



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2030 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 16<sup>th</sup> July, 2020)

**BERNARD E.N. GACHURI.....CLAIMANT**

**VERSUS**

**JAMII BORA BANK LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Bernard Gachuri instituted this suit vide a Memorandum of Claim dated 12<sup>th</sup> November 2015 for unfair and wrongful termination of his employment against the Respondent, Jamii Bora Bank Limited.
2. He avers that he was employed by the Respondent as an Assistant Credit Officer by a letter of appointment dated 21<sup>st</sup> October 2009, to take effect on 1<sup>st</sup> November 2009 and that his services were confirmed on 15<sup>th</sup> February 2010 after his probationary period came to an end. That he was later promoted to Manager Credit Administration in 2013 and on 11/12/2014, the Respondent reviewed his salary upwards to a salary band of between Kshs. 140,000/= to Kshs. 343,750/= per month.
3. He contends that after keeping an eye open for better opportunities in the banking industry, he attended an interview in July 2015 for a job in a new bank that he had previously applied for and after passing the interview, was required to report in August 2015.
4. That after discussions, the new bank offered to pay the Respondent one month's notice and he thus handed over his letter of resignation dated 31<sup>st</sup> July 2015 to his immediate supervisor, to take effect on the same date.
5. That his immediate supervisor declined to acknowledge receipt of his resignation letter while insisting he had a bright future with the Respondent bank and even instructed him to attend a Management Leadership Training on 03/08/2015 as he discussed his resignation with the CMHR. That at 11am on the same 03/08/2015, he was summoned from the training to the Respondent's Boardroom by the Chief Manager Audit about alleged malpractices in the credit department.
6. He denied knowledge or involvement of the same and was ordered to document and sign the discussion. That he once again demanded acknowledgement of his resignation but his supervisor referred him to the CMHR who acknowledged being contacted by the new bank but claimed she could not facilitate the transition before his resignation had been acknowledged.
7. The Claimant avers that he wrote another resignation letter that afternoon on 03/08/2015 addressed to the Chief Executive Officer and copied to both his supervisor and the CMHR and that his letter of resignation was finally acknowledged by the Chief Executive Officer.
8. He delivered a duly acknowledged copy of his resignation to his new employer on 04/08/2015 who in return wrote to the Respondent requesting for the amount of notice to be paid and to which bank account. However, on 07/08/2015 he received two letters from the Respondent, one dated 04/08/2015 notifying him of the Respondent's non-acceptance of his resignation and claiming to suspend him pending investigations.
9. The second letter dated 05/08/2015 was a Show Cause Letter for "***illegally receiving bribes in return of favours from a certain valuer and a certain car tracking company through some members of staff***" and further being in denial of another bank account which he was operating.
10. He contends that by the time he was receiving the non-acceptance letter, his position with the Respondent had already been advertised on the Respondent's website contrary to the logic of non-acceptance of his resignation.

11. That the Respondent further communicated the same to his new employer and that noting that his reputation was at stake due to the Respondent's malicious allegations, he instructed a lawyer who wrote to the Respondent twice but never received any response.

12. He avers that on 15<sup>th</sup> September 2015, the Respondent backdated a letter it had addressed to the Claimant to 08/09/2015 notifying him of termination of his employment while claiming that it had decided to treat his resignation as termination from that date.

13. He contends that the Respondent unlawfully and in breach of its own Human Resource Policies and Procedure Manual, terminated his employment and particularises the special damages as follows:-

***i) One month pay in lieu of notice***

***Kshs. 140,000/=***

***ii) Pay for the 39 days the claimant is alleged to have been under suspension***

***Kshs. 187,000/=***

***iii) 49 days pay in lieu of accrued***

***leave Kshs. 234,000/=***

***iv) 12 months' compensation for unfair***

***Termination of employment***

***Kshs. 1,680,000/=***

***TOTAL Kshs. 2,241,000/=***

***PLUS: General damages and declarations as pleaded. Interests of special and general damage; costs of the suit and any other relief that the court may deem fit to grant.***

