager in April, 1999 and the Branch Manager was his boss. C.W.1 denied the allegations in the inspection report that he was incompetent, disloyal and grossly negligent. C.W.1 stated that he was not given a chance to defend himself.

41. C.W.1 denied having mishandled letters of credit as was put to him by counsel for the defendant. In particular, he denied any role in deliberate delay in processing the letters of credit to benefit specific customers.

42. Cross-examination of the plaintiff was not concluded and matter was set down for continued hearing on 24th and 28th March, 2016 on priority basis.

43. The matter did not proceed as scheduled and was again placed before me on 8/12/2016 when I set it for hearing on 19th and 20th April, 2017 and directed the Respondent to file witness statements within 21 days.

44. Again the matter was not placed before me for hearing as scheduled and I was subsequently transferred to Kisumu Employment and Labour Relations Court. Hon. Wasilwa, J. took over the matter and directed proceedings to be typed to enable her continue with the hearing of the suit. Proceedings were typed and the matter was set for hearing before Wasilwa, J. on 16/12/2019, but it did not proceed due to absence of the Respondents.

45. The matter was subsequently set down for hearing before Wasilwa, J. on 26/2/2020 when Mr. Macharia held brief for Mr. Machira for the plaintiff and informed the Court that they were ready to proceed with the hearing of the suit. Again the Respondent was absent without explanation. Wasilwa, J. placed the matter for hearing at 12.00 noon on that day. Mr. Machira appeared for the plaintiff and the Respondent was still absent. The Court was informed that the plaintiff was still undergoing cross-examination.

46. Hon. Wasilwa, J. made the following order: -

“In the absence of the Respondent, the claimant’s case is deemed complete and closed. The defence case is also closed. The claimant to file submissions in 30 days and the Respondent to file their submissions in 14 days.”

47. Subsequently, the plaintiff filed his written submissions on 3/11/2020 and the defendant did not file any submissions as directed.

48. It was not until 26th January, 2021 when Mutua, Waweru and Company Advocates filed a Notice of Appointment of Advocates and has not filed any witness statements nor written submissions as had been directed to the defendant on diverse dates mentioned herein.

Determination

49. According to the aforesaid history of the matter, the Court has only the sworn testimony of the plaintiff on record. The Defendant has not adduced any evidence to contradict the extensive testimony set out herein by the plaintiff.

50. That notwithstanding the plaintiff has the onus in terms of section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya to prove his case on a balance of probabilities.

51. This being a matter whose cause of action arose in the year 1999, and was filed in the year 2000, the law applicable to the case is the repealed Employment Act, Cap 226 Laws of Kenya.

52. *Section 17 of the repealed, Cap 226 read: -*

“Any of the following matters may amount to gross misconduct so as to *justify* the summary dismissal of an employee for *lawful cause*, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for dismissal.” (emphasis mine)

53. *The letter of dismissal dated 22/6/1999 read thus: -*

Dismissal

“This letter serves to confirm the Bank’s decision to dismiss you from your employment on account of gross negligence in performance of your duties as the Head of the Foreign Business Division of Harambee Avenue Branch between 1997 and 1999, full particulars of which have been discussed between you and the Chief Branch Manager, Harambee Avenue Branch.

Your dismissal is effective from the date of this letter and arrangements will be made to compute and pay you all your terminal dues less any monies owed to the Bank

Unless we receive proposals from you within the next seven days on how to handle your liabilities to the Bank, these liabilities will start to attract a commercial rate of interest at the expiry of this notice.” (emphasis mine)

54. *From the letter of dismissal, it is clear that the claimant was: -*

(i) dismissed and not summarily dismissed as stated in the statement of defence;

(ii) dismissed for gross negligence and not for commission of fraud and negligence as stated in the statement of defence;

(ii) to be paid all terminal benefits.

(iv) to advise on how to continue paying his loans to the bank.

55. From the Local Leave Register produced by the plaintiff which is not challenged as at 1999, the plaintiff had 157 leave days due and had only taken one (1) leave day on 24/4/1999 up to the time he was dismissed. The plaintiff therefore had according to the Register 156 leave days due as at the time of dismissal.

56. As per the pay slip produced by the plaintiff dated May, 1999, he earned a gross salary of Kshs. 115,495 and his total taxable monthly pay was Kshs. 126,399.00 which included Basic salary, house allowance, telephone, water, Gardener and reduced interest on loans.

57. The pay slip is not in dispute. Indeed, all the documentation produced by the plaintiff has not been challenged, the Defendant having failed to call any witness to refute the credible, and consistent testimony by the claimant on all the matters that he placed before Court to prove his case.

58. The plaintiff has adduced unchallenged evidence that he diligently and in an excellent manner worked for the Defendant for a period of 29 years rising from the position of Clerk, Assistant Manager, Credit Manager to Branch Manager.

