



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1469 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MARTIN KIRIMI MBAYA

CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED

RESPONDENT

JUDGMENT

1. The Claimant herein was until the termination of his employment by letter dated 3rd May 2016, an employee of the Respondent, a commercial bank incorporated in Kenya under the Companies Act and regulated by the Central Bank of Kenya.
2. The Claimant was employed by the Respondent by letter of offer of employment dated 15th January 2014 in the position of Head of Collections and Recoveries. His terms of engagement included a gross annual salary of Kshs.4,040,000/= and annual bonus of Kshs.900,000, a car allowance of Kshs.1,080.00 per annum, annual leave of 36 days per year, pension and medical insurance
3. According to the Claimant, he was headhunted from Standard Chartered Bank where he had worked as Head of Collections and Recoveries from 2001.
4. The grounds for termination of the Claimant's employment was that he did not enforce the Respondent's policy and procedure on forced debit which led to irregular force debits of costumers' accounts. The letter of termination further accuses the Claimant of not being diligent in the performance of his duties and responsibilities as required in his role.
5. It is the Claimant's assertion that the Respondent's accusations against him were not based on any justifiable grounds, that the termination was irregular and a clear violation of his constitutional rights including his right to dignity, the right to reasonable working conditions, fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that the Claimant was targeted on unfair grounds.
6. It is further the assertion of the Claimant that the termination of his employment was unfair due to invalid reason and procedurally flawed for reasons that –
 - a) *The termination was not done in accordance with fair procedures.*
 - b) *The Respondent failed to prove that there was a valid reason for termination.*
 - c) *The Respondent did not have a fair reason for terminating the Claimant.*
 - d) *Terminating the Claimant even after exoneration from wrongdoing by issuing him with a Deed of Separation that clearly indicated awareness of his innocence.*
7. It is also the Claimant's assertion that the termination of his employment was actuated by malice considering that the Claimant was presented with a Deed of Separation which indicated awareness of his innocence. Further the Respondent proceeded to terminate the services of the Claimant knowing that he was innocent, which is contrary to Section 45 of the Employment Act.
8. It is the Claimant's assertion that due to the unfair termination process and the senior position of the Claimant, the Claimant's further employment prospects were severely damaged by the Respondent's action. That the Claimant has suffered loss of reputation among his peers

and loss of work which has occasioned him irreparable damage.

9. The Claimant avers that having regard to his professional standing and the senior position he held in the Respondent, the material contained in the said falsehoods have caused him a high degree of embarrassment, ridicule, injury to his reputation and character and are meant to ruin his professional career in very unparalleled dimensions including not getting future employment in the banking industry where he has specialized and has spent most of his productive years.

10. It is further the Claimant's averment that the Respondent through its agents made various representations to the Claimant that it would advance his already successful career that he had before being headhunted by the Respondent. The representations were intended to and did induce the Claimant to enter into the said agreement dated 15th January 2014 and signed on the 17th January 2014. Further that the said information constituted material representations of fact and intention. That the Respondent knew or ought to have known that the said representations were false in material particulars and meant to deceive the Claimant.

11. That due to the said representations, the Claimant believed them to be true which occasioned him to alter his senior position as the Head of Collection and Recoveries at the Standard Chartered Bank and enter into a contract of employment with the Respondent, which has now resulted to loss of his career and damage to his reputation.

12. The Claimant claims that since the Respondent maliciously and unfairly terminated his employment on baseless grounds, the court should award him aggravated, Punitive and/or Exemplary Damages for the irrational and unlawful acts of the Respondent and for failing to uphold and respect the Claimant's Fundamental Rights and Freedoms as enshrined in the Employment Act and the Constitution of Kenya, particularly Articles 28, 41(1) and 47.

