



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2312 OF 2015

JOHN MBUGUA.....CLAIMANT

VERSUS

JAMII BORA BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 23.12.2015 alleging that his contract of service was breached and unfairly terminated by the respondent on 17.11.2015. He therefore prayed for the following reliefs:-

- i. A declaration and finding that the termination of the Claimant's employment with the respondent was unlawful and unfair,
- ii. An order directing the respondent to reinstate the Claimant to his employment without loss of position, status or benefits or in the alternative, payment of Kshs.37,800,000/= (which is computed as 21 years x 12x Kshs.150,000/=);
- iii. Special damages of Kshs.4,396,000/= as pleaded in paragraph 18 of the Memorandum of Claim;
- iv. Costs and interest on (b) and (c) at court rates from the date of filling this claim till payment in full.
- v. Certificate of service.
- vi. Any other relief that this Honourable court may deem fit to grant in the interest of justice.

2. The respondent filed here defence on 8.3.2016 admitting that she dismissed the Claimant on 17.11.2015 but denied that the same was unfair. She averred that the Claimant was dismissed after approving overdrafts on several accounts without authority and in breach of the bank's code of conduct. She further averred that a fair procedure was followed before the dismissal and prayed for the suit to be dismissed with costs.

3. The issues for determination arising from the pleadings are whether the dismissal of the Claimant was unfair and whether the reliefs sought should be granted. The suit was heard on 14.12.2018 when the Claimant testified as CW1 and the respondent's Human Resource Officer Mr. Andrew Juma Wafula testified as RW1. Thereafter both parties filed written submissions. 'The Claimant further avers the offending

Evidence

4. CW1 testified that he was employed by the respondent on 13.3.2014 as a Branch Manager and posted to the Funzi Road branch Industrial area. That his appointment was confirmed on 1.7.2014 pursuant to his stellar performance. However on 8.9.2014, he received a written enquiry on some Temporary overdraft (TOD) facilities from the Head office.

5. CW1 further testified that he responded to each and every allegation by his letter dated 10.9.2014 followed by oral presentation to the Head of finance and the relevant department on the same day. However, he received a show cause letter on the same day which according to him was breach of the Respondent's disciplinary process as envisaged in the staff Human Resource policy and failed to respond thereto. Thereafter he was suspended by the letter later 24.9.2014 to pave way for further investigation and on 17.11.2015 he was dismissed for authorising irregular overdrafts through fraudulent transactions.

6. CW1 contended that his dismissal was unfair because it was not grounded on a valid reason and without according him a fair hearing as required by the respondent's Human Resource Manual and the statutory law. He further contended that the manner in which he was dismissed barred him from getting an alternative job in the banking industry on account of negative references. He therefore prayed for reliefs set out in his memorandum of claim.

7. In cross examination, CW1 admitted that he was dismissed by the respondent on 17.11.2014 and got appointment from the Equatorial Bank on 12.1.2015. He Further admitted that on 10.9.2014, he had a discussion with his line manager Mr. Zacharia Cheruiyot on his role in approving overdrafts without authorization from the Credit Department. He also admitted that after the discussions he wrote the letters dated 10.9.2014 to the said line Manager requesting for leniency for the excess validations done and stated that he had stopped authorising all excess drawing and notified all the customers.

8. CW1 admitted that he was authorising excess drawings on default accounts upon a charge of 3% interest. He contended that the 3% interest was revenue to the bank and not his own income. He maintained that as the Branch Manager he had the discretion to do so. He further admitted that he was suspended on 24.9.2014 and the matter was reported to the Banking Anti fraud unit. That on 17.11.2014 he was served with termination letter and arrested the same day and thereafter charged with theft of money from the employer. He denied the alleged theft and contended that all the money was paid to the customers by the tellers.

9. RW1 testified that the CW1 was involved in unethical practices including authorising overdrafts of account at his branchy without express authorization from the Credit Department at the Head Office contrary to bank's procedures. That in September 2015 he was served with a show cause letter for the breach of his contract of employment and the Bank's code of conduct. That thereafter he was suspended by the letter dated 24.9.2015 and dismissed on 17.11.2015 under **section 44(4)(g)** of the Employment Act after being afforded an opportunity to defend himself. That on the same day, he was arrested by the police and charged with stealing by servant contrary to section 281 of the Penal Code.

10. RW1 contended that the dismissal of the Claimant was fair and justified because he had severely compromised his conduct as a Branch Manager. He contended that the bank lost confidence in him as an employee in the banking industry which calls for high levels of trust, integrity and confidentiality. He therefore prayed for the suit to be dismissed with costs.

