



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1603 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

REUBEN MUTHANGA MUTHONI.....CLAIMANT

VERSUS

EQUITY BANK LIMITED..... RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent in November 2004 as a bank clerk and later confirmed as a micro-credit officer. He was promoted to various positions and the last position he held was Relationship Manager, Credit.

On 24th April 2015, he was issued with a letter to show cause for soliciting for bribes to facilitate processing of loans and borrowing of an asset finance facility. He responded to the same but later opted to write a resignation letter to which Respondent declined acceptance and sent him on suspension without pay, benefits or allowances. While on suspension, he was issued with another letter to show cause on 11th July 2015 which he responded to. The letter extended his suspension.

On 14th July 2015, the Claimant was subjected to disciplinary hearing which culminated in the termination of his employment. Aggrieved by the Respondent's actions, the Claimant instituted this claim seeking the following reliefs-

- a. A declaration that the termination of the Claimant in a letter dated 16th July 2015 by the Respondent was unfair and unlawful.
- b. Compensation for unlawful termination at a sum equal to 12 months' salary in the sum of Kshs.1,920,000.
- c. Accrued arrears in the following terms-
 - i. One months' salary in lieu of notice of Kshs.160,000.
 - ii. Salary arrears for May, June and July 2014 of Kshs.480,000.
- d. Certificate of service.
- e. Costs of the suit.
- f. Any other relief as this Court may deem fit and just to grant.

The Respondent filed its Memorandum of Response on 7th March 2016 contending that due process was followed and that the Respondent had valid reasons for terminating the Claimant's employment.

The Claimant's Case

The Claimant avers that the notice to show cause issued to him on 24th April 2015, was vague and abstract and failed to give detailed particulars of the charges. He avers that the notices to show cause issued to him were unsubstantiated, vexatious and malicious because the customer whom he allegedly bribed wrote a letter denying that the claimant had never bribed him.

The Claimant avers that his disciplinary proceedings and termination were premeditated hence unlawful, unfair and violated the provisions of the Employment Act. Consequently, they are void *ab initio* hence a nullity.

In his witness statement filed on 15th February 2017, the Claimant avers that he knew Mr. Samuel Njenga Thuo when Samuel came to him as the credit manager for an asset facility of Kshs.8,000,500 which was awarded to him independently without any influence.

He avers that they became friends and the claimant would source business for Samuel from people who needed transport services. These people made payments in the claimant's account and he transferred them to Samuel's company account: Rasam Agencies. It is his case that he would hire the same services like was the case in June and August 2014 and would pay for the services through his personal account or his company account: Fortress Capital Limited. It is his position that transacting through his company was not suspicious as his wife who was one of the directors had died.

As regards the allegation regarding Mr. Muthee, he avers that by the time the loan of Kshs.100,000 was processed, they did not know each other and Mr. Muthee wrote a letter denying that they knew each other.

The Respondent's Case

The Respondent avers that on or about April 2015 the Respondent received information from its operation risk department regarding suspicious transactions in account number 1320561802067 known as Rasam Agencies, account number 1320299932300 known as Fortress Capital Limited and 0610195290722 in the Claimant's name whose activities exhibited an undisclosed link with the Claimant.

It is the respondent's position that the trust bestowed upon the Respondent is critical and once it is broken the damage will be unquantifiable.

Claimant's Submissions

In his submissions of 30th August 2019, the Claimant submits that the Respondent had no valid reason to terminate his employment. He avers that the grounds that formed the basis of his termination were baseless hence the Respondent was on a fishing expedition.

The Claimant further submits that the disciplinary proceedings were an afterthought and aimed at sanitizing the decision to suspend him. It is the Claimant's position that the termination of his employment was unfair hence he is entitled to compensation for wrongful termination.

The Claimant submits that he is entitled to 12 months' salary as compensation for wrongful dismissal because the termination of his employment was unfair and he was unable to find alternative employment for lack of a certificate of service which was only given to him in 2016. It is his submissions that the Respondent should bear the costs of this suit for unfairly terminating his employment and the delay in paying him his dues.

Respondents' Submissions

In its submissions of 1st October 2019, the Respondent submits that the reason for terminating the Claimant's employment was valid as he had borrowed money from the bank using a proxy which was contrary to the Respondent's policy guidelines. That this breached the trust the Respondent had in the Claimant and risked its reputation. Further, the Claimant was afforded a fair hearing before his employment was terminated.

Analysis and Determination

On 25th July 2019, this Court directed the parties to make their submissions on prayer 1, 2 and the issue of costs as the liquidated sum had been settled and the Claimant issued with a certificate of service. The issues for determination therefore are whether the Claimant's employment was unfairly and unlawfully terminated, whether he is entitled to compensation for wrongful termination and who bears the costs of this suit.

Under Section 47(5) of the Employment Act, the burden of proving that an unfair termination of employment has occurred rests on the employee, while the burden of justifying the grounds for termination of employment rests on the employer. Further, section 43(1) of the Act places the burden of proving the reason(s) for termination on the employer and where they fail to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

The Claimant's termination letter of 16th July 2015, stated the reasons for terminating the Claimant's employment being his unprofessional conduct and violation of the Bank's policies and procedures by borrowing through proxy.

The Respondent averred at paragraph 4 of its response, that on or about April 2015, it received information from its operational risk department of suspicious transactions in account numbers 1320561802067, 1320299932300 and 0610195290722. This information was not presented before this Court. The investigation report that formed the basis of commencing disciplinary proceedings against the Claimant was also not tabled before this Court. Neither were minutes of the disciplinary hearing produced as evidence to show that the same had been presented to the Claimant and that he was afforded an opportunity to interrogate it.

Further, no evidence was adduced to controvert the Claimant's evidence that the amounts deposited in Samuel Njenga's accounts were for other purposes other than payment for his business transactions. In any event, the Respondent produced a statement from the said Samuel, which corroborated the Claimant's account of events.

Similarly, the Bank policies and procedures that the Claimant had allegedly breached were not presented before this Court. Neither did the Respondent state the provisions that had been breached. It is therefore my finding that the Respondent has failed to prove the validity of its reasons for terminating the Claimant's employment as required under Sections 43(1) and 47(5) of the Employment Act.

In light of the foregoing, I find that the termination of the Claimant's employment was unfair within the meaning of section 45 of the Employment Act.

Remedies

The claimant prayed for pay in lieu of notice and arrears of salary totalling Kshs.640,00 which has already been settled. The only prayers for consideration are therefore compensation and costs.

Having found that his employment was terminated unfairly, I award the claimant compensation equivalent to 10 months' salary. In awarding the same I have taken into account the claimant's long service of about 11 years, and the fact that his service to the bank was fairly clean as there is no mention of any disciplinary incident mentioned by the respondent other than those that led to the termination of his employment. I have further considered all the relevant factors under Section 49(4) of the Employment Act.

On the issue of costs, Section 12(4) of the Employment and Labour Relations Court Act gives this Court the power to make such orders as to costs as it considers just. The Court of Appeal in the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** made the following observation on the issue of costs-

"It has been held that section 12(4) of the Employment & Labour Relations Court Act gives the trial court discretionary powers to award costs as it considers just. In addition, that costs in this kind of claims do not automatically follow the event unlike in other civil claims."

Contrary to the Claimant's submissions, costs do not automatically follow the event in proceedings before this Court. Nevertheless, were it not for the Respondent's failure to adhere to the tenets of substantive fairness as outlined in the Employment Act and its failure to pay the Claimant his dues as demanded in his letter 14th August 2015, this Claim would not have been instituted. In the circumstances, the claimant is awarded the costs of the suit.

In the final analysis, the termination of the claimant's employment by the respondent is declared unfair and judgment entered for the claimant against the respondent in the sum of Kshs.1,600,000. The respondent shall pay the claimant's costs of the suit and interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They 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 has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE