



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1381 Of 2010**

**ERNEST MORARA MOKUA.....CLAIMANT**

**- VERSUS -**

**KENYA RAILWAYS CORPORATION..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> March, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim dated 04.11.2010 through Auta Nyakundi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) General damages.
- b) Exemplary damages.
- c) Costs of the suit.
- d) Interest on (i), (ii), & (iii) above at Court rates.
- e) Any other relief the Honourable Court may deem fit and just to grant.

The respondent filed the memorandum of response dated 05.04.2011 through Prof. Albert Mumma & Company Advocates. The respondent prayed that the claim be dismissed with costs.

The respondent employed the claimant as its Assistant Management Accountant sometimes in April 2007 and the claimant served in that position until February 2009. It is not in dispute that on 09.10.2008 the claimant in the course of his duty received a cheque of Kshs. 10.7 Million being payment to the respondent by its customer. The claimant testified that he received the cheque on 09.10.2008 at 5.00pm. He had gone out to collect the cheque from the customer and he testified that he arrived late. He testified that he put the cheque in a safe, locked and left for the weekend. It was on a Thursday and Friday 10.10.2008 was a public holiday - Moi day. On Monday 13.10.2008 he resumed duty and he issued a receipt to the customer with respect to that cheque. It was an on-line receipt. He gave the cheque to the accounts clerk for safe custody.

The claimant further testified that on 13.10.2008 the cheque was not banked because the client requested for 2 weeks before banking because they did not have liquidity. Thus the claimant testified that he asked the accountant to hold on the cheque and it was banked after 2 weeks. Further the claimant stated that in the week of 13.10.2008 he informed the respondent's General Manager for Finance about that cheque and it was his evidence that due to pressure of work some time had lapsed before he informed the General Manager about the cheque.

The claimant testified that the customer who had issued the cheque had deposited Kshs. 214 Million in cash as security on delayed payments and so he saw no urgency in the processing of the cheque in issue. The claimant testified that the accounts clerk then banked the cheque on 27.10.2008 at the Kenya Commercial Bank (KCB). Further, at that time KCB was upgrading its systems and the claimant expected to see a credit of the cheque the following day as awaiting clearance by Central Bank. The bank statements were printed on daily basis and during such reconciliation the claimant and his team discovered that the cheque had not been credited. The discovery was by the Assistant Accountant in January 2009.

It is not in dispute that the claimant was thereafter arrested on 07.02.2010 together with three others on a charge of stealing by servant. The claimant and the others were later released because the cheque was found at KCB who explained that they were undergoing challenges in their systems. The cheque's principal sum plus interest was processed and deposited in the respondent's KCB account by 11.02.2009.

The respondent's witness (RW) was Josephine Masibo, the respondent's General Manager for Human Resource and Administration. She testified that the reason the claimant was suspended was because he issued instructions to Assistant Accounts Clerk to withhold the cheque in issue for 2 weeks amounting to Kshs.10.7 Million and the claimant had done so without authority. An ad hoc committee was instituted to investigate the matter and RW testified that the committee found that the claimant had instructed that the cheque be withheld for 2 weeks. RW then concluded her testimony by saying that the respondent's Board subsequently dismissed the claimant on that account. RW while testifying that for the 2 weeks the cheque was withheld the respondent lost interest, she further testified that she did not know when interest on the cheque would be due. She further confirmed that she did not know the details of how the cheque was processed at the bank. RW also confirmed that the respondent had employed and also contracted some debt collectors.

The **1<sup>st</sup> issue** for determination is whether the termination of the claimant's employment was unfair. At the hearing the parties recorded consent thus, **"By consent no dispute on disciplinary procedure as it was followed as was agreed upon."** The Court will not therefore delve into the procedural fairness.

The only issue for determination is whether the reason for termination was genuine or valid as at the time of termination as per section 43 of the Employment Act, 2007. The evidence is clear that the claimant was terminated on account of giving instructions that the Kshs. 10.7 Million cheque be withheld for a period of 2 weeks without proper authority as per the letter dated 20.05.2009. The claimant testified that the customer in issue had requested that due to liquidity challenges, the cheque was to be banked 2 weeks after it was delivered to the claimant on 09.10.2008. The respondent has not exhibited any operational policy or standing instructions that the claimant lacked the authority to implement the customer's instructions in that regard. The evidence was that the cheque was then promptly banked on 27.10.2008. The respondent also offered no evidence to discount the claimant's evidence that the customer had deposited Kshs. 214 Million in cash as security on delayed payments so that in any event the respondent would not suffer any loss. In the circumstances the Court returns that the claimant's action to implement the customer's instructions was within the scope of the claimant's duties and in absence of the claimant's job description or operational policies as may have been imposed under the contract of service, the Court returns that the claimant was doing his best in view of the respondent's otherwise deficient operational policies and systems governing the claimant's employment and discharge of duties.

The Court upholds its opinion in Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR thus,

**"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."**

In the present case the respondent has failed to show that it had a genuine reason to terminate the claimant's employment as per section 43 of the Employment Act, 2007 as read with section 47(5) of the Act. In particular the Court returns that in this case the respondent has been ensnared by the provisions of section 45(2) of the Act which provides that a termination of employment is unfair if the employer fails to prove that the reason for termination is related to the employees' conduct, capacity or compatibility, or, based on the operational requirements of the employer. The Court has found that the respondent has not exhibited terms of the contract of service or job description or operational requirements that barred the claimant to cause withholding of the cheque for 2 weeks in line with the customer's instructions. The Court further considers that in any event, in view of the otherwise deficient operational systems, the claimant was honestly doing his best towards discharging the duties that were vested in him by reason of the office he had been appointed to hold.

