



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 72 OF 2018**

**GKN.....CLAIMANT**

**VERSUS**

**SMFB LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant's suit against the Respondent seeks relief for her alleged wrongful, unlawful and unfair termination. The Claimant averred that she was employed by the Respondent on 19<sup>th</sup> January 2016 a business development officer III earning a salary of Kshs. 27,000/- and that she diligently worked for the Respondent until 31<sup>st</sup> October 2017 when she was unfairly terminated from employment. She averred that the Respondent terminated her services on the basis of an agreement between herself and a third party all of which was totally unrelated to her employment or her employer. She averred that her termination was occasioned by her refusal to give in to sexual advances by the Branch Manager [Particulars Withheld] who promised to deal with her ruthlessly and that when she raised the issue of sexual harassment with the Human Resource, her pleas went unanswered and that instead she was transferred to another station. The Claimant averred that she was taken through a sham disciplinary process and her submissions were never taken into account. She thus maintained that the decision to terminate her services was discriminatory, unfair and unlawful and that she is therefore entitled to compensation. The Claimant sought general damages for sexual harassment, compensation for unfair/unlawful termination – Kshs. 324,000/-, one month's salary in lieu of notice – Kshs. 27,000/-, unpaid leave days – Kshs. 27,000/-, unpaid maternity leave Kshs. 81,000/-, un-refunded transport allowance Kshs. 2,900/-, unpaid pension savings Kshs. 50,400/-, severance day for 2 years Kshs. 45,000/- all amounting to Kshs. 607,300/-, a certificate of service plus costs of the suit.

2. The Respondent filed a reply to the statement of claim and averred that the claimant was terminated on grounds of misconduct after conducting a disciplinary hearing and making a determination. The Respondent averred that the termination was reached after receiving a complaint from one of the banks customer touching on the Claimant's conduct as a Business Development Officer. The Respondent averred that the report impacted negatively on the Claimant's integrity and credibility. The Respondent averred that the Claimant through a letter dated 12<sup>th</sup> November 2016 made a request to be transferred to Embu Branch citing an upcoming personal life event and also to manage an upcoming event (her nuptials). The Respondent averred that it had knowledge that the transfer was because of the upcoming nuptials that was to take place in Embu. The Respondent averred that the disciplinary process was conducted fairly and a fair decision arrived at taking into consideration the code of conduct and commitment to work which the Claimant had signed and which she had clearly breached. The Respondent averred that the decision to terminate the Claimant was arrived at after following the laid down procedure. The Respondent averred that the Claimant was in breach of the terms of service and her conduct had impacted negatively on the bank's image. The Respondent averred that her explanation at the disciplinary hearing was not satisfactory and as such she was terminated for misconduct. The Respondent averred that the Claimant failed to establish the elements of sexual harassment hence she cannot be awarded general damages for sexual harassment. The Respondent averred that the Claimant cannot be awarded for unfair termination as it followed the employment laws in terminating her. The Respondent averred that it was its policy is that the Claimant would be paid one month's salary in lieu of notice after clearing but in this case the Claimant never cleared. The Respondent maintained that her maternity leave was paid off as evidenced by the pay slips for the month of August, September and October. The Respondent averred that the claim is fictitious and that the Claimant had approached the court with dirty hands and was undeserving of any of the orders sought. The Respondent thus prayed that the claim be dismissed with costs.

3. The Claimant testified that she was employed in 2014 by the Respondent as a sales representative and later as a business development officer and was posted to [Particulars Withheld] Branch in the year 2016. She said that she worked there until March when she was transferred to [Particulars Withheld] Branch. She testified that her manager Misheck Kimethi had sexual requests which she declined. She said that after that, work became difficult and the manager would tell her that if she felt it was too much then she should do herself a favour and resign. She testified that she had health issues and so she reached out to the HR RB and that her complaint was received and CA from HR called and told her to send an email on the complaint. She stated that he told her not to be worried as he will sort it out but he never did. She stated that she then continued with the challenges until when she had a one on one meeting with the HR. She testified that she had requested for a transfer from Maua to Embu due to too much pressure as she was also pregnant at the time. She stated that she needed a conducive environment and [Particulars Withheld] Branch lacked that conducive environment. She said she was therefore transferred to

