



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2310 OF 2015

PETER JUMA SIMIYU.....CLAIMANT

-VERSUS-

JAMII BORA BANK LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th July, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 23.12.2015 through Kihanga and company Advocates. The claimant stated that at termination he earned Kshs. 174, 495.00 per month and he claimed Kshs.3, 060, 307 as follows:

- a. Unpaid half salary for August 2015 Kshs.87,248.00.
- b. Unpaid salary for September – December 2015 Kshs.697, 980.00.
- c. 24 days' unpaid leave days Kshs. 139, 506.00.
- d. Unpaid half pension for August 2015 Kshs. 4, 613.00.
- e. Unpaid pension for September – December 2015 Kshs. 9, 255.00 x 4 making Kshs. 37, 020.00.
- f. Claim under section 49 of Employment Act Kshs. 174, 495.00 x 12 Kshs. 2, 093, 940.00.

The claimant prayed for judgment against the respondent for:

- a. A declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.
- b. An order directing the respondent to reinstate the claimant to his employment without loss of position, status or benefits or in the alternative payment of Kshs.174, 495 x 12 x 29 (60 years' age of retirement less 31 years' current age of claimant making Kshs. 60, 724, 260.00.
- c. Special damages of Kshs. 3, 060, 307.00 as claimed.
- d. Costs and interest on (b) and (c) above at court rates from the date of filing the claim until payment in full.
- e. Any other relief that the Honourable Court may deem fit to grant in the interest of justice.

The respondent filed a memorandum of appearance on 15.01.2016 through Robson Harris & Company Advocates. The response to the memorandum of claim was filed on 08.03.2016. The respondent prayed that the claimant's claim herein be dismissed with costs. The respondent further filed the response to the memorandum of claim and counterclaim on 27.03.2019. The respondent counterclaimed that the claimant applied for a loan of Kshs. 1, 300, 000.00 from the respondent on 04.11.2013. The amount was advanced to the claimant as applied on 10.12.2013 to be repaid within 60 months at Kshs. 30, 927.00 per month. The loan had fallen in arrears and the outstanding loan amount as at 01.03.2017 was Kshs. 1, 139, 220.17 and applicable interest rate was 10.5% per annum. The respondent counterclaimed Kshs. 1, 139, 220.00 as at 01.03.2017 and prayed for that amount, interest thereon at Court rates, costs of the suit, and any other relief that the Honourable Court may deem fit and just.

The claimant filed on 02.04.2019 the reply to response and response to counterclaim. The claimant denied the counterclaim and stated that the respondent had not availed the proof of payment of appropriate filing fees pursuant to the directions of court on 29.01.2019 so that there was no valid counterclaim. The claimant further urged that the rate of interest counterclaimed of 10.5% is at variance with the actual interest rate as provided for under the loan instrument being 15 %. The Court has perused the Court file and the memorandum of claim and counterclaim was filed on 27.03.2019 and receipt no. 9944349 for Kshs. 1365.00 issued for the filing fees. Thus the Court finds that the filing fees in issue was paid and the court will not return to that point of objection by the claimant.

The claimant testified to support his case and the respondent's witness (RW) was one John Wamwati, the respondent's Chief Manager, Human Resource. Parties filed their respective submissions. The Court has considered all the material on record and makes findings as follows.

To answer the **1st 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 as a teller around 07.02.2011. By the letter dated 04.06.2014 the claimant was appointed to the position of a Branch Manager and deployed at the respondent's Kikuyu Branch. The letter provided for a monthly consolidated pay of Kshs. 120, 000.00. The demand letter by the claimant's advocates dated 05.11.2015 demands one-month salary in lieu of notice at Kshs. 120, 000.00. The Court returns that as at termination the claimant's consolidated monthly pay was **Kshs. 150, 924.00** as per evidence by RW who testified thus, **"...If he was terminated he'd not be able to have a pay slip. His last pay was Kshs. 150, 924.00 (basic pay). No allowance. I base answer on document not filed."** The Court finds that the claimant's allegation that at termination he was earning Kshs.174, 495.00 was unfounded as it contradicts the documentary evidence on record in view of the figures stated in the contract and the demand letter. While making that finding the Court has considered the claimant's inconsistent evidence on the monthly pay thus, **"I was employed in 2011 (7.02.2011) as a teller. That time basic pay was Kshs. 25,000.00. It was gross. I was promoted to branch manager as at termination at Banana Branch at Kshs. 150, 000.00 plus allowances Kshs. 174, 000.00 per month. Pay slip is filed. Contract of employment is 4.06.2013. It shows Kshs. 120,000.00. There was increment."** The Court has revisited the record and finds that the pay slip alleged in the claimant's evidence is not exhibited. The record of the alleged increments is as well not exhibited at all. Thus the monthly pay is found to be **Kshs. 150, 924.00** as per evidence by RW.

To answer the **2nd issue** the Court returns that the respondent terminated the contract of service by the letter of notice of termination of employment dated 07.09.2015. The letter stated thus, **"The Employment Act under section 44 provides that an employee can be terminated if suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."** The letter had referred to the claimant's suspension and disciplinary hearing on 03.09.2015. The dismissal was immediate effective 07.09.2015.

The **3rd issue** for determination is whether the termination was unfair or unlawful.

The evidence is that the respondent suspended the claimant from duty effective 05.08.2015 per the letter of suspension of the same date. The suspension was upon alleged unethical practices in the credit process where it was alleged that the claimant had been receiving bribes in return for favours from certain valuer and car tracking company. While on suspension, the letter stated that the claimant would receive half salary and was to report to the Audit Office every Monday morning until the case was finalized. The claimant received the show-cause letter dated 24.08.2015 alleging as follows. That the claimant had been soliciting for bribes from customers in exchange for favours specifically to process customer facilities at the claimant's Branch and in particular the customer was one Samuel Mwai of Baraka Junior School. It was further alleged that the claimant had been receiving bribes from valuers and car tracking companies namely Attic and Ultimate valuers and Trail My Car tracking company in return for influencing the award of customer briefs in their favour. He was required to reply in 48 hours.

The claimant replied by denying the allegations. For loan approvals he stated that approval was by the credit department and his role was to make comments that were not final. For valuation issue, he stated that the function had been centralized and the branches had no role to issue instructions in that regard. The respondent summoned the claimant to attend a disciplinary hearing on 19.08.2015 per the letter dated 17.08.2015. He was again summoned per the letter dated 01.09.2015 for disciplinary hearing on 02.09.2015.

The respondent has exhibited the record of the disciplinary hearing held on 02.09.2015. The claimant denied all the allegations. He stated he had no relationship with any of the alleged valuers. He confirmed that he spoke to Baraka School and advised them on how their staff would benefit from a salary scheme and had provided relevant documents to the personal banking section. The processing of the salary scheme for the school had taken some time and it could be that the customer had been frustrated and thought that a kick back was necessary to speed up the process but which was never asked for and therefore not true. The recommendations show that the claimant may not have received any money from the customer but that needed to be confirmed with the confidential report. The recommendation report was not exhibited in Court or at the disciplinary hearing.

The Court has considered the evidence. The Court returns that the respondent complied with the due process of a notice and a hearing as per section 41 of the Employment Act, 2004. Thus the procedure leading to the termination was not unfair.

As relates the reasons for termination, the Court returns that the respondent has failed to show that as at termination (in terms of section 43 of the Act) the alleged reasons for the termination genuinely existed. There was no evidence that the claimant solicited for the bribes or received bribes from Baraka School or any other customer –and the alleged confidential report in the matter was never exhibited or given to the claimant and who told the disciplinary hearing panel that he had written to the customer to verify the allegations in writing but no such verification was provided. The Court further finds that the respondent failed to establish that the claimant was involved in giving instructions to valuers. The Court finds that there is no reason to doubt the claimant's evidence that the role of giving instructions to valuers had been removed from branches and centralized. The Court further finds that while alleging suspected crime against the respondent as per the letter of termination, RW testified that no report of alleged bribery had been made to the police or the Ethics and Anti-Corruption Commission (EACC). RW testified that no written complaint had been made against the claimant and no evidence of the alleged bribery had been made at the disciplinary hearing. Further RW testified that the allegation of receiving bribes had not been captured at the disciplinary hearing. Accordingly, the Court returns that the reasons for termination did not exist as at the time of termination, they were not genuine and did not relate to the claimant's capacity, conduct and the respondent's operational requirements as envisaged in section 45 of the Act. The Court finds the termination was unfair for want of a valid reason.

To answer the 4th issue being whether the claimant is entitled to the remedies as prayed for, the Court makes findings as follows:

- a. The Court has already found that the claimant is entitled to the declaration that the termination was unfair and unlawful.
- b. The claimant had a clean record of service. He wished to continue in employment. The evidence is that he never contributed to his termination. Instead it appears that he performed his duties with due diligence. He had served the respondent climbing the ladder from a teller to a branch manager. The respondent has not established a mitigating factor. In the circumstances under section 49 of the Employment Act, 2007 the claimant is awarded 12 months' salaries in compensation at Kshs. 150, 924.00 as per month making **Kshs. 1, 811, 088.00**.
- c. As the termination was sudden without due notice he is awarded the contractual **Kshs. 150, 924.00** one month pay in lieu of termination notice.
- d. The claimant prayed for reinstatement. Under section 12 (3) (vii) of the Employment and Labour Relations Court Act, 2011 reinstatement is available within 3 years of dismissal. The dismissal in the instant case was on 07.09.2015. The three years lapsed on or about 07.09.2018. The Court finds that the remedy of reinstatement is therefore time barred.
- e. As submitted for the claimant, the court follows and upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR**, thus “**In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’.** The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination is unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.” In the present case the Court finds that the claimant is entitled to half salary for August 2015 making **Kshs.75,462.00** and salary for 7 days in September 2015 making **Kshs.10,564.68**. While making that award the Court has considered the cited case and finds that the award is with respect to the salaries due for the term the claimant was entitled to work but for the suspension which has been found to have been unfair. As reinstatement is time barred in the instant case, no payment would be due to the claimant beyond the dismissal date as partial reinstatement to the date of this judgment is not available at all. Half pension for August 2015 is awarded as prayed for at **Kshs. 4,613.00** plus for 7 days in September 2015 **Kshs. 2,152.70**.
- f. The claimant prays for 24 days of untaken and unpaid annual leave days. There is no reason to doubt the claim and the termination letter promised to pay in lieu of due annual leave but the respondent provided no evidence to show that such payment was made. The claimant is awarded 24/30 x Kshs. 150, 924.00 making **Kshs.120, 739.20**.
- g. The claimant is therefore awarded a sum of **Kshs.2, 175, 543.58**. while making that finding the Court returns that the claimant has not justified the prayer for Kshs.60, 724, 260.00 for lost future earnings for 29 years prior to attaining retirement age of 60 years. The claimant has not established that after termination or by reason of termination his capacity to engage in gainful activities was impossible and such impossibility was attributable to the respondent. Thus the Court finds that the claimant has failed to justify the claim and prayer. As submitted for the respondent the Court follows the holding in **Charles Muturi Mwangi –Versus- Invesco Assurance Company Limited [2016]eKLR** (Wasilwa J) and in **Alphonse Mghanga Mwachanya –Versus- Operations 680 Limited** (Radido J) that in such cases, the award for compensation under section 12 of the Employment Act, 2007 was adequate.

To answer the 5th issue for determination the Court returns that the claimant did not deny that the loan was advanced as counterclaimed and the claimant clarified in the response to the counterclaim that the applicable interest was 15% per annum. However, the respondent prayed for Kshs. 1, 139, 220.17 plus interest thereon at 10.5%. As parties are bound by their pleadings and the respondent did not seek to amend the counterclaim, the Court considers that the respondent waived the interest at 15% to retain the staff preferential interest at 10.5% as claimed and prayed for and which is now awarded. Further it is trite law that the Court will not grant that which is not prayed for.

The Court has considered the parties' margins of success and finds that the respondent will pay 50% of the claimant's costs of the suit and each party to bear own costs of the counterclaim.

In conclusion judgment is hereby entered for the parties for:

1. The declaration that the termination of the contract of service herein was unfair and unlawful.
2. The respondent to pay the claimant a sum of **Kshs.2, 175, 543.58** (less due PAYE).

3. The claimant to pay the respondent a sum of **Kshs. 1, 139, 220.17** plus interest thereon at 10.5% as claimed and prayed for.
4. For avoidance of doubt parties to set off the amounts as awarded and balance be paid to deserving party as appropriately and such payable amount be included in the decree herein as per parties' reconciliation and agreement in drawing the decree.
5. The respondent to pay 50% of the claimant's costs of the suit and each party to bear own costs of the counterclaim.
6. In view of the prevailing Covid 19 situation, there be stay of execution until 01.10.2020.

Signed, dated and delivered by the court at **Nairobi** this **Friday, 24th July, 2020**.

BYRAM ONGAYA

JUDGE