59. That throughout that period, the plaintiff had no warning letter nor any letter of reprimand until when he was falsely accused of gross negligence immediately upon being promoted and transferred from Nairobi to Nakuru as a Branch Manager.

60. The plaintiff has tendered clear and credible testimony of his meteoric rise, his brilliant service and the sudden victimization by a new Managing Director who had assumed office some time in 1998.

61. The plaintiff testified that he responded to a Show Cause letter alleging negligent performance of duty and his request for documents to help respond to the same was not responded to and the documents the subject of the false accusations were not provided to him. That he was not given opportunity to appear before a disciplinary meeting to confront his accusers.

62. The plaintiff further testified that the allegations of fraud, dishonesty and loss of funds were first brought out in the pleadings before Court.

63. The Court is satisfied that indeed allegations of loss of money, fraud, dishonesty, and counterclaim were not raised at all in the letter of dismissal.

64. The Court is satisfied that the plaintiff has proved on a balance of probability that the reason given for his dismissal was not proved against the plaintiff by the defendant and so the defendant did not justify the dismissal nor demonstrate the lawfulness of the dismissal in terms of Section 17 of Cap 226 Laws of Kenya (*now repealed*).

65. The Court is satisfied from the unchallenged evidence that the plaintiff was a member of the Defendant's pension fund to which he had contributed money over 29 years and the defendant had also made contributions on his behalf over the period of 29 years. The Court is satisfied that the pension duly earned by the plaintiff was unlawfully withheld by the respondent and the Court awards the plaintiff full payment of his pension as claimed in the plaint.

66. The Court is also satisfied that the plaintiff was owed 156 untaken leave days at the time of his dismissal. The Court therefore awards the plaintiff payment in lieu of leave days not taken as claimed in the plaint.

67. The plaintiff is also awarded 3 months' salary in lieu of notice as prayed as the dismissal was unlawful and unfair.

General damages

68. The Case of **Dr. Ezekiel Nyangoya Okemwa –vs- Kenya Marine and Fisheries Research Institute [2016] eKLR**, per Rika, J. is similar to this case in that the plaintiff was dismissed in the year 2002 before the enactment of the Employment Act, 2007. The law applicable to the case was the repealed Cap 226 of the Laws of Kenya.

69. The Court sitting at Mombasa, awarded the claimant Kshs.20 million in damages for unfair and unlawful termination, diminished employability and in compensation for related violations outlined in the award.

70. In the present case, the plaintiff had served the Defendant faithfully for a period of 29 years only to be shown the door, without notice and without payment of his full pension and terminal benefits on false and unproved allegations. The plaintiff suffered financial embarrassment, developed diabetes due to stress; and suffered loss and damage associated with sudden loss of income and non-payment of pension dues that had accrued over a 29-year period. The Court finds that the plaintiff did not contribute to the unlawful loss of his job. The plaintiff was unable to get alternative employment due to his advanced age. The plaintiff had loans to pay to the defendant and fees to pay for his children in private universities then and suffered embarrassment and pain due to sudden unlawful curtailment of income.

71. The Defendant had the option to retire the plaintiff and pay his pension but did not.

72. The Court has also considered the case of **Pamela Lutta –vs- Mumias Sugar Company [2017] eKLR**. However, the case was determined in terms of the Employment Act, 2007 which is not applicable to the present case.

72. The Court has the common law option of awarding general damages to the plaintiff for the loss and damages occasioned him by the Defendant.

73. Taking all the circumstances of this case, the Court awards the plaintiff Kshs. 5,000,000 in General damages for pain and suffering occasioned him by the defendant in the callous manner it treated him after loyal service of 29 years.

74. In the final analysis, Judgment is entered in favour of the plaintiff against the defendant as follows: -

(a) Kshs. 446,469,00 being 3 months' salary in lieu of notice.

(b) Kshs. 404,075.90 being plaintiff's own pension contribution.

(c) Kshs. 404,075.90 being 100% Defendants pension contribution.

(d) Kshs. 375,535.00 being payment in lieu of leave days' not taken.

(e) Kshs. 12,295,992.00 being pension benefits under clause 10 of the Defendant's Pension Fund less Kshs. 1,183,686.80 already paid.

Total amount due and payable: Kshs. 12,742,461.

(f) Kshs. 5,000,000 being general damages for the loss and damage suffered by the plaintiff.

Total award – Kshs. 17,742,461.

(g) Interest at Court rates from date of judgment till payment in full.

(h) Costs of the suit.

Dated and delivered at Nairobi this 18th day of May, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with ***Order 21 rule 1 of the Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by ***Article 159(2)(d)*** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under ***Article 48*** of the Constitution and the provisions of ***Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Machira & Co. Advocates for the Plaintiff

Mutua Waweru & Co. Advocates for the Defendant

Ekale – Court Assistant.