



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 141 OF 2018

SILAS NTHIGA NJERU.....CLAIMANT

VS

KENYA WOMEN MICRO FINANCE BANK LTD.....RESPONDENT

JUDGMENT

Introduction

1. Silas Nthiga Njeru, the Claimant in this case was an employee of Kenya Women Micro Finance Bank Ltd, initially as an Accounts Clerk and rising through the ranks to the position of Operations Manager, at the time of exit from the Respondent's establishment.

2. The Claimant brought this claim following his dismissal on 23rd March 2015. The claim is documented by a Memorandum of Claim dated 16th March

2018 and filed in court on even date. The Respondent filed a Response on 23rd October 2018.

3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its General Manager, Human Resource, Caroline Mwangi.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent Bank on 11th February 2009 as an Accounts Clerk, Grade 8. He was confirmed in his appointment by letter dated 31st July 2009.

5. On 12th February 2010, the Claimant was promoted to the position of Assistant Accountant. On 23rd May 2012, he was appointed as Acting Regional Accountant and on 4th October 2012 he was further appointed as Acting Operations Manager.

6. By letter dated 16th May 2013, the Claimant was confirmed in the position of Operations Manager, a position he held until 23rd March 2015 when he was summarily dismissed.

7. By letter dated 9th January 2015, the Claimant was suspended, pending investigations into fraudulent activities at Mombasa Branch, where he served as Operations Manager.

8. By letter dated 16th March 2015, the Claimant was invited to a disciplinary meeting to be held on 23rd March 2015. On the same day of the disciplinary meeting, the Claimant was issued with a summary dismissal letter.

9. The Claimant appealed against the summary dismissal by his letter dated 25th March 2015 and on 3rd June 2015, he sent a demand letter to the Respondent.

10. The Claimant submits that his dismissal was wrongful and unfair in that the Respondent did not follow the due procedure in effecting the dismissal.

11. The Claimant avers that he was not accorded any opportunity to be heard prior to the dismissal. He adds that he was not paid his terminal dues, including accrued gratuity and staff share capital plus dividends thereon.

12. The Claimant tabulates his claim as follows:

- a) One month's salary in lieu of notice.....Kshs. 79,400.00
- b) Unpaid 3 months' half salary (January – March 2015).....119,100.00
- c) Unpaid leave for 2014-2015.....110,328.20
- d) Unpaid wages for 35 months' remainder of contract.....2,858,400.00
- e) 12 months' salary in compensation.....952,800.00
- f) KWFT ESOP (21,000 units) plus dividends for 2 years.....133,560.00
- g) Accumulated gratuity balances to March 2015.....583,849.00
- h) Costs plus interest

The Respondent's Case

13. In its Response dated 20th September 2018, the Respondent admits having employed the Claimant from February 2009 until 23rd March 2015.

14. The Respondent states that the Claimant was aware that it was an express or implied term of his contract of employment to be honest, a person of integrity as well as take all necessary measures including following the laid down procedure on handling of money.

15. The Respondent avers that contrary to the express and implied terms of the Claimant's employment contract, the Claimant in his capacity as the in charge of operations, responsible for authorising cash transactions, was negligent, dishonest as well as professionally irresponsible, leading to a significant loss of Kshs. 14,000,000.

16. On 9th January 2015, the Claimant was put on suspension to pave way for investigations, into various fraudulent activities that had taken place at the Mombasa Branch, where the Claimant worked.

17. By letter dated 16th March 2015, the Claimant was invited for a disciplinary meeting on 23rd March 2015, to answer to charges of wilfully neglecting to perform and/or carelessly discharging his duties that caused the Respondent Bank to incur huge losses.

18. The Respondent states that the Claimant was granted an opportunity to be heard after discovery of the loss and each member of the Disciplinary Committee recommended that the Claimant be summarily dismissed.

19. The Claimant was therefore issued with a dismissal letter on 23rd March 2015, which letter the Claimant signed in acknowledgement of receipt.

20. The Claimant appealed against the dismissal on 25th March 2015 but before the Respondent could communicate its decision on the appeal, the Claimant, on 26th October 2015, wrote to the Respondent's Managing Director, withdrawing the appeal and recording his acceptance of the decision of the Disciplinary Committee. The Claimant further sought forgiveness and pardon for his shortcomings that had caused great loss to the Respondent.

21. The Respondent points out that on 21st March 2016, the Claimant together with another employee one Jacob Kemboy Komen were charged with stealing by servant in Criminal Case No 622 of 2016. Kemboy was acquitted but the Claimant was put on his defence as the prosecution had proved that he had a case to answer.

