



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1468 OF 2018

ROBERT GATOBU KIMONYE.....CLAIMANT

VERSUS

BANK OF AFRICA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit vide a Memorandum of Claim dated 25th October, 2018 and filed in court on the same date, through the Firm of Kibaya & Kamau Associates Advocates. He later filed a reply to the Respondent response and a response to the set-off and counter claim on 20th May, 2021.
2. The Claimant seeks payment of Kshs. 6,051,00.36 being 12 months' salary compensation for unfair/ or wrongful termination, Kshs. 4,034,00.24 being service pay for 8 years in the service of the Respondent, Kshs. 1,512,750.09 being three months' salary in lieu of notice, an apology, general damages for a damaged career, punitive and exemplary damages for malicious and unfair termination, general damages for employment related defamation, costs of the suit and interest.
3. The Claimant testified as the 1st witness (CW1) and presented a second witness (CW2) a Mr. Andrea Balongo in support of his case. He adopted his witness statement dated 25th October, 2018, a supplementary witness statement of 31st July, 2021, bundle of documents and a supplementary bundle of documents dated 25th October, 2018 and 20th May, 2021, respectively. The Claimants second witness CW2 also adopted his statement dated 30th July, 2021.
4. The Respondent filed a response to the Claimant's claim together with a set-off and counter claim for Kshs.518,557.68/=-, on the 21st December, 2018, through the Firm of Hamilton Harrison & Mathews.
5. The Respondent presented two witnesses to testify on its behalf. One a Mr. Godwin Otieno (RW1), a former Security Manager of the Respondent Bank and the second witness (RW2) a Ms. Isabel Njooro, an acting head of Human Resources of the Respondent.
6. Both RW1 and RW2 adopted their witness statements both dated 19th July, 2021 and bundles of documents of 21st December, 2018.
7. The Respondent strongly denies the claim and avers that the Claimant was negligent in his work and that he voluntarily left the service of the Respondent through resignation.

The Claimant's Case

8. The Claimant's case is that he was an employee of the Respondent from 26th June, 2007 to 8th October, 2015, earning a gross salary of Kshs. 488,250/=-.
9. It is his case that he was employed as a corporate dealer and rose through the ranks to the position of senior dealer in charge of fixed income and inter-bank trading.
10. The Claimant's case is that from 15th August, 2015, the working environment at the Respondent's Bank became untenable. He states that he was subjected to harsh working conditions which forced him to involuntarily resign.

11. The Claimant avers that for five (5) weeks prior to his resignation, the working environment with the Respondent became extremely toxic. He states that his requests to his seniors were ignored, senior managers ignored him in decision making and instead, dealt with junior staff in his department who ordinarily reported to him, that he was humiliated by seniors and scolded before junior staff of the Respondent.
12. It is the Claimant case that he was informed of the venue, date of the disciplinary hearing and the charges against him. He further states that he was notified that he could appear with a representative of his choice.
13. The Claimant states that he verbally asked for more time to prepare for the hearing, but which request was not granted. He nevertheless attended the hearing.
14. The Claimant states that though the disciplinary hearing took place, he was not given sufficient time and resources to prepare for it and that the environment under which the process was conducted, was toxic and full of witch hunt. The Claimant further states that he wrote to the Secretary to the disciplinary committee raising issue he thought were not properly addressed and/or handled by the committee, but that he never received a response to the issues he raised.
15. The Claimant further states that the disciplinary process was pre-meditated to terminate his employment and that this together with the already harsh working environment led him to tender his resignation.
16. The Claimant case is that he did issue a three-months' resignation notice and though he did not serve through the notice period, the Respondent paid him for the entire notice period.
17. It is the Claimant's case that he was arraigned in court and charged with fraud; charges he was later acquitted off on the 12th of July, 2018. He states that the criminal charges made it difficult for him to secure alternative employment, as the banking sector became aware of his case, and states that the case has badly tainted his name affecting his employability.
18. The Claimant states that the Respondent is responsible for his lack of employment to date, as it was fully aware that he did not defraud it but went ahead to instigate criminal charges against him.
19. The Claimant states that he has a rich experience in the area of foreign exchange having served at Chase Bank for 2 years and 8 years with the Respondent in the same area.
20. On cross examination, the Claimant told the court that a banker is person keen to details and which he states that he did just that when handling the transaction subject of his termination and in his entire area of work which was foreign exchange dealing. The Claimant agrees with the Respondent that his contract allowed termination on ground of negligence and further asserts that he was never negligent at his work.
21. It is the Claimant's case that only authorized staff do foreign exchange dealings and that it is not a conduct expected of all staff at the Respondent Bank or any bank for that matter.
22. The Claimant admitted on cross-examination that an error occurred on 2nd July, 2015 and that he was aware of the error. He states that the error was in relation to a request to purchase of USD 6,000,000, where the sender of the money was Citi Bank of New York, but which request was by error interpreted to be from Dubai Bank and for ZAR 6,000,000. He states that indeed, the Respondent Bank did send the money to Dubai Bank instead of City Bank of New York. He further admitted that the error costed the Respondent Bank Kshs. 48,180,000/=
23. The Claimant case is that he is not responsible for the loss as his work was at the front office and that the instruction he implemented came from the back office. He states that on the day of the error, the interpretation of what was available for trading came from the back office of the Respondent Bank and not from the front office where he was stationed.
24. The Claimant states that the Respondent bank treasury back office cite currencies for trading and in this case, the currency was cited by a teller named Faith who was the source of the error.
25. It is the Claimant case that he did not have access to swift messages and therefore could not verify the information coming in. It is his evidence that this could only be done by employees with rights to access the swift messages and who work at the back office. The Claimant states that swift messages are binding and are a formal way of communication between banking institutions.
26. On the question of whether or not he identified his counter parties, his answer is that he did identify his counter party in the disputed transaction.
27. The Claimant further testimony is that there was an authenticated message indicating that Dubai Bank had agreed to refund the money to the Respondent with a 12% interest. He however could not confirm at the time of this hearing whether the money was recovered.
28. The Claimant states that he filed a suit being civil case number 137 of 2019 seeking a declaration that his prosecution was unlawful and that the case is still in court.
29. The Claimant's testimony on cross-examination is that he was a member of NSSF and that deductions were made from his pay slip. The Claimant further states that the Respondent bank has a Defined Contribution Pension Scheme to which he was member and contributed to it.
30. A Mr. Andrea Balongo, testifying for the Claimant, states that he worked with the Claimant and the Respondent bank and was aware of

