



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.5 OF 2020

(Before D.K.N.Marete)

ERIC GITONGA KIRIMI.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

This matter was originated by an Amended Memorandum of Claim amended on 30th April, 2021. The issue in dispute is therein cited as;

“Unfair and wrongful dismissal from service”

The Respondents in a Respondent’s Memorandum of Claim dated 11th September, 2020 denies the claim and prays that the same be dismissed with costs.

The Claimant’s case is that the parties herein are governed by a Human Resources Manual that guides appointment, discipline, suspension and dismissal of employees by the respondent.

It is the Claimant’s further case that he was appointed as a clerical officer by the Respondent on 19th January, 2009 at a salary of Kshs.36,758.00 per month.

The Claimant’s other case is that he worked as such and as at the time of termination of his services on 10th April, 2017 he earned Kshs.135,590.00.

The termination of employment was vide a letter dated 10th April, 2017.

The Claimant’s further case is that he was invited to defend himself on 27th March, 2017 but could not attend as he was in police custody.

It is his case that his stint of employment was blotless and he had not been served with a warning letter. Again, the claimant further states that there were no reasons availed by the Respondent for terminating his services and the laid down procedure was not followed by the Respondent in terminating his services.

He claims thus;

a) Unpaid salary during the period of suspension to when

<i>the claimant was dismissed (135,590 x 36 months)</i>	<i>- Kshs.4,881,240/=</i>
<i>b) Damages for unfair termination (135,590 x 12)</i>	<i><u>-Kshs.1,627,080/=</u></i>
Total	<u>-Kshs,6,508,320/=</u>

He prays thus;

- a) Kshs.6,508,320/= as terminal dues for the claimant.*
- b) Compensation for wrongful dismissal*
- c) Interest on (a) and (b) above.*
- d) Costs of this dispute.*

The Respondent's case is an admission of the basis of the claim per paragraph 4 and 5 of the defence.

The Respondent's other case is that at all times the claimant was expected to handle diligently candidly and with integrity in the best interest of the employer. Contrary to this and his allegations, he failed to so execute his duties as follows;

- i) The Claimant in his role as a cashier at the Bank's Meru Branch incurred a cash shortage of Kshs.240,000/- at the close of business on 7th March 2017.*
- ii) On the 8th of March 2017 Meru Branch reported various fraudulent transaction totalling to Kshs.1,660,000 through the Branch's M-Pesa Super Agency Float Account through the Claimant's user ID.*
- iii) On 9th March 2017, a customer reported that he had given the claimant Kshs.130,000/- on 7th March 2017 to deposit into account 010861131323000 in the name of Silor Healthcare Services but the claimant failed to deposit the said funds or declare the same which was in breach of the Bank's cash Handling Procedures.*

It is the Respondent's further case that when the Claimant was confronted with these allegations, he absconded duty on the pretence of going to look for the cash in issue. He was consequently suspended by letter dated 8th March, 2017 with a view to conducting investigations into the matter. The claimant was served with this letter on 22nd instant but declined to acknowledge receipt by endorsement of the signature.

The Respondent further case is that investigations were undertaken and it was established that the claimant was accountable of stealing Kshs.2,032,400.00. He was summoned to disciplinary proceedings by a letter dated 20th March, 2017 which he declined to acknowledge.

He *in toto* failed to attend disciplinary proceedings but this proceeded on 27th March, 2017 with a recommendation for summary dismissal of the claimant. The termination was therefore lawful in accordance with the employment contract.

The Respondent's further case is that subsequently the claimant handed over and was paid all his terminal benefits vide April 2017 payroll as follows;

- i) Claimant half month's salary while he was on suspension as per the Respondent's policies and procedure.*
- ii) Salary in lieu of leave*

iii) Arrears basic salary for unionizable staff were paid vide the April 2017 payroll.

The matter came to court variously until the 10th December, 2020 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether there termination of employment of the claimant was wrongful, unfair and unlawful?
2. Whether the Claimant is entitled to reliefs sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of employment of the claimant was wrongful, unfair and unlawful. The claimant did not file any written submissions in support of his case. Indeed, he was a remarkably unwilling to prosecute his case in the final days.

