



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 424 OF 2017

FREDRICK O. KOMBIJA.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The suit by the Claimant was filed on 17th November, 2017, arising from termination of Employment of the Claimant by the respondent.
2. The Claimant prays for the following reliefs:-
 - (a) A declaration that the termination of the claimant's employment was unlawful.
 - (b) An Order for the unconditional reinstatement of the claimant back into the respondent's service.
 - (c) Kshs. 1,950,000.
 - (d) As an alternative to (b) above, Kshs.43,200,00 being lost salary from 24th March, 2017 to 24th September, 2017.
 - (e) An Order restraining the respondent from increasing the claimant's bank loan rate from 4% to 14%.
 - (f) Costs of the suit and interest.
3. Interim Orders on prayer (e) were granted pending hearing and determination of the suit upon application by the Claimant and Notice of Appeal was filed on the ruling of the Court dated 20th September, 2018, whose outcome has not yet been received by this Court as at the time of writing this judgment.
4. The respondent filed a response to the memorandum of Claim on 7th February, 2018 in which the respondent denies all the particulars of claim and puts the Claimant to strict proof.

Evidence

5. The Claimant testified in person as C.W.1 and called Gibson Amendi as C.W.2 . The testimony by the Claimant may be summarized as follows:-
6. That C.W.1 lives in Kakamega and is now aged 37 years.
7. That C.W.1 worked for the respondent from 16/6/2006 as a graduate clerk at Awendo Branch.
8. C.W.1 was transferred to Kakamega Branch on 15/12/2008 where he was promoted to Departmental Head and was later posted as head of cash department which position he held until he was summarily dismissed by the respondent on 14th March, 2017 upon being found guilty of gross negligence leading to loss of Kshs. 1,389,138.60 at the Kakamega Branch.
9. The Claimant was designated Cash Team Leader.
10. C.W.1 testified that the Branch had four (4) heads of department – in cash, customer service, Account and processing and sales.

11. That in 2014, the Branch lost two (2) heads of department pursuant to a Voluntary Retirement Scheme. The Branch also lost a Manager who was subsequently replaced but the two heads were not replaced. C.W.1 remained at the Back office and his colleague George went to the front office. The two had so much work and were overwhelmed. When C.W.1 went on leave, his subordinates took over his responsibilities.
12. On 21/4/2019 George was transferred to a new department under Sales Agency. C.W.1 was left as Head of Department for the entire front and back office. C.W.1 testified that it was impossible to hold such wide responsibility. C.W.1 enquired about replacement of staff but it was not forthcoming. C.W.1 wrote about the situation and the need to replace staff who had left but James Oyungu the Manager did not offer support in that respect. Some of the responsibilities of C.W.1 were given to the Chief Teller, who was later accused of fraud. C.W.1 stated that the checkings were not done properly due to staff shortage. Gaps occurred when the Chief of Staff got combination of ATM from C.W.1. The duties of the ATM were now beyond C.W.1.
13. On 30/1/2017 C.W.1 was summoned by the Branch Manager to do a surprise check of the cash in the ATM. When treasury door was opened the Chief Teller declined to enter as instructed. C.W.1 noted amounts of Kshs.500 notes stuck between Kshs.1000 notes. C.W.1 noted Kshs. 950,000 difference in cash. At the ATM was also a difference of Kshs. 299,000. The teller could not account for Kshs. 107,000 in his till. The Teller had stamped the missing stacks and signed. The Teller could not explain the deficit in the till.
14. The police were called and the Chief Teller was arrested on 31/1/2017. C.W.1 received a Memo from the Manager seeking clarification and C.W.1's input on the arrested Chief- Teller. C.W.1 explained his position and why Chief Teller was not present at the ATM and Treasury during the check done by C.W.1 on 3/2/2017. C.W.1 received another memo seeking further explanation why C.W.1 had indicated that the teller had balanced accounts. C.W.1 explained the position. C.W.1 then received a notice to show cause from Bank headquarters and was called to a disciplinary hearing to attend with a representative of choice. C.W.1 stated that the teller was not allowed to come to the disciplinary hearing at Nairobi and C.W.1 was not facilitated to travel either. After the hearing took place, C.W.1 was summarily dismissed on 14/3/2017. C.W.1 was accused of gross misconduct which charges he denied. C.W.1 states that the dismissal was unlawful and unfair. That the lapses that resulted in loss of funds were as a result of the respondent failing to replace key staff. That he was overwhelmed and played no role at all in the said lapse and wrong.
15. The claimant prays he be awarded as prayed. That he had exhausted the internal Appeal process to no avail. C.W.1 was closely cross-examined by Mr. Ojulo for the respondent and candidly responded to the questions in a consistent and credible manner.
16. C.W.2 Gibson Amendi testified that he worked at Nairobi for Finder Ground Africa from 2/11/2015 to 2/11/2018. That he had resigned from the employment of the respondent. He adopted his witness statement filed on 21/2/2019 as his evidence in Chief. C.W.2 stated that he worked with C.W.1 at the Kakamega Branch and that C.W.1 was his immediate supervisor. That as a supervisor C.W.1 was supposed to confirm the cash balance daily. That the confirmation did not happen due to staff shortage because C.W.1 was at the Customer Service desk most of the time.
17. That the Chief Teller checked the balance of the tellers including C.W.2.
18. That the Cash Team Leader was unable to do his duties daily due to under staffing.
19. That upon an impromptu check, a shortage of Kshs.1.3 million was detected.
20. The Branch Manager informed the staff about the loss. That the Chief Teller, Mr. Iganga and Operations Manager confirmed balance at the ATM whilst C.W.1 was stationed at the Customer Service. That C.W.1 was not available to confirm cash balance. That C. W.1 and the Chief Teller shared the password for the ATM. That two (2) people operated the ATM at any one time. That the Operations Manager had one (1) set of combination and the other was with C.W.1 and another officer who had not been replaced at the time.
21. R.W.1, Stephine Opiyo Obonyo testified that he was the Head of Employment Relations of the respondent under Human Resource Department from 1/3/2018.
22. R.W. 1 adopted a witness statement filed on 9/12/2019 as his evidence in Chief. R.W.1 and produced exhibits '1' to '17' in support of the defence case filed on 9/12/2019.
23. R.W.1 testified that the letter of termination contained reasons for the summary dismissal of the claimant. R.W.1 stated the bank lost money due to negligence of C.W.1. That C.W.1 was accorded a hearing and C.W.1 appealed the decision to dismiss him and the same was confirmed. That the bank lost Kshs.1,389,138.60 whilst the Claimant was Cash Team Leader and therefore the Head Teller at the Kakamega Branch.
24. Upon cross-examination by Mr. Odeny for the Claimant, R.W.1 stated that he never worked at the Kakamega Branch, that he did not know the Claimant and only saw him in Court. R.W.1 stated that he was not involved in the investigations and only relied on the record he had produced. R.W.1 added that he did not know the specific tellers who handled the lost cash at the Kakamega Branch. R.W.1 said he did not know how many tellers were at the Branch at the time. That Kakamega Branch is categorized as small to medium size branch. That it should have at least 15 employees. That if the employees were less than nine (9) as alleged by the Claimant it was still possible for the branch to perform. That staff complement is determined by the Chief Executive Officer in liaison with regional manager. R.W.1 confirmed that records show Kakamega Branch was understaffed.
25. R.W.1 stated that there was need to replace transferred staff. That those left shared responsibility. That the staff who left the Branch were not replaced. R.W.1 stated that he did not see the Show Cause letter and did not know if C.W.1 and his witness were facilitated to travel to Nairobi.

26. That records show C.W.1 was found guilty of 7 charges but R.W.1 testified that the Cash Team Leader usually sits behind the tellers whilst the customer service consultant sits at the front office. That Operations depend on the size of the Branch and Volume of business it handled. R.W.1 stated that in a busy branch it would be impossible to serve as Cash Team Leader at the same time serve Customer Service desk.

27. R.W.1 confirmed that on 27/5/2016 the Branch Manager wrote to the head office complaining that the branch was understaffed and that C.W.1 was doubling up in two roles.

28. R.W.1 stated that checking on tellers reports and balance was a daily task whereas customers are handled on a needs basis.

29. R.W.1 stated that he did not have the data of Kakamega Branch at the time to determine if it was a busy branch or not. R.W.1 stated that the number of accounts in a branch was one of the indicators of volume of business at the Branch.

30. R.W.1 explained that the deposit base of 473,000,000 held by the Branch at the time is categorized as small to medium. R.W.1 said sales staff do not constitute permanent staff and 7 of the staff were sales team. R.W.1 denied that Kakamega Branch was a large Branch at the time.

Determination

31. The issues for determination are:-

(a) Whether the respondent had a valid reason to summarily dismiss the Claimant and if fair procedure was followed in arriving at the decision.

(b) Whether the Claimant is entitled to the reliefs sought.

32. In answer to issue (a) above, the Court has carefully considered the testimony by C.W.1, C.W.2 and R.W.1, the documentary evidence tendered by both parties and the submissions by the parties and has come to the inevitable conclusion that C.W.1 was a credible witness and adduced consistent and truthful evidence that was well collaborated by the testimony by C.W.2 in material respects. Furthermore, the testimony by R.W.1 under cross-examination also confirmed crucial evidence adduced by C.W.1. That C.W.1 being the Cash Team Leader doubled up also as the Customer Service Consultant. That the two functions ordinarily are located at different parts of a bank in that Cash Team Leader is positioned at the back office behind the cashiers whereas the Customer Service Consultant is situated at the front part of the Bank at a service desk. C.W.1 and C.W.2 testified that it was impossible for C.W.1 to perform the two roles at the same time yet the respondent failed to replace two heads of departments who had left the branch for many months. That the said vacancies created gaps and loopholes in the cash accounting system which resulted in lack of daily cash balance checks in the entire operations of the bank leading to the inevitable loss of cash at the Treasury and in the ATM machine.

33. R.W.1 agreed with the testimony by C.W.1 and C.W.2 that in a busy branch of a bank it was not possible for a cash Team Leader to double up as a Customer Service Consultant. It was thus proved on a balance of probabilities that C.W.1 was neither negligent nor did he engage in any misconduct and/or did not contribute to the gaps and loopholes which resulted in loss of cash at Kakamega Branch. Instead the Court is satisfied, that it was the negligent failure by the respondent to replace key staff at Kakamega Branch which created loopholes through which the bank lost 1.3 million shillings.

34. The Court finds, that the respondent has failed to prove that it had any valid reason to summarily dismiss the Claimant as provided under Sections 43, 45, and 47(5) of the Employment Act, 2007.

35. To the contrary the Claimant has discharged the onus placed on him under Section 107, and 108 of the Evidence Act Cap. 80 Laws of Kenya read with Section 47(5) of the Employment Act to demonstrate on a balance of probabilities that his summary dismissal was wrongful, unlawful and unfair. The Claimant was not accorded fair hearing by the respondent in that the defence proffered by the Claimant was not given the weight it deserved leading to a flawed decision to dismiss the Claimant unlawfully.

36. The Claimant is entitled to the remedies provided under Section 49 of the Employment Act, 2007 accordingly.

37. In this respect the Claimant sought to be reinstated by the bank to his previous position. The claimant testified that he was 37 years old and had many years ahead to serve to the age of retirement at 60 years. The Claimant was summarily dismissed on 14th March, 2017. It is now over three years from the time the Claimant was dismissed.

35. Section 12 (3) of the Employment and Labour Relations Court At, 2014 (as amended) provides:-

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following Orders-

(vii) An Order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) Any other appropriate relief, as the Court may deem fit to grant.”

38. The present suit concerns the banking sector. Relations between an employee and employer are of utmost good faith. The slightest breach of confidence in an environment where large sums of money are handled on a daily basis makes it not conducive for parties who have

had suspicion against each other however wrongful to be placed back on a somewhat forced engagement especially as in this case where considerable period of time has passed since the parties separated.

39. The Court guided by Section 12(3) (vii) of Employment and Labour Relations Court Act, will not therefore reinstate the Claimant to his previous employment but will instead apply the alternative remedy sought by the Claimant of compensation for the wrongful and unlawful summary dismissal in terms of Section 49(1) (c) read with (4) of the Employment Act.

40. In this respect the Claimant had a meteoric career with the respondent from 2006 to 2017 during which period he rose from a bank clerk to Cash Team Leader. The respondent did not adduce evidence of any previous adverse record of the Claimant during his tenure. The Claimant was summarily dismissed without notice or payment in lieu of notice. The Claimant lost good career prospects with the respondent and in the banking industry due to the wrongful blame and dismissal in a very sensitive industry.

41. The Claimant suffered loss and damage for the loss of employment for no fault of his own and was not compensated for the loss. The Claimant would have wished to be reinstated but the Court has for the reasons given opted to compensate him. The Claimant had served the respondent for a long period of 11 years and expected to work for a further 23 years up to the age of retirement at 60 years.

42. It is not easy to secure a job in the banking industry once summarily dismissed by one bank due to the sensitivity of the sector. The Claimant was servicing bank loans on favourable terms with the respondent which opportunity has now been wrongfully lost. This compounds the extent of loss suffered by the Claimant as a result of the wrongful dismissal. The Claimant has yet to mitigate the loss by obtaining alternative employment.

43. The Court has considered similar decided cases by Employment and Labour Relations Court including the case of **Kenya Broadcasting Corporation –vs- Geoffrey Wakio, Civil Appeal No. 352 of 2017 [2019] eKLR** in which the Court of Appeal ordered the Corporation to pay the respondent 12 months' salary in compensation for the unfair termination of Employment and also award the Claimant herein, the equivalent of twelve (12) months' salary in compensation for the unfair dismissal.

44. In addition the respondent is to pay the Claimant one month salary in lieu of notice.

45. In the final analysis Judgment is entered in favour of the Claimant against the respondent as follows:

- (a) Kshs. 150,000 being one-month salary in lieu of notice.
- (b) Kshs. 1,800,000 being the equivalent of 12 months' salary for the unlawful dismissal

Total award: 1,950,000.

- (c) Interest at Court rates from date of judgment till payment in full.

a. Costs of the suit.

Dated and delivered at Nairobi this 27th day of November, 2020

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due 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 online with their consent. 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, this 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 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this 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.

MATHEWS N. NDUMA

JUDGE

Appearances-

Mr. Odenny for Claimant

Mr. Ojuro for respondent

Chrispo – Court clerk.