[Particulars Withheld] Branch and given a disturbance allowance. She stated that she enjoyed working in the [Particulars Withheld] Branch. She testified that after she left there, she was called and told to respond to an issue of a loan taken by a customer in her favour. She stated that she knew the purported Customer one RK as a friend and that she never met her as a customer. She stated that on a friendly level R lent her Kshs. 70,000/- on 5<sup>th</sup> March 2016 and she was to repay the money within 2 years. She stated that when R demanded the money she was not in a position to refund as she had spent the money on hospital bills and the wedding. She testified that R got a loan as a customer from SMEP in May but the loan was not in her favour. She testified that R failed to service the loan and when she visited the Bank she requested for more time and she told the manager that the Claimant had her money. She said the branch manager then asked R to write the loan letter which indicated that R had taken the loan in her favour. She stated that when that information got to her employer, she was called while on maternity and was told to go to Nairobi. She stated that she had a one-month old baby at the time and that caused her depression. She admitted to have attended a disciplinary hearing but the customer RK was not called. She said that she told the committee that R had given her money on a friendly basis and she was to pay her by March the following year. She testified that after the disciplinary meeting she was never given any feedback despite her writing so many emails requesting for the same. She said that she was paid leave dues after termination but she was not paid terminal dues. In cross-examination she confirmed that as a Business Manager her role was to assist the Respondent with loan advances. She stated that the process involved an approval by the branch credit committee and the branch manager would approve. She said the loan file would then be sent to head office which would subject it to loan approval before disbursement. She stated that she would be the first person to be in contact with the customer. She testified that she had requested for a transfer due to personal reasons as she was pregnant at the time. She stated that her fiancé lived in Embu. She testified that when she wrote to the HR in November 2016 alleging sexual harassment her email was blocked. She testified that she did not raise the issue of sexual harassment in her reply to the notice to show cause but she said that she raised the issue during the hearing. She stated that the same was not reflected in the minutes of the hearing. She testified that the branch manager had promised to make sure she lost her job. She stated that she did not approve any loan as she was not even the credit committee chair who was appointed by the manager. She said that the chair was Melly Kainde who chaired the credit committee. She denied that the loan disbursed was not approved as per policy. She stated that she received the letter of termination from Embu and that she cleared from the Branch but she did not clear with the Bank since the reasons for dismissal were not clear. She conceded that clearance was to be undertaken prior to payment. She stated that she was paid during the time she was on maternity leave but she added that she prayed for severance pay because while on maternity she used to be paid late.

4. The Respondent's witness was the HR RCC. She relied on her statement and list of documents as exhibits in support of her evidence and stated that the branch manager received a letter from a customer by the name RG which raised a complaint that she was taken advantage of by the Claimant as she took a loan of Kshs. 150,000/- and gave Kshs. 70,000/- to the Claimant. She testified that such action by the Claimant was considered fraudulent as the Claimant's role was to recruit bank customers, process facilities and manage the group customers. She stated that in the letter of complaint the customer indicated that she was owed Kshs. 62,400/- as they had agreed that the Claimant would pay her Kshs. 5,200/- a month. She stated that upon receipt of the letter, the branch manager forwarded it to the internal auditors to investigate and ascertain if the information by the customer was true. She stated that after receiving the report they proceeded as per the bank policy and took the Claimant through a disciplinary process. She stated that the Claimant was informed of the finding by the internal audit and the amount owed at the time of the investigation was Kshs. 70,340/-. She testified that from the Claimant's reply to the notice to show cause the Claimant admitted that she received money from R but she denied that it came from part of the loan advanced to the customer and that she received the money the previous year. She testified that according to the internal auditor's report, it was shown that the process in approval of the loan was not properly done as the branch team leader did not append his signature in the loan file for RG. She stated that after the Claimant responded to the notice to show cause, she wrote the Claimant an email and informed her that she would be called for a disciplinary hearing and since she was expectant, the Claimant was to advise when it would be convenient for her to appear. She stated that the Claimant then responded and said that she was willing to appear and a hearing was scheduled for 12<sup>th</sup> September 2017. She testified that the Claimant's views were considered and the panel recommended for termination of her services due to breach of banking tenets since the Claimant did what was not permitted of her. She stated that she never received any email from the Claimant complaining about sexual harassment and that the issue was also not raised during the disciplinary hearing. She testified that the Claimant had requested for a transfer in February 2017 and when a vacancy arose in Embu in February 2017 she was transferred there. She stated that the transfer was for the Claimant's own personal convenience and it had nothing to do with sexual harassment. She testified that due procedure was followed and the Claimant deserved termination for contravening the bank policies and code of conduct. In cross-examination she stated that there was record showing that R received Kshs. 150,000/- but there was no record showing that R gave the Claimant Kshs. 70,000/-.

