



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.3 OF 2018

(Before D. K. N. Marete)

MARGARET CHEPNGETICH.....CLAIMANT

VERSUS

LETSHEGO KENYA LIMITED.....DEFENDANT

JUDGEMENT

The matter was originated by way of a Memorandum of Claim dated 20th December, 2017. The issues in dispute are therein cited as;

- a) *Breach of Employment Contract*
- b) *Unlawful, unfair and termination of the Claimant*
- c) *Unpaid terminal dues and other allowances.*

The respondent in a Memorandum of Defence dated 27th March, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant in a Reply to Memorandum of Defence dated 16th April, 2018 reiterates her case in opposition to the respondent's defence.

The claimant's case is that on 9th June, 2014, she was offered employment as a Branch Manager of the respondent. She commenced work on 14th July, 2014.

The claimant's further case is that their employment relationship was governed by a contract of employment dated 9th June, 2014 clearly setting out the terms and conditions of her engagement. At the time of her employment she earned Kshs.100,000.00 which gradually rose to Kshs.145,000.00 as at the time of her dismissal on 6th September, 2017.

The claimant's further case is that she worked for the respondent for 38 months in which time he grew her loan portfolio from zero to Kshs.176,000,000.00 at the Kericho office. This is an indication of exemplary service delivery. She further expresses her case in the following averments;

7. *The claimant avers that as a matter of fact the Respondent rewarded her diligence with yearly bonuses of Kshs.122,000/=, Kshs.435,000/=, 181,300/= for the period between 2014 and 2017. Annexed hereto and marked, "MC 3a, 3b and 3c" is a bundle of documents comprising letters dated 19th February, 2015, 12th February, 2016 and 6th March, 2017 and the claimant's bank statements; evidencing as much.*

8. *The Claimant avers that the bonuses paid to her were premised on her good performance upon her last performance appraisal for the year 2016 undertaken by the Respondent; See annexure marked, "MC 4" being the Claimant's performance appraisal/individual key performance appraisal form, evidencing as much.*

9. *Vide a memorandum dated 9th January, 2017, the Claimant received communication from the Respondent in respect of some documents which were purportedly returned for failing to comply with the set policy and procedure, a concern which was addressed by Claimant who took it up with the Respondent's Office Administrator who was in charge of forwarding the said documents to the Respondent's head office. Annexed hereto and marked, "MC 5a and 5b" is a bundle comprising the said Memo dated 9th January, 2017 and the Claimant's letter dated 2nd February, 2017.*

10. The Claimant avers that the foregoing was occasioned by a mix-up in the Respondent's system which updated loan arrears in real-time (in respect of mobile loans vide its mkopo chap chap platform) thereby placing

subsequent applications by applicants who had been cleared before by a credit committee chaired by the Claimant; in arrears.

11. On 16th May, 2017, to the Claimant's consternation, she received a memo from the Respondent claiming that she had not met her branch disbursements targets as at 30th April, 2017 and that she had not reduced her provisions for bad debts to the desired level of 5%. Attached hereto and marked, "MC 6" is a copy of the said Memo dated 16th May, 2017.

12. The Claimant respondent to the concerns raised in the said memo vide her letters dated 16th May, 2017 and 31st May, 2017, wherein she explained that the failure to meet the set disbursement target had been occasioned by one employee namely, Joseph Waretere who had a huge deficit of Ksh.10.9 Million and was therefore pulling down the Claimant's branch's performance as regards disbursements. Attached hereto and marked, "MC 7a and 7b" are copies of the said letters dated 16th May, 2017 and 31st May, 2017, respectively.

13. In further response vide the said letters, the Claimant explained that the provisions for bad debts had risen due to default by several clients (at least 8) who had defaulted in settling their respective secured loans to the tune of at least Kshs.20,000,000/= and over whom she had nonetheless instituted loan recovery process and/or set in motion processes to achieve realization of the securities submitted. Attached hereto and marked, "MC" is a bundle of documents comprising 6 (six) Statutory Notices and 2 (two) demand letters, in respect of the said clients; evidencing as much.

The claimant's further case is that on 25th July, 2017, she received a letter of notice to show cause. This required that she answers the same within 48 hours. She was to show cause as to why disciplinary action should not be taken against her for negligence of duty on her part that occasioned "double receipting" (issuance of two receipts in respect of the same payment) by employees under her supervision and for failing to stem the rising of provisions for bad debts to the tune of Kshs.14,834,439/= (which represented 9.2% of the loan book). She answered this in her letter of 27th July 2017 and also on her appearance before the respondent's disciplinary committee. This comes out as follows;

16. In her response, the Claimant stated that the double receipting only affected payments made through the Respondent's M-pesa platform since the respective M-pesa transactions payment reference numbers (received by each relationship officer/loan officers) were used to issue receipts which were then handed over to an Office Administrator who was the only person authorized to access the system and who was then required to verify from the said system whether the said transactions were bonafide. See the annexure marked, "MC 10" being copy of the letter dated 27th July, 2017.

17. The Claimant further indicated that the rising of the provision for bad debts was occasioned by the fact that several clients had defaulted in settling their respective loans; which in any event were secured and the realization process thereof, set in motion. See annexure marked, "MC 8" copies of the said statutory notices.

The claimant's other case is thus expressed;

18. That in spite of the Claimant's representations, the Respondent terminated her services vide a letter dated 30th August, 2017 which was served upon her on 6th September, 2017; on grounds that she had grossly neglected her duties owing to her alleged approval of double receipting and rising provisions for bad debts. Annexed hereto and marked, "MC 11" is a copy of the said Termination Letter.

19. The Claimant avers that her termination was irregular, unfair and/or unlawful for the following reasons;

i) That the rise of the provisions for bad debts cited as a reason for her termination was clearly explained in the Claimant's response dated 25th July, 2017 to the notice to show cause dated 25th July, 2017 and her Claimant's representations before the disciplinary committee on 22nd August, 2017 had been occasioned by clients who had defaulted in settling their loan obligations who were in any event serving statutory notices.

ii) That the Respondent only assessed the Claimant's performance in respect of management of the quality of the loan book and totally ignored her performance in loan book growth (disbursements portfolio).

iii) That the Claimant was crucified for alleged double-receipting by employees under her supervision whereas in truth she had no right to access the system whether to ascertain that the transactions (M-pesa deposits) posted were indeed bonafide.

iv) That double receipting had been exacerbated by the fact that the respondent's finance department (a department which the claimant had no control over) had not undertaken reconciliation of the transactions posted.

v) That the employees accused of double receipting had in fact admitted to their own negligence and never implicated the Claimant in any way. Annexed hereto and marked, "MC 12" is a bundle of documents comprising the said employees letters addressed to the Claimant and the Respondent, evidencing as much.

vi) The Claimant was terminated on performance related grounds without an appraisal conducted in the year 2016 (See annexure marked, "MC 4" annexed hereto) which clearly shows that the Claimant had met her set targets.

She prays and claims as follows;

i) A declaration that the termination was wrongful, unfair and unlawful and thus for an order for payment of all terminal dues and benefits owed and full compensation for wrongful dismissal from employment as particularized hereunder;-

a. Kshs.1,740,000/= being an equivalent of the annual Claimant's salary as compensation for her wrongful, unfair and unlawful termination.

b. Ksh.435,000/= being three months's salary in lieu of notice.

c. Kshs.44,708.33/= being 10 days pay for leave earned but not paid.

d. Costs of this suit.

ii) A declaration that the Claimant is entitled to be issued with a Certificate of Service.

The respondent's case is a denial of the claim. She comes out as follows;

2. The Respondent denies the Claimant's allegations and claims in this cause and states as follows;

i) The Claimant was summarily dismissed on the grounds of gross negligence of duties by approving double receipts amounting Kshs.87,180 for 15 groups in Kericho Branch without verification as stipulated in the policies and procedure and also due to failure in her primary responsibilities to manage the quality of the loan book which was 12.4% against a budget of 5% she was not unlawfully terminated as alleged.

ii) The Claimant's summary dismissal was fair, procedural and in accordance with the applicable provisions of the law.

iii) The Claimant's summary dismissal was warranted on the grounds of gross negligence of duties and was in fact accepted by the Claimant herein as justified. The Claimant should not be allowed to approbate and reprobate.

iv) The Claimant's claim as filled is false and deliberately misleading.

v) The Claimant is not entitled to the orders sought.

The respondent's further case is that the claimant was promoted to Regional Manager at a salary of Kshs.125,000.00 vide a letter dated 13th July, 2015 on set terms and conditions. On 5th September, 2016 she was redeployed as Branch Manager, Kericho due to her non performance as RO manager/officer. She failed to discharge her duties effectively and was not able to supervise those under her charge.

