



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 48 OF 2019

JAMES MOGAKA.....CLAIMANT

VERSUS

KCB BANK KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant vide his Memorandum of Claim dated 29th January 2019 sued KCB Bank Kenya Ltd. He averred that he has been an employee of the Respondent since 1995 when he joined as a clerk and that he got progressively promoted to Manager Card Settlement reporting to the Senior Manager Card Operations of the Respondent. The Claimant averred that the Respondent issued him with a Show Cause Letter dated 21st September 2018 setting out 4 specific charges, which letter he responded to and was later invited to attend a disciplinary hearing set down for 30th October 2018. He averred that he also requested in his response, for the Respondent's documented policy/rules on disciplinary proceedings by a memorandum in writing dated 26th October 2018 but the Respondent refused, neglected and/or failed to avail the vital document in violation of his right to adequately prepare for the said disciplinary hearing. He further averred that the Respondent arbitrarily suspended him by a letter dated 12th September 2018 prior to the said disciplinary hearing, under the purported "Manager's Terms of Service" which were unknown to him. The Claimant averred that the said suspension letter unlawfully reduced his salary by half and considering that the Respondent had granted him loans deductible through check off, and that the reduction of his salary increased the total deductions from his resultant half salary to 90.5% and left him with a mere 9.5% of his salary. Further, that the Respondent crippled his effective participation in the disciplinary proceedings and rendered the whole exercise a sham even before his attendance. He averred that the Respondent had previously asked him vide a Show Cause Letter dated 26th June 2018 to give an explanation on the alleged unsatisfactory rating in the Internal Audit Report dated 31st March 2018. The Claimant averred that he shed light on all the areas of concern vide his response dated 29th June 2018 which then laid the matter to rest but to his surprise, the Respondent's Lumumba Mutonga telephoned him on or around 7th September 2018 and invited him to attend proceedings at the Respondent bank's headquarters regarding the said Audit Report dated 31st March 2018 and ensuing correspondence and to which he obliged. The Claimant averred that he and the said Lumumba then made an agreed report after the said proceedings and again put the matter to rest. He further averred that the functions, transactions and accounts that had issues in the Audit Report dated 31st March 2018 do not fall within the province of the Manager Card Settlement as can be attested by the job description for the said position; the specific measurable responsibilities contained in the performance appraisal tool kit used by the Respondent to evaluate his performance; and the Respondent's organization structure for the Card Operations Unit which lays out the responsibilities of all jobs within the operations of the Respondent. The Claimant averred that he diligently and with loyalty served the Respondent for over 23 years and that the Respondent's attempt to destroy his tried and tested professional career for a 'potential loss' that had not crystalized is speculative and should not be allowed. That the figures of the alleged 'potential loss' as given to him by the Respondent on various occasions have been contradictory and inconsistent and that the upshot of the foregoing is that the termination of his employment was illegal, wrongful and unfair as there was no justifiable reasons for the termination. He prays for the Court to declare that the termination of his employment was unfair and for an order quashing/setting aside the entire disciplinary proceedings. He further prays for reinstatement or for the Respondent to alternatively be compelled to pay him compensation for unfair termination as enumerated in the Claim and for the Certificate of Service to issue. The Claimant filed a witness statement in which he stated that the Respondent purported to terminate his employment by a letter dated 16th November 2019 on the following grounds:

- i. Failure to ensure that reconciliations were done as required.
- ii. Allowing and/or concealing old entries by recycling them in order that they may appear as current items.
- iii. Failure to ensure that transactions were presented for payment to MasterCard in time.
- iv. Failure to take full responsibility for the role he was assigned.
- v. Failure to provide the required leadership to his team.

vi. Incurrence of huge losses by the Bank caused by his acts of omission and commission.

2. The Claimant further stated that at the time of the purported termination of his employment he had filed a complaint before Court in Cause No. 1513 of 2018 challenging the process he was being subjected to but the complaint was marked as overtaken by events by Justice Makau on 28th November 2018. The Claimant averred that he appealed against the termination of his employment by a letter to the Respondent dated 20th November 2018 and that despite pendency of his appeal, the Respondent has unilaterally converted all his existing loans to public interest rates and struck his name off its payroll. The Claimant averred that the said punitive actions by the Respondent are maliciously intended to strip him of his matrimonial home and render him and his young family destitute. The Claimant further states that even if his appeal is *fait accompli*, he has a right to be heard and to exhaust his right of appeal as well as the court process before his loans terms can be varied. He thus seeks the indulgence of this Court to suspend, stay and or defer the actions of the Respondent to unilaterally and draconically vary the interest rate and other terms of his loans until the internal and judicial dispute resolution processes are exhausted. He contends that the Respondent will not suffer any prejudice if the unlawful suspension and proceedings are quashed and that it is in the interest of justice if the prayers sought in the Memorandum of Claim are granted.

3. The Respondent filed a Memorandum of Reply dated 30th November 2020 confirming that it engaged the Claimant via a letter dated 30th December 1994 with effect from 4th January 1995 and that his last designation at the Bank was that of Manager Settlements vide a letter dated 20th January 2016. It averred that the Claimant in his capacity as Manager Settlements was directly responsible for the issues as raised in the Audit Report of 31st March 2018 and that his suspension was necessary to pave way for investigation in the Card Operations Unit. The Respondent averred that it was not satisfied with the explanations provided by the Claimant on the said Audit Report and thus carried out a forensic audit of the Card Operations which resulted to the Forensic Report No. 533 of 2018. The Respondent averred that the said forensic report established that the Claimant and other individuals were responsible for various lapses in the Card Operations Unit resulting in a loss amounting to Kshs. 349,022,112.90 and that it is for this reason that it issued the Claimant with a second Notice to Show Cause seeking his explanations on the results of the forensic audit. The Respondent averred that his response was unsatisfactory and occasioned the disciplinary committee to invite him for a disciplinary hearing. The Respondent further averred that it put the Claimant on half salary upon his suspension as guided by the Respondent's Disciplinary and Grievance Procedures Manual and nevertheless paid him all his dues and other benefits or allowances upon the termination of employment. That it terminated the Claimant's employment based on the establishments and recommendations of the disciplinary committee and through a fair, procedural and lawful process and that the suspension of the Claimant has been overtaken by events by virtue of termination of his employment on 16th November 2018. The Respondent prays for the Claim herein to be dismissed with cost. The Respondent also filed a Witness Statement made by its HR Head of Employee Relations, Robley Ngoje who attached documents in support of the Respondent's case to his Statement. He stated that the Claimant declined to sign the minutes of the disciplinary hearing concluded on 30th October 2018 for reason that he needed time to consult. He further states that the Claimant breached his contract of service when he failed to effectively undertake his responsibility to ensure that the card operations under his supervision were properly managed. He believes the Claimant has therefore no valid claim against the Respondent and notes that the Claimant is currently enjoying ex- staff rates pursuant to the interim orders in force issued by Court on 30th January 2019.

4. The claim was heard by way of *viva voce* evidence and the Claimant adopted his witness statement as his evidence in chief and also produced his bundle of documents which were admitted as his evidence. He stated that termination of his employment was unfair because he should have been given 2 warning letters but never received any warning letter, he never got the one-month salary in lieu of notice as per the contract. The Claimant stated that the other reason is that his termination is contrary to his job description is that while he only received 4 charges, his letter has 6 reasons for the termination. He prays that the Court assists him get compensation for the 23 years he worked for the Bank. The Claimant stated in cross-examination that the potential loss of Card was not his function and that as far as he was aware of, there was no delay and that the 2 warning letters are provided for in the Disciplinary Procedure Manual. He testified that he only came to know about the Grievance Procedure Manual much later and that even though he signed his employment letter which had indicated there being procedure and policy manual, he did not have access to the Policy and only sought for it when the disciplinary process had begun. He denied receiving the minutes of the disciplinary hearing and stated that he was convicted over matter that did not fall under his responsibility.