13. In his memorandum of claim dated 20th July 2016, the Claimant seeks the following remedies –

- a) *Twelve (12) months compensation for unfair termination at Kshs.596,000.00. per month*
- b) *One month pay in lieu of Notice.*
- c) *Compensation for the interest on the aforesaid sums at the court rates from the date of termination.*
- d) *Compensation for 12 days accrued leave at Kshs.34,0571.42*
- e) *General and aggravated damages, including exemplary damages for, deceit, injury to reputation and malicious falsehood.*
- f) *General and aggravated damages, including exemplary damages, for libel.*
- g) *Costs of the suit and interest thereon at Court rates.*

14. The Respondent filed a memorandum in reply in which it avers that the Claimant's employment was subject to the Respondent's Staff Handbook and Human Resource Intranet (where available) in addition to the provisions of the Employment Act.

15. It is the Respondent's averment that the Claimant agreed to comply with all local and group policies and procedures recognizing that failure to do so may result in disciplinary action including termination.

16. The Respondent avers that it has a policy that allows forced debits as a mechanism to recover debts. RW1 explained forced debits during hearing as a process wherein a customer with a loan account would have monies debited from his current (CASA) account and credited into his loan account in satisfaction of the loan advanced to him by the bank. CW2 confirmed this statement during cross examination. The Respondent avers that it has a policy on how forced debits ought to be conducted. That the genesis of this suit is based on failure by the Claimant to ensure that this policy was followed when effecting forced debits.

17. The policy referred to above requires that forced debits ought to have been undertaken only in accounts that had consistent credit.

18. The Respondent suspected irregular forced debits in the recoveries department headed by the Claimant and undertook an investigation which revealed that 26 accounts that had been force debited did not have previous credits and that the forced debits reflected an incorrect position as to the status of the Respondent's loans and recoveries. The picture portrayed was that monies had been collected/recovered when in fact they had not.

19. The investigators established that there was a rise in forced debits in the months of October 2015, November 2015, and December 2015 and equally a high number of reversals of the forced credits in the months of November 2015 and December 2015 because the accounts force debited did not have funds. The fact that there were such a high number of reversals raised a red flag because, had the policy requiring forced debits only on accounts that had consistent credit been strictly followed, there would be minimal or no reversals.

20. The Claimant was questioned by the investigators and in his statement the Claimant admitted that indeed there had been a rise in forced debits in the months of October 2015, November 2015 and December 2015 and equally a high number of reversals of the forced credits in the months of November 2015 and December 2015 for lack of funds. According to the Claimant however, his supervisees had operated within the Respondent's collections manual. This was however untrue according to the Respondent because the forced debits had been undertaken on accounts that did not have consistent credits thereby contravening the Respondent's policies. Refer to the investigation report on page 26 of the Claimant's bundle of documents.

21. It is the Respondent's averment that the Claimant was aware of a rise in forced debits and reversals thereof from October 2015 until 27th January 2016 when he finally acted. He had to be reminded by one Charity an officer working under his supervision about this issue before he acted. The Respondent opines this is manifest negligence in the performance of his duties. There was false reporting of the Respondent's loans and collections status for the three (3) months because of such negligence.

22. The Respondent submits that the Claimant was grossly negligent in the performance of his duties as demonstrated above. He did not perform the functions entrusted to him under his role profile and such inaction led to false reporting of the Respondent's financial status. He was required to demonstrate personal accountability which he did not but instead blamed other persons for his omissions. There were valid reasons for termination as per Section 45(2)(a) and termination was based on the Claimant's misconduct and is thus within the threshold of Section 45(2)(b)(i) of the Employment Act.

23. The Respondent submits that the Claimant's termination was conducted in accordance with fair procedure as per the requirements of Section 45(2)(c) of the Employment Act. The Respondent informed the Claimant in a language he understood the charges leveled against him and was given time and opportunity to defend himself. Further, the Respondent complied with the requirements of Section 41 of the Employment Act in notifying the Claimant in a language he understood the reasons why the Respondent was contemplating terminating his employment, his entitlement to be represented during the disciplinary hearing and gave the Claimant a chance to be heard. Any lapse in communication of the Respondent's verdict after the hearing was necessitated by the mutual separation negotiations undertaken by both parties. That during re-examination of the Claimant, he did confirm to the court that he was issued with a settlement proposal and he countered that proposal; this is evidence of negotiations.

24. The Respondent submits that the Claimant was fairly terminated so the prayer for compensation must fail. The Claimant was paid notice together with outstanding leave days as indicated in Paragraphs 15 and 16 of the defence. These statements have not been rebutted so both prayers must fail. The Claimant has not established any factual, legal and/or contractual basis for payment of general, aggravated, exemplary damages for deceit, injury to reputation, malicious falsehoods and libel so all these prayers must fail. The Claimant is not entitled to costs and interest because he has no valid cause of action.

25. At the hearing of the claim, the Claimant testified on his behalf as CW1 and called one witness **SAMUEL WAMATHAI MWANIKI (CW2)**. The Respondent called one witness **VASLAS ODHIAMBO**, its Head of Employee Relations. The parties thereafter filed and exchanged written submissions which they highlighted in open Court.

Analysis and Determination

26. The Claimant has broken down the issues to be determined by the Court to be: -

- a) The flaws occasioned by force debiting should not be visited on the Claimant;
- b) The disciplinary process by the Respondent was procedurally unfair;
- c) The Claimant was entitled to approach the Employment Court for relief;
- d) The Claimant's termination was marred with malice occasioning, injury to reputation, malicious falsehood and libel;
- e) The Claimant is entitled to the reliefs sought.

27. I will adopt the issues as raised by the Claimant.

Whether flaws occasioned by force debiting should be visited on Claimant

28. It is submitted for the Claimant that he was not responsible for force debiting. That this was done by individual collection officers of the Respondent who reported to the Respondent through their team leaders. It is further submitted for the Claimant that the lapses in force debiting were addressed by the Claimant as soon as the same were reported by suspending processing of force debiting.

29. For the Respondent it is submitted that force debiting was done outside the Respondent's policies and was not discovered by the Claimant but by one Charity Mwaliki.

30. In the Claimant's supplementary witness statement dated 31st October 2019 and filed on 7th November 2019, he states as follows at paragraphs 7, 8, 9, 10 and 11 –

7. "That I worked with a team of several employees who ordinarily reported to me the different aspects of their roles. The overall job purpose for my role was to execute and oversee the implementation of initiatives related to early, late and post write off secured and unsecured collections for the Respondent as was indicated in my Role Profile."

8. That during one of my routine Team Leaders meetings held on 12th January 2016, one of my team leaders, Charity Mwaliki reported an operational lapse relating to the force debiting process.

9. The Collections and Recoveries department handles several functions one of them being force debiting. Force debiting involves debiting customer current accounts to credit the customer's corresponding loan account which was an accepted practice in the bank and had been approved within the procedure manuals. The process involved debiting a customer's current account regardless of the

account not having sufficient funds to cover the amount of the debit instruction.

10. This process was however restricted to customers who were receiving a salary into their specific current accounts that were being subjected to the force debit. The lapse that was highlighted during this meeting was that some collections officers would also include customer accounts that had not received a consistent salary, as part of accounts to be subjected to the force debit process. This practice was not allowed.

11. Following the report by one of my managers, I tasked my Quality Assurance Officer to conduct further tests for me and my team to understand the magnitude of the lapse. Upon her completion of these further tests, she confirmed to me the actuality of the lapses on 27th January 2016

31. In the Claimant's witness statement (undated) filed with the claim, he states as follows –

“During my Team Leaders’ meeting on 12th January 2016, an operational lapse relating to force debiting of customer accounts to the extent that customers without a fixed salary were having their accounts force debited on the basis of promise to pay was highlighted as a gap. The force debit of a customer is authorized for customers with consistent salary as per the approved procedure manual. I instituted additional controls on 27th January 2016 to address the gaps that had been highlighted.

