



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2584 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th September, 2020)

SAMUEL CHEGE KAMAU.....CLAIMANT

VERSUS

UWEZO MICROFINANCE BANK LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 16th December, 2016, seeking damages for wrongful and unlawful dismissal from his employment with the Respondent and failure and/or refusal to pay terminal dues and other monies owed to him.
2. The Claimant states that on 5th January, 2009 he was employed by the Respondent on contract for a fixed period of six months earning a monthly salary of Kshs. 35,130/-. He further averred that vide its letter dated 6th July, 2009 the Respondent did extend his employment and further appointed him in the capacity of an Administration Accountant.
3. The Claimant averred that he performed his duties diligently and to the Respondent's satisfaction and as a result was appointed to the position of Assistant Risk and Compliance Manager and had his salary reviewed to Kshs. 75,000/- per month.
4. The Claimant further averred that he was subsequently promoted to the position of Finance Manager, a position held until 12th July, 2016 when he was summarily dismissed on allegation of fraud and poor performance despite not being taken through any performance review to establish poor performance.
5. The Claimant contended that subsequent to his dismissal he was arrested and detained at the Central Police Station on allegation of conspiracy to defraud the Respondent prior to any forensic audit report prepared to confirm his culpability.
6. The Claimant further contended that his dismissal was unfair and unlawful as the Respondent failed to comply with the mandatory requirements of Section 41 of the Employment Act, 2007 as well as Article 41 of the Constitution of Kenya, 2010.
7. The Claimant maintains that despite his detention, no formal charges were levelled against him and therefore claims refund of Kshs. 30,000/- being the cash bail paid to the police to secure his release. He further maintains that his dismissal was discriminatory, unfair, unlawful and wrongful in the circumstances.
8. The Claimant contended that during the subsistence of his employment the Respondent failed to enhance his salary from Kshs. 75,000/- to Kshs. 100,000/- being the amount paid to the previous office bearer without any justifiable or valid reason.
9. Aggrieved by the decision to unfairly terminate his services the Claimant filed the instant Claim seeking the following reliefs:-
 - a) *A declaration that the Claimant's dismissal from the Respondent's employment was unprocedural, unfair and unlawful and unconstitutional.*
 - b) *An Order directing the Respondent to unfreeze the Claimant's bank account No. 001205000001.*
 - c) *Certificate of Service.*

d) A fine of Kshs. 100,000/- against the Respondent for failure by the Respondent to comply with mandatory provisions of Section 51 of the Employment Act, 2007.

e) Unpaid salary for July, 2016.

f) Damages for freezing the Claimant's bank account No. 001205000001.

g) Pay for untaken leave days.

h) Severance pay.

i) Cash bail refund.

j) One month salary in lieu of notice of termination.

k) Punitive and aggravated damages.

l) Compensation equivalent to twelve months wages.

m) Costs of the suit.

n) Interest on (e), (g), (i) and (j).

o) Any other relief that the Court may deem appropriate to grant.

10. The Respondent in its Response to the Memorandum dated 24th January, 2017 and filed in Court on 25th January, 2017 admitted having engaged the Claimant as alleged in his Memorandum of Claim. It however maintained that the Claimant's performance was marred with fraudulent dealings, poor performance and negligent conduct that occasioned it great loss forcing it to summarily dismiss him from his employment.

11. The Respondent confirmed the Claimant's arrest on allegation of conspiracy to defraud the Bank and that it was not bound to carry out any forensic audit as alleged by the Claimant. The Respondent further contended that it was also not bound to issue the Claimant with any notice to show cause in view of its suspicion of his involvement in fraudulent activities.

12. The Respondent contends that it fully complied with all statutory and constitutional provisions while terminating the Claimant and that his dismissal was not discriminatory or in bad faith as alleged by the Claimant.

13. It is on this basis that the Respondent maintains that the Claim as filed against it is baseless and that the Claimant is not entitled to the reliefs sought therein. The Respondent urges this Honourable Court to dismiss the Claim in its entirety with costs to it.

14. The matter was thereafter fixed for hearing on 12/3/2020 when the Claimant testified on his own behalf and the Respondent called on witness to testify on its behalf.

Claimant's Case.

15. The Claimant, CW1 requested and was allowed to adopt his witness statement dated and filed in Court on 16/12/2016, as his evidence in chief. The Claimant in his statement reiterated the averments made in his Memorandum of Claim.

16. On cross-examination, CW1 testified that he was unfairly dismissed without being taken through any disciplinary hearing. He maintained that on 12/7/2016 he was called for a meeting and was presented with a debt collection report and was not informed of any poor performance or any alleged fraudulent dealings.

17. He further confirmed having been arrested and paying a cash bail of Kshs. 30,000/- to secure his release. He further confirmed that he did not receive any payment for his July 2016 salary.

18. CW1 further confirmed that the Respondent froze his bank account despite not having any documentary proof in Court to support his assertion. He further testified that he was not paid.

19. On re-examination, he denied having committed any offence against the Respondent and maintained that his termination was indeed unlawful and unfair thus urging this Court to allow his Claim as prayed.

Respondent's Case

20. The Respondent put up one witness one Leonard Mwakalu Kilambo, the Legal & Compliance Officer at the Respondent Company. RW1 similarly sought and was allowed to have his witness statement dated 2/2/2020 and filed in Court on 9/3/2020 adopted as his evidence in chief. In which statement RW1 confirms that the Claimant was dismissed following his involvement in fraudulent activities.

21. RW1 further testified that an audit was conducted and the Claimant was subsequently dismissed on 12/7/2016. He further stated that as per the report, the Claimant was collecting money and not remitting the same to the Respondent. He however, stated that he was not aware how much was not remitted.

22. RW1 further testified that the Claimant was taken through a disciplinary process as he was invited orally. RW1 further confirmed that the Claimant was not issued with any written communication detailing the accusations levelled against him by the Respondent and that he was neither served with a show cause letter nor was he issued with any warning letter prior to his dismissal.

23. On further cross-examination, RW1 stated that the Claimant's salary was Kshs. 30,000/- as evidenced by the payslip and not Kshs. 75,000/- as pleaded.

24. Parties thereafter agreed to file and exchange written submissions to the Claim herein.

Submissions by the Parties

25. The Claimant submitted that from the evidence on record there was no justifiable reason and/or grounds to summarily terminate his employment. He further submitted that he has discharged the burden placed upon him by law under Section 47 of the Employment Act, 2007 of his unfair and/or wrongful dismissal from employment.

26. The Claimant further submitted that the ground of poor performance as pleaded for the Respondent as one of the reasons for his termination was not substantiated by the Respondent as it failed to prove to the Court whether he was evaluated on his performance and the parameters of such an appraisal. He further submitted this ground is an afterthought and therefore urged this Court to dismiss the same.

27. The Claimant further submitted that the allegation levelled by the Respondent of fraud is also not supported by evidence and that the said allegations were nowhere in the internal audit report produced by the Respondent.

28. The Claimant contends that his termination was done contrary to the provisions of Section 41 of the employment Act, 2007 thereby making it unlawful and wrongful. To buttress this argument the Claimant cited and relied on the case of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR** where the Court held that compliance with the provisions of Section 41 of the Employment Act, 2007 is mandatory and failure to which renders a termination unfair.

29. On the Claim for compensation for unfair termination the Claimant urged that this to Court be guided by the provisions of Section 49 of the Employment Act, 2007 and award him full compensation for unfair termination. For emphasis, the Claimant cited and relied on the case of **Moses Kaunda Moro Vs CMC Motors Group Limited (2013) eKLR**; where the Court awarded a Claimant compensation equivalent of 12 months' salary where there was no evidence that the Claimant was subjected to either a disciplinary procedure as set out in Section 41 or the Respondent's internal disciplinary procedural rules.

30. The Claimant further submitted that he is entitled to unpaid salary for 12 days worked in the month of July, 2016 that was not paid to him as there is no evidence supporting such payment filed by the Respondent.

31. He further contended that he is entitled to payment in lieu of notice as none was issued to him prior to his termination in gross violation to his letter of appointment and the Employment Act, 2007

32. On the issue of underpayments, the Claimant submitted that he is entitled to this relief as his pay was not increased following his promotion to the Grade of Assistant Risk and Compliance Manager from the sum of Kshs. 75,000/- to Kshs. 100,000/- being the amount earned by the previous office holders.

33. With respect to pay in lieu of leave, the Claimant maintained that he is entitled to compensation the Respondent having failed to avail any evidence to prove or disapprove this assertion.

34. On the issue of issuance of a certificate of serve, the Claimant maintained that none was issued to him, a fact that was not denied by the Respondent. He therefore urged this Court to convert the fine of Kshs. 100,000/- to an award of damages. To fortify this argument the Claimant relied on the case of **David Ndungu Vs Thika High School ELRC No. 397 of 2013** where the Court directed the Respondent to pay a fine of Kshs. 100,000/- for failure to copy with the provisions of Section 51 of the Employment Act. The Court further directed that the said amount be paid directly to the Claimant.

35. In conclusion, the Claimant urged this Honourable Court to allow his Claim in terms of the reliefs sought therein.

Respondent's Submissions

36. The Respondent on the other hand submitted that it lawfully summarily dismissed the Claimant's employment due to fraudulent dealings that occasioned it losses in strict compliance with the provisions of Section 44 (4) (g) of the Employment Act, 2007.

37. The Respondent maintained that it has fully discharged the burden placed upon it under Section 47 (5) of the Employment Act, 2007 of justifying the grounds of the alleged termination as the Claimant admits that he was indeed arrested and released on Kshs. 30,000/- Police cash bail.

38. The Respondent further maintain that the Claimant having accepted the letter of employment is bound by the terms therein more

specifically **Clause (v) on dismissal that allows it to summarily dismiss the Claimant without notice for gross misconduct such as theft, fraud, drunkenness among others.**

39. The Respondent contends that the Claimant has no claim against it and urged this Court to accordingly dismiss the Claim in its entirety with costs to the Respondent.

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

- 1) Whether the Respondent had valid reasons to terminate the services of the Claimant summarily.**
- 2) Whether the Respondent followed due process before the dismissal.**
- 3) Whether the Claimant is entitled to remedies sought.**

Reasons for termination

41. From the letter of summary dismissal dated 12/7/2016, the Claimant was summarily dismissed for the following reasons: fraud and poor performance, growth in company's risk portfolio to over 53 million due to his attributed negligence and fraud. It is also indicated that he had been involved in fraudulent activities as follows:-

- 1. Stealing four files belonging to customers with debts in order to defraud the company.**
- 2. Stealing various documents from customers' files in order to make it difficult to trace the debtors.**
- 3. Colluding with customers to who had defaulted in loan repayment in order to hide vehicles given as collaterals to avoid repossessing the vehicles and payment of the loans.**
- 4. Colluding with customers and getting handouts in order to delay repayment of loans when the loans became due.**
- 5. Collecting cash and not remitting to the company on time.**

42. The Claimant denied committing the listed offences. In an attempt to explain the reasons leading to the dismissal, the Respondent produced an internal audit report. The report was however not explained, nor dated. RW1 when asked to explain the specific files the Claimant stole, she could not explain. There was also no evidence of the various specific documents allegedly stolen by the Claimant from customers' files.

43. The witness also failed to explain the customer that the Claimant colluded with to hide vehicles and delay payment of loans. It was also alleged that the Claimant also received handouts from certain customers to delay loan repayments. Such evidence was also not forthcoming.

44. No evidence was also produced of the amount of cash the Claimant collected and failed to remit to the company.

45. It was indicated that the Claimant had committed fraud and his performance was poor. To establish poor performance, the Respondent was expected to give evidence of the performance of the Claimant against his expected output. There was no evidence adduced to show his performance.

46. Section 43 of the Employment Act 2007 states as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

47. The law envisages that the Respondent will not terminate services of an employee without valid reasons. In case of summary dismissal, parameters to be established are provided for under Section 44(4) of Employment Act and the Respondent have not established that the Claimant committed any of the alleged offences. It is therefore my finding that the Claimant was dismissed without any valid reasons.

Due process

48. The Claimant has averred that he was denied an opportunity to defend himself and was therefore condemned unheard.

49. The Respondent on their part indicated that they were not bound to issue him with a show cause letter in view of the serious suspicions of fraud against him. The Respondent averred that they suspected that the Claimant had committed serious cases of fraud and so reported the matter to the police and Claimant was arrested and in their view this, there was credible evidence to have the Claimant arrested.

50. Despite the fact that the Claimant was arrested by police on the report of the Claimant does not in my view exonerate the Respondent from their obligation to grant the Claimant an opportunity to explain himself.

51. The process of investigation by police is indeed an independent process from the Respondent's internal disciplinary process which must also be adhered to as provided for under Section 41 of the Employment Act which provides as follows:-

1) "Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

52. There is no indication that this was followed as such the Respondent failed in their obligation by condemning the Claimant without granting him as opportunity to be heard.

53. Section 45(2) of the Employment Act 2007 states as follows:-

(2) A termination of employment by an employer is unfair if the employer fails to prove:-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

54. In view of the fact the Claimant was dismissed without valid reasons and without being granted an opportunity to be heard, the dismissal was unfair and unjustified and I declare it so.

Remedies

55. Having found the dismissal unfair and unjustified it is my finding that the Claimant is entitled to some remedies. I find for the Claimant and award him as follows:-

1. 1 month salary in lieu of notice = 75,000/=

2. Salary not paid in July 2016 for 12 days = $12/30 \times 75,000 = 30,000/=$

3. Pay in respect of leave not taken of 40 days as pleaded = $40/30 \times 75,000 = 100,000/=$

4. In view of the fact of not being accorded an opportunity to be heard, I award him 7 months' salary as compensation for the unlawful and unfair termination = $7 \times 75,000 = 525,000/=$

TOTAL = 730,000/=

Less statutory deductions

5. Unfreezing of the Claimant's account at the Claimant's bank account No.001205000001.

6. Issuance of a certificate of service

7. Costs and interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Manyara holding brief Kamotho for Claimant – Present

Onduma for Respondent – Present