



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 400 OF 2014

ATHUMANI MWAZIKWA MWARAMSHI.....CLAIMANT

- VERSUS -

KENYA COMMERCIAL BANK LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

JUDGMENT

The claimant filed the statement of claim on 27.08.2014 through Aboubakar Mwanakitina & Company Advocates. The claimant's case is as follows. He was employed by the respondent on 18.01.1995 as a subordinate staff and worked as such until 07.09.2011 when the respondent terminated his employment. The claimant alleges that the termination was wrong and illegal upon the following grounds:

- a) The termination letter of 07.09.2011 does not state the particulars of the gross misconduct.
- b) He suspects that the termination was based on a previous allegation that he had stolen money from the respondent which allegation was not investigated and proved.
- c) He was not charged with any offence related to alleged stealing.
- d) There was no factual or legal basis for the termination at a time he was 49 years of age.

The claimant prayed for judgment against the respondent for:

- a) Reinstatement to his employment.
- b) Salary arrears for the period from the date the claimant was terminated to the date he is reinstated.
- c) In alternative, damages which include the claimant's salary and benefits from the date of termination to the date he would have retired in 2022 which amount to Kshs. 5, 879, 400.00.
- d) All retirement benefits that the claimant would have been entitled to had he worked until retirement.
- e) Costs of the claim.
- f) Any other relief that the Honourable Court shall deem just to grant.

The respondent filed on 16.09.2014 the reply to the memorandum of claim and through Kithi & Company Advocate. The respondent admitted that it employed the claimant by the letter dated 18.01.1995. It was implied in the contract of service that the claimant would serve with due diligence, honestly and with integrity and desist from any form of theft, fraud or conspiracy. The respondent states that in January to September 2011 the claimant was deployed to serve at the respondent's Treasury Square Branch, Mombasa when he was involved in a series of theft where the respondent lost substantial amount of money. Consequently, the claimant's employment was terminated by the letter dated 07.09.2011. The respondent denies that the termination was wrongful or unfair because the reason was valid and the due procedure was followed. The termination on 07.09.2011 was by the respondent giving the claimant one month's salary in lieu of notice. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case. The respondent's 1st witness (RW1) was the Manager Service Quality and Compliance (who served at the same work station as the claimant) one Abdi Mwanaima Wasai. The respondent's 2nd witness (RW2) was one Felix Oduor, the

respondent's Forensic Investigator at the time. The parties filed their respective submissions. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination the Court returns that there is no dispute that the respondent employed the claimant as a subordinate staff by the letter dated 18.01.1995.

To answer the **2nd issue** for determination the Court returns that there is no dispute that the employment was terminated by the letter dated 07.09.2011. The termination was on account of gross misconduct details of which were well within the claimant's knowledge.

To answer the **3rd issue** for determination the Court finds that the termination was not unfair. The claimant has pleaded that suspects that the termination was based on a previous allegation that he had stolen money from the respondent which allegation was not investigated and proved. In his testimony he stated that he was shown a CCTV footage about the events of the lost money. He further stated that he knew he had a right of appeal but he did not recall writing an appeal. RW2 testified that on 10.05.2011 he received a telephone call from the Treasury Square Branch about the incident of 09.05.2011. It was about loss of USD 100 notes at the cash handling department. RW2 visited the Branch and the claimant was one of the implicated members of staff. RW2 further testified that he reviewed the cash handling area covered by the CCTV and the claimant was interviewed but he denied involvement in the loss of the 14 pieces of USD notes. However, the CCTV footage reviewed of events of 09.05.2017 showed that from 1720Hrs to 1920 Hrs there were clear events that at 1728Hrs the claimant and his supervisor were at the cash handling area. At 1728Hrs the claimant in the process of bundling notes picked some notes at random and placed them behind the sealing machine. Later the footage showed the claimant picking the notes he had placed behind the sealing machine and throwing them in the dust bin below his desk. RW2 testified that the claimant and managers came and loaded the cash at the main vault and by 1754 Hrs they had finished doing so and as seen on the CCTV footage, the claimant is seen coming back straight to the dust bin, picked the pieces and left.

The Court has considered the evidence and returns that the respondent has established the validity of the reasons that justified the termination as envisaged in sections 43 and 45 as read with section 47(5) of the Employment Act, 2007. By his own pleading and evidence, the claimant was shown the CCTV footage and he knew about the details of the circumstances prior to the termination. The evidence for both parties also showed that the claimant had previous record of warnings about lost cash and in view of those circumstances the Court finds that the respondent was entitled to terminate the contract of service, albeit, giving the claimant a softer landing under which he was paid one month in lieu of termination notice. In any event, in view of the gross misconduct, the respondent would otherwise be entitled to terminate with a shorter notice than the contractual notice and per section 44 (1) of the Act.

To answer the **4th issue**, the Court finds that the claimant is not entitled to the remedies as prayed for. He testified that he was not interested in a reinstatement order. He further has failed to attribute to the termination or other claimant's conduct as diminishing his capacity to mitigate his situation by finding alternative gainful employment. His claims for lost future earnings will collapse as unjustified.

In conclusion judgment is hereby entered for the respondent for dismissal of the suit with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16TH JULY, 2021.

BYRAM ONGAYA

JUDGE