11. In cross examination RW1 admitted that he joined the respondent after Claimant had been dismissed. He admitted that he was not aware whether the investigation report produced herein was given to the Claimant before his dismissal. He further admitted that there are no minutes for any disciplinary hearing for the Claimant before his summary dismissal. He admitted that the investigations revealed that money was not stolen but it was advanced to clients and the commission from the overdrawn accounts was revenue to the bank. He further admitted that there was possibility that the overdrawn accounts were fully paid. He concluded by contending that, negative references was not done by the bank but by the banking sector.

Submissions

12. Claimant submitted he was dismissed for a false reason while in police custody without being accorded hearing as required by section 41 of the Employment Act. He relied on **Kenya Union of Commercial Food and Allied Workers vs. Meru Norther Farmers Sacco Ltd [2014] eKLR** to fortify the foregoing submissions. He further relied on **Beatrice Achieng Osir vs. Board of Trustees Teleposta Pension Scheme** to seek an order for reinstatement because he is not able to get alternative employment due to negative references from the Kenya Bankers Association.

13. The respondent on the other hand, submitted that an unfair termination of employment results from breach of statutory procedure and the burden of prove lies with the employee under section 47(5) of the Employment Act while the employer has the burden of justifying the reason for the termination as required by section 43 and 45 of the Act. In her view she has proved that the Claimant's actions of approving unauthorized overdrafts constituted gross misconduct within the meaning of section 44(4) (g) of the Act. That he wrongfully used his discretion without following the laid down credit and lending procedures and therefore exposed the bank to a liability of Kshs.10,537,000/=. She relied on the Court of Appeal decision in **CMC Aviation Ltd vs. Muhammed Nour [2015] eKLR** and this court's decision in **Agnes Mwangi vs. Barclays Bank of Kenya [2013]eKLR** to support the foregoing submissions.

14. As regards the procedure followed, the respondent submitted that the Claimant was served with a show cause letter and failed to attend disciplinary hearing. That Claimant admitted in his evidence that he was served with a written inquiry on temporary overdraft facilities and he responded to the issues raised and thereafter made oral presentations to the Head of the Department. That thereafter he was served with the show cause letter which he ignored. She relied on Isaac Nyamosi Nyangau vs. Gibaru's Supermarket Ltd [2016]eKLR and Mathew Lucy Chemisa vs. Reverelle Sisters of Belfano t/a Blessed Louis Pelazzalo Health Centre [2013] eKLR to fortify the submission that the Claimant was afforded a fair procedure before the dismissal.

15. The respondent further submitted that, the Claimant admitted that he secured another job at the Equitorial Bank in 2015 and contended that his dismissed did not affect his chances of getting alternative employment. She therefore prayed for the suit to be dismissed.

Analysis and determination

16. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the Claimant was employed by the respondent from March 2014 to 17.11.2014 when he was summarily dismissed. As earlier noted herein above the issues for determination are:

- a) Whether the dismissal of the Claimant was unfair.
- b) Whether the reliefs sought by the Claimant should be granted.

Unfair dismissal

17. Under **section 45 (2)** of the Employment Act, termination of employee's employment is unfair if the employer fails to prove that, it was grounded on valid and fair reason which must relate to the employee's conduct, capacity and compability or based on the employer's operational requirements. The employer must also prove that a fair procedure was followed.

18. In this case the reason cited for the summary dismissal of the Claimant in the letter dated 17.11.2014 was irregularities in the overdrawing of account. In his letter dated 10.9.2014, the Claimant stated as follows in response to the written inquiry in to the temporary overdraft facilities:

“Att: Zacharia Cheruiyot **FUNZI ROAD OVERDRAWN ACCOUNTS/EXCESS OVERLIMITS**

The above refers;

Further to the long story and candid discussion we had on Tuesday 9th September, kindly find attached the reasons for the overdrawn accounts/excesses, remedial actions taken and the expected dates of regularization.

I do apologize for giving myself and the branch EOL/TOD/ENC credit discretionary powers without Credit Risks' approval in my zeal to keep our clients' businesses running despite the liquidity crunch experienced between May and August due to delayed payments mostly from GOK, County Governments and Contractors.

I wish to state that all due diligence was taken before authorizing these excesses to confirm that the bank is not exposed. I confirmed and called back the sources of payments and verified with GOK and other buyers that indeed they are holding client's monies. ...

I have been charging 3% flat fee on all excess and the accounts continues to accrue default fee of 2.5% P.M. until regularized, hence increased non-interest incomes for the bank. I believe banks were formed to make money by bridging the timing difference between clients' payments and receivables.

Without justifying a wrong or non-adherence to bank policies/procedures, I believe I speak for many branch managers when I humbly request that you amend the bank policies and procedures to roll out branch credit discretionary limits.

I have consequently stopped authorizing excesses and communicated to all my clients accordingly, and I beg for your leniency in terms of disciplinary action as my motives were positive and aimed at growing the bank.

Your support, assistance and guidance is ever appreciated.

Yours sincerely.

John Mbugua

Branch Manager

Funzi Road Branch.”

19. After considering the foregoing letter, the tone notwithstanding, I find that the Claimant made an express admission of the misconduct of authorising overdrafts to customers in his branch without approval from credit department of the bank's Headquarters and without adhering to the bank's policies and procedures. The said conduct had the potential of exposing the bank to liquidity problems, endanger other clients' deposits and of course the bank's reputation. The Claimant acknowledged his mistake and prayed for leniency. Consequently, I return that the respondent has proved that the dismissal of the Claimant was grounded on a valid and fair reason as required by section 43, 44 and 45 of Employment Act. A bank was entitled to dismiss a manager who violates banking policies and procedures.

20. As regards the procedure followed, I agree with the respondent that she followed a fair procedure before dismissing the Claimant by serving him with a written enquiry to which he responded admitting the offence of breach of credit procedure of the bank in extending overdrafts in his branch. That even after the said admission she served him with a show cause letter which he failed to respond after which he was dismissed.

21. I have held in a number of other matters that where an employee admits in writing the offence charged by the employer even before a formal disciplinary hearing as envisaged under section 41 of the Employment Act, the employer becomes discharged from the statutory obligation of according the employee any hearing under section 41 of the Act. The said section provides that before dismissing an employee for misconduct, poor performance or physical incapacity, the employer shall explain the reason for the intended dismissal to the employee in a language he understands and in the presence of a fellow employee or shop floor union official of his choice, and thereafter invite the two to air their representations which shall be considered by the employer before the dismissal is decided.

22. The foregoing view is fortified by *Isaac Nyamosi Ngangau vs. Gilani's Supermarket Ltd [2016]eKLR* where Radido J. had the following to say concerning employees failure to respond to show cause letter:

“Putting into consideration the warnings and the previous show cause notices, the court is predisposed to believe the respondent's account that the Claimant refused to acknowledge the show cause letter dated 6th March 2014. The show cause letter had requested the Claimant to show cause within 7 days why disciplinary action should not be taken against him. The court reaches a conclusion that the Claimant was given an opportunity to be heard before disciplinary action was taken, but he instead ignored the chance.”

23. Having found that the employer herein has proved on a preponderance of evidence a valid and fair reason for dismissing the Claimant and that a fair procedure was followed I proceed to hold that the dismissal was fair within the meaning of section 45 of the Employment Act.

Reliefs

24. In view of the foregoing holding, I decline to make a declaration that the termination of the Claimant's employment was unlawful and unfair as prayed. I further decline to order reinstatement of the Claimant because first his dismissal was justified, second section 12 of ELRC Act bars reinstatements

after the lapse of 3 years from the date of separation and finally because the Claimant admitted in evidence that he secured another job with another bank in January 2015. For the same reasons I dismiss the claim for salary in lieu of notice and compensation for unfair termination under section 49 of the Employment Act.

25. I however awarded him salary from September and October 2014 being Kshs.150,000 x 2 = **300,000/=** and 17 days in November 2014 being **Kshs.98,077**. I further award him the claim for 30 days leave being **Kshs.150,000/=**. The said claim for leave and unpaid salary for September, October and November 2014 were not disproved by employer using employment and leave records. However the claim for salary after dismissal on 17.11.2014 is dismissed for lack of any legal or contractual basis. The claim for pension may be pursued under the relevant scheme rules.

26. The claim for 14 days paternity leave is granted because RW1 admitted that when the Claimant was arrested on 17.11.2014, he was in the office pursuing his claim for paternity leave. RW1 never adduced any evidence to prove that the said claim was ever settled. He is therefore entitled to 14 days /26 x 150,000 = **kshs.80.769.23** but because he prayed **Kshs.70,000**, I award him the sum pleaded.

27. Finally the claim for certificate of service is granted as provided by section 51 of the Act.

Conclusion and Disposition

28. I have found that the summary dismissal of the Claimant on 17.11.2014 was fair both substantively and procedurally. I have however found that he is entitled to some of the reliefs sought. Consequently I enter judgment for him in the sum of **Kshs.618,077/=** plus costs and interest at court rates from date of filing suit. The sum awarded is however subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 3rd day of May, 2019

ONESMUS N. MAKAU

JUDGE