5. The Claimant submitted that the claim of sexual harassment could not be proved in any way as it is always done in secret. She submitted that the Respondent never produced any anti-sexual policy which would have been applicable to its employees nor did it confirm that it had such a policy displayed somewhere for employees to comply with. She submitted that in the absence of such a policy the employees were vulnerable and exposed to sexual harassment since there was nothing to bind the offenders and that therefore her claim was valid. The Claimant submitted that she had reported the issue through email which email the Respondent's witness confirmed that they had blocked thus making it difficult for the Claimant to access it and produce evidence. The Claimant submitted that the Respondent's action was meant to defeat the cause of justice. She submitted that she proved her case of sexual harassment to the required threshold. She submitted that the customer was her friend and that the money she received from her was not from the proceeds of the loan. She submitted that the letter purporting to have been written by the customer was not received by the Respondent from the customer and that in the absence of the Respondent's received stamp and/or an explanation of how the letter landed at the Respondent raises eyebrows and only confirms the threats that were issued by the branch manager at Maua of dealing with the Claimant. She submitted that no explanation was given by the Respondent as to why the letter did not bear a stamp despite the confirmation that all documents lodged with it are always received and stamped. She submitted that the Respondent further failed to call the purported customer to confirm the content of the letter both in court and in the disciplinary process. The Claimant submitted that in the absence of the stamp and the maker the letter could have been self-made by the Respondent to defeat the cause of justice. She submitted that no proof was produced to confirm that the said money extended to the Claimant was the same money that was received by the customer from the Respondent as a loan. The Claimant submitted that this having formed the basis of termination and in the absence of bank statements to confirm the same, it was an unsupported ground for dismissal thus rendering the termination unfair. The Claimant submitted that she had testified that the money she received from the customer was lent to her long before the customer applied for a loan. She thus submitted that the disciplinary process was a façade aimed at achieving a backdoor termination and that the dismissal was unlawful and she should be compensated. She submitted that she proved her case on a balance of probabilities and should be compensated and the claim should be allowed as prayed.

6. The Respondent submitted the Claimant was accorded due process in accordance with Section 41(1) of the Employment Act. The Respondent submitted that the Claimant failed to exhaust all the available avenues for dispute resolution before she approached the court as stipulated by paragraph 11.7 of her contract service. The Respondent submitted that the Claimant breached the service contract together with

the code of conduct by using information within her knowledge as an employee to obtain funds from a customer under her portfolio. The Respondent submitted that the Claimant reneged on payment of the debt which caused financial constrain on the customer who subsequently made a complaint to the Bank. The Respondent reiterated the reasons for terminating the Claimant's contract in their letter dated 31<sup>st</sup> October 2017 being failure to honour financial obligation to a customer of the Respondent and submitted that the Claimant was terminated for a valid reason. The Respondent submitted that the Claimant failed to prove the allegations of sexual harassment. It submitted that had the Claimant reported the allegations with Respondent, then she ought to have kept copies of the same. The Respondent submitted that the Claimant had access to the emails up until the date she was terminated from employment and she cannot therefore purport that she never had access to the emails. The Respondent submitted there was no proof that the Claimant lodged a complaint with the HR and that her transfer to Embu was as a result of her request and for personal reasons as evidenced by her letter. The Respondent submitted that there was no mention of sexual harassment in her request for transfer letter. The Respondent submitted that the allegation of sexual harassment was a mere fabrication by the Claimant, an afterthought conceived after she had been terminated for misconduct. The Respondent submitted that the Claimant was paid during maternity as evidence by her pay slips and her claim fails in that regard. The Respondent submitted that the claim for transport is groundless as the same was not provided for in her contract of service. The Respondent submitted that the claim for severance is unwarranted as it only arises in case of a redundancy. The Respondent submitted that the Claimant in her testimony confirmed that she never cleared with the Respondent to enable the calculation of her final dues if any, less liabilities. It submitted that it is thus premature for the court to determine what is payable if any, as her final dues before clearance. The Respondent submitted that the Claimant was lawfully terminated, due process was followed and valid reasons for termination were given and that the issue of sexual harassment was an afterthought that had never been brought up until the filing of the claim herein. The Respondent thus prayed that the court dismisses this claim with costs.

7. The Claimant's termination was for alleged gross misconduct. The Respondent was to accord the Claimant a hearing in terms of Section 41 of the Employment Act. It is common ground that a disciplinary hearing was held despite it being held when the Claimant was still on maternity leave. The Claimant was heard, her representations considered and a decision made that she had breached the service contract together with the Respondent's code of conduct. That was in keeping with the requirement to show there was a valid reason for the dismissal in terms of Sections 43 and 45 of the Employment Act. The law provides as follows under Sections 43 and 45:-

*43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

Section 45 (2) of the Act provides that:

*45.(2) A termination of employment by an employer is unfair if the employer fails to prove-*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason -*

*(i) related to the employee's conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure (underline mine)*

8. Upon dismissal the Claimant could have appealed in terms of Clause 11.7 of the contract of service but she moved to court instead. Whereas there may have been untoward behaviour targeted at the Claimant by a supervisor, no evidence was adduced to that end and it therefore cannot be held that the Claimant suffered sexual harassment. If the Claimant required to access the emails an appropriate order would have been sought from court for either discovery or limited access to retrieve the email or other relevant correspondence. In the eyes of the court the allegations remain just that, allegations. After dismissal, the policy of the Respondent is for an employee to clear for final dues to be processed. That was not done as the Claimant failed to clear with the Respondent and cannot therefore complain she has not received her dues. She should proceed to clear with the Respondent so as to collect her final dues. As the matter fails on the reasons above the suit is dismissed and is so dismissed with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of February 2020**

**Nzioki wa Makau**

**JUDGE**