



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 159 OF 2018

JACOB KEMBOY KOMEN.....CLAIMANT

VS

KENYA WOMEN MICROFINANCE BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. On 28th July 2021, the parties filed a consent settling the following limbs of the Claimant's claim:

a) Gratuity.....	Kshs. 290,005.95
b) Pay in lieu of leave (20.75 days).....	54,197.05
c) Half salary during suspension.....	77,066.80
d) Travelling allowance.....	10,892.83
Less 9 days' basic salary erroneously paid.....	(8,372.80)
Less tax @ 30%.....	(127,136.95)
e) ESOP Shares liquidation:	
i) 3,500 Units @ 45.56.....	159,810.00
ii) 3,500 Units @ 24.70.....	86,450.00
Less NIC loan.....	(74,197.58)
Less NHIF arrears.....	(530).00

2. The consent was adopted as an order of the Court on 29th July 2021, leaving only the claims for compensation for unfair termination, one month's salary in lieu of notice and house allowance, for determination by the Court.

3. The events giving rise to this dispute kicked off on 18th December 2014, when a lady bearing Kenyan National Identity Card No. 8518639, in the name of Sophia Wanjiru John walked into the Respondent's Mombasa Branch along Nkurumah Road and presented a Kenya Women Finance Trust (KWFT) Account waiting card for Account No 100xxxx, in the name of Marura Nursing Home. The Account was domiciled at the Respondent's Thika Branch. The lady wanted to withdraw the sum of Kshs. 3,400,000 over the counter, which was duly paid.

4. Later on the same day, a gentleman by the name Joseph Maina Wahehia, bearing Kenyan National Identity Card No. xxxx walked into the same Branch and presented a request to withdraw the sum of Kshs. 3,400,000 from Account No 100xxxx in the name of Wahehia Limited, which was also paid. This Account was also domiciled at the Respondent's Thika Branch.

5. The following day, on 19th December 2014, Sophia Wanjiru John went back to the Respondent's Mombasa Branch and requested to withdraw the sum of Kshs. 3,200,000 over the counter, which was duly paid. Later on the same day, Joseph Maina Wahehia showed up and

asked to withdraw Kshs. 4,000,000 which was also paid.

6. All these transactions were effected by the Claimant, with approval by the then Branch Operations Manager, Silas Njeru.

7. It turned out that all the four transactions were fraudulent and as a result, the Claimant who was the paying Teller lost his job. This is what led to this dispute.

8. The matter was heard *viva voce* on 28th July 2021, with the Claimant testifying on his own behalf. The Respondent called its General Manager, Human Resources, Caroline Wanjiku Mungai. Thereafter, the parties filed written submissions.

The Claimant's Case

9. By his Memorandum of Claim dated 20th March 2018 and filed in court on 22nd March 2018, the Claimant states that he was employed by the Respondent on 14th June 2007 in the position of Business Development Officer Grade 5. He was confirmed on 29th May 2008.

10. On 22nd September 2010, the Claimant was promoted to the position of Desk Manager and on 6th October 2011, he was re-designated as Customer Service Officer. At the time of leaving employment, the Claimant was stationed at the Respondent's Mombasa Branch.

11. By letter dated 9th January 2015, the Claimant was suspended on half pay, to pave way for investigations into various alleged fraudulent transactions that had allegedly taken place at the Respondent's Mombasa Branch.

12. On 16th March 2015, the Claimant was invited to a disciplinary hearing that was to take place on 23rd March 2015. The Claimant duly attended the meeting where he was asked to explain the happenings of 18th and 19th December 2017, which he did.

13. The Claimant claims to have inquired about the outcome of the investigations by the Respondent and even asked for the investigation report, which was not supplied.

14. After the disciplinary hearing, the Claimant was served with a summary dismissal letter dated 23rd March 2015.

15. On 26th March 2015, the Claimant appealed against the summary dismissal on the ground that the investigations into the alleged fraud had not been concluded and that there was no report from the investigations linking him to the alleged fraud.

16. The Claimant avers that he was summoned by the Respondent to go to its Head Office in March 2016 to get information on his appeal. He was however arrested upon arrival at the Respondent's Head Office. The Claimant's position is that to date he has not been notified of the outcome of his appeal.

17. The Claimant further avers that he was arraigned at Mombasa Law Courts on 21st March 2016 where he was charged in *Criminal Case No. 622 of 2016*. He was acquitted on 11th January 2018.

18. The Claimant's case is that there was no valid reason for his dismissal and that the process followed in dismissing him was unlawful. He therefore seeks compensation for wrongful and unfair dismissal plus one month's salary in lieu of notice. He also asks for house allowance

19. In addition, the Claimant asks for a Certificate of Services, costs of the case plus interest.

The Respondent's Case

20. In its Statement of Response dated 25th August 2018 and filed in court on 4th September 2018, the Respondent admits having employed the Claimant. At the time material to this claim, the Claimant held the position of Customer Service Officer at the Respondent's Mombasa Branch.

21. The Respondent accuses the Claimant of being negligent, dishonest, fraudulent and professionally irresponsible, leading to the loss of Kshs. 14,000,000.

22. The Respondent avers that an audit was carried out to establish the cause of the loss and an opportunity was subsequently granted to the Claimant to be heard after the discovery of the loss.

23. The Respondent states that on 9th January 2015, its Disciplinary Committee summoned the Claimant and upon deliberation, the Committee decided to suspend the Claimant, in accordance with the Human Resource Policy, to pave way for investigations.

24. On 16th March 2015, the Respondent summoned the Claimant for disciplinary proceedings, to answer to charges of wilfully neglecting to perform and/or carelessly discharging his duties.

25. The Respondent avers that during the disciplinary hearing conducted on 23rd March 2015, it was proved that the Claimant had failed to exercise due care and/or perpetrated an illegality through fraud against the Respondent, which caused the loss of Kshs. 14,000,000. The Respondent was therefore compelled to dismiss the Claimant for gross misconduct.

26. The Respondent maintains that it had a valid reason for dismissing the Claimant and that in executing the dismissal, due procedure was followed.

27. The Respondent denies receiving the Claimant's appeal against the dismissal.

Findings and Determination

28. Following partial settlement of the claim, the only surviving limbs are compensation for unfair termination, notice pay and house allowance.

29. The Claimant was dismissed by letter dated 23rd March 2015 stating:

"Dear Sir,

RE: SUMMARY DISMISSAL

The above refers and the disciplinary committee meeting held on 23rd March 2015.

We hereby advise you that you have been summarily dismissed from your employment with effect from 23rd March 2015.

Ensure that you return the official documents e.g. the AAR card, ESOP Certificate, employment card, office keys or any other items belonging to KWFT immediately.

We thank you for the time you served the women of this country and wish you well in your future endeavors.

Kindly acknowledge receipt of this letter by signing the attached duplicate copy of the letter.

Yours faithfully

(signed)

JACKSON WANJAU,

GENERAL MANAGER, HUMAN RESOURCE."

30. Granted that the dismissal letter did not disclose the reason for the Claimant's dismissal, the suspension letter dated 9th January 2015 and subsequent record of disciplinary proceedings were clear that the Claimant was dismissed for making the following over the counter payments that turned out to be fraudulent:

- a) Kshs. 3.4 Million paid on 18th December 2014 from Marura Nursing Limited Account to Sophia Wanjiru John;
- b) Kshs. 3.4 Million paid on 18th December 2014 from Wahehia Limited Account to Joseph Maina Wahehia;
- c) Kshs. 3.2 Million paid on 19th December 2014 from Marura Nursing Limited Account to Sophia Wanjiru John;
- d) Kshs. 4 Million paid on 19th December 2014 from Wahehia Limited Account to Joseph Maina Wahehia.

31. The Claimant told the Court that these were large transactions and were a first at the Mombasa Branch. He further stated that both Accounts were domiciled at Thika Branch. Additionally, in his witness statement dated 20th March 2018 the Claimant described Joseph Maina Wahehia as "very edgy".

32. Yet, the Claimant went ahead to make the payments, totalling Kshs. 14,000,000, within a span of two days, ostensibly because the Branch Operations Manager had authorised him. Tellers are not robots who will make every payment that is authorised by their superiors; they are bankers in their own right with a heavy responsibility.

33. In its decision in *Shariffu Mike Omondi v Ranfer Teas (Kenya) Limited [2021] eKLR* this Court held that the fact that a supervisor may have been negligent, does not diminish the culpability of a junior employee. Every employee operates under their own individual employment contract and they therefore owe a direct duty of care to their employer.

34. The Claimant, being the first point of contact with the fraudsters, should have done more than the standard Know Your Customer (KYC) drill, including a call back to the domicile Branch. He failed to do so and as a result, his employer lost Kshs. 14,000,000 to say nothing about the exposure to reputational risk.

35. Bankers operate in a sensitive environment and their lifeline is customer confidence; their standard of care must therefore be

correspondingly high (see *Agnes Murugi Mwangi v Barclays Bank of Kenya Limited [2013] eKLR*).

36. The Claimant failed this test and the Respondent had a valid reason for terminating his employment as required under Section 43 of the Employment Act.

37. This finding is despite the fact that the Claimant was acquitted of the criminal charges. In *Kibe v Attorney General (Civil Appeal No 164 of 2000)* the Court of Appeal held that an acquittal in a criminal case does not immunise an employee against disciplinary action by an employer, even on the same set of facts.

38. Regarding the issue of procedural fairness, there is evidence that the Claimant was notified of the administrative charges against him by the suspension letter dated 9th January 2015. This was reiterated in letter dated 16th March 2015 inviting the Claimant to a personal hearing before the Staff Disciplinary Committee on 23rd March 2015.

39. There nothing on record to show that the Claimant raised any issue with regard to the disciplinary proceedings.

40. It seems to me therefore that the Respondent made a good attempt to comply with the procedural fairness requirements set under Section 41 of the Employment Act. The only gaffe was that there was no statutory or contractual basis for withholding the Claimant's half pay during the suspension.

41. For this reason alone, I fault the procedure adopted by the Respondent in dealing with the Claimant's case and therefore find and hold that the Claimant is entitled to some compensation.

Remedies

42. Consequently, I award the Claimant three (3) months' salary in compensation. In making this award, I have considered the Claimant's length of service diminished by his contribution to the dismissal.

43. I further award the Claimant one (1) month's salary in lieu of notice.

44. With respect to the claim for house allowance the only thing to say is that the Claimant's confirmation letter dated 29th May 2008, provided for a consolidated monthly salary, which would ordinarily be inclusive of house allowance. This claim is therefore without basis and is disallowed.

45. Finally, I enter judgment in favour of the Claimant as follows:

- a) 3 months' salary in compensation.....Kshs. 181,800
- b) 1 month's salary in lieu of notice.....60,600
- Total242,400**

46. This amount will attract interest at court rates from the date of judgment until payment in full.

47. The Respondent will meet the costs of this case.

48. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OCTOBER 2021

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JUDGE

Appearance:

Mrs. Nyange for the Claimant

Mr. Aloo for the Respondent