



**REPUBLIC OF KENYA**

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

**AT MOMBASA**

**CAUSE NO. 463 OF 2018**

**FAT-HI GHALIB ATHMAN BASHEIKH.....CLAIMANT**

**- VERSUS -**

**FIRST COMMUNITY BANK LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 3<sup>rd</sup> December, 2021)**

**JUDGMENT**

The claimant filed the memorandum of claim on 04.07.2018 through Timamy & Company Advocates. The claimant was employed by the respondent by the contract dated 25.08.2015 as a Business Centre Manager (Manager Grade 4) to work at Mombasa Digo Road Business Centre. His gross monthly pay was Kshs. 277, 836.00.

The claimant was summarily dismissed by letter dated 24.01.2018 which he received on 26.01.2018. The letter referred to the meeting held on 04.01.2018 at the respondent's Head Office and, the Security and Investigations Report on the loss of the respondent's funds, details said to be in the claimant's knowledge. The letter stated that it was advising the claimant that he was thereby summarily dismissed from the bank with effect from 24.01.2018 upon the reason that he had contravened section 44 of the Employment Act, 2007. The letter stated that his final dues would include salary up to 24.01.2018; 15 days of leave earned but not taken and provident fund payable as per the rules of the scheme. The letter stated that as at 23.01.2018, the claimant's liabilities included Staff Tawaruq Facility Kshs. 2, 058, 022.70 and loss of funds by fraud to be confirmed. The letter asked the claimant to note conditions thus, he must be available for interviews during the investigations; to hand over all respondent's assets in his custody and all outstanding projects or assignments to Regional Manager, Coast; complete the handover form to be approved prior to issuance of the clearance certificate; and to clear facilities upon exit unless repayment or takeover proposal is received and accepted and unsettled facilities to immediately attract market rate. The letter required the claimant to sign to signify understanding and acceptance of the conditions – but he did not sign the copy exhibited.

The claimant's case is that the summary dismissal was wrongful, illegal and in contravention of the Employment Act, 2007 because:

- a) It was premature because the investigations had not been completed.
- b) There were no lawful reasons to justify the summary dismissal.
- c) The process leading to dismissal breached sections 41, 45(5) and 51 of the Act.
- d) The reasons for dismissal in the show-cause notice did not relate to the accusations in the show cause letter.
- e) After dismissal the respondent never remitted the claimant's final dues.

The claimant claimed one-month notice pay Kshs. 277, 836.00; 12 months' salaries compensation Kshs. 3, 334, 032.00; punitive and exemplary damages for embarrassment, anguish, emotional and psychological torture.

In reply to the demand notice the respondent had issued the certificate of service and paid Kshs. 535, 555.20 from Staff Pension Fund.

The claimant prayed for judgment against the respondent for:

- a) A declaration that the summary dismissal of the claimant was illegal and wrongful.

- b) one-month notice payment Kshs. 277, 836.00
- c) 12 months' salaries compensation Kshs. 3, 334, 032.00.
- d) Punitive and exemplary damages.
- e) Any other relief which the Court may deem fit to grant.

The respondent filed the memorandum of reply on 19.10.2018 through Onyango & Ameyo Advocates. The respondent prayed that the claimant's claim be dismissed with costs. The respondent pleaded as follows. The claimant is not entitled to the claims and prayers made. The respondent admitted it employed the claimant as pleaded and was dismissed by letter dated 24.01.2018. The dismissal was procedurally fair per the contract dated 25.08.2015, the respondent's Human Resource Policies and Procedure Manual and section 44 of the Employment Act. Further the claimant falsified and colluded with a customer Jamil Trading Limited domiciled at his Digo Branch by authorizing irregular transactions involving the directors of the said customer in unlawfully approving collection documents being Bills of Collection under Trade Finance which resulted in the losses of USD 719, 475 and Kshs. 365, 000.00 as commission to the respondent. The particulars of gross misconduct and breach of contract included:

- a) Failure to diligently prepare, complete and verify a customer information as required by Central Bank of Kenya, the regulator ("Know Your Customer requirements").
- b) Opening the customer account for Jamil Trading Limited at Digo Branch without requisite supporting documentation and instead opening the account on the basis of a Board resolution only yet the company was yet to be incorporated.
- c) Facilitating fraud against the respondent by opening a customer account for a non-existing company, Jamil Trading Limited, at Digo Branch.
- d) As the senior manager in – charge of the respondent's Digo Branch, failing to supervise proper adherence to banking procedures and the respondent's standard operating practice applicable in transacting a customer account.
- e) Colluding with directors of Jamil Trading Limited in irregularly approving release of Trade Financing documents before payment resulting into financial loss by the respondent bank.
- f) Negligently, recklessly and casually discharging duties assigned to the claimant by his superiors by authorizing transactions without authority of the respondent's head office in clear violation of banking procedures for Trad Finance and the respondent's standard operating guidelines and practice.
- g) Handling the respondent's collections from Trade Financing at the Branch level of the respondent contrary to applicable procedures namely MT 202 and thus illegally denying the respondent income from the said transaction.

