



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2311 OF 2018

FRANKLINE EUSTACE KIMATHI.....CLAIMANT

- VERSUS -

JAMII BORA BANK LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th May, 2019)

JUDGMENT

The claimants filed the memorandum of claim on 23.12.2015 through Kihangah and Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.
- b) An order directing the respondent to reinstate the claimant to his employment without loss of position, status or benefits or in alternative payment of Kshs.11, 137, 500.00.
- c) Special damages of Kshs. 1, 101, 375.00 as pleaded in paragraph 14 above (unpaid salary for September 2015 Kshs.61, 875.00; 30 days unpaid leave days Kshs. 49, 500.00; unpaid salary November to December 2015 Kshs. 247, 500.00; claim under section 49 of the Employment Act Kshs.61, 867 x 12 making Kshs.742, 500.00).
- d) The Costs and interest on (b) and (c) above at Court rates from the date of filing the claim until payment in full.
- e) Certificate of service.
- f) Any other relief that the Honourable Court may deem fit to grant in the interest of justice.

The response to the memorandum of claim was filed on 08.03.2016 through Robson Harris & Company Advocates. The respondent prayed that the suit be dismissed with costs.

It is not in dispute that on 25.03.2009 the claimant was employed by the respondent who is the successor to City Finance Bank Limited. He was employed as a custodian in the credit administration department. The respondents took over from City Finance Bank Limited and the claimant's terms of employment to the respondent were by the letter dated 28.07.2014. The respondent deployed the claimant from the credit administration department to become a legal assistant. He was employed on permanent and pensionable terms of service with all attendant benefits.

By the letter dated 03.08.2015 the claimant was suspended from employment effective 04.08.2015 upon allegations of unethical practices in the credit process. The letter stated that while on suspension the claimant would be on half salary and was required to report to the Audit office directly every Monday morning, until the matter was finalised. He was to hand over to immediate supervisor.

The respondent addressed to the claimant the letter to show-cause dated 05.08.2015. The letter notified the claimant that it had been alleged that the claimant had been receiving bribes in return of favours from a certain valuer and car tracking companies. It further stated that the same was against the claimant's contract clause 17 a. The letter stated that the offense was taken very seriously by the respondent as it exposed the bank to reputational risk and compromise on the bank's credit controls thus leading to issuance of non-quality loans. The letter required the claimant to show cause within 48 hours why disciplinary action should not be taken against him.

By the letter dated 17.08.2015 the claimant was invited to attend a disciplinary hearing on Wednesday 19.08.2015 at 2.00pm at the respondent's meeting room. It appears that the disciplinary hearing did not take place and the claimant was invited by the letter dated 01.09.2015 to attend a disciplinary hearing on 02.09.2015 at 2.30pm.

The respondent's case is that the claimant failed to reply the show-cause letter and the respondent issued the letter dated 24.08.2015 but for a second time the claimant failed to respond in view of the bribery allegations. The respondent's further case is that the claimant attended the disciplinary hearing on 03.09.2015 and he had no defence to the allegations and therefore he was dismissed from employment by the letter dated 07.09.2015 on grounds of being suspected of having committed a criminal offence against or to the substantial detriment of his employer or employer's property as envisaged under section 44 of the Employment Act, 2007. He was to be paid salary for days worked in the month of termination paid by way of cheque; any leave accrued and not taken; and any allowance including pension accruing as approved by the line manager. He was to collect the final dues 14 days after clearing with the respondent and less monies owed to the respondent.

The claimant's evidence was that he saw no record of the alleged complaints from the Valuers in issue. Further it was his evidence that the alleged disciplinary hearing was to inform him that he had been dismissed. He saw the human resource manager and the dismissal letter handed to him. The claimant confirmed that he received the show-cause letters dated 05.08.2015 and 24.08.2015 respectively. He stated that after termination he appealed on 15.09.2015 but he was not called to appear before the appeals board. The claimant confirmed that he had signed the staff clearance form.