14. He prays for judgment against the Respondent for:

***a) A declaration that the Respondent since the Claimant submitted his resignation acted maliciously and irrationally by falsifying the facts.***

***b) The Respondent be ordered to recant the false and slanderous information directed to DIB Bank Kenya Limited in the Respondents letter dated 5<sup>th</sup> August, 2015, and e-mail dated 11<sup>th</sup> September, 2015.***

***c) A declaration that the Claimant's termination of employment by the Respondent was unprocedural, unfair and unlawful and the Respondent be ordered to pay the Claimant 12 months' gross salary compensation for unfair and malicious termination of employment.***

***d) That if the Respondent is able to prove that they had formally suspended the Claimant on 3rd August, 2015, (which is denied) the Respondent be ordered to pay the Claimant his salary for August and 8 days in September, 2015, being the period under suspension.***

***e) The Respondent be ordered to pay one month pay in lieu of notice to the Claimant.***

***f) The Respondent be ordered to pay the Claimant 49 days' accrued leave plus service pay.***

***g) Order the Respondent to enable the Claimant to access his pension contribution as provided for under the law.***

***h) The Respondent be ordered to issue the Claimant with a Certificate of Service in accordance with the law.***

***i) The Respondent be ordered to pay the Claimant damages suffered as a result of the Respondent's documented erosion of the Claimants credibility through falsification of facts, slanderous and malicious.***

15. The Respondent filed a Response to Memorandum of Claim dated 30<sup>th</sup> March 2016 averring that the Claimant had been involved in various unethical practices, which led to it terminating his contract of employment. That on or about July 2015, its Chief Manager Audit received various complaints from customers regarding malpractices at the Respondent's Banana and Ongata Rongai Branches.

16. That its internal investigations revealed there was a cartel comprising some of its credit officers and two branch managers with the

Claimant being one of them. It denies receiving any resignation letter from the Claimant and contends that the Claimant's immediate supervisor was not aware of the investigations that were being carried out when the Claimant tendered his resignation.

17. That the Claimant was verbally notified of his suspension on 03/08/2015 by his immediate supervisor and that his second resignation letter to the CEO was erroneously stamped by the office of the CEO as received. The Respondent further denies knowing about the Claimant's job offer in another bank.

18. It avers that it responded to the Claimant's new employer's enquiry on notice pay due from the Claimant vide a letter dated 04/08/2015 indicating that the Claimant was under suspension and was being investigated by the bank on some irregularities in the credit valuation process. That it had no malice on its part as it was merely communicating the position at that time to the Claimant's new employer and that it shall seek to rely on the defence of fair comment.

19. The Respondent avers that the Claimant failed to respond to the Show Cause Letter dated 05/08/2015 and further failed and/or neglected to attend the disciplinary meeting, where after it was constrained to summarily dismiss his services vide its letter dated 8<sup>th</sup> September, 2015. That it thereafter wrote to the Claimant's employer demanding that the Claimant hands over all the Respondent's files in his possession as it could not reach him in person.

20. The Respondent denies receiving any of the demand letters produced by the Claimant and contends it followed due process in terminating the Claimant's services. It further denies the Claimant's particulars of special damages and avers he has not formerly cleared with the bank as is procedure and prays that the Claim herein be dismissed with costs.

21. The Claimant then filed a Reply to the Respondent's Defence dated 13<sup>th</sup> June 2016 averring that the Respondent's Response does not raise reasonable or plausible and bona fide issues worth a trial and that it anticipates the Respondent will avail the complainants of the alleged kickbacks in court for cross-examination by him.

22. That in his role as a Credit Administration Manager, he never faced clients and that the Respondent has acknowledged of there being two resignation letters. That the alleged investigation was intended to blackmail and victimize him and also influence the new employer not to employ him through its response letter to DIB Bank which dwelt on character assassination.