Under my direction, the department extensively reviewed the extent of the misuse of the force debit process as highlighted for the period between October 2015 to December 2015 and shared the names of the officers and team leaders that may have been culpable with the Operations Director for further guidance. This analysis was not provided to me for purposes of my disciplinary hearing. A review by management assurance and another by Forensic Investigations were recommended by our Chief Operating Officer.

32. In both witness statements, the Claimant states that his main objective was to –

“Uplift the Collections and Recoveries Department capabilities to levels of effectiveness as desired by the C & R Africa Region Centre as set out in the Annual Council objectives forums.”

33. During cross examination, the Claimant stated that the effect of force debits on the performance of the Respondent was that it reflected that the bank was performing better than the reality. The accounts would be force debited then the same would be reversed.

34. During the disciplinary hearing, the Claimant acknowledged that the accountability of the performance of the department **stopped with him as the leader of the team.**

35. From the totality of the evidence on record, it is evident that the Claimant failed in his role to create an environment that makes it possible for any irregularity to be identified and dealt with timeously and ensure any irregularity was discovered and brought to his attention in good time. That it was also his role to hold collections officers accountable and manage their performance.

36. The Claimant's Disciplinary Panel observed that –

“Panel Observations and findings

§ Although he was accountable for delinquent bucket balances, he did not verify the accuracy of forced debits which resulted in inaccurate impairment position.

§ The force debits that were made outside the procedure were fraudulent and he did not detect for quick action.

§ He claims to have been misled by his managers (direct-reports) but did not take further action to verify.

§ He was detached from day to day operations in the unit and there is no evidence of oversight.

§ He was responsible for the GL: that was debited for Mpesa process that never came.

§ He failed to see the connection with the force debit and impact on impairment.

§ Appears technically sound on collections/recoveries but lacks leadership skills.

§ He allowed the introduction of procedures that are not documented in the manual of debiting customers by (PTP) promise to pay which is a lapse.

§ He appears to over delegate with no accountability.”

37. As submitted for the Respondent, bank employees are called to a higher standard of account than other employees due to the special fiduciary relationship that banks have with their customers and the very high risk of abuse of the relationship by employees. That as a senior member of management holding the position of responsibility, the Claimant was very aware or ought to have been aware of this fact.

38. I therefore find that the Respondent had valid reason to hold the Claimant accountable for the irregular force debiting.

Disciplinary Process

39. The Claimant was first suspended from employment to facilitate investigation. He was thereafter called for a disciplinary hearing. He attended together with a representative and both of them signed the minutes of the disciplinary hearing. Thereafter the Claimant was offered a Deed of Separation which he declined. He was eventually issued with a letter of termination in a meeting with his Line Manager on 3rd May 2016.

40. I find that there was procedural compliance in the process leading to the termination of the Claimant's employment.

Whether the Claimant was entitled to approach the Court for relief

41. The Respondent admitted this Court's jurisdiction. It is thus my view that there was no dispute over Claimant's right or entitlement to approach this Court for redress.

Whether there was malice in the termination of the Claimant's employment

42. The Claimant listed the particulars of malice as follows –

- a. Alleging that the Claimant was guilty of gross misconduct for allowing Force Debiting knowing fully well the falsity of the allegation;
- b. Failure to issue the Claimant with documents he requested that were necessary for him to rely on during the disciplinary hearing;
- c. Failure to implement the Investigation Report Number Ke/123/2016 by Forensic Investigation which report never mentioned the Claimant adversely;
- d. Failure to issue the Claimant with findings of the Disciplinary hearing on time;
- e. Giving the Claimant a Deed of Separation which indicated awareness of his innocence without according the Claimant the outcome of the disciplinary hearing in a formal way; and
- f. Failure to issue an apology to the Claimant even after being informed that the claimant was not guilty of the alleged misconduct.
- g. Calculating that it would be financially convenient to the bank to pay basic damages for wrongful dismissal despite the grave harm of loss of career to the claimant.