The Court also observes that the extract of the ad hoc committee's report investigating the case noted and enumerated at clause 4.0 various respondents' internal control weakness as per 4.1 to 4.9 but while doing so, just as in alleging lack of authority against the claimant, the committee did not identify the respondent's operational requirements or policies and systems that were in place for correcting the weaknesses. In such circumstances, the Court returns that indeed the respondent operated a deficient operational system, requirements and policies and the claimant was entitled to do the best in the circumstances including withholding the cheque for 2 weeks as per the customer's instructions.

It was suggested for the respondent that the customer had to exhibit the evidence of payment prior to collecting the scrap metal that was subject of the payment. However there is no reason to doubt the claimant's account that the respondent's position in that regard was not the practice because RW confirmed that the respondent employed debt collectors and contracted or outsourced others. Further the claimant's evidence that the customer had paid security to cover for any delays in the payment for the scrap metal went unchallenged. The Court also finds that there was no allegation against the claimant that the customer had been allowed to irregularly take away the scrap metals without having paid.

The claimant's honesty in the whole transaction had also been demonstrated by the letter dated 09.02.2009 by KCB to the respondent that the cheque for Kshs. 10, 722, 617.54 had been deposited with the bank on 27.10.2008 but proceeds of the same were not credited to the respondent's account due to the system shortcomings prevailing at the time. The letter also confirmed that the proceeds of the cheque had been deposited in the respondent's account on 09.02.2009 and the bank apologised for the inconveniences caused to the respondent. The bank's letter dated 16.02.2009 confirmed that the foregone interest for the period 27.10.2008 to 09.02.2009 would be reimbursed to the respondent.

The letter by the investigators dated 28.04.2009 confirmed the errors at the bank and that interest on the belated processing of the cheque had been paid by the bank per receipt that the letter stated was attached. The letter did not implicate the claimant at all. The criminal case that had been preferred against the claimant and 3 others was withdrawn under section 87 of the Criminal Procedure Code and the accused persons

discharged accordingly.

To answer the 1<sup>st</sup> issue for determination the Court returns that the termination of the claimant's contract of service was unfair for want of valid reason for termination as at the time of the termination.

The 2<sup>nd</sup> issue for determination is whether the claimant is entitled to compensation for the unfair termination. The Court has considered that the claimant desired to continue in employment and he had a clean record of service. The aggravating factor against the respondent is that the claimant was erroneously prosecuted on an alleged charge of stealing by servant but discharged under section 87 of the Criminal Procedure Code. The Court has considered the mitigating factor in favour of the respondent that the claimant admitted to have delayed in informing the General Manager Finance about the cheque sometimes in the week of 13.10.2008 but he eventually informed him that week. The fact of that information by the claimant to the General Manager Finance was not challenged and the delay, in the opinion of the Court would amount to a small contribution by the claimant to the ensuing termination. The Court has considered the factors and awards the claimant 10 months' salaries in compensation under section 49 of the Employment Act, 2007 at Kshs. 136, 400.00 per month making **Kshs. 1, 364, 000.00**.

The 3<sup>rd</sup> issue for determination is whether the suit was time barred. It was submitted for the respondent that the suit was time barred under section 87 (b) of the Railways Corporation Act prescribing 12 months from the date of the alleged default as the time of limitation for suits against the respondent. It was also submitted that under section 92 of the Act it was provided that the provisions of the Act, except where otherwise provided, shall be in addition to, and not in substitution for or in derogation of the provisions of any other Act. The Court has considered the submission and returns that the provisions of section 87(b) of the Act cannot derogate from the provisions of section 90 of the Employment Act, 2007 prescribing 3 years as the time of limitations in cases of termination of contracts of service like the claimant's cause of action in the present case. The claimant's dismissal letter was dated 20.05.2009 and suit was filed on 09.11.2010 clearly within 3 years of limitation under section 90 of the Employment Act, 2009. In any event section 3(1) of the Employment Act, 2007 provides that the Act applies to all employees and employers in a contract of service and the Court returns that the parties in the present suit are bound including on the prescribed terms and conditions of service. In that regard the Court distinguishes **Joel Kiprono Langat –Versus- Kenya Postal & Telecommunication Corporation [2000]eKLR** where the Court of Appeal considered a similar provision as the respondent seeks to rely on in the instant case and held that the suit was time barred. The Court returns that the holding will not apply to the present case where, as opposed to the cited case, the cause of action was after the enactment of the Employment Act, 2007.

To answer the 4<sup>th</sup> issue for determination and as submitted for the respondent, the exemplary damages as prayed for will fail. The Court follows **Abdulhamid Ebrahim Ahmed –Versus- Municipal Council of Mombasa [2004]eKLR**, where Maraga J (as he then was, currently CJ) held that the exemplary damages are awarded in three categories of torts to punish the defendant and vindicate the law namely, relating to oppressive, arbitrary or unconstitutional actions of servants of government; where the defendant's conduct is calculated to earn him profit; and where exemplary damages are expressly authorised by statute. The Court returns that the claimant has not established any of the categories and the prayer will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs. 1, 364, 000.00** by 15.05.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 29<sup>th</sup> March, 2019**.

**BYRAM ONGAYA**

**JUDGE**