5. The Respondent's witness, Mr. Robley Ngoje adopted his witness statement as his evidence in chief and further produced his bundle of documents which were admitted as part of the Respondent's documentary evidence. He stated that the meeting of 7th September 2018 was after the forensic department investigated the matter and invited the Claimant to record a statement and clarify some issues and that it is upon this clarification that the bank decided to suspend him on 12th September 2018 pending conclusion of investigations by the bank's forensic department. He testified that upon conclusion of forensic investigations, the report was moved to HR and after being reviewed, it became necessary to re-issue a Notice to Show Cause. He noted that the Claimant did not complain of denial of documents to mount his defence and that he was paid one-month salary in lieu of notice being Kshs. 300,197/- as per the final payment statement and salary in lieu of leave Kshs. 187,590.30.

6. The Respondent's witness stated under cross-examination that the Claimant had previously been terminated from employment in a previous disciplinary matter and later reinstated but the said matter was not before this Court. He explained that the Claimant is not named in the audit report as the nature of the said report does not assign names of employees but highlights and that the action plans therein are assigned to the head of the Unit with the Claimant having been assigned in the Unit under Head of Shared Services. He confirmed there being a difference in the figures given in the suspension letter and notice to show cause and stated they did not issue the Claimant with any warning in this matter but that it is incorrect to say that the Claimant was entitled to two warnings. He further stated that the Claimant was not dismissed but was terminated from employment after being afforded a disciplinary hearing and that the bank felt it was unnecessary to process the appeal filed by the Claimant when he moved to Court. He also confirmed not having the Claimant's bank statement in Court to show that he received his final dues.

7. In re-examination he that the disciplinary proceedings were based on the forensic report which found the figure of Kshs. 340 Million while the earlier audit report had returned a figure of Kshs. 790 Million that could not be explained. He reiterated that the Claimant refused to sign the minutes of the disciplinary hearing when he went to the bank on 16th November 2018 and they could not force him. Further, that the Claimant being the account holder, he has never brought a statement of non-receipt of his dues and neither did he write in relation to the same.

8. Parties were to file submissions and in his submissions, the Claimant submitted that he was unfairly terminated from his employment contrary to Section 45(1) and (2) of the Employment Act which contemplates a termination that is both substantively and procedurally fair. The Claimant submitted that the principle of substantive fairness under Section 43 of the Employment Act requires an employer to prove the reasons for termination, failure of which the termination is deemed to have been unfair as defined under Section 45. He cited the cases of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR** in support of the submission that dismissal or termination must meet the requirements of substantive and procedural fairness. He submitted that the Respondent's witness was a stranger to the proceedings and the disciplinary hearing that preceded the Claimant's termination and did not also give any evidence to prove that he works with the Respondent. The Claimant submitted that the entire testimony of the said witness for the Respondent (RW1) was hearsay as he relied on statements as told by other people who were never called upon to testify before this Honourable Court. That since RW1 did not also meet the criteria for exceptions to the hearsay rule, this Court ought to disregard his testimony in its entirety and make a finding that RW1 was not the Claimant's employer and that his testimony is hearsay and of no probative/evidentiary value in the proceedings. The Claimant relied on the case of **Jane Nyokabi Karungu v Manpower Services (K) Limited [2017] eKLR** where the Court held that it is difficult to test the veracity of what one says he was told by another who is not called to testify. He further submitted that pegging his termination on the Audit Report of 31st March 2018, which made no reference to his name or job position, was terminating his employment for an invalid reason. He submitted that the Respondent's act of giving contradicting figures for the amount of money lost is also a material demonstration that he was terminated for invalid reasons. Further, that the reasons for termination given in the Termination Letter are different from the 5 questions he was invited to answer in the Notice to Show Cause letter dated 21st September 2018. The Claimant submitted that he has hitherto never been charged with any criminal case regarding the alleged potential loss and neither have there been any civil proceedings against him to recover the amount lost, if any. He submitted that he has established in the proceedings before Court that the process adopted by the Respondent in terminating his employment was fundamentally flawed and asserts that the Forensic Report dated 4th September 2018 was prepared solely for the purposes of incriminating him after the Respondent realised he was not mentioned in the Audit Report of 31st March 2018. He implored the Court to take judicial notice of the fact that his relationship with the Respondent had irretrievably broken down at the point he was requesting for the Respondent's documented policy/rule on disciplinary proceedings, seeing that the Respondent received his Appeal but did not stamp it. He further submitted that under the Respondent's Group Disciplinary and Grievance Procedure Manual, he ought to have been issued with two (2) warnings/reprimands and dismissal effected upon the third offence for which a warning/reprimand would have been issued if the three (3) offences were committed within any period of twelve (12) months. That the importance of issuance of a warning prior to termination of employment was considered by this Court in the **Jane Nyokabi Karungu** case (*supra*) and that had the Respondent issued him with the Manual as per his request, he would have raised the issue of warning letters in his Appeal. The Claimant also submitted that since the Respondent failed to tender in evidence the said minutes of the disciplinary hearing, this Court cannot make a finding as to whether or not the disciplinary hearing was fair. The Claimant submitted that the Respondent did not provide proof of payment in the form of a bank statement proving that it paid the Claimant his final dues as pleaded. The Claimant submitted that this burden of proof does not shift from the Respondent to him so that he now has to prove he was not paid i.e. there is no burden of disprove and that this being a court of law, it cannot second guess whether or not the payments were made. He cited Section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides that: "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." That this provision embodies the doctrine of spoliation or suppression of evidence which imputes that it is generally the duty of a party to lead the best evidence in their possession, which could throw light on the issue in controversy and where such material is withheld, the Court may draw adverse inference citing **Woodroffe's Law of Evidence, 9th Edition at Page 811-816**. The Claimant submitted that this Court is thus mandated by law to make an adverse finding against the Respondent to the effect that if the Respondent's bank statement was to be availed, it would be adverse to the Respondent's case and that in other words, the proof of payment from the Respondent to the Claimant does not exist.

9. He further submitted that an order of reinstatement would not be feasible as it is apparent that his relationship with the Respondent has irretrievably broken down and that granting prayers 1, 2, 4, 5 and 6 in the Memorandum of Claim would be the appropriate remedy in the circumstances. The Claimant submitted that he prayed for severance pay instead of service pay and that this Court has the power to award service pay as was held in **Alice M'mboga Ogolla v Nyayo Tea Zones Development Authority [2017] eKLR**.

10. The Respondent submitted that the Claimant never raised an objection to RW1 testifying on behalf of the Respondent before the hearing and or during the hearing and that neither did he object to adoption of the respective statement and documents. Further, that the Claimant cannot thus purport that the testimony and evidence produced by RW1 is not admissible before this Court. That since the Claimant did not also file a reply to the Respondent's Memorandum of Response to raise any issue with the Respondent's witness statement or the averments therein, he cannot raise an objection at this stage per **Nicholas Otieno Aloo v G4S Security Services (K) Limited [2016] eKLR**. It submitted that RW1 is an employee of the Respondent Bank and that his testimony which made reference to documents kept by the Respondent as records is admissible before this Court. The Respondent submitted that it has duly met the threshold of a substantial and procedural fair termination of employment in this matter as required under Sections 43(2) and 41 of the Employment Act. It cited the case of **Wilson Reuben Sibiya v Kenya National Examinations Council [2013] eKLR** and submitted that it had substantive reasons for the Claimant's termination. It also relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd [2013] eKLR** to argue that it afforded the Claimant procedural fairness. The Respondent averred that it is evident that the issues raised in the Audit Report as at 31st March 2018 were under the responsibility of the Claimant in his capacity as Manager Card Settlements and that the Forensic Report No. 533 of 2018 also revealed the Claimant was aware of the anomalies and the concealment of long outstanding items and the non-extraction of un-presented items. It cited an excerpt of the Forensic Report at page 90 of the Respondent's Bundle of Documents as follows:

"in our considered view therefore the said function of overseeing Card Settlement lies squarely under his docket and he cannot run away from that fact...this position has also been confirmed by Azu Ogola, The HR Business Partner that the reconciliation team reports to James Omoke"

