



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1434 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

DANIEL NJIRU NGAI.....CLAIMANT

VERSUS

FOUNTAIN CREDIT SERVICES LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the respondent on 9th March 2013 to work at its subsidiary called Fountain Credit Services Limited as a Credit Analyst. He was on probation for 6 months following which he was confirmed on 4th October 2013. On 22nd May 2014, he received a call to collect a letter, which upon reading he found to be a letter of dismissal.

The grounds of dismissal according to the letter were that he had approved a loan of Kshs.2 million to one Puro Kihunyu Kang'ara payable over 12 months at a monthly instalment of Kshs.196,000 yet the total income of the customer was Kshs.55,000. The second ground was that he filled a loan application form for one Irene Wanja Munene trading as Cecon Consultancy based on a desktop appraisal. Upon review of the application by the Credit committee of the respondent, it was found that Cecon Consultancy was a partnership but the other partner had not been involved in the loan application. The letter of dismissal accused the claimant of wilfully contravening company policy, failure to perform his assigned duty and intentionally misrepresenting facts in respect of the two loan applications.

Dissatisfied with the summary dismissal the claimant filed the instant suit in which he alleges that the dismissal as unfair. He seeks the following remedies –

1. The sum of Kshs.985,000/= as particularised below –

(i) Salary for the month of May 2014 Kshs.60,000

(ii) 12 months' compensation for loss of employment due to summary dismissal 60,000 x 12 Kshs.720,000

(iii) Three (3) months' notice in lieu of salary Kshs.180,000

(iv) 10 days unpaid leave Kshs.25,000

Total Kshs.985,000

2. Costs of this suit.

3. Interest

4. Any other relief as the court may deem fit and just to award.

The respondent filed a statement of defence denying the averments in the memorandum of claim. The respondent avers inter alia that the claimant fundamentally breached his obligations arising under the contract and was guilty of gross misconduct in that he carelessly and improperly performed his work as a credit analyst by recommending the approval of a loan of Kshs.2 million to one Puro Kihunyu Kang'ara to be repaid in 12 months. The recommendation was improper and not in the best interest of the respondent given that the monthly loan repayments was Kshs.196,000 which was way above the borrower's monthly income of Kshs.55,000. This reckless conduct by the claimant exposed the respondent to financial vulnerability and loss.

The respondent also avers that the claimant recommended the approval of a loan in the sum of Kshs.200,000 to a partnership known as Cecon Consultancy without involving both its partners or verifying the authenticity of its proposed guarantors and the assets offered as security. It averred that during this transaction, the claimant fraudulently misrepresented the partnership to be a viable borrower when the evidence presented to him could not reasonably support such a conclusion.

It prays that the claimant's suit be dismissed with costs.

At the hearing the claimant reiterated the averments in the statement of claim and his witness statement. He denied that he recommended the two clients who were not qualified for loans. The claimant testified that he deferred the application for PURO KIHUNYU KANG'ARA pending additional information to be supplied by the client. That his final recommendation in respect of the loan application was to defer the loan subject to security valuation and other conditions.

For the case of IRENE WANJA MUNENE the claimant denied the allegation that he did a desktop evaluation or that no evidence of partnership was attached.

He testified that after he was dismissed from employment he did an email appealing against the dismissal. He was thereafter invited for a meeting on 28th May 2014 during which he was given a chance to state his case but never got a determination on the appeal up to the time of filing suit.

Under cross examination the claimant testified that before he was employed by the respondent he had worked for several organisations where he undertook duties similar to those he did for the respondent being the assessment of risk before extending credit. He stated that his primary duty was to ensure minimum risk to his employer in loans extended to clients.

For the respondent LUCY MBONE LUCHINGA testified that she was employed in March 2015 and was not in the employment of the respondent at the time the claimant's employment was terminated, that she relied on records handed over to her by the officer from whom she took over, one Sarah Kamau.

RW1 testified that the claimant's role was very critical being to analyse cases, check documents and recommend to credit committee. That in the case of PURO he recommended the loan, then cancelled. That the case of PURO should have been declined right away. For the case of IRENE WANJA, RW1 testified that the claimant filled the forms for the client which he should not have done. Secondly, the application needed a guarantor but there was no analysis of guarantors.

She testified that in a micro finance institution a credit analyst is above the credit committee as he checks the risk so that the company does not suffer loss.

She testified that the claimant could not be issued with notice as the company feared it would suffer loss if the claimant continued to sit in the position.

Under cross-examination RW1 testified that the claimant had approved the loan for PURO and only deferred it when the boss questioned it.

She testified that in the case of summary dismissal, the respondent was not supposed to hear the claimant.

Determination

I have considered the pleadings, evidence and written submissions. The issues that arise for determination are whether there was valid reason for termination of the claimant's employment, whether the respondent subjected him to fair procedure and if he is entitled to the remedies that he seeks in his claim.

From the evidence on record, it is evident that the role of the claimant as credit analyst was critical to the respondent's business as a micro credit institution. He was supposed to ensure minimal risk of loss to the respondent. This fact was appreciated by the claimant as admitted in his testimony. It is also evident from the evidence that the claimant did not handle the applications of Puro Kihunyu Kang'ara and Irene Wanja Munene in the manner expected of him. In the case of Puro his reason for approving a loan payable by instalments of Kshs.195,000 while the applicant's income was Kshs.55,000 was that his final recommendation was to defer the loan pending security evaluation. The correct position is that the loan application should have been rejected outright as the client did not qualify for the loan. For the case of Irene he admitted not having evaluated the partner yet the loan was to be advanced to a partnership.

The two cases amounted to reckless or careless performance of his duties which would have led the respondent to advance loans to clients not capable of repayment in the case of Puro and to a loan without approval of partners in the case of Irene. For these reasons, the respondent had valid reason to dismiss the claimant.

On the procedure of termination, it is evident from the evidence on record that the respondent did not give the claimant an opportunity to defend himself as provided in Section 41 of the Employment Act. He was dismissed then only given an opportunity to defend himself on appeal whose determination was never communicated to him. RW1 confirmed this position when she stated that the respondent was under no obligation to provide evidence in a case of dismissal meaning that according to the understanding of the respondent an employee who is summarily dismissed is not entitled to a hearing. To this extent the termination of the claimant's employment did not meet the procedural requirements of the law and by virtue of Section 45(2) of the Employment Act, was unfair.

Remedies

Having found the summary dismissal of the claimant procedurally unfair, he is entitled to one month's salary in lieu of notice. He is further entitled to salary for the month of May 2014, which he was not paid. He is entitled to 10 days' leave earned but not taken. He is however not entitled to compensation for unfair termination taking into account the circumstances that led to the termination of his employment and his contributions thereto, or his length of service which was less than one year.

Orders

I enter judgment for the claimant as follows –

1. One month's salary in lieu of notice Kshs.60,000
2. Salary for the month of May Kshs.60,000
3. 10 days leave Kshs25,080

Total Kshs.145,080

4. The respondent shall pay claimant's costs.
5. Interest shall accrue on decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE