



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 935 OF 2016**

**PATRICK KAMAU MBUGUA.....CLAIMANT**

**VERSUS**

**EQUITY BANK LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> July, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 09.12.2016 through Mwaniki Gitahi & Partners Advocates. The amended memorandum of claim was filed on 22.01.2020 through Adagi & Associates Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant was unlawfully, wrongfully and unfairly terminated.
- b. Revocation of the termination letter dated 10.10.2016 and reinstatement of the claimant to the position of Senior Relationship Credit Officer that he held as at termination or any other equivalent or higher position.
- c. Terminal dues of Kshs. 883, 839.00 being compensation for unfair termination 64, 550.00 x 12 Kshs. 774, 600.00; pay in lieu of notice of termination Kshs. 64, 550.00; and unpaid 18 leave days Kshs. 44, 689.00.
- d. Interest at Court rates.
- e. Issuance of a certificate of service.
- f. Costs of the claim.
- g. Any further or other relief or entitlement which the Honourable Court deems just to grant.

The respondent filed the reply to the memorandum of claim on 01.02.2017 through Mwangi Njenga & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case together with his witness (CW2) one Patrick Ndahi Ramadhan, the customer mentioned in the allegations against the claimant by the respondent. The respondent opted not to call a witness. Counsel for the respondent submitted at the hearing that the claim and prayer for certificate of service and leave days were not in dispute and they are granted. The Court finds that the respondent will pay the claimant **Kshs. 44, 689.00** for the 18 leave days as claimed.

The parties are in agreement that they were in a contract of service. The claimant was employed by the respondent by the letter of appointment dated 10.03.2010. The claimant was promoted and earned salary reviews in his favour over the period of service. He served for about 7 years.

The claimant received the letter to show cause dated 15.09.2016. It was alleged that the claimant was responsible for irregularities in the loan appraisal and valuation of security for customer account No. 046xxxxxxxx details which were stated to be in the claimant's knowledge. The irregularities were allegedly evidenced by the following matters:

- a. Two separate valuation assessment reports on the security with contradicting information.
- b. The alleged yard for valuation were different from the photos.

c. The motor vehicle used as security did not have an original number mainly engine number.

d. Provision of misleading information to BCC and Head Office Credit Committee leading to disbursement of micro loan in the sum of Kshs. 700, 000.00.

The claimant responded by his letter dated 17.09.2016 as follows:

a. The claimant noted a disclaimer in the first evaluation report that the chassis number was not visible due to rust and corrosion. The claimant raised the issue with the credit manager and who ordered the motor vehicle be re-assessed and therefore the second assessment report was made per order of the credit manager and not the claimant's decision.

b. The claimant had not noted the differences in the yard the assessment was done because he had not visited the yard physically both on the 1<sup>st</sup> and 2<sup>nd</sup> valuation.

c. The claimant noted from the valuation report that that the front number plates were not original as per photographs presented. He went ahead and confirmed the other details of the motor vehicle mainly the engine number and chassis number as tallying. The front number plate was also tallying with the back number plate and which from the photos was original. The chairperson of BCC being a senior member of management had also sent for the valuation and had confirmed it was okay and the issue had not been raised as a disclaimer.

d. He denied giving misleading information to BCC and HOCC leading to disbursement of Kshs. 700, 000.00. The client was known to majority of the branch members He also visited the business and home and provided all the information he gathered and even attached the relevant photos. He obtained the account turnover from the finacle system. The information he presented to the BCC on security was correct to the best of his knowledge and the chairman of BCC knew the client well and the claimant gave no contradictory information to that known by the chairman. The customer was a repeat borrower having previously borrowed Kshs. 500, 000.00 and Kshs. 1, 100, 000.00 respectively.

e. The claimant had worked round the clock beyond call of duty to ensure that the loan was cleared. He had worked with the security team to have the vehicle recovered and cooperated with the security team showing them the customer's house, business premises and making reports to the DCI. He also got informers to smoke out the customer from the hideout. The claimant then stated that he regretted his actions and the same would not repeat.

The claimant was invited for a disciplinary hearing by the letter dated 03.10.2016 and the hearing was held on 05.10.2016. The claimant was entitled to attend accompanied by his lawyer or fellow employee. He was subsequently terminated upon the allegations as levelled and as per the letter of termination of service dated 10.10.2016.

The claimant has pleaded that the termination was wrongful, illegal and unfair because the reason for termination was not justified and valid. He states that his service was exemplary and clean as he worked diligently to market the respondent's loans and he monitored loan repayment to ensure growth of the loan book. Further, the bank never lost any shilling in the said transaction but made a profit of Kshs. 106, 556.00 as interest and a further profit of Kshs. 23, 100.00 as commission for the said transaction.

There is no dispute that the respondent complied with and accorded the claimant due procedure of a notice and a hearing as provided for in section 41 of the Employment Act, 2007. The dispute is whether the reason for termination was valid.

The burden to show that the reason was valid as at the time of termination and it justified the termination was vested upon the respondent as per sections 43 and 47(5) respectively, of the Act. The record is that the respondent failed to call a witness in that regard and the burden has not been discharged at all. The claimant's evidence is that he exercised due diligence throughout the transaction and his response as per his letter replying the letter to show cause has not been rebutted by the respondent by way of the relevant evidence. The claimant's witness CW testified and confirmed that the loan in issue had been fully repaid. The Court has considered the handwritten record of the disciplinary hearing as exhibited for the respondent and finds that the claimant repeated the account as given in his letter replying the respondent's letter to show cause. In such circumstances and in absence of the respondent's evidence to establish the validity and justification of the reasons for termination, the reasons are found unjustified and invalid as at the time of termination. The Court finds that the termination was unfair.

The Court has considered the factors in section 49 of the Employment Act, 2007. The claimant had served for over six complete years with a clean record. He desired to continue in employment. The aggravating factor is that the respondent terminated the claimant despite the claimant's effort to deliver and to ensure that the loan was repaid. The Court further considers that the claimant partially contributed to his termination when he stated in his letter replying the letter to show cause that he regretted his actions thereby creating a perception that he had failed on his duties. Taking all the circumstances into account, the claimant is awarded 6 months for the unfair termination at Kshs.64, 550.00 per month making **Kshs.387, 300.00**. The Court further finds that the termination was unfair and abrupt and the claimant is awarded **Kshs. 64, 550.00** being pay in lieu of the contractual one-month termination notice. The claimant has succeeded in his claims and will be paid costs of the suit.

The termination letter was dated 10.10.2016 and it is clear to the Court that the three years of limitation for award of reinstatement under section 12 of the Employment and Labour Relations Court Act, 2011 have since lapsed and the Court may not grant reinstatement. In any event, the Court has considered the sensitive nature of the banking business and all the circumstances and returns that there is no exceptional circumstance established that would justify the grant of an order of reinstatement.

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

1. The declaration that the termination of the claimant's contract of service by the respondent was wrongful, unfair and unlawfully.

2. The respondent to pay the claimant a sum of **Kshs.496, 539.00** (less PAYE) by 01.09.2021 failing interest to be payable thereon at Court rates from the date of this judgment until full payment.

3. The respondent to deliver the claimant's certificate of service in 30 days from the date of this judgment.

4. The respondent to pay the claimant's costs of the suit.

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

**BYRAM ONGAYA**

**JUDGE**