



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 288 OF 2018

[Formerly Cause No. 1125 of 2014, Industrial Court at Nairobi]

BETWEEN

RICHARD MARIGA MAOGOTO.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munene Wambugu & Kiplagat Advocates for the Claimant

Macharia, Mwangi & Njeru Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim at the Court in Nairobi, on 7th July 2014. He avers he was employed by the Respondent Bank as a Branch Manager. His contract was unfairly terminated, on 11th July 2014, without notice and/or valid reasons. He was denied terminal benefits. He was the Branch Manager, Gilgil, at the time. He prays for Judgment against the Respondent for compensation for unfair termination; terminal benefits including notice, annual leave, unpaid salary; and costs.

2. The Respondent filed its Statement of Response on 4th September 2014. It is conceded that the Claimant was employed by the Respondent as Branch Manager. He breached his contract and statutory duty of care. His contract was terminated for gross misconduct. Termination was fair and lawful. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified and closed his case at Nairobi, during the Court's Service Week, on 18th April 2018. With the consent of the Parties, the Respondent's case was fixed for hearing on 28th June 2018, at Mombasa where the Trial Judge is resident. There was an order that the file is forwarded to Mombasa for hearing. Unfortunately the Deputy Registrar, Nairobi mistook the order to forward the file, for an order of transfer. Once received at Mombasa, the file was treated as transferred in accordance with the communication of the Deputy Registrar, and was assigned a registration number at Mombasa.

4. Respondent's Employee Relations Manager, Bramwel Simiyu Mbirira testified for the Respondent at Mombasa, on 3rd December 2018. The Claimant was recalled briefly the same day, and gave additional evidence in response to a document freshly filed by the Respondent. Hearing closed on 3rd December 2018. The dispute was last mentioned on 4th March 2019 when Parties confirmed the filing of their Submissions.

Claimant's evidence

5. The Claimant told the Court he presently works as the Branch Manager of Stanbic Bank, at Naivasha. He previously worked for the Respondent, beginning 3rd December 2007, ending 7th July 2011.

6. He was suspended on 9th May 2011, on allegations that he had committed irregularities. At the point of suspension, nothing was detailed to comprise irregularities.
7. 2 days later, on 11th May 2011, he was issued a Memo by the Bank's Regional Officer Nakuru. It was alleged that the Claimant had engaged in credit irregularities. He was required to respond by 13th May 2011. He was unable to respond, because he did not have access to the original documents, as he was suspended.
8. He requested for access to the documents severally. He received response on 23rd May 2011. The period given to him to respond had already expired, 10 days earlier.
9. He was not called subsequently, to any disciplinary hearing. He was not given a chance to defend himself. The Respondent has a disciplinary committee. The Claimant never appeared before this committee. Termination was based on correspondence and discussions between the Parties.
10. The Claimant appealed to Respondent's CEO. He was invited for ad hoc meetings. Ultimately, he was informed by Head of Human Resource that his Appeal was unsuccessful.
11. His last salary was Kshs. 256,410 monthly.
12. His contract provided for notice or notice pay. He was not given either. He had 32 days of pending annual leave days. He was eligible for bonus, incentive performance, medical cover, staff loans and death gratuity under contract.
13. He never approved customer loans without adequate funds and securities. He was not the only Officer who authorized grant of loans. This was a centralized function, with a chain of authorization.
14. He did not recall serving a customer named Lucy Wambui. He was constrained not to disclose customer details. The facility extended to the particular customer was approved by 4 Officers. The Claimant was not responsible for the Bank's credit-downgrading. The allegations against him lacked specificity. He did not have insider dealings, because he did not have insider information such as relate to investment in stocks. He could approve salary advancement of up to Kshs. 100,000, but was not involved in disbursement. Advances Team and Operations Manager disbursed.
15. The Claimant was never absent from duty as alleged. He did not fail to supervise staff. He was consistently paid performance bonus. He did not fail to attend disciplinary hearing. The allegations were not in the letter of suspension. In the Memo which followed the letter of suspension, the charge was about irregular credit activities. Other issues were not stated.
16. The Claimant did a job interview with another Bank, CBA. He was to earn a monthly salary of Kshs. 270,000 and other benefits. He was to run the largest Branch. He was to go through security vetting. He was asked why he left KCB. He was told he had negative reference from KCB, and could only be employed if he cleared with KCB. He lost a second chance to work with Jamii Bora Bank. The same query was made, with the same answer and result. Lastly the Claimant was offered a job by Stanbic. The same negative reference as made by KCB. But the Claimant had worked earlier with Stanbic, earning accolades, and Stanbic ignored the adverse reference from KCB, and offered the Claimant the job.
17. The Claimant adopts the documents filed with the Statement of Claim as his exhibits.
18. Cross-examined, he stated that he did not have any documents showing he was offered jobs by CBA and Jamii Bora. He was issued Certificate of Service by KCB, dated 13th September 2011.
19. He lodged an Appeal with the CEO. He was called to a meeting on Appeal which he attended. No one was clear on the purpose of the meeting. There was no decision on the Appeal. 2 months later, KCB Forensic Department called the Claimant and apologized to him, saying they should have been involved in the matters leading to Claimant's exit. They purported to reopen the case. In March 2012, the Claimant received a letter from the Respondent saying the Appeal was not successful.
20. The Claimant received Memo dated 9th May 2011 and one dated 11th May 2011. He replied to all of them. He did not have copies of the replies. He did not appear before any disciplinary committee. His lending authority had been withdrawn. It was alleged the Claimant continued to pay out cash against cheques without adequate funds. He was unaware that an Account belonging to one Lucy Wambui Ngirita was overdrawn. The Claimant could not comment on e-mails at page 19 of the Respondent's documents, because he was under suspension on the relevant dates. The Claimant had a letter of clearance from the Respondent. He did not exhibit the letter. He did not know that notice was paid as indicated in the letter of termination. Bonus was not discretionary.
21. Redirected, the Claimant testified that the Benefits Scheme included bonus. Notice was to be paid in due course. It was not paid. He did not have the necessary information to respond to the Memos issued by the Respondent as he was under suspension and without access to his Office. He was suspended in the morning of 9th May 2011. The e-mail about Lucy Wambui Ngirita came after the Claimant had left. He was never heard. He had a right to receive Certificate of Service. It is true that he lost job opportunities.

Respondent's evidence

22. Bramwel Simiyu Mbirira adopted his Witness Statement and Documents on record as Respondent's evidence.

23. There were several letters issued warning the Claimant, before termination. The disciplinary committee met on 17th June 2011. The Claimant was not in attendance. The Claimant was engaged in various malpractices. His lending discretion was withdrawn. He continued to authorize overdrafts irregularly. He made payments in anticipation, increasing risk to the Respondent.

24. The Claimant was paid terminal dues including salary for days worked, notice, balance of salary while on suspension, all at Kshs. 685,270. He was to contact Head of Credit to propose how he was going to repay his outstanding loan. He did not. His terminal dues were applied in recovery of his loan.

25. Cross-examined, Mbirira told the Court the Respondent did not generate a pay slip on payment of the Claimant's final dues.

26. Reasons for termination related to credit violations. There were 7 violations. There was insubordination. The Claimant had discretion to lend, before discretion was withdrawn.

27. The Branch Manager could authorize payment against un-cleared effects. Discretion was withdrawn in April 2010. There were violations after this date.

28. In his Witness Statement, Mbirira stated that the Claimant appeared for disciplinary hearing in person. This was not true. The Claimant did not attend disciplinary hearing. The Committee met at the Head Office in Nairobi. It cannot have been a disciplinary hearing because the Claimant did not attend, and was not invited to the meeting. Operational Manager Njoka, who was suspended alongside the Claimant, was not dismissed. He was transferred. The level of responsibility was different. There was no discrimination. Absenteeism was just one of the acts of commission and omission, but was not the reason for termination. The Claimant's last salary was Kshs. 256,410 monthly. There were allowances and bonuses payable to the Claimant. He would enjoy increments depending on his performance. Mbirira was not aware about forensic investigations carried out after termination. Redirected, the Witness told the Court he did not know of any document which reinstated Claimant's lending discretion. There were credit irregularities at the Branch. The Bank was likely to lose.

29. On recall, the Claimant told the Court he did not receive any terminal dues. He had never seen the documents exhibited by the Respondent on payment of terminal dues. He cleared with KCB. He repaid his loan. Re-cross-examined the Claimant reiterated that he was cleared by the Respondent. He was given clearance letter, which he did not exhibit in Court.