The respondent further pleaded that as at termination the claimant owed liabilities to be settled per his contract of employment and respondent's staff provident scheme including:

- a) Facility advanced by the lender for purchase of motor vehicle.
- b) Staff advance under Islamic Banking (Tawaruq) Kshs. 2, 058, 022.70.
- c) Loss of Funds USD 719, 475 ns Kshs. 365, 000.00.

Further the claimant was paid until 24.01.2018; he was paid accrued 15 annual leave days; he was paid provident funds Kshs. 535, 555.20 plus profit; and he received a certificate of service. Further the claimant did not have a clean record of service and he had received internal disciplinary memos. Further he received a notice to show cause dated 18.10.2017 setting out the allegations levelled; he received an invitation dated 22.12.2017 to attend disciplinary hearing; internal report recommended disciplinary action against the claimant; the claimant made oral and written presentations which were considered prior to summary dismissal; the external investigation report dated 13.07.2018 by One Source Financial Management Services Limited recommended disciplinary action against the claimant for collusion with third parties resulting in losses in the management of customer account, Jamil Trading Limited at Digo Branch which was under the charge of the claimant. In that regard the claimant admitted to have engaged in the malpractices and proposed a payment plan to offset losses incurred by the respondent as a result of his breach of contractual duties and collusion with a customer Jamil Trading Limited in falsifying claims related to invoices for import of rice. Further the fraud was subject of Mombasa Criminal Cases Nos. 2140 of 2016 and 1705 of 2016.

The claimant testified to support his case. The respondent's witnesses included Mohamed Jaffer A. Laving (RW1) the Head of Operations and Aisha Mohamed Sheikh (RW2) the Human Resource Manager. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows.

**First**, as per pleadings, evidence and final submissions, there is no dispute that the respondent employed the claimant and the contract of service was subsequently terminated by way of summary dismissal.

**Second**, was the summary dismissal unfair? The evidence by the claimant and the respondent is that the claimant received the letter to show cause setting out the allegations, he was invited to attend disciplinary hearing with a representative of his choice, he opted to attend alone, he

was heard and the letter of summary dismissal followed. The Court finds that the respondent complied with the procedure of a notice and hearing as required in section 41 of the Act. As submitted for the respondent the Court returns that the procedure leading to the summary dismissal was not unfair.

Did the respondent have genuine and valid reasons to dismiss the claimant as at termination and as per section 43 and 45 of the Act? The evidence is that as at termination, the investigations into the issue had not been completed. The letter of summary dismissal requested the claimant to note as a condition thus, **“1. During the course of the investigation, you must ensure you are available for interviews during this period. If you do not make yourself available, we will proceed with the investigation and make a determination based on the information we have available to us.”** Again, on the final dues computation dated 24.01.2018 it is endorsed for the respondent thus, **“However, funds to be withheld until after investigations are complete.”** The Court finds that as pleaded and urged for the claimant and in view of that evidence, it cannot be said that as at termination the respondent has established that it had a valid or genuine reason to dismiss the claimant whereas the investigations to guide the determination, in the respondent’s own words in the summary dismissal letter, had not been fully and completely concluded. As per the claimant’s case the Court returns that the respondent rushed or acted prematurely in terminating the claimant.

RW1 testified that in the case against the claimant, the Digo Branch gave the customer documents without informing the head office and released documents without confirming availability of funds so that the customer got the goods and at the point of payment the respondent discovered that it had no funds. RW1 further testified thus, **“Independent report found that there was Relationship Manager who reports to Branch Manager who dealt with it. The exporter directly communicated with the Relationship Manager without engaging head office at all. My report is on the supplementary list of documents for respondent. Is my report.”** The Court finds that with that evidence, the respondent has shown that the Relationship Manager and not the claimant had dealt with the exporter directly. That evidence by RW1 is consistent with the claimant’s written reply to the letter to show cause thus, **“...The subject client has an account domiciled at Mombasa 1 Branch. As per the issue regarding the documents that have been raised, I wish to state that the same was being handled through the respective RM of the account without my knowledge. I have never been involved in handling the documents neither have I received nor released the documents in question. The issue only came to my attention when Trade Finance sent a request on 13.09.2017 provide proof of payment. I investigated the issue and learnt that the documents were neither received through the appropriate bank channel nor were they being released to the client through the appropriate bank channel. This was a personal arrangement between the company and the RM. Since then we have been following up with the client who has claimed that he does not owe Noor Rice any monies. He has made payments through FCB amounting to USD 701, 245 and that the rest of the amounts amounting to USD 719, 475 were paid through cash direct to clients and a document to that effect is being withheld by a one Mr. Osman who is Noor Rice’s clearing agent. Over the past few days we have been relentlessly pursuing Mr. Osman to release the document and he has not done so. I am nonetheless still engaging client to either deposit the funds or provide the document as proof of payment.”**