The respondent's further case is that the claimant continued her poor performance at Kericho and failed to comply with the respondents set policies and procedures. This was communicated vide a letter dated 9th January, 2017.

The respondent's other case is that the claimant was issued a notice of show cause letter dated 25th July, 2017 when it was discovered that she had approved double receipts amounting to Kshs.87,180.00 for 15 groups in Kericho without verification as is provided in the respondent's policies on procedures. Again, her performance had also deteriorated in the last 6 months and that the provisions at the end of June, 2017 stood at Kshs.14,834,439.00 which was 9.2% of the loan book.

The respondent's further case is that vide a letter dated 27th July, 2017, the claimant in response to the show cause letter accepted her wrong doing and committed to achieve the set branch targets. On 22nd August instant, the respondent held a disciplinary meeting where the claimant was awarded an opportunity to explain herself on the issues of double receipting and poor performance whereby she responded and asked for forgiveness. This was found wanting and she was summarily dismissed from employment.

The respondent penultimate case is that the claimant's final dues were computed at Kshs.171,345.05 and a certificate of clearance for signing by the claimant done. She did sign the clearance certificate confirming that she had no other claims against the respondent and was thus paid her terminal dues. She therefore denies any liability and deems the claim baseless in law and fact.

The claimant in her Reply to Memorandum of Defence further reiterates her case and avers as follows;

5. In response to the Respondents averments in paragraph 6 of the Defence, the Claimant avers that her redeployment was done way before an appraisal on her performance was conducted and avers that in any event, her final appraisal for the relevant year i.e 2016 was positive leading to an award of a bonus payment of Ksh181,000/=. See annexure marked, "MC C" to the Memorandum of Claim.

8. The Claimant denies the contents of paragraph 13 of the Memorandum of Defence and avers that she did execute the certificate of clearance to confirm that she had surrendered all the Respondent's property then in her possession and thus avert any subsequent claims against her by the Respondent.

9. In further reply to the contents of paragraph 13, the Claimant avers that the sum of Kshs.175,345.00/= was in respect of her unpaid dues owing at the time of her termination.

10. In further reply to the contents of paragraph 14 of the Defence and avers that she duly collected her Certificate of Service upon clearance.

The matter came to court variously until the 3rd October, 2018 when it was heard. At the hearing, the parties testified in reiteration of the respective cases.

The issues for determination in this cause therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances.
2. Whether the claimant is entitled to the relief sought.
3. Whether the claimant is entitled to the costs of the cause.

The 1st issue for determination is whether the termination of the claimant was wrongful, unfair and unlawful in the circumstances. The claimant in her written submissions dated 20th October, 2018 reiterates her case of unlawful termination of employment.

The claimant in support of her case seeks to rely on sections 43 (1), 45 (2) and 47 (5) of the Employment Act, 2007 which provides as follows;

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

Further, section 45 (1) provides thus;

45.(1) No employee shall terminate the employment of an employee unfairly.

(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 employees 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.

Again, section 47 (5) apportions the burden of proof of unfair termination in the following wording;

47 (5) "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"

The claimant in further support of her case seeks to rely on the authority of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013]eKLR** where the court observed as follows;

"The Claimant was dismissed based on multiple reasons. The Court is therefore enjoined to consider all the reasons, without more, since section 43(2) of the Employment Act, 2007 presupposes that the reasons for termination are the ones which genuinely existed and caused the employer to terminate".

Again, she cite and relies on the authority of **Naomi Ruwa v Peter Odote [2018]eKLR** which comes out thus;

"In this case, the reason for termination was poor performance. According to the termination letter dated 3.6.2014, the Claimant was accused of failure to meet any requirements and responsibilities bestowed upon her at the appointment. The letter however did not outline the said requirements and responsibilities which were not met. No performance appraisal was done to rate the Claimant as a poor performer. The termination letter only made generalized statement of alleged poor performance without any particulars and facts to substantiate. Consequently, I make a finding of fact that the Claimant had indeed poorly performed her duties and proceed to hold that the Respondents have failed to prove and justify the reason for the termination of the Claimant's employment as required by section 43 and 47 (b) of the Act."

In the penultimate, the claimant further buttresses her case of unlawful termination of employment by relying on the authority of **Jane Samba Mukal v OI Tukai Lodge Limited [2013]eKLR** where the court observed thus;

“The respondent having no evaluation measure for performance, then cannot be said to apply a measure for the same in this case. It has no basis. Majority of employers have now adopted various tools for performance appraisal every year to address matters of employee performance. This is set out as an elaborate system where an employee is given a chance for self evaluation system where an employee is given a chance for self evaluation, then peers are invited to evaluate and a supervisor is given a chance to give their evaluation and comments. Where there are weak areas identified following this evaluation, the employee is given work target with a time plan on how to address these weaknesses. A follow up review is done and where such an employee is still found to be below the set criteria, then a warning and eventual termination may arise. Where such an employee show improvement, they are given a chance to demonstrate that indeed given time and the necessary support, they can give their best. This would constitute what is procedurally and substantively fair to an employee.”

The respondent in her written submissions dated 20th November, 2018 submits in reiteration of a case of lawful termination of employment. In this she relies on section 41 of the Employment Act, 2007 which requires that an employer pursues the following in a case of unlawful termination of employment;

i. Explain to the employee in a language that the employee understood

the reason why it was considering the termination.

ii. Allow a representative of the employees, being either a fellow employee or a shop floor representative to be present during information/explanation of the reasons.

iii. Hear and consider any explanation by employee or his representative.

She further sought to rely on the authority of **CFC Stanbic Bank Limited versus Danson Mwashako Mwakuwona (2015)eKLR**, where the learned judge observed thus;

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views of those of the employer and decide whether it would have dismissed on those facts it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts”

When all is said and done, this matter tilts in favour of the claimant. A case of unlawful termination of employment ensues in the circumstances. This is because the claimant’s performance at the work place, like she submits, is all super and exemplary except in the last minute instance of double receipting at the work place. This is exemplified by the numerous awards of bonus made to herself in the three year stint of employment. A case of poor performance is therefore not made or compelling.

It must be appreciated that at all times, the claimant was at best, a supervisor. She was a team leader and one amongst equals. All are supervisees like would be expected at a work place had individual duties and responsibilities of which they were answerable. The claimant would not be expected to square the burden of the failures of the team in entirety unless this was overwhelming. In the instant case, the issue of double receipting crops up at the close of the day and mars the good performance of the past. It was a one off affair and could have been cured internally. This is excusable and the claimant should not be hanged on the same.

I would understand the claimant’s acceptance of wrong doing and search for forgiveness as is the case and submission of the respondent. A good worker on realizing faults in performance would ordinarily understand, acknowledge and seek time to remedy such situations and defaults. She would also be apologetic and remorseful. This is not tantamount to accepting responsibility for such failure: at least not in the sense of the disciplinary process. This is mere courtesy, a show of goodness, accountability and responsibility. Just that. It cannot be employed as a tool for such drastic measures as summary dismissal, or at all. This would be deplorable conduct on the part of the employer. It would be unjust.

Looking at the claimant’s explanation at the turn of events in her reply to the show cause letter and also during disciplinary proceedings displays a case of a supervisor who was caught up in a web of mistakes by her supervisees. There is no evidence of repeated or even massive duplicity of receipts. It remained a one instance scenario of a mess up at the work place. Was this indeed goo material for the finale sentence of summary dismissal? I wonder.

I also agree with the respondent’s submission that the respondent’s assessment of the claimant’s poor performance was not beyond reproach. The respondent did not adduce evidence of her policy on performance appraisal. The claimant was not overtly involved in the exercise of such appraisal. In a situation where performance and performance appraisal are critical terms of the employment contract, the means of such appraisal must be transparent. It must be clear and open to all parties to the employment contract. This was not the case here. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim, declare and order relief as follows;

i. A declaration be and is hereby issued that the termination of the employment of the claimant by the respondent was wrongful,

unfair and unlawful.

ii. One (1) months salary in lieu of notice.....Kshs.145,000.00

iii. Six (6) months salary as compensation for unlawful termination of employment 145,000.00 x 6 =
.....Kshs.870,000.00

iv. Compensation for untaken leave.....Kshs.44,708.33

Total of claim.....Kshs.1,059,708.33

v. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Koech instructed by Bett & Company Advocates for the claimant.

2. Mr. Mugumya holding brief for Opar instructed by Muthanwa & Company Advocates for the respondent.