43. The Claimant did not adduce evidence or submit on how the grounds set out or any of them constitutes malice. **Black's Law Dictionary Tenth Edition** defines malice as –

- 1. The intent, without justification or excuse, to commit a wrongful act,**
- 2. Reckless disregard of the law or of a person's legal rights.**
- 3. Ill will; wickedness of heart**

44. I find that the Claimant has not proved malice on the part of the Respondent.

45. The Claimant further alleged defamation by the Respondent by virtue of the contents of the letter of termination.

46. During cross examination, the Claimant testified that –

“The termination as it was done and attributable to me having executed force debit injured my reputation because of the negative tag. That is why I have not been able to get any employment ... I cannot confirm whether the bank has not put a negative report when asked to recommend ... I do not have evidence of any negative publicity by the Respondent. I can only attribute to what I perceive from responses I get from my interviews. I am not aware of any false reports by the bank ...”

47. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a Claimant may be entitled to nominal damages. In this case, the legal issue is whether the Claimant proved there was publication to a third party and injury or damage suffered to his reputation.

48. In **Carter-Ruck on Libel and Slander, 4th Edition Butterworth's at page 66** it is stated:

“Sometimes, for one reason or another, a letter gets into the hands of some other person other than the person for whom it was intended. The question then arises as to whether the writer or sender of such a letter is liable for this publication. Broadly speaking, the rule is that the sender of a letter is only liable for the publication of its contents to the person to whom it was addressed unless, at the time of sending the letter, he knew or ought to have known that it was likely to be opened by other persons.”

49. A person’s own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the Claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, I find no proof of the claim for defamation.

50. I find no proof of defamation by the Claimant in this case.

Is the Claimant entitled to any of the remedies sought?

(a) 12 months’ compensation for unfair termination

51. Having found that the Claimant had not proved unfair termination, the Claimant is not entitled to compensation.

(b) One month’s salary in lieu of notice

52. The last page of the Claimant’s letter of termination states as follows in respect to terminal dues –

“Please note that any terminal dues owed to you i.e. Salary including today’s pay, allowances, leave pay of 1 days and notice pay will be earmarked to facilitate completion of the exit process and payment of amounts owed to the bank where applicable. You will be required to ensure that part A of the Leavers checklist has been duly completed and a copy of the form returned to Human Resources department in order for the earmark to be lifted. You will retain the original copy of the Leavers checklist to progress completion of Part B and signoff by respective accountable functions. The duly completed and signed off form must be returned to Human Resources within 2 weeks of your exit date.”

53. RW1 testified that the Claimant was paid his terminal benefits.

The Claimant did not submit his account statement as proof that his terminal benefits, including notice pay, was not paid into his account and utilized to offset his outstanding debt to the bank.

54. I find no proof that pay in lieu of notice was not made to the Claimant.

(c) Compensation for 12 days accrued leave

55. Like the claim for pay in lieu of notice, I find no proof that the Claimant was not paid for accrued leave days.

(d) General and aggravated damages, including exemplary damages for, deceit, injury to reputation and malicious falsehood

(e) General and aggravated damages, including exemplary damages, for libel

56. As was stated in the case of **Rookes v Barnard [1964] AC 1129**, exemplary damages are only payable in the following circumstances –

(i) In cases of oppressive, arbitrary or unconstitutional action by the servants of the government

(ii) Cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff; and

(iii) Where exemplary damages are expressly authorized by statute.

57. The Claimant having not proved malice or defamation, is not entitled to exemplary damages or general damages for malice or defamation.

58. **From the foregoing, I find no merit in the case and the same is dismissed in its entirety.**

59. **Each party shall bear its costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER 2021

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE