



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**ELRC NO. 182 OF 2015 [as consolidated with] 183, 184 and 185 of 2015**

*(Before Hon. Justice Mathews N. Nduma)*

MICHAEL GETANDA MAKENI.....1<sup>ST</sup> CLAIMANT

WARREN MALESI.....2<sup>ND</sup> CLAIMANT

EVERLYN KIAGE.....3<sup>RD</sup> CLAIMANT

SETH MICHAEL OKELLO.....4<sup>TH</sup> CLAIMANT

**VERSUS**

**ECOBANK KENYA LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The claimants were summarily dismissed on various dates and they seek declaration that the summary dismissal was unlawful and unfair and seek payment in lieu of one month notice, interest and costs of the suit.

2. The summary dismissal of the four claimants arose from same circumstances hence the suits were consolidated.

**Facts of the case**

3. Between 21<sup>st</sup> September to 4<sup>th</sup> October 2012, the Respondent received complaints from various account holders that there had been unauthorized withdrawals from their accounts. Investigations were done and criminal charges were preferred against the four (4) claimants who worked as ATM card and pin custodians. The claimants were charged in Kisii Law Courts in CMR No. 1809 of 2012 and Criminal Case No. 230 of 2013, Criminal Case No. 180 of 2012 was terminated and the claimants acquitted on 9<sup>th</sup> May 2015 whereas Criminal Case No. 230 of 2013 was terminated and claimants acquitted under *Section 210 of the Penal Code* on 17<sup>th</sup> February 2014.

4. The claimants allege that there was no valid reason to summarily dismiss them and that they were not accorded a fair hearing before that summary dismissal.

5. Wherefore the claimants seek the reliefs sought.

**Response**

6. The respondent filed a defence to each of the claims by the four (4) claimants in which it denies the claims by the claimants adding that investigations had revealed participation by the claimants in a series of unlawful withdrawal of cash from customers' accounts vide ATM machines. That the claimants were entrusted with safe custody of ATM cards and Pins and were therefore suspected of having committed and or aided in the commission of the said theft.

7. That the claimants were suspended upon suspicion and were subsequently dismissed from employment based on the findings of investigations.

8. That acquittal under *Section 210 of the CPC* was on mere technicalities and same did not translate to absence of reasonable suspicion to prosecute and neither does it amount to a declaration of innocence.

9. That investigations had revealed there was theft of ATM Visa Electronic Chip cards and fraudulent withdrawals in Kenya Shillings

totaling eight hundred and Ninety Thousand (Kshs 890,000) done using same cards.

10. That the respondent had lost faith and trust on the claimants hence the summary dismissals.

11. The respondent suffered financial loss and loss of good will since the claimants actions led to customers closing their accounts and moving to other financial institutions.

12. The respondent pray that the claimants' case be dismissed with costs.

### **Determination**

13. The issues for determination are as follows:

(i) Whether the summary dismissals were for valid reasons.

(ii) Whether the respondent followed a fair procedure in summarily dismissing the claimants.

(iii) Whether the claimants are entitled to the reliefs sought.

### **Issue i.**

14. The Claimants were suspended from work by standard letters dated 15<sup>th</sup> October 2012, with effect from 15<sup>th</sup> October to 31<sup>st</sup> October 2015. The reasons for suspension in respect of the four claimants was further investigations following recent internal Audit investigations regarding the theft of ATM Visa Electronic Chip cards and pins and subsequent fraudulent withdrawals from customers' accounts amounting to Kshs 890,000 and the ongoing case with regard to the matter.

15. The claimants were placed on 50% basic pay during the period of suspension. The claimants were required to report daily to the Bank Manager, Kisii Branch at 9.00 am pending the outcome of the investigations.

16. The claimants were not required to show cause why their employment should not be terminated.

17. On 31<sup>st</sup> October 2012, the claimants received letters of summary dismissal which were written in a standard format. The letters simply said:

***“We hereby inform you that management has found it necessary to summarily dismiss you for the employment of the Bank with immediate effect.”***

No reason was attributed to the decision to summarily dismiss any of the claimants. The letter simply referred to the Audit investigations and the subsequent suspension of the claimants without giving any outcome of the investigations and whether any of the claimants was implicated in the scam.

18. Simply put, the respondent did not in the letters of summary dismissal provide any or any valid reasons for the summary dismissal of the claimants.

19. It is also not in dispute that none of the claimants was subjected to a disciplinary hearing. It is also not contested that criminal cases commenced against the claimants were terminated summarily under *Section 210 of CPC* for lack of evidence. In other words prosecution withdrew the charges against the claimants and the court terminated the cases against all the claimants.

20. The counsel for the claimant and counsel for the respondent entered a consent order in which it was agreed that the matter was to proceed by way of written submissions reliance being placed on the pleadings and list of documents filed. Therefore no oral testimony was adduced in the matter.

21. From the pleadings and documents before court, it has been proved that the claimants worked for the respondent and were suspected of involvement in theft of money from customer accounts vide stolen ATM cards and pins. It is not in dispute that the claimants were not subjected to any disciplinary process at the work place. They were simply suspended from work on 15<sup>th</sup> October 2015. They were not required to answer to any disciplinary charges. They were not called to any disciplinary hearing and were simply served letters of summary dismissal on 31<sup>st</sup> October 2015.

22. From the evidence not in dispute, the claimants were summarily dismissed for no valid reason and were not subjected to any disciplinary process prior to the taking of the decision to summarily dismiss the claimants from their employment. Criminal charges preferred against the claimants were terminated for lack of any evidence to prosecute the claimants under *Section 210 of CPC*.

23. Accordingly, the claimants have discharged the onus placed on them under *Section 47 (5) of the Employment Act, 2007* that they were summarily dismissed wrongfully. The respondent has failed to discharge the onus placed on it under *Sections 43 and 47(5) of the Employment Act* to justify the summary dismissal by demonstrating that there was a valid reason to summarily dismiss the claimants and that the respondent had adhered to a fair procedure as provided under *Section 41 of the Employment Act* in reaching the decision to summarily dismiss the claimants.

24. Accordingly, the summary dismissal of the claimants was in violation of *Sections 41, 43, and 45 of the Employment Act 2007* in that they were not for a valid reason and no fair procedure was followed in effecting the same. **See Kenfright (EA) Limited vs Benson K. Nguli (2016) eKLR.**

**Issue ii – Relief Sought.**

25. **Compensation and Notice Pay**

Upon finding that the summary dismissals of the claimants was in violation of *Sections 41, 43 and 45 of the Employment Act*, the Claimants are entitled to compensation in terms of *Section 49(I) (c) and (4) of the Employment Act 2007*.

26. In this respect the court finds as follows:

**Michael Gitanda Makini**

The claimant earned a monthly salary of Kshs. 77,473. The Claimant is entitled to one month's salary in lieu of notice in the sum of Kshs 77,473 and is awarded accordingly.

27. The Claimant was falsely accused of theft and was acquitted of the charge. The claimant suffered pain and anguish and is said to have spent up to Kshs. 300,000 in legal fees. The claimant lost his job and means of income and support. The claimant had just completed his probation on 17<sup>th</sup> July 2012 and was suspended four (4) months later on mere suspicion. The career prospects of the claimant were blown through the window especially in the banking industry and he is unlikely to get another job easily. The court awards the claimant the equivalent of four (4) month's salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 309,892.

**Warren Malesi**

28. The claimant earned a monthly salary of Kshs 84,358. The claimant was employed by the respondent on 16<sup>th</sup> March 2011 and was summarily dismissed by the respondent on 31<sup>st</sup> October 2012 about one year and eight months later. He lost his career prospects based on mere suspicion. The claimant was humiliated by facing false criminal charge from which he was acquitted. The claimant lost means of income and career prospects. The claimant incurred legal fees in the criminal case in the sum of Kshs 300,000. The claimant suffered loss and damage. The court awards the claimant the equivalent of Eight (8) month's salary in compensation for the unlawful and unfair loss of employment in the sum of Kshs. 674,864. The claimant is also awarded Kshs. 84,358 in lieu of one month notice.

**Evelyne Kiage**

29. The claimant earned Kshs. 55,000 a month. The claimant was employed on 9<sup>th</sup> September 2011 and was summarily dismissed on 31<sup>st</sup> October 2012 on mere suspicion of theft. The claimant was falsely charged in a criminal court and was acquitted of the charge. The claimant suffered humiliation and hurt. Her character was assassinated in the process. The claimant lost means of livelihood. The claimant lost career prospects in a difficult industry and has suffered loss and damage. The claimant spent about Kshs 300,000 to defend herself in the criminal trial. The court deems this a suitable case to award the claimant eight (8) month's salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs 440,000. The claimant is also awarded Kshs 55,000 in lieu of one month notice.

**Seth Michael Okello**

30. The claimant earned Kshs 72,000 monthly salary. The claimant was employed on 9<sup>th</sup> September 2011 and was summarily dismissed on false allegations of theft. On 31<sup>st</sup> October 2012, the claimant was charged, fined and acquitted. He spent Kshs 300,000 in legal costs. He suffered humiliation, embarrassment and loss of employment and income. The claimant lost career prospects and has suffered loss and damage. The claimant is awarded eight (8) month's salary in compensation for the unlawful and unfair loss of employment in the sum of Kshs. 576,000. The claimant is also awarded Kshs 72,000 in lieu of one month notice.

31. In the final analysis judgment is entered in favour of the claimants and against the respondent as follows:

(i) Michael Getanda Makeni

(a) Kshs 77,473 in lieu of one month's Notice.

(b) Kshs 309,892 compensation

(ii) Warren Malesi

(a) Kshs 84,358 in lieu of one month's notice.

(b) Kshs 674,864 compensation.

(iii) Evelyne Kiage

- (a) Kshs 55,000 in lieu of one month notice.
- (b) Kshs 440,000 in compensation.
- (iv) Seth Michael Okello
  - (a) Kshs 72,000 in lieu of one month notice.
  - (b) Kshs. 576,000 in compensation.
- (v) Interest at court rates from date of judgment till payment in full.
- (vi) Costs of the suit.

**Judgment Dated, Signed and delivered this 14<sup>th</sup> day of February, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Nyamurongi for Claimants

Gumbo for Respondent

Chrispo - Court clerk.