11. The Respondent further relied on the case of **Miriam Siwa v Kenya Post Office Savings Bank Limited [2014] eKLR** where the Court emphasised the importance of the claimant's supervisory role and stated that she ought to have detected and stopped the crime and the huge loss occasioned to the respondent. The Court in that case went on to hold that the respondent had established substantive reasons for the claimant's termination. The Respondent submitted that the Court thus cannot substitute its decision with the findings of the disciplinary committee as stated in **Republic v Kenyatta University Ex-Parte Gladys Nyambura Njogu [2011] eKLR**. The Respondent submitted that it suspended the Claimant as per Clause 2.2.3.2.1 of the Respondent's Disciplinary and Grievance Procedures Manual and placed the Claimant on half monthly salary. The Respondent submitted that the issue of warnings to an offending employee is among the actions a

disciplinary committee can take and that the Disciplinary committee was not required to apply a sequential application to the actions. Further, that the Forensic Report No. 533 of 2018 recommended disciplinary action for the Claimant and other individuals in the Card Operations Unit. As to whether the Claimant is entitled to the reliefs sought in his Claim, the Respondent submitted that the burden of proving payment of the Claimant's terminal dues has been discharged by way of evidence at page 100 of the Respondent's Bundle of Documents and that as under Section 11 of the Evidence Act Cap 80 Laws of Kenya, the onus of proof of non-payment ought to thus lie with the Claimant but who has failed to demonstrate the same. It further submitted that the Claimant is not entitled to severance pay which is provided under Section 40 of the Employment Act 2007 as payment for redundancy and which the Claimant confirmed in his testimony that his services were not terminated on account of redundancy. The Respondent submitted that it is trite law that parties are bound by their pleadings and can only be granted relief sought in their pleadings and that the Claimant cannot therefore claim to have pleaded service pay instead of severance pay and that in any event, the Claimant is not entitled to service pay by virtue of Section 35(6) of the Employment Act 2007 since he is a member of the National Social Security Fund. The Respondent submitted that the Claimant is not entitled to compensation as prayed or at all as he was fairly terminated as demonstrated herein above and prays that the Claimant's case be dismissed with costs to the Respondent.

12. The Claimant's claim initially related to his suspension on account of alleged misdeeds as enumerated in the Respondent's audit report of 31st March 2018. The Claimant was subjected to a disciplinary process where he was asked to show cause and subsequently was removed from the Respondent's payroll and his interest rates converted to commercial rates. The Respondent on its part asserts the Claimant was suspended in accordance with its internal policies and procedures manual and that the Claimant was asked to show cause, his response was considered and he was called to a disciplinary meeting where he was heard and as a result the Respondent terminated his services. The Claimant asserts that the Respondent having failed to show there was a hearing is not absolved from the inference that he was not properly terminated. Under Section 41 of the Employment Act, an employee is guaranteed the safeguards of a fair hearing before termination for actions such as those the Claimant was accused of. In this case, the Respondent asserts it applied its policies and procedures to come to the decision it made. Whereas the Respondent asserts it carried out a disciplinary hearing, there is no proof of the same. Under Section 43 of the Employment Act, the burden shifts to the employer to show there was fairness in the termination where circumstances such as obtain in this case emerge. The Respondent having failed to provide this crucial evidence, it is my finding that the termination of the Claimant was unfair. The Claimant was terminated in 2018 and the remedy of reinstatement though available is not appropriate as a lot of bad blood has developed between the parties. In the premises I will instead order maximum compensation in terms of Section 49 of the Employment Act and order that the termination of the Claimant be reduced to normal termination with no loss of benefits. The compensation is to be computed on the basis of his salary as per his job grade at the time of termination. The Claimant is to continue enjoying the preferential rates until he defaults on the loan repayments. He may also opt to offset the compensation he has received against his outstanding loans with the Respondent. In the final analysis, he is entitled to the following reliefs

- a. The termination of the Claimant's employment be reduced to normal termination.
- b. The Claimant to receive 12 months salary as compensation.
- c. Costs of the suit
- d. Interest at court rates on the sum in (b) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE