



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO 2440 OF 2017**

**MARY WAHU KAMAU.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA.....RESPONDENT**

**JUDGMENT**

1. The claim is based on the contract of service between the parties to this suit which was terminated on 15<sup>th</sup> April 2015. The Claimant challenges the fairness of the decision to terminate the said contract. Hence, she prays for inter alia, reinstatement to her position in the Respondent organization.
2. The Respondent disputes the claim. It is the Respondent's prayer that the claim be dismissed with costs. As well the Respondent prays that its Counter Claim and Set Off in the cause be allowed.
3. The Claimant filed her Statement of Claim on 14<sup>th</sup> December 2017. In it she asserts that she was first employed by the Respondent on 1<sup>st</sup> November 2013 as a Direct Sales Representative. The contract was for a fixed term of one year and was to terminate on 31<sup>st</sup> October 2014.
4. However, midstream on 17<sup>th</sup> December 2013, the Respondent issued the Claimant with a fresh appointment as a Micro Banker but this time on permanent and pensionable basis. This contract was expressed to take effect as from 2<sup>nd</sup> January 2014.
5. After serving her probation period of approximately six months, the Claimant was confirmed into her new position on 30<sup>th</sup> July 2014. At this point her salary was Ksh. 62,743/= plus house allowance of Ksh. 6,700/=.
6. The Claimant pleads that sometime in April 2015, she was handed a letter dated 8<sup>th</sup> April 2015 purporting to reclassify her position from that of subordinate staff to management. Her consolidated salary was expressed as Ksh. 71,855/= per month.
7. The Claimant pleads that she rejected these changes as they were phantom. According to her apart from the purported reclassification, her entitlements at the bank remained the same.
8. The Claimant therefore believes and she pleads that the shift in positions was ill motivated. In her view, it was aimed at removing her from a unionisable position at the bank in order to deprive her of her entitlements and protections from the Collective Bargaining Agreement (CBA) then in force.
9. Shortly after her shift to the management position, the Claimant was terminated from her employment. This was by a letter dated 15<sup>th</sup> April 2015. The termination was allegedly on grounds of unacceptable performance on the Claimant's part.
10. The Claimant asserts that prior to this termination she was not notified of the intended termination. That she was not afforded a hearing as is required under the Employment Act. That the Respondent failed to adhere to the disciplinary procedure set out in the CBA as she was terminated before getting at least two warnings. That the CBA did not recognize unacceptable performance as a ground for gross misconduct to support summary termination.
11. The Claimant also pleads that she was not subjected to any performance improvement plan before she was laid off. That this was in contravention of the Respondent's own policy on handling performance issues.
12. She pleads that her constitutional rights to fair administrative process and protection against discrimination were violated. She asserts that the Respondent violated provisions of the Employment Act on fair discharge from employment.

13. Against this background, the Claimant prays that the court:-

- a) Declares her termination as unfair and unlawful.
- b) Orders that she be reinstated to her position at the bank without loss of benefits.
- c) Orders compensation for her for wrongful termination equivalent to her gross salary for 12 months.
- d) Grants her interest on the award and costs of the claim.

14. The Respondent filed a Memorandum of Reply, Counter Claim and Set Off. By it, the Respondent disputes most of the issues averred by the Claimant.

15. In respect of the reclassification of roles, the Respondent asserts that it was undergoing some reorganization that required that staff roles be reviewed. That this issue was discussed with all staff including the Claimant. That it was only after this that the reclassification was done. That the Claimant took up her new position without raising any objection and actually served in it. Therefore, by her conduct, she had acceded to this new arrangement. That the reclassification was without ill motive but in response to the needs of the Respondent.

16. In response to the fact of termination, the Respondent asserts that the Claimant was terminated after being evaluated on her performance. That this was based on the Respondent's staff evaluation policy outside the CBA. That as the Claimant was no longer in the subordinate workforce of the Respondent but as part of its management, her human resource issues were handled without reference to the CBA but on the basis of the bank's policies.

17. It was the Respondent's case that the Claimant's performance was found to be unacceptable. That the evaluation was done based on an objective scaling system which all bank staff were aware of and had access to. That the decision to terminate her was after the Claimant had been given opportunity to improve through constant consultations with her line managers. That the Respondent had the right under the evaluation policy to terminate employees whose performance was marked as unacceptable.

18. That the Claimant acknowledged her poor performance, accepted her discharge and collected her dues only to revisit the issue several months down the line culminating in the institution of the current proceedings. The Respondent asks that the claim be dismissed with costs.

19. The Respondent also filed a Counter Claim and Set Off. It asserts that the Claimant took a staff facility of Ksh. 600,000/=. That this facility was still outstanding at the time the Claimant was terminated and is in arrears in the sum of Ksh. 1,574,994.97. That it continues to attract interest at bank rates till full payment.

20. The Respondent counter claims for this amount. In the alternative, the Respondent pleads a set off in the event the court awards the Claimant any sums in damages.

21. At the hearing the parties adopted their respective witness statements and copies of documents filed as their evidence. In addition they tendered oral evidence. At the close of the hearing, parties filed written submissions.

22. The critical issues for determination are the following:-

- a) Whether the Claimant was a unionizable employee or was part of the Respondent's management when she was terminated.
- b) Whether the Claimant's termination was unfair and unjust in the circumstances.
- c) Whether the Claimant is entitled to the remedies sought in the claim.
- d) Whether the Claimant is indebted to the Respondent in the sum of Ksh. 1,574,994.97 as at the date of filing the reply to the claim and whether the amount continues to attract interest at bank rates.
- e) Whether the Respondent is entitled to the prayers sought in the Counter Claim and Set Off.

23. In respect of the 1<sup>st</sup> issue, the evidence on record shows that the Claimant was on 30<sup>th</sup> July 2014 confirmed in employment as a Micro Banker, a position that neither party disputes was clerical. At this level both parties accede to the position taken by the Claimant that she was a unionisable staff.

24. On 8<sup>th</sup> April 2015, the Respondent moved the Claimant from the clerical position to management. This was through what the Respondent described as reclassification of roles.

25. However, it is apparent from the letter dated 8<sup>th</sup> April 2015 and as submitted by the Claimant's counsel that this reclassification did not result in any change in the job title of the Claimant. At least this is not communicated in the letter.

26. Again, the salary of the Claimant in this transited position is stated to be Ksh. 71,885/=. This is the same salary as is exhibited in the Claimant's pay slip at page 21 of the Claimant's documents. The pay slip was for 24<sup>th</sup> March 2015. It appears to me therefore that the reclassification did not result in any specific added benefits apart from simply moving the Claimant from subordinate staff to management.

27. The Claimant states that this letter was delivered to her on 15<sup>th</sup> April 2015 a position not specifically disputed by the Respondent. Perhaps, the only attempt at disputing this assertion by the Claimant is the assertion by the Respondent that the Claimant took up the position and served in it. By this, the Respondent insinuates that the Claimant was notified of these changes earlier than she suggests.

28. It is noteworthy that almost immediately after the reclassification of roles, the Respondent on 15<sup>th</sup> April 2015 terminated the Claimant's services. This begs the question whether the Claimant really had the time to internalize and be said to have accepted or acquiesced to the changes before she was terminated.

29. Sections 9 and 10 of the Employment Act deal with employment particulars and the obligation to evidence them in writing. Section 10(5) of the Act requires any changes to these particulars to be undertaken only in consultation with the affected employee and be communicated to the employee in writing. The Respondent asserts that it did this when it wrote to the Claimant on 8<sup>th</sup> April 2015 notifying her of her shift from subordinate to management staff.

30. The view I take is that there were no consultations with the Claimant before her position was purportedly changed. At least, there is no evidence on record to suggest this. The letter of 8<sup>th</sup> April 2015 only communicated the Respondent's decision to reclassify the Claimant's position. It is not evidence of consultation before the decision was taken.

31. But more importantly, the Claimant was at the time, a member of a trade union. The Respondent does not dispute this. At the very least and in the spirit of cordial labour relations, one would have expected the Respondent to involve the trade union in this matter first as the duly constituted representative of the Claimant in work related matters with the Respondent and second because this decision was in any event going to affect the said union's membership at the Respondent's workplace ( see the comments by the Court of ***Appeal in Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR*** (pages 5-6) on trade union involvement in disputes between employer and employee where the employee is a member of a trade union).

32. The haste with which the decision to reclassify the Claimant's position from subordinate to management was taken before she was almost immediately terminated does not paint the Respondent in very good light. It leaves a reasonable person with the irresistible persuasion that it was intended to steal a march at the Claimant. This is particularly so when it is considered that the letter to reclassify her position, although dated earlier, was delivered on the same day that she was terminated. In my respectful view, this action was meant to remove the Claimant from the protection of the CBA before the Respondent could strike.

33. Taking into account the circumstances under which the shift in roles was executed and having regard to the fact that the Claimant was not consulted, I decline to find that she acquiesced to the changes. As she was not consulted and no changes in her actual job description or benefits were effected, I hold and agree with the submissions by the Claimant that the purported change was ineffective with the consequence that the Claimant remained a unionizable employee.

34. On whether the termination was fairly executed, the Respondent states that the Claimant was terminated after she was subjected to an internal performance review that graded her performance as unacceptable. This, the Respondent argues was communicated to the Claimant. That the Claimant's line manager kept the Claimant informed on the evaluations. That the evaluation was based on an objective bank evaluation policy that the Claimant was familiar with. That in any event the Claimant later on wrote to the Respondent acknowledging her poor performance.

35. The Claimant asserts that she was not subjected to any performance improvement programme. That in any event, she was entitled to the protections under the CBA in force then which apart from not recognizing performance deficiencies as gross misconduct which would entitle the Respondent to terminate her service in the manner it did, entitled her to at least some two warnings before she could be terminated. The Claimant asserts that she was not taken through the procedural protections offered by section 41 of the Employment Act before she was terminated.

36. I have carefully evaluated the evidence on record on this issue. Although the Respondent asserts that it followed the requirements of section 41 in terminating the Claimant, RW1 made several concessions during cross examination which negate this position. For example, the witness admitted that the Claimant was not issued with a notice to show cause before she was terminated. She also admitted that the Claimant was not taken through a disciplinary session. She said that although there were performance evaluation meetings between the Claimant and other bank officials, minutes of these sessions had not been produced in evidence to fortify the assertion. She conceded that it was desirable that such evaluations should have been in writing.

37. Section 41 of the Employment Act read together with sections 43 and 45 of the Act require that an employer only terminates an employee on valid grounds. Further, the employer must take the employee through the motions of notifying him/her of the malady complained of, permitting the employee to make representations in his/her defense and call witnesses. This applies whether the proposed termination is on grounds of poor performance, gross misconduct or physical incapacity.

38. These requirements have been reiterated by this court and the Court of Appeal in a myriad decisions including ***National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR***. As it is, there is no evidence that the Claimant was subjected to this process before she was terminated.

39. Even assuming that the Claimant had moved into the management and was therefore not amenable to the CBA protections, she was, at the very least, entitled to the specific protections under the Employment Act set out above. To the extent that the termination process did not adhere to these requirements, it is declared unfair and unlawful.

40. Is the Claimant entitled to the remedies sought? I think not. But for the prior settlement between the parties, I would have awarded the Claimant compensation as guided by section 49 of the Employment Act. However, as the parties resolved the question of the compensation to be paid before this suit was instituted, it will be improper for the court to disregard that settlement and make its own award.

41. At paragraph 13 of the Respondent's response to the claim it stated inter alia as follows:-

***"The Claimant duly cleared with the Respondent and completed the handing over process and she was duly paid all her terminal dues."***

The Respondent then refers to an annexure at pages 1 to 4 of its list of documents. This document was produced in evidence.

42. The Claimant did not file a response to this averment in the Respondent's response to claim. In effect, this fact was conceded by the Claimant. In cross examination, the Claimant confirmed that she was paid the settlement amounts less deductions of Ksh 26, 189.20 towards what she was told was her loan installment.

43. In the submission by Counsel for the Respondent, they take up this issue. Surprisingly, the Claimant did not seek to address it either in her pleadings or her submissions.

44. I have considered the decisions cited by the Respondent on the effect of a discharge voucher on a party's right to pursue compensation outside what was agreed on as per the voucher. In ***Nathaniel Nyongesa Lichungu v High Grove Holding Ltd (2018) eKLR***, the learned Judge observed that the discharge in the case only addressed the claimant's contractual and statutory dues. In the learned Judge's view, this had nothing to do with compensation for unfair termination.

45. On my part, I think that compensation for unfair termination is a statutory edict and to that extent it is covered by what the learned Judge described as statutory dues. As such, a discharge voucher can only be said not to cover a head of damage that is specifically excluded in the voucher.

46. In ***Munshi Zulekha Bahadur v Metal Crowns Ltd (2018) eKLR***, I understand the court to be saying that the mere existence of a settlement does not preclude the court from interrogating it with a view to determining whether the employer is fully released from his/her obligations to the affected employee. If I have understood the learned judge correctly, then I think she is in agreement with the Court of Appeal position that a settlement, being in the nature of a contract, is binding but could be displaced by the court on some grounds that are known to law.

47. Having said thus, I now ask myself what was the effect of the clearance form that the Claimant signed in this cause? I begin interrogating this question by setting out what the Claimant stated in the instrument. She said:-

***"I acknowledge that I owe the bank Ksh. 860,282.70 as shown on [No] F (7). Finally, I acknowledge receipt of my terminal dues being Kshs. 126,189.20 and confirm that this amount represents a full and final settlement of my dues from the Bank and have no further claims. Thus, I indemnify the Bank against any claims hereafter."***

The form, dated 27<sup>th</sup> April 2015, is signed by the Claimant in the presence of a witness.

48. The Claimant admitted that she signed this form and accepted the payments in it in full and final settlement of her terminal dues. She further confirmed that the amounts were paid to her. She has not challenged the validity of this document either through her pleadings or evidence or submissions. She has not suggested that her signature on the instrument was procured through fraud, intimidation or any other form of undue influence that will vitiate the instrument. Should the court simply dismiss the instrument and proceed to make its own award?

49. In ***Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR***, the Court of Appeal observed as follows on the effect of discharge forms:-

***"We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge."***

50. In ***Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR*** the court said as follows of pretrial settlement agreements:-

***"Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties."***

51. To my mind therefore, a pretrial settlement leading to the execution of a discharge voucher could as well preclude the court from re-opening the question of compensation. However, this must be looked at on a case by case basis having regard to the content of the instrument and whether it was executed voluntarily. Where there is no evidence that the instrument is vitiated by any of the grounds upon which a contract would be vitiated, it is, as was said in the ***Coastal Bottlers Limited*** case, binding on the parties.

52. As was said in ***Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR***, such voucher constitutes a complete contract between the parties. The court observed that this would remain the position even if payment by it was less than the total loss sum so long as it is shown that the Claimant accepted it.

53. I think that it is in this context that I should consider the voucher in this matter. The Claimant agrees that she signed it. She does not

allege any compulsion on her in the process. I see no reason why I should disregard it. Accordingly, I hold that to the extent that the Claimant agreed to be paid Ksh. 126, 189.20 in full and final settlement of her dues the court is precluded from making a separate award of damages in this matter.

54. In relation to the prayer for re-engagement, I have already observed that the Claimant settled for agreed terminal dues in compensation for the job loss. I do not think that the prayer for re-engagement is therefore available to her. In any event, I subscribe to the view that this remedy should only be granted as a last resort for to order it is to require two combatants to continue subsisting together. This may not work unless it is demonstrated that the opportunity for minimal interaction between the two is guaranteed or that the parties have buried the hatchet.

55. In respect of the Counter Claim and Set Off, I have noted that the Claimant did not dispute her indebtedness to the Respondent in the sum claimed. In fact, in the discharge voucher that she signed, the Claimant acknowledged that she owed the Respondent Ksh. 860,282.70 as at 27<sup>th</sup> April 2015.

56. This amount is connected to the employment contract from the view point of the facility having been advanced to the Claimant against her salary. As a result, I enter judgment for the Respondent for the sum of Ksh. 1,574,994.97 as at 2<sup>nd</sup> March 2018, the date of the Counter Claim and Set Off together with interest thereon.

57. As the Claimant would have succeeded on damages but for the out of court settlement, I consider it inequitable to condemn her to pay costs. I will order that each party bears their own costs.

#### **58. Summary of the Award**

- a) A declaration issues that the Respondent's termination of the Claimant's contract of service was unfair and unlawful.**
- b) The Claimant does not get any compensatory award as the parties settled the question of payments out of the court.**
- c) That the prayer for re-engagement is declined for the reasons set out in the judgment.**
- d) I enter judgment for the Respondent against the Claimant for the sum of Ksh. 1,574,994.97 as at 2<sup>nd</sup> March 2018, the date of the Counter Claim together with interest thereon.**
- e) Each party to bear their own costs.**

**Dated, signed and delivered on the 13<sup>th</sup> day of September, 2021**

**B O M MANANI**

**JUDGE**

#### **ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B O M MANANI**

**JUDGE**