23. He denies being invited to attend any disciplinary proceedings and contends that the dismissal was done in complete disregard of natural justice and law. He prays for the defence to be dismissed with costs and judgment entered as prayed in the Memorandum of Claim.

24. The Claimant testified in court and adopted his witness statement filed on 26<sup>th</sup> March 2019 in totality. During cross-examination, he stated he had worked for close to 7 years and confirmed that his resignation letter (annexure 4) is not stamped to show receipt.

25. He denied resigning on account of credit queries and confirmed that **Clause 7.1 of the Respondent's HR Manual** requires an employee who has submitted resignation to continue attending to his duties. That **Clause 7.3 of the Respondent's HR Manual** requires the HR to acknowledge receipt and give effective date of termination and further requires the employee to hand over the property of the Respondent. He confirmed he had not yet cleared with the Respondent.

26. RW1, John Wamwati testified and relied on his witness statement filed on 03/04/2019 and further adopted documents filed by the Respondent. During cross-examination, he stated there was a complaint against the Claimant dated 15/05/2015 by Alex Ondimu, about a facility which had taken long but confirmed that the said complaint did not mention the Claimant.

27. He also confirmed that the report by Auditor Kimani is not signed nor dated and that the Claimant's suspension was verbal but the HR Manual permits only for written suspension. He also confirmed they did not have a letter calling the Claimant for disciplinary hearing but in re-examination he stated they could not invite him as they could not get him.

### **Claimant's Submissions**

28. The Claimant submits that RW1 had just been employed and any evidence either in written form or oral was hearsay which under general rule is inadmissible and that the Respondent should have produced its Chief Manager Human Resource, Ms. Wangari Muchoki-Gathu for cross-examination purposes.

29. He further submits that the investigation of the alleged issues in the credit process was done in one day and on the same day his letter of resignation was acknowledged. That the three managers maliciously concluded he was a criminal without subjecting him to disciplinary proceedings as provided for under **Section 41 of the Employment Act** and even included in his dismissal letter that he had committed criminal offences against the Respondent.

30. He submits that his **appointment letter at paragraph 8** provides: "*TERMINATION after probation, your employment may be terminated by either party giving one month's notice in writing or one month's salary in lieu of notice*" which is exactly what he did on 31/07/2015. That the Respondent concocted reasons for termination which were unfair and intended to destroy his banking career and further failed to prove that the dismissal was valid and fair.

31. The Claimant relies on **Cause No. 665 of 2011-Beatrice Achieng Osir vs. Board of Trustees Teleposta Pension Scheme** where the Court held that the termination of the claimant's employment by the respondent was unlawful and unfair and ordered the respondent to pay the claimant 12 month' salary compensation, damages and leave due. In support of his case, he further relies on **ELRC Cause No. 2306 of 2015 Nairobi-Carolyne Lagat Cheptumo vs. Jamii Bora Limited** and **ELRC Cause No. 534 of 2014 Nairobi-Ephantus Githuku Ndungu vs. Kenol Kobil Limited**.

## **Respondent's Submissions**

32. The Respondent submits that the Claimant contravened his contract of employment as well as the Bank's code of conduct when he inter alia received kickbacks from Valuers and sourced bribes from customers as it was an outright breach of his obligations and that this is evidenced by the Respondent's internal email correspondence dated 3rd August, 2015. It relies on **Section 44(3) of the Employment Act** which provides:-

***“Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”***

33. The Respondent submits that the Claimant tendered his resignation with a view of defeating the procedural disciplinary proceedings initiated by the Respondent and it relies on the position taken by this Court in the case of *Kenya Union of Commercial Food and Allied Workers vs. B S Mohindra & Company (K) Ltd* [2015] eKLR in which Lady Justice Mbaru held that:-

***“The case for Litunya is that he was issued with a show cause letter upon gross misconduct and before this could be addressed he resigned. This is a scenario contemplated under the CBA at clause 19. Where an employee terminates employment to escape disciplinary action, whether that process would result in a termination or not, such an employee is supposed to subject himself to the same but to resign to avoid such a process is an act in bad faith.”***

34. That the Claimant's action was illegal, dishonest and unfaithful in terms of the expected employer-employee relationship, which is a lawful and justifiable ground for summary dismissal for gross misconduct as under **section 44(4) (g) of the Employment Act**. It invites the Court to be guided by the decision in the case of ***Thomas Sila Nzivo vs. Bamburi Cement Limited*** [2014] eKLR, where Rika J. held that the employer was not required to have conclusive proof of the claimant's involvement but was only expected to have reasonable and sufficient grounds.

35. The Respondent further submits that it has demonstrated that the reasons for termination were fair and valid as required under **Section 45 of the Employment Act** and that it had reasonable and sufficient grounds to dismiss the Claimant after receiving complaints from customers regarding malpractices. That it lost confidence in the Claimant and cites the case of ***Agnes Murugi Mwangi vs Barclays Bank of Kenya Limited*** [2013] eKLR where the Court observed that:-

***“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. The Claimant's conduct fell below this standard and I find that the Respondent had a valid reason for terminating her employment.”***

36. It is submitted by the Respondent that with regards to procedural fairness, it adhered to **Sections 41 and 45(2) (b) and (c) of the Employment Act** and **Article 47(1) of the Constitution** by suspending the Claimant pending investigations into his conduct and issuing him with a show cause notice and that since he was unreachable, he neglected to attend a disciplinary hearing. That in deciding whether it acted in accordance with justice and equity in terminating the Claimant's employment, this Court should be guided by the provisions of **Section 45(5) (a) of the Employment Act**.

37. The Respondent submits that the Claimant's resignation was valid and that any act undertaken by either party after the resignation is therefore null and void as was similarly held by this Court in the case of ***David K. Cheruiyot vs. Barclays Bank of Kenya Limited*** (2015) eKLR.

38. It is their submission that in the event the Honourable Court finds that the Claimant was unlawfully and unprocedurally terminated, it should consider that at the time the Claimant claims his employment was terminated, he had already resigned thus terminating the contract of employment. It cites on the case of ***Kennedy Obala Oaga vs Kenya Ports Authority*** [2018] eKLR where the court relied on the case of ***Edwin Beiti Kipchumba v National Bank of Kenya Limited*** [2018] eKLR, where it was held as follows:-

***“Resignation by an Employee from employment is basically termination of employment at the instance of the Employee. It is a unilateral act. The Employment Act does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.”***

39. That any disciplinary proceedings initiated or continued after resignation are null and void and have no effect at all since the Respondent no longer had jurisdiction over the Claimant and that it is thus not possible for him to claim he was unlawfully and unprocedurally terminated yet he had already tendered his resignation. That authority to discipline an employee is based on the existence of a contract of employment and therefore without a contract, there is no authority.

40. It further submits that the Claimant has failed to prove unfair termination from employment as per the provisions espoused in **Section 47 (5) of the Employment Act** by dint of his resignation from employment.

41. It submits that the rule of evidence under **Section 107(1) of the Evidence Act** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist. That the Claimant herein has failed to satisfy the elements of the tort of defamation and that the information sent to DIB Bank was neither defamatory, false nor was it published anywhere by the Respondent.

42. That the Claimant did not give proof of not having taken leave days and on the issue of service pay, it submits that since the Claimant's membership and contribution to NSSF is not exempted, the same is not payable to him. That the Claimant also belonged to a scheme established and operated by the Respondent, which therefore disentitled him to service pay.

43. On the claim for access to pension contribution, the Respondent submits that the Claimant did not clear with it and that in doing so he would have filled a pension withdrawal form for him to be paid his pension dues.

44. That the Claimant has further not provided any evidence to prove he is indeed entitled to the said pension contribution. That the Claimant is not entitled to the claim of twelve months salary compensation and any payment in lieu of notice because he terminated the contract of employment by resigning.

45. I have examined the evidence and submissions of the Parties herein. The issues for this Court's determination as follows:-

- 1) *Whether the Claimant resigned from employment of the Respondent.*
- 2) *If so, whether the Respondent had a right to reject the resignation and subject the Claimant to disciplinary proceedings.*
- 3) *Whether the Respondent acted with malice in writing to the Claimant's new employer indicating that the Claimant's resignation had not been accepted and that he was under investigation.*
- 4) *Whether the Respondent's letter to the Claimant dated 8/9/2015 giving him notice to terminate his services was valid.*
- 5) *Whether the Claimant is entitled to the remedies sought.*

### **Resignation**

46. Vide a letter dated 3/8/2015 the Claimant tendered his resignation for the Respondent's employment. This letter was received by the Respondents and stamped received on 3/8/2015. The Respondent acknowledged receipt of this letter vide their own letter dated 4/8/2015 declining to accept the resignation and instead purporting to institute disciplinary proceedings against the Claimant.

47. In the intervening period, the Claimant's future employer DTB Bank wrote to the Respondent a letter received on 4/8/2015 indicating that the Claimant was now their employee and were willing to pay the salary in lieu of notice on account of the Claimant and inquired of the amount payable and which account the amount should be paid into.

48. The Respondent have in their submissions acknowledged that the Claimant had resigned from employment and therefore his claim for wrongful termination should fail.

49. Indeed the Respondent acknowledges the resignation thus reneging on their previous stand that the resignation was not accepted. Once the Claimant delivered his letter for resignation, he indeed resigned from the Respondent's employment.

### **Can the Respondent reject a resignation**

50. The answer to this question is a resounding NO. The Respondent seems to finally accept this position in their submissions. The law is clear that a party to an employment contract is free to terminate the contract with valid reasons.

51. If the employer was to insist that the employee cannot resign or even indicate that the resignation does not take effect unless accepted, this would be tantamount to subjecting the employee to servitude which is against Article 30 of the Constitution which states as follows:-

- 1) *"A person shall not be held in slavery or servitude.*
- 2) *A person shall not be required to perform forced labour".*

52. The Respondent in this case went ahead to reject the resignation of the Claimant. This was tantamount to holding the Claimant under servitude.

53. The Courts have adjudicated in this issue and rendered finding that an employer cannot decline to accept a resignation (see **Mombasa ELRC 824/2016 – Edwin Kipchumba vs NBK (2018) eKLR**. See also **David K. Cheruiyot vs BBK (215) eKLR and Kennedy Obala vs KPA (2018) eKLR** (supra).

54. Despite, the Respondent declining to let the Claimant go, the Respondent further wrote a letter to DTB Bank, the Claimant's future employer indicating that they had declined to accept the Claimant's resignation and had instituted disciplinary action against him.

55. This act of the Respondent, despite their current admission that the Claimant resigned smacks of malice. The fact that the Respondent even purportedly wanted to subject the Claimant to a disciplinary process and even followed with a termination letter all point to an employer not eager to let go of an employee and willing to go to all length to punish the Claimant who had already ceased being their employee.

56. It is my finding that the Respondent acted irresponsibly in the circumstances and that the termination letter that followed was null and void in the circumstances.

### **Remedies**

57. Having found that the termination was null and void, the only remedy the Claimant is entitled to are his terminal dues which the Claimant has not sought in his Memorandum of Claim.

58. He is however entitled to general damages due to the malice actuated by the Respondent against him in attempt to smear his name against his new employer. For this, I award him damages equivalent to Kshs. 2 million.

59. The Respondent will pay costs of this suit.

Dated and delivered in Chambers via zoom this **16<sup>th</sup> day of July, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Macharia holding brief Mbogo for Respondent – Present

Gachuri for Claimant – Present