The Respondent in their written submissions dated 30th April, 2021 elaborately spells out their case of lawful termination of employment. This is illustrated by an analysis of the grounds for summary dismissal of the claimant as follows;

Under Section 45(2) of the Employment Act termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

They further seek to justify the termination on the basis of substantive and procedural fairness as enunciated by Section 41 of the Employment Act, 2007 which provides thus:

"41(1). Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

The Respondent further sought to support their case by relying on the authority of National Union of Mineworkers, Francis Sithole and Another v Commissioner for Mediation and Arbitration & Timothy Boyce Case No.2910/08 Justice Molahlehi of the South African Labour Court held that an employer does not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that he should so on a balance of probability. He further observed that where a tribunal is considering the employers complaint against an employee the *"credibility of witnesses and probability or improbability of what they say should not be regarded as separate enquiries to be considered piece meal. They are part of the single investigation where questions of demeanour and impression are measured against content of the witnesses evidence where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities that at the end of the day one can say with conviction that one version is more probable and should be accepted, not that therefore the other version is false and may be rejected with safety"*

In this case, the Claimant failed to carry out his duties diligently and in the interest of the Respondent and as follows;

i) He incurred a cash difference shortage of Kshs.240,000/= on 7th March 2017.

ii) On the same date the branch reported another difference in their Mpesa Super Agency Float account 01A750001684437 which had a shortage of Kshs.1,600,000/- occasioned by the Claimant.

iii) A customer reported that he had given the Claimant Kshs.130,000/= to deposit into his account but the same was not done.

In the case of **Co-operative Bank of Kenya Limited v Banking Insurance and Finance Union (K) (2017) eKLR** where the Court of Appeal observed thus;

“We have considered the record, submissions by the respective parties as well as the law. As correctly observed by the trial court under Section 47(5) of the Employment Act the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing. Consequently, as noted by this court in Iyego Farmers Co-operative Sacco vs Kenya Union of Commercial Food and Allied Workers (2015)eKLR, whenever an issue of wrongful or unfair dismissal arises, the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.

17. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing which is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. See this court’s decision in Samsung Electronics East Africa Ltd vs K.M (2017)eKLR. It is that right that is delineated under Section 41 of the Employment Act which stipulates...”

The Respondent in her written submissions dated 30th April, 2021 further submits a case of lawful termination. This is by a reliance on Section 44(1) of the Employment Act No.11 of the 2007 defines summary dismissal in the following terms;

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.”

Subsection (3) of the Section further states;

“Subject to the provisions of this Act an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

iv) He incurred a cash difference shortage of Kshs.240,000/= on 7th March 2017.

v) On the same date the branch reported another difference in their Mpesa Super Agency Float account 01A750001684437 which had a shortage of Kshs.1,600,000/- occasioned by the Claimant.

vi) A customer reported that he had given the Claimant Kshs.130,000/= to deposit into his account but the same was not done.

This case tilts in favour of the Respondent. She is clearly and deniably demonstrated a case of lawful termination of employment. This is by the elaborate statements of the default of the claimant in the performance of his duties and also his massive misconduct leading to enormous loss in the circumstances.

The Respondent also demonstrates a case of compliance with section 41 and 43 of the Employment Act, 2007. This was by satiating the prerequisite of procedural and substantive justice. The claimant was informed of the reason for termination and subjected to a disciplinary process. He ignored the same. A

case of lawful termination of employment therefore arises. This answers the 1st issue for determination.

The 2nd issue for determination is whether the Claimant is entitled to reliefs sought. He is not. Having lost on a case of unlawful termination of employment, he is disentitled to the relief sought.

The 3rd issue for determination is who bears the costs of the claim. Curiously, the claimant's disinterest in this cause and its prosecution is evident. Why then did he bring the matter to court?

The claimant was always breast of the facts and circumstances of this case. He was always aware of his contribution to his termination of employment. Why then did he choose to indulge everybody in his mess and adventure? I award costs to the respondent. This is deserving.

I am therefore inclined to dismiss the claim with costs to the Respondent.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mrs.Mutegi instructed by Mutegi Mugambi & Company Advocates for the Claimant.
2. Miss Aboki instructed by Gitau & Kaburu Advocates for the Respondent.