22. The Respondent's case is that the Claimant's dismissal was justifiable and fair.

Findings and Determination

23. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

24. The Claimant was dismissed by letter dated 23rd March 2015 stating the following:

“Dear Sir,

RE: SUMMARY DISMISSAL

The above refers and the disciplinary committee meeting held on 23rd March 2015.

We hereby advise that you have been summarily dismissed from your employment with effect from 23rd March 2015.

Ensure that you return the official documents e.g. the AAR card, ESOP Certificate, employment card, office keys or any other items belonging to KWFT immediately.

We thank you for the time you served the women of this country and wish you well in your future endeavors.

Kindly acknowledge receipt of this letter by signing the attached duplicate copy of the letter.

Yours faithfully,

(signed)

JACKSON WANJAU

GENERAL MANAGER, HUMAN RESOURCE.”

25. Although this letter does not disclose the reason for the Claimant’s dismissal, it is evident from the suspension letter dated 9th January 2015 and subsequent record of disciplinary proceedings that the Claimant was dismissed for authorising transactions that turned out to be fraudulent.

26. The Claimant himself gave the following chronology of over the counter transactions that he authorised at Mombasa Branch:

- a) Kshs. 3.4 Million paid on 18th December 2014 from Marura Nursing Limited Account;
- b) Kshs. 3.2 Million paid on 19th December 2014 from Marura Nursing Limited Account;
- c) Kshs. 3.4 Million paid on 18th December 2014 from Waheiha Limited Account;
- d) Kshs. 4 Million paid on 19th December 2014 from Waheiha Limited.

27. From the evidence on record, the Claimant was accused of failing to interview the customers and to make a call back to the domicile branch. Coincidentally, both accounts were domiciled at the Respondent’s Thika Branch.

28. The Claimant admitted that he did not interview the customers and did not make a call back to Thika Branch, ostensibly because these were not requirements at the time.

29. The Claimant availed an extract of the Respondent’s Operations Procedures Manual together with the Job Description for the position of Operations Manager to demonstrate that he was not required to interview customers or to make a call back with regard to accounts domiciled in other branches.

30. In *Agnes Murugi Mwangi v Barclays Bank of Kenya Limited [2013] eKLR* this Court rendered itself in the following terms:

“Banks are in the business of handling other people’s money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face.”

31. It seems to me therefore that even in the absence of express policy guidelines, the Court must ask itself whether the Claimant acted reasonably and responsibly in the circumstances.

32. Four six-digit over the counter cash withdrawals from two corporate accounts, with no prior notice, within a span of two days should have raised the antennas of any banker. Indeed, the Claimant himself testified that these were not normal transactions. This being the case, the Claimant should have done more to safeguard customer funds, by going beyond the ordinary checking against the core banking system.

33. The Claimant appears to have been aware that he failed to exercise due care as required. I say so because on 26th October 2015, he wrote to the Respondent withdrawing his appeal against the dismissal, a demand letter dated 3rd June 2015 and request for partial clearance made in August 2015. By the same letter the Claimant asked for forgiveness and pardon for his shortcomings.

34. The Claimant told the Court that he wrote this letter in order to facilitate release of his terminal dues, which he required to meet urgent financial needs. While the Claimant's financial needs at the time are evident from the contents of his letter, his failure to exercise due care has not been atoned.

35. I must add that the Claimant's acquittal by the criminal court did not absolve him from the administrative charges preferred against him by his employer. This position is well settled in case law. In *Kibe v Attorney General (Civil Appeal No 164 of 2000)* the Court of Appeal held that an acquittal in a criminal case does not immunise an employee against disciplinary action by an employer, even on the same set of facts.

36. The reason for this position is simply this; that a criminal trial and internal disciplinary proceedings at the work place are two distinct processes, with diverse procedural and standard of proof requirements.

37. In the circumstances of this case, I find and hold that the Respondent had a valid reason to dismiss the Claimant, as required under Section 43 of the Employment Act.

38. The next question is whether in effecting the dismissal, the Respondent observed due procedure.

39. From the evidence on record, the Claimant was notified of the administrative charges against him by the letter that sent him on suspension on 9th January 2015. The subsequent letter dated 16th March 2015 inviting the Claimant to a personal hearing before the Staff Disciplinary Committee was also clear on what the Claimant was going to face. There is further evidence that the Claimant was heard on 23rd March 2015.

40. During trial, the Claimant took the position that he was not afforded a proper opportunity to be heard. The Court did not however find any evidence of the Claimant having taken issue with any part of the disciplinary proceedings. The Claimant held a senior position within the Respondent's establishment; he told the Court that he was number two in the pecking order at Mombasa Branch. He cannot therefore be said to have been unaware of his rights at the shop floor.