The record of the disciplinary panel is exhibited on the respondent’s supplementary list of documents filed on 05.10.2020. That final report of the disciplinary panel states that an investigation report was presented and both the Relationship Manager and the claimant as Branch Manager had been liaising with the customer Jamil Trading as evidenced by the emails that the customer wrote to them on the matter and which the customer had willingly presented to the respondent. The Court finds that the emails in issue were not exhibited. The Court finds that on a balance of probability (and in view of the claimant’s reply to the show cause letter and the evidence by RW1 that it was the Relationship Manager who dealt with the customer directly), the claimant did not deal with the customer but the Relationship Manager (RM) did deal with the customer and was therefore directly culpable. The Court follows its opinion in **Edward Juma Masaka –Versus- National Environment Management Authority [2014] eKLR** thus, **“While making the finding, the court further holds that it would be unfair labour practice for an employer to terminate a manager or other senior officer on account of obvious breach of trust by an officer working under the manager because managers are entitled to trust those who work under them and an employer’s service delivery would be impossible if such trust relationship is not protected and respected.”**

The Court finds that the respondent has failed to establish the reason for termination as at the time of summary dismissal as envisaged in section 43, 45 and 47(5) especially that the letter of summary dismissal stated that investigations into the issues had not been completed and the claimant had to co-operate in that regard. While making that finding, the Court observes that the reason for the termination in the letter of summary dismissal was generalised as details known to the claimant and, **“The reason for the cause of action is that you have contravened Employment Act 2007 section 44”** and the Court returns that such generalised reason substantially deviated from the allegations levelled. The respondent by generalising the reason is found to have failed to justify the grounds for the termination as required in sections 43 and 47(5) of the Act.

**Third**, is the claimant entitled as claimed and prayed for? The Court finds that the claimant is entitled to a declaration that the summary dismissal was unfair for want of a valid and justifying ground as at time of dismissal. In view that the termination was unfair, the claimant is awarded one-month payment in lieu of the contractual notice of termination thus **Kshs. 277, 836.00** as prayed for. The Court has considered the factors in section 49 of the Act on award of compensation. The Court has considered that the claimant desired to continue in employment. The claimant appears to have had a clean record of service. The mitigating factor in favour of the respondent is that despite being the Branch Manager, the claimant belatedly discovered the dealings in issue between the Relationship Manager and the customer as he stated in his reply to notice to show cause thus, **“The issue only came to my attention when Trade Finance sent a request on 13.09.2017 provide proof of payment.”** In his cross-examination the claimant confirmed that he was in-charge of all Branch functions and while testifying he did not oversee the Retail Manager he testified that he oversaw the Relationship Manager. That being the evidence, the Court returns that the claimant significantly contributed to his dismissal when he belatedly discovered the issue when a request was made on 13.09.2017 to provide proof of payment. His contribution is put at 75% and he is awarded 3 months’ salaries under section 49 of the Act making **Kshs. 833, 508.00**. There were no submissions made for the claimant to justify and guide the Court on the quantum for the claim and prayer of punitive and exemplary damages and the same is deemed abandoned. As submitted for the respondent, per **Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 12 at page 474** exemplary damages should be awarded only in cases within the categories of oppressive, arbitrary and unconstitutional action by servants of government; conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or cases in which the payment of exemplary damages is authorised by statute. In the instant case, the Court returns that exemplary damages were not justified at all because for the unfair termination, section 49 of the Act prescribes the remedy and factors to guide the Court accordingly. The Court has considered parties’ margins of success and returns that the respondent will pay the claimant’s costs of the suit.

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

- 1) The declaration that the summary dismissal was unfair for want of a valid reason and justifying ground as at time of dismissal.
- 2) The respondent to pay the claimant **Kshs. 1, 111, 344.00** (less PAYE) by 01.02.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimant costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 3<sup>RD</sup> DECEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**