the error subject of this case. He states that he supervised the Claimant in the period of the transaction subject of this matter. It is his testimony that the error did occur and that it involved many players including the Claimant.

31. The witness states that use of personal mobile phones is not forbidden, but where one uses their mobile phones to transact, they are required to send the information by email within 48 hours to ensure the transaction is not hidden.

32. It is the witness testimony that treasury department of any bank is the most liquid and carries the highest risk. He states that money used for foreign exchange dealings is not client money, but money from shareholders of the bank.

33. The witness states that the incident subject of this matter was purely an error and that there was no fraud involved. He further states that the incident did not warrant disciplinary action as fraud was not detected.

34. The witness states that he did sign a show cause letter and a hearing notification written to the Claimant as he was his immediate supervisor.

35. The witness confirmed that the Claimant had told him of the harsh working environment and as his supervisor, he raised it with a Mr. Godwin Otieno the security manager who was said to be harassing the Claimant.

The Respondent's Case

36. The Respondent case is that it employed the Claimant on 26th July, 2007 as a dealer. It states that the Claimant's employment was governed by its Human Resources Policy, Treasury Back Office-Interbank Procedure and the Procedure Manual for Foreign Exchange.

37. The Respondent denies constructively dismissing the Claimant or taking him through a discipline process that amounted to harassment.

38. It is the Respondent's case that Dubai Bank did not send a sum of ZAR 6,000,000, as alleged by the Claimant. Instead, what the Respondent received was a request for a sum of USD 6,000,000 and that the Claimant being an experienced dealer, should have been able to tell the difference.

39. The Respondent states that it transferred a sum of Kshs.48, 180,000/= to Dubai Bank through the negligent actions of the Claimant.

40. It is the Respondent's case that it received swift messages from City Bank New York requesting to purchase USD 6,000,000, with ordering institution being City Bank South Africa, but the Claimant and another staff at its back office misinterpreted the amount as ZAR 6,000,000. The Respondent states that the Claimant informed it that he had called a person named Mr. Keter of Dubai Bank, who confirmed the request and that it was on the strength of his confirmation that the Respondent transferred the money to Dubai Bank.

41. The Respondent case is that Treasury Back Office- Interbank Procedure required the Claimant to verify transaction details and correct any anomalies before authorizing the transaction.

42. It is the Respondent case that the Claimant conducted himself negligently in relation to the transaction which occasioned substantial financial loss to the Respondent.

43. The Respondent states that the Claimant resigned on 8th October, 2015, shortly before it made a resolution on the disciplinary hearing which took place on the 22nd of September, 2015.

44. The Respondent denies that it caused the arrest, charging and prosecution of the Claimant. It further states that the Claimant is not entitled to the reliefs sought.

45. The Respondent states in its set-off and counter claim, that it advanced the Claimant total of Kshs. 2,106,169.81, which he has since repaid leaving a balance of Kshs. 518,557.68.

46. The Respondent case is that it is an implied policy of the Respondent that dealers are required to use telephones provided by the Respondent as they are recorded and make it easier to tract transactions.

47. The Respondent witness states that he did not harass the Claimant but that he was only trying to get information from him so as to clarify what happened in the incident subject of the discipline case that the Claimant was facing at the time.

48. The Respondent witness admitted not being conversant with the working of the Respondent's treasury department and only came to learn about it when investigating the incident subject of this matter.

49. It is the witness' testimony that he was aware that the Claimant was working at the Respondent's front office and further confirmed that he was bound by the information coming to him from the Respondent's back office. It is his evidence that the foreign investment risk policy of the Respondent did not apply to the Claimant.

50. It is his further evidence that the Respondent bank lost money and which has not been recovered to date. He states that the incident was a case of a failed undertaking and not a loss to the Respondent Bank.

51. It is his further evidence that a report of an audit conducted by the Respondent did not say that the Claimant was fraudulent, but that he was negligent.
52. It is his evidence that though an investigation was carried out on the incident, the report did not recommend the charging of the Claimant and neither did point to negligence on the part of the Claimant. The report was however not produced before court.
53. It is his evidence that the Respondent had transacted in similar dealings with Dubai Bank before this failed transaction. He confirmed that it was common for the Respondent to deal with Dubai Bank.
54. It is his further evidence that an audit report had recommended certain changes to the Respondent's operations, aimed at minimizing risks, but which recommendations were not actualized. He states that one of recommendation was for the Respondent to stop dealings with Dubai bank. He states that the Claimant was not given any warning in relation to this recommendation.
55. It is his further evidence that the Respondent encountered similar errors even after the Claimant had been terminated (31/7/2015 and 9/11/2015) and that the employees responsible for the errors were not investigated nor disciplined in the same way as the Claimant was.
56. The Respondent second witness one Ms. Isabel Njooor, states that she had worked for the Respondent for 14 years and that she is the Acting Head of Human Resources.
57. It is her evidence that she does not vouch for the swift messages in this matter as they had been produced after the Claimant had left the service of the Respondent, an action the Respondent does not allow.
58. It is her case that the Claimant had not made any reports on his purported harassment and hostile working environment.
59. It is her evidence that she was not involved in the investigation of the incident nor was she conversant with the working of the Respondent Treasury department.
60. The witness confirmed that the Respondent lost money and that it is the Claimant who sent the money to the wrong bank in error. She states that there is an agreement where Dubai bank had agreed to reimburse the money, but that it never did.
61. The witness testimony is that the disciplinary hearing was conducted in accordance with the Respondent's Human Resource Manual. It is her further testimony that the Claimant was given twenty-four hours (24hrs) to appear for the disciplinary hearing.
62. It is her testimony that at the time of instituting suit, the Claimant owed money to the Respondent, but which he had repaid as at the time of this hearing.
63. It is her further testimony that the Claimant was not terminated, instead, he resigned from the service of the Respondent and that the Respondent did not have chance to act on the resolution of the disciplinary hearing.
64. Its is the Respondent's assertion that this suit is time barred having been filed outside the Statutory three-year period prescribed under *Section 90 of the Employment Act, 2007*.

Submissions

65. Both parties filed submissions in the matter.

The Claimant's Submissions

66. It is submitted for the Claimant that the Respondent failed to demonstrate that the Claimant was negligent in his work and that the statements recorded by one Faith Munyori is an admission that she was the source of the error. This was confirmed by an investigation officer from the Central Bank, who also pointed the error to the teller known who worked at the Respondent's back office.
67. It is submitted that the Claimant was victimized and unfairly subjected to disciplinary action. They rely on the holding in the case of ***Kenya Local Government Workers Union v Mombasa Municipal Council (2002) eKLR***.
68. It is submitted that the Claimant was subjected to several unfair labour practices resulting in his involuntary resignation. The Claimant submits that he was constructively terminated arising from the actions of the Respondent in the weeks leading to his resignation. He sought to rely on the holding in the case of ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR***, where the court held that in constructive dismissal, the focus is on the conduct of the employer and not the employee. The court went on to state that the employee must leave due to the conduct of the employer.
69. It is submitted for the Claimant that this suit was filed within the Statutory time limits contrary to the Respondent's assertion. The Claimant's position is that the cause of action arose on the 7th January, 2019, being the date the Claimant's resignation was to take effect. They sought to rely on the case of ***Anne Waithira Kimani v Stephen Ndungu Njenga (2013) eKLR***, where the court held that the cause of action arose when the resignation took effect.

The Respondent's Submissions:

70. It is submitted for the respondent that this suit is time barred for reason of having been filed after the three years allowed under section 90 of the Employment Act. To the Respondent, the cause of action arose between 14th of August, 2015 and 8th October, 2015, while the case was filed on the 25th October, 2018.

71. The Respondent submitted that the Claimant voluntarily resigned. That his resignation letter was straight forward and without mention of a difficult working environment. The Respondent submits that to amount to a constructive termination, the employer's conduct has to be so grave as to constitute a repudiatory breach of the employment contract.

72. The Respondent submits that it had justifiable reasons to commence disciplinary hearing against the Claimant and further that the process was lawful. It submits that the discipline process was overtaken by events by reason of the Claimant's resignation.

73. It is the Respondent's submission that the claim for breach of constitutional rights was never pleaded. It is submitted that parties by law are bound by their pleadings and courts cannot be called to determine issues that are not pleaded. He sought to rely on ***Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet and Maxwell (The Comm on Law Library No. 5)***

Issues for Determination

74. The court sifted out the following as issues for determination in the matter:

- i. *Whether the suit is statute barred*
- ii. *Whether the Claimant was constructively terminated from employment*
- iii. *Whether the Claimant is entitled to the remedies sought*
- iv. *Whether the Respondent is entitled to the counter claim*
- v. *Who should bear the costs of the suit.*

Whether the suit is Time barred

75. Section 90 of the Employment Act 2007, provides as follows in regard to filing of employment related claims;

“Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”.

76. The Claimant resigned on the 8th October, 2015. The Respondent's letter dated 15th December, 2015 to the Claimant accepting his resignation, stated at paragraph 1:

“...your last working day is the 7th of January, 2016. However, in line with the discussions held on the 15th December, 2015, your last day shall be today the 15th December, 2015.”

77. This same letter, gives the Claimant's salary computation to be up to 7th January, 2016.

78. The Claimant's memorandum of claim is dated 25th October, 2018 and filed in court the same day. The question for this court to answer, is when the cause of action accrued?

79. According to ***Black's Law Dictionary (10th Edition)*** the word “accrue” means ***“to come into existence as an enforceable claim or right.”*** The Claimant claim is one for constructive termination. He could not be said to have been terminated earlier than 7th January, 2016, as up to this date, he was still in the Respondent's payroll as an employee. The cause of action thus in the opinion of this court, accrued on the 8th January, 2016, and, when in terms of section 90 of the Employment Act, the time begun to run.

80. The court finds and holds that this suit was filed within the statutory time limit and is properly before this court.

Whether the Claimant was constructively terminated from employment

81. The Claimant's case is that he involuntarily resigned from the service of the Respondent owing to the harsh and hostile working conditions. The Respondent on its part, asserts that the Claimant was never terminated, instead, he voluntarily resigned.

82. A determination of whether an employee has been constructively terminated, is premised on the circumstances and tenor of the Claimant's resignation from the service of the Respondent. ***Black's Law Dictionary (Tenth Edition)*** defines constructive dismissal as:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to

resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit."

83. In his written submissions filed in this Court, the Claimant referred to the decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR* where the court of appeal stated the following: ***"The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test."***

84. The question for the court is to determine whether the circumstances under which the Claimant resigned, fit within the principles set out by the court of Appeal in the **Coca Cola** case.

85. The Claimant's testimony is that he was humiliated, by passed in decision making, scolded and ignored by senior managers of the Respondent. The court was further told that senior managers of the Respondent dealt with junior staff in the Claimant's department, who ordinarily reported to him and was not consulted on decisions taken concerning his department.

86. The Claimant was in the service of the Respondent for eight (8) years. The evidence before court indicate that he had an illustrious career in the employ of the Respondent. The letters of promotion produced in evidence before this court, demonstrate that indeed the Claimant rose steadily through the ranks from the position of dealer earning a gross salary of Kshs. 140,000/=, Fixed Income Dealer earning a gross salary of Kshs. 270,000/= and finally a senior dealer in charge of Fixed income earning a gross salary of Kshs. 540,250.03/=.

87. The letters herein, referred to the Claimant as an employee who individually contributed to the performance of the Bank, and was severally paid bonuses for his sterling performance.

88. The Claimant's resignation letter does not refer to the harsh conditions he says he faced in his last months in the service of the Respondent. It however does not indicate that the Claimant had been offered alternative employment. It is telling how an employee who is seemingly doing well for himself, would wake up and decide to resign. Something was most obviously wrong, and the court believes his evidence of a hostile working environment, must have informed his decision to resign.

89. It is the evidence of both parties that the Claimant resigned in the middle of a disciplinary process. RW1 told the court of two instances where the Respondent encountered similar erroneous transactions as the one subject of the Claimant's disciplinary action. He confirmed to the court that the errors were rectified and no employee of the Respondent was taken through disciplinary action or treated the way the Claimant was. The court concludes that the manner in which the Respondent handled the transaction involving the Claimant, was harsh and discriminatory and in the opinion of this court, amounts to repudiatory breach of the Claimant's employment contract which left the Claimant with no option but to resign.

90. The Respondent in the opinion of this court, created a situation that rendered the Claimant's continued stay in its employ untenable, leaving the Claimant with no option but to resign. No evidence showed that the Claimant had intended to resign prior to the time when he did and this court is convinced that the Claimant resigned due to the employer's intolerable working conditions. ***(See Jooste v Transnet Ltd t/a South African Airways (1995) 16 I.L J 629(LAC)***

91. This court concludes that the Claimant was constructively terminated and declares the termination unfair and unlawful.

Whether the Claimant is entitled to the remedies sought

92. The Claimant's seeks the following reliefs:

- i. Kshs. 6,051,00.36 being 12 months' salary compensation for unfair/ or wrongful termination,
- ii. Kshs. 4,034,00.24 being service pay for 8 years in the service of the Respondent,
- iii. Kshs. 1, 512, 750.09 being three months' salary in lieu of notice,
- iv. An apology,
- v. general damages for a damaged career,
- vi. punitive and exemplary damages for malicious and unfair termination,
- vii. general damages for employment related defamation,
- viii. costs of the suit and interest.

12 Months' Salary Compensation for Unfair/ Or Wrongful Termination,

93. The court has held that the Claimant was constructively terminated hence the termination is unfair and unlawful. For this reason, the

court finds and holds that the Claimant is entitled to compensation per Section 49 of the Employment Act, 2007.

94. The Claimant was in the service of the Respondent for 8 years. He told the court that he lost many career prospects owing to the bad press associated with the criminal charges coupled with the sensitivity of the banking industry. It is clear to this court that the ghosts of the criminal case that the Claimant faced, will continue to haunt the Claimant's search for alternative employment for a long time. For this reason, the claimant has proved a case for maximum compensation.

95. Following queue from the holding of the Court of Appeal in the case of *Kenya Broadcasting Corporation v Geoffrey Wakio, Civil Appeal No. 352 of 2017 (2019) eKLR*, I award the Claimant the equivalent of 12 months' salary in compensation for unfair termination.

Service Pay and Three Months' Salary in lieu of notice

96. The Claimant's testimony is that the Respondent had a Defined Contribution Pension Scheme to which he was a member and made contributions as did the employer. On this ground, the claim for service pay fails and is dismissed.

97. The Claimant confirmed to this court that though he did not serve his entire notice period, the Respondent paid him for the whole of that period up to 7th January, 2016. The claim is dismissed.

General Damages for A Damaged Career

98. The claim for general damages for employment related defamation is based on criminal case No. 1078 of 2016. The Claimant has filed a civil suit in relation to these charges and this court will not address a claim that is before another court of competent jurisdiction. The claim fails and is dismissed.

Punitive and Exemplary Damages for Malicious and Unfair Termination

99. Having made an award for compensation for unfair termination as above, this prayer fails and is dismissed.

Whether the Respondent is entitled to the Set-off and Counter Claim

100. The Respondent's witness RW2, one Ms. Isabel Njoro confirmed in her oral testimony, that the contents of her witness statement in relation to the counter claim are correct. It is her evidence that the Claimant paid off the loan advanced to him by the Respondent, and added that the Claimant does not owe the Respondent any money in this respect or at all. The Respondent's claim for set-off and counter claim fails and is dismissed.

101. It is trite law that costs follow the event. The Claimant is awarded the costs of this suit and interests at courts rate from the date of this judgment until payment in full.

102. In the final analysis, judgment is entered for the Claimant against the Respondent in the following terms:

- a) 12 months' salary equivalent in compensation for unfair termination amounting to Kshs. 6,483,000.36/= at Kshs. 540,250.03 per month.
- b) Costs of the suit and interest at court rates from the date of this judgment till payment in full
- c) Costs of the set-off and counter claim

103. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Thuku present for the Claimant

Mr. Owiti present for the Respondent

Ms. Christine Omollo C/A