



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 142 OF 2015**

**LUCAS OTIENO ONDONG' .....CLAIMANT**

**-VERSUS-**

**EQUATORIAL COMMERCIAL BANK LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 9<sup>th</sup> April, 2020)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.02.2015 through Munyalo Muli & Company Advocates. The claimant subsequently changed his advocates to Omulele and Tollo Advocates. The claimant prayed for judgment against the respondent for:

- a. The declaration that the termination of the claimant by the 1<sup>st</sup> respondent vide its letter dated 14.07.2014 was unjustifiable, unfair, un-procedural and unlawful.
- b. Claim for Kshs.3, 684, 000.00 being 12 months' salaries of Kshs.307, 000.00 per month as compensation for unlawful termination as itemized at Paragraph 20 above.
- c. Interest on (b) above at Court rates from the date of filing the claim until payment in full.
- d. Costs of the suit.

The respondent filed on 30.03.2015 the statement of reply through Gikera & Vadgama Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

To answer the 1<sup>st</sup> issue for determination the Court returns that there is no dispute that the parties were in a contract of service. The respondent employed the claimant on 06.03.1995 in the position of Accounting Assistant. He was promoted to Financial Controller on 01.03.2004, Business Development Manager on 14.12.2009, Finance and Administration Manager on 21.07.2011 and as Risk Manager on 07.07.2012. The appointments and promotions were in writing.

To answer the 2<sup>nd</sup> issue for determination, the Court returns that there is no dispute that the claimant's employment was terminated by the letter dated 14.07.2014. As at termination, the claimant's monthly pay was Kshs.307, 000.00.

The circumstances of the termination were as follows. The claimant addressed to the respondent's Human Resource Manager the letter dated 11.07.2014 as follows:

**“Att: Mr. Kisegei**

**Dear Sir,**

**RE: EARLY RETIREMENT PROPOSAL**

**Further to our several discussions over the last two weeks leading to my subsequent email of 09.07.2014, I hereby write to confirm my agreement to your proposed early send-off package to me as detailed therein with a variation on the following:**

1. After enquiring from some of the recent bank lay-offs, I got to know that KCB paid its senior managers a one and half months pay for each year worked in recognition of their contribution towards the bank and foregone benefits. It is my conviction that a similar view should be accorded to me in view of my uninterrupted 20 years long and positive contribution to the bank to date.

2. Any other benefit that the bank may deem fit.

It is my hope that this matter will be considered favourably.

Yours faithfully,

Signed

L.P.O. Ondon'g'

The respondent replied by the letter dated 14.07.2014 addressed to the claimant as follows:

“Dear Lucas,

**RE: EARLY EXIT PACKAGE**

We refer to your letter dated 11<sup>th</sup> July 2014 and advise that due to the unique circumstances of your case that Bank has exceptionally allowed you to exit early from the service of the Bank under the following terms:

1. Three month's salary in lieu of notice Kshs.922, 500.00.
2. Severance pay of 15 days' pay for each completed year of service Kshs.2, 881, 232.88.
3. Accrued leave days as at 31<sup>st</sup> July 2014 Kshs.111, 205.48.

Gross pay - Kshs.3, 914,938.36.

Less Tax - Kshs.1, 169,575.71.

Net pay - Kshs.2, 745,362.65

4. You will continue enjoying concessionary rates of interest on any outstanding loans up to 31.12.2014 after which the Bank shall apply the commercial rate of interest until the loans are paid in full.
5. Your staff bank account will be credited with the net pay on 31<sup>st</sup> July 2014.
6. In addition, you will be retained in the Bank's Medical Scheme until 31<sup>st</sup> December, 2014.
7. Your Provident Fund dues will be dealt with in accordance with the rules of the scheme and the Retirement Benefits Act.

Your last day of service with the Bank shall therefore be 31<sup>st</sup> July 2014 before which date you are required to hand over your duties and all Bank properties in your possession to your Unit/Function Head.

In this regard, a clearance form is attached hereto which you are requested to ensure completion and hand over to your Unit/Function Head.

The Management would like to thank you for the service that you have rendered to the Bank and to wish you well in all your future endeavours.

Yours Sincerely,

Signed

SIMON KISEGEI

**HEAD OF HUMAN RESOURCES**

Signed

**SAMMY ITEMERE**

**MANAGING DIRECTOR**

**I Lucas Otieno holder of ID no. 6104162 acknowledge receipt of Kshs.3, 914, 938.35 in full and final settlement of my final dues.**

**Signed (by claimant) 17.07.2014”**

The respondent issued the certificate of service dated 11.08.2014 showing the positions the claimant held with the respondent from 1995 to July 2014 when he left employment with the respondent.

The **3<sup>rd</sup> issue** for determination is whether the claimant’s early exit was unlawful and unfair. The claimant alleges that the termination of the contract of service was unlawful and unfair. His case is as follows. The claimant had a clean record of service with the respondent for 20 years. The claimant’s tribulations with the respondent began when the claimant in his official capacity reported to the Central Bank of Kenya (CBK) as the respondent’s regulator that the respondent had failed to uphold good corporate governance structure of employee hierarchy requiring that head of legal and compliance department in a banking institution must not also be the one heading the risk department. The CBK Inspection Report as at 31.01.2014 (and dated June 2014) about the respondent at paragraph 1.2 found as follows:

- a. It was established that the Risk and Audit function are both supervised by the Head of Governance, Legal and Company Secretary, who also reviews their reports. This compromised the independence of the oversight functions.
- b. The performance appraisals of the Internal Auditor and the Risk Manager were also done by the Head of Governance, Legal and Company Secretary, contrary to the requirements of CBK/PG/O2 which requires that the appraisal of the oversight functions be carried out by the Board.

The report states that the findings were discussed with the respondent’s senior management on 06.05.2014 and a progress report on corrective actions taken or to be taken was to be submitted to the Director, Bank Supervision Department within 45 days of receipt of the report.

The claimant’s case is that after the Inspection Report, the respondent alleged his poor performance and by telephone and orally demanded that he should leave employment for non-performance. The claimant’s further case was that he was therefore left with no option but to engage the respondent on the dues that would be paid to him upon his termination from employment. The claimant’s case is that the termination by the letter dated 11.07.2014 was without any disciplinary process and was abrupt without any reasons. It is his case that the termination was without a hearing or lawful cause. It is his further case that the termination coincided with the Inspection Report by CBK and his supervisor unfairly demanded his immediate mid-year appraisal but which was due two weeks after 30.06.2014. The evaluation rated him as highly performing hence the desire to terminate him on account of poor performance became impossible and the claimant’s case is that the early retirement was unfair.

The respondent’s case is as follows. The claimant’s performance was wanting because he refused or neglected to furnish the respondent’s Board’s with accurate, timely and regular progress reports from the claimant as per his job description. Further the claimant made effort to provide the reports only after requests and assertion of pressure to do so. It is true that the management summoned the claimant and a few issues were discussed. The claimant decided to negotiate an early retirement and parties agreed to the terms as conveyed in the letter dated 14.07.2014 and effective 30.07.2014. The Governance structure was within the knowledge of all staff of the respondent and at no time did the respondent instruct the claimant not to give necessary information to CBK.

The Court has considered the pleadings, the evidence and submissions on record. The evidence is that as pleaded by the claimant parties held discussions about their employment relationship and the parties agreed to separate through a mutual agreement known to them as early exit or retirement and summarized in the letter of early exit package dated 14.07.2014. The Court finds that the parties having agreed upon the terms of separation, it was misconceived for the claimant to allege that the termination was unfair for want of a disciplinary process of a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The Court finds that the reason for termination was the negotiated separation agreement per the letter dated 14.07.2014 signed by both parties and duly implemented or performed by the parties. The reason and procedure for termination is found to have been lawful and valid in terms of sections 43 and 45 of the Act. The Court finds that there was no evidence that the claimant was not forced or coerced to accept the early exit and as it was purportedly submitted for the claimant by Omulele & Tollo Advocates. Instead, the Court finds that the parties are bound by their mutual and voluntary separation agreement that has not been shown to have been unlawful in any respect. The Court finds that the termination was not unfair or unlawful.

To answer the **4<sup>th</sup> issue** for determination the Court returns that prayers made for the claimant were premised on a finding that the termination was unlawful or unfair. In the circumstances they will fail as unjustified. The respondent filed or served the submission belatedly or not at all and each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with orders each party to bear own costs of the proceedings.

**Signed, dated and delivered in court at Nairobi this Thursday, 9<sup>th</sup> April, 2020.**

**BYRAM ONGAYA**

**JUDGE**