The Court Finds:-

30. The Claimant was employed by the Respondent Bank as a Branch Manager. He was employed in 2007. His contract was terminated by the Respondent on 7th July 2011. The letter of termination states that it had been established that the Claimant committed acts of gross misconduct details of which were well within the Claimant's knowledge. It is stated also, that the Claimant's contract was terminated for loss of confidence. The procedure leading to termination, as disclosed in the letter of termination, consisted exchange of correspondence and discussions held between the Parties.

31. The questions raised from the stated facts above, are whether termination was based on valid reason, or reasons, and whether it was procedurally fair. The questions are based on the requirements of Section 41, 43, 45, and 47 of the Employment Act.

32. On procedure, the record shows the Claimant was suspended on 9th May 2011. The reason for suspension is indicated to be *"irregularities you appear to have committed."*

33. On the same date the Claimant was issued a Memo from the Portfolio Manager, detailing the irregularities the Claimant was supposed to have committed. These consisted unauthorized overdraft facilities to Clients, irregular payment of salary advances and payment against un-cleared effects.

34. The Claimant was required to show cause, why disciplinary action should not be taken against him, by 10.30 a.m. on 13th May 2011.

35. The Claimant states he was on suspension and not able to access documents, relevant to the accusations made against him, to enable him make a proper response. There is a second Memo from the Portfolio Manager, indicating the lack of access to documents had been discussed between the Claimant and the Portfolio Manager. The Claimant was advised the documents would be available for his perusal at the Regional Office on 27th May 2011. He was required to respond to the letter to show cause by 30th May 2011.

36. In his evidence the Claimant acknowledges he received the second Memo, advising him further on access to documents, and requiring him to reply to the letter to show cause. He does not explain why he did not respond, even after he was offered access to the documents. All he told the Court is that the period given to respond to the first Memo had lapsed 10 days before the second Memo issued. What prevented the Claimant from accessing the documents and replying to the first Memo, as advised in the second Memo? Did the expiry of the period given initially, preclude the Claimant from responding, after the Respondent had opened up its servers to the Claimant?

37. Having failed to respond to the letter to show cause, the Claimant did not forego his right to a disciplinary hearing. Mbirira was categorical that having initially lied in his Witness Statement that the Claimant attended a disciplinary hearing, he wished to change his evidence before God and Court, to indicate that the Claimant did not attend disciplinary hearing in person. The disciplinary committee met in Nairobi without the Claimant. The Claimant was not invited to attend any hearing. The Claimant was not heard at all.

38. The letter of termination which refers to discussions and correspondences implicitly concedes that there was no disciplinary hearing.

39. The Claimant's contract was terminated without the benefit of a disciplinary hearing. He appealed against the decision to the

Respondent's CEO. He states he was called for Appeal meetings at Nairobi. No one was clear on the purpose of the Appeal. There was no decision. Later, Respondent's Forensic Department called the Claimant, apologizing and telling the Claimant that the Department should have been involved from the beginning. The Department purported to reopen the case. It was not until March 2012 that the Claimant was informed his Appeal was not successful.

40. The procedure, after the Claimant failed to reply to the letter to show cause, was clearly flawed. There is no record of investigation carried out, pursuant to the letter of suspension. There was no hearing based on an investigation report. There was no disciplinary hearing, and the appeal hearing was a jumbled process. The Respondent's Bank's Forensic Unit apologized to the Claimant and purported to carry out investigations after termination. Even these investigations are not reduced to an actionable report. Curiously, Regional Business Manager Great Rift, Kenneth Limo, generated a Report for the consumption of the Human Resources Department, on 15th September 2011, months after the Claimant had been dismissed, which validated the raft of accusations against the Claimant. These procedures were not in consonance with the minimum standards of procedural fairness, contemplated under Section 41 and 45 of the Employment Act 2007. Termination was unfair on account of procedure.

41. Was there valid reason, or reasons, to justify termination? The Claimant would have assisted his cause on this, if he had replied to the letter to show cause, when offered the opportunity to do so.

42. The accusations against the Claimant were not isolated in nature, or without precedent. He had in the past been accused of flouting the Bank's overdraft and cheque payment policies. There is a very informative response dated 28th June 2010, the Claimant made to a Memo issued by the Portfolio Manager.

43. It was about overdrawn accounts as at 6th May 2010. The response confirms that Claimant had authorized cash payout in anticipation of National Youth Service payments in favour of Lucy Wambui Ngirita and Joseph Methu Ngirita among others. Subsequently the Claimant as Branch Manager approved a temporary overdraft of Kshs. 3 million in favour of Lucy Wambui Ngirita. At the time, the Client had a negative balance of Kshs. 4.3 million in her account. The Branch had no authority to allow such excesses.

44. The Respondent had in place policies such as Credit Process and Lending Discretions and Sanctioning; and Limits for Drawing Against Un-cleared Effects. The Claimant, as Branch Manager, was conversant with these policies. He continued to flout the policies. He was reprimanded at some point for this. He had his delegate lending withdrawal authority withdrawn on 14th April 2010, but continued to have Clients receive cash payments against un-cleared effects. Among these Clients were Lucy Wambui Ngirita, John Methu Ngirita and Jerrycathy Enterprises. These repeated indiscretions for a Bank Manager, entrusted an entire Branch to run, were pronounced, justifying the Respondent's loss of trust and confidence in the Claimant.

45. There was a valid reason- loss of confidence and trust in the Claimant- to justify termination. The Courts have held that trust and confidence are the cornerstones upon which employment relationships in the banking industry are founded. The Claimant repeatedly acted in a manner that did not sustain the trust and confidence of the Respondent. He was contracted to provide powerful leadership to the Branch, and drive business. His conduct of business particularly with respect to Clients named Ngirita, among others, did not show him to provide powerful leadership and drive Respondent's business in the right direction. It did not inspire trust and confidence. Termination was based on valid reasons.

46. The Respondent alleges to have computed the Claimant's terminal dues at a total of Kshs. 685, 270. The computation is shown in a payroll extract, dated 13th July 2011. The Respondent states that the entire terminal dues were applied in offsetting Claimant's loan obligations to the Respondent.

47. This is not reflected in the payroll extract under review. The deductions are shown, and nowhere is it stated that the amount of Kshs. 685,270 was applied to pay any loan obligations. The car loan shown on the document was a sum of Kshs. 23,366. The net sum is shown at Kshs. 459,285. The Claimant states he paid all his loan amounts and was cleared by the Respondent. He however did not have the clearance document in Court.

48. The Court is persuaded that the sum of Kshs. 459,285 was due to the Claimant in terminal dues. There is no evidence that he did not liquidate his loan obligations to the Respondent. The Respondent did not even attempt to establish what amount, if any, was owed by the Claimant. There is no counterclaim for any amount which would raise the question how is it, that the terminal dues exactly matched Claimant's obligation to the Respondent? There is no document on record showing that the Claimant was indebted to the Respondent, to justify withholding or diversion of the terminal dues computed by the Respondent. The payroll extract indicates the net sum was forwarded to Claimant's Bank for disbursement and that no further entries should have been posted or raised from the recipient's end.

49. The sum computed by the Respondent included salary for 7 days the Claimant is deemed to have worked in July 2011; 1 month salary in lieu of notice; leave days; and salary for the period under suspension. The Court is of the view that the computation carried out by the Respondent, meets the prayers for notice, salary for the period of suspension and annual leave pay. ***The Respondent shall pay to the Claimant the sum of Kshs. 459,270 as terminal benefits.***

50. There is no evidence to support the prayer for damages for loss of medical benefits, annual increment and club membership.

51. On assessment of compensation for unfair termination, the Court has taken into account that there was valid reason to justify termination, but procedure was grossly unfair. The Claimant worked for 4 years and did not have a clean record. After attempting to secure alternative job and failing twice, the Claimant, on third attempt secured comparable and suitable job with his old Employer, Stanbic. He mitigated the effects of loss of employment. It cannot be doubted that he contributed by his own conduct, to the circumstances leading to loss of trust and confidence in him, by the Respondent. He does not merit maximum compensation equivalent of 12 months' salary. All factors under Section 49 taken into account, the ***Court grants the Claimant compensation equivalent to 5 months' salary at Kshs. 1,282,050.***

52. *No order on the costs.*

53. *Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED: -

a) Termination was unfair on account of procedure.

b) The Respondent shall pay to the Claimant terminal benefits as computed by the Respondent, at a net sum of Kshs. 459,270 and compensation for unfair termination, equivalent of 5 months' salary at Kshs. 1,282,050- total Kshs. 1,741,320.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 20th day of June, 2019.

James Rika

Judge