The respondent's witness (RW) testified that there was no evidence on record showing the complaint that the claimant solicited for bribes from the respondent's service providers. Further there was no evidence that half pay during the suspension had been paid. He stated that the record of the disciplinary hearing did not reflect the respondent's manner of undertaking a disciplinary hearing because there was no record on chairperson, and the charge against the claimant although the agenda was disciplinary hearing.

To answer the 1st issue for determination the Court returns that the termination was unfair for want of a valid reason for termination and due procedure. RW confirmed that there was no evidence that the claimant solicited the bribes as was alleged and there was no evidence of complaints by the two service providers in issue. The Court returns that the respondent has failed to show that as at the time of the termination it had a valid reason to terminate the claimant's employment. The Court further returns that RW confirmed that the procedure adopted at the disciplinary hearing was inconsistent with the respondent's standards of a disciplinary hearing for want of a record on the chairperson, secretary, and the allegations that were levelled. That evidence by RW leads that Court to find that the alleged disciplinary hearing was to inform him that he had been dismissed. As per section 41 of the Act, the claimant appears not to have been accorded chance to be accompanied with a co-employee of his choice. The Court returns that the procedure was not fair and the termination was unfair.

The 2nd issue for determination is whether the claimant is entitled to 12 months' pay under section 49 in compensation for the unfair termination. The claimant desired to continue in employment and he had a long time to go in service of the respondent under the permanent and pensionable terms of service. However the undisputed evidence is that despite receiving a show-cause letter and a reminder thereto, the claimant failed to respond to the allegations as was required. The Court finds that failure to have been a significant contribution to his termination and the contribution is put at 50%. The claimant is awarded 6 months' pay under section 49 of the Act making **Kshs.371, 202.00**.

The 3rd issue is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

a) The claimant prays for unpaid salary for September 2015 Kshs.61, 875.00; unpaid salary November to December 2015 Kshs. 247, 500.00. The suspension was effective 04.08.2015 and termination by the letter dated 07.09.2015. The evidence was that during the suspension the half salary that was promised in the suspension letter was not paid and RW confirmed that there was no evidence of such payment. In the circumstances the claimant is awarded one month salary for the period of suspension making **Kshs. 61, 875.00**. The suspension having lapsed on 07.09.2015, there would be no basis to award pay beyond that date. In any event, there was no agreement that the administrative appeal would stay the dismissal decision. The award as made is consistent with the holding in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited [2013]eKLR**, that for the period the employee is kept away unlawfully on interdiction or suspension, the employee is entitled to partial reinstatement and therefore a total of salaries due during that period. The Court awards accordingly.

b) The claimant prayed for 30 days unpaid leave days Kshs. 49, 500.00 but the clearance form showed 27 pending leave days which are awarded making 27/30 x Kshs.61, 875.00 making **Kshs. 55, 687.50**.

c) The Court returns that the 3 years of limitation from dismissal date under section 12 of the Employment and Labour Relations Court Act, 2011 have since lapsed and reinstatement will not issue. The Court considers that compensation awarded is sufficient for ends of justice in the case and in any event parties appear to have strained relationship manifested in the claimant's failure to reply the show-cause letters and therefore implementing reinstatement will be impracticable.

d) The claimant submits that he is not able to secure alternative job in the banking industry in view of the unfair dismissal so that he should be awarded Kshs. 11, 137, 500.00. There are no submissions on the basis of the Kshs. 11, 137, 500.00 as was claimed. Further the evidence was that the claimant was a driver deployed in the legal department as a legal assistant so that the Court returns that he could serve in any other industry as a driver. In any event there was no evidence that the claimant had attempted to obtain employment in another bank and denied on account of adverse reference flowing from the termination. The Court finds accordingly.

e) The claimant is entitled to a certificate of service under section 51 of the Employment Act, 2007.

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

- 1) The declaration that the termination of the claimant's employment with the respondent was unlawful and unfair.
- 2) The respondent to pay the claimant a sum of **Kshs.488, 764.50** (less PAYE) payable by 01.07.2019 failing interest to be payable thereon at Court rates from the date of the judgment till full payment.
- 3) The respondent to deliver the claimant's certificate of service by 15.06.2019.

4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 24th May, 2019.

BYRAM ONGAYA

JUDGE