41. It would appear therefore that the Respondent made a good attempt to comply with the procedural fairness requirements set under Section 41 of the Employment Act. But there was one misstep that occurred; the Claimant was sent on suspension on half pay without any statutory or contractual basis.

42. This Court has stated in the past that suspension is a neutral action aimed at paving way for unhindered investigations. It should therefore not be used as a punishment to the affected employee (see *Kefa Omae Obiri v Marianist Organization [2018] eKLR*).

43. Although the Claimant's suspension letter refers to section 10.7 of the Respondent's Human Resource Policy as the basis for the suspension, the Respondent did not bother to avail the policy document to the Court. The Court could not therefore tell from which document, either statutory or contractual, the Respondent drew the decision to suspend the Claimant on half pay. The only inference I will make in the circumstances is that the decision to withhold part of the Claimant's salary during suspension was unlawful and unfair.

44. As a result, I find and hold that the procedure adopted by the Respondent in bringing the Claimant's employment to an end was tainted with illegality. For this reason alone, the Claimant is entitled to some compensation.

Remedies

45. Flowing from the foregoing findings, I award the Claimant three (3) months' salary in compensation. In making this award, I have considered the Claimant's length of service but also his contribution to the dismissal. I have further taken into account the Respondent's decision to withhold part of the Claimant's salary without any known basis, which no doubt caused the Claimant significant hardship.

46. I further award the Claimant one (1) month's salary in lieu of notice.

47. In light of the finding that the Claimant's suspension on half pay was unlawful, I allow the claim for unpaid half salary for three (3) months.

48. Regarding the claim for accumulated gratuity balances up to March 2015, the Respondent's General Manager, Human Resource, Caroline Mwangi relying on the Claimant's letter of appointment, told the Court that because the Claimant did not successfully complete his contract, then he is not entitled to gratuity.

49. The only thing I will say is that the Respondent's stance in this regard flies right in the face of Section 18(4) of the Employment Act which provides as follows:

(4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.

50. In light of this express provision of the law, the Respondent had no reason to withhold the Claimant's accrued gratuity. The claim thereon therefore succeeds and is allowed.

51. In her testimony before the Court, the Respondent's witness admitted that the Respondent owed the Claimant leave pay in the sum of

Kshs. 95,485.20. Since the Claimant did not adduce any evidence to support his stated claim in this limb, I adopt the figure of Kshs. 95,485.20 admitted by the Respondent in this regard.

52. The Claimant further makes a claim for liquidation of his shares under the Respondent's Employee Stock Ownership Plan (ESOP). Again, the Respondent did not bother to avail its ESOP Agreement. It is therefore left to the Court to piece together as to what may have been the intention of the Respondent and its employees with regard to shares held by employees in the Respondent Bank.

53. In general terms, ESOP allows employees to purchase stocks in their employer's enterprise. ESOP Agreements outline the process by which employees purchase the stocks, the accruing benefits as well as restrictions on buying and selling of stocks.

54. In the dismissal letter issued to the Claimant on 23rd March 2015, the Claimant was instructed to return his ESOP Certificate which was categorised as an official document. It would appear therefore that the Claimant's exit from the Respondent's employment coincided with his exit from the Respondent's ESOP.

55. In the course of trial, it emerged that the Respondent's employees purchased the shares through a loan facility extended by a third party lender. In light of this and because the parties were equivocal on the Claimant's loan status with the third party lender, I will desist from making a liquidated award on this limb. Instead, I direct the parties to work out a liquidation plan, taking into account all accrued dividends and any outstanding loan balances owed to the third party lender.

56. No basis was established for the claim for wages for 35 months' remainder of contract which therefore fails and is dismissed.

57. In the end, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....	Kshs. 238,200.00
b) 1 month's salary in lieu of notice.....	79,400.00
c) Unpaid 3 months' half salary.....	119,100.00
d) Leave pay for 2014-2015.....	<u>95,485.20</u>
Total.....	532,185.20

58. This amount will attract interest at court rates from the date of judgment until payment in full.

59. In addition, I direct the Respondent to tabulate and pay to the Claimant his accrued gratuity up to the date of dismissal within the next thirty (30) days from the date of this judgment.

60. I further direct the Respondent to liquidate the Claimant's shares under the ESOP arrangement and pay to the Claimant the current value plus accrued dividends net of third party loan balances, also within the next thirty (30) days from the date of this judgment.

61. The Respondent will meet the costs of this case.

62. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF MAY 2020

LINNET NDOLO

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, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Silas Nthiga Njeru (the Claimant in person)

Mr. Maruti h/b Miss Matasi for the Respondent