



**REPUBLIC OF KENYA**

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

**CAUSE 691 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**HESBONE GAVUNJI MAFUNYA.....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, Hesbone Gavunji Mafunya, instituted this claim by a Memorandum of Claim dated 15<sup>th</sup> May 2013 against the Respondent, Kenya Commercial Bank Limited. He avers that he was an employee of the Respondent from 7<sup>th</sup> December 1998 to 3<sup>rd</sup> June 2009 when his employment contract was wrongfully terminated by the Respondent without notice or payment of one month's salary in lieu of such notice as expressed in the said employment contract. That the said dismissal was instant and malicious. He particularises the breach of contract as follows:

- a. Failing to give notice of termination as required by Clause A5 (d) of the Collective Agreement between Kenya Bankers Association and Banking Insurance and Finance Union (Kenya) dated 27<sup>th</sup> July 2006.
- b. Maliciously imputing that the Claimant was guilty of misappropriating funds and that he had committed criminal offences.
- c. Arbitrarily and unlawfully freezing the Claimant's bank account No. 1108748074 held at KCB Moi Avenue branch holding Kshs.1,733,000/= (One Million, Seven Hundred and Thirty Three Thousand).

That on or about 16<sup>th</sup> February 2009, the Respondent maliciously lodged a complaint with the police against the claimant and he was thereafter unlawfully arrested and detained at a police station. He gives the particulars of malice which include: the Respondent unlawfully and illegally accusing him of being negligent in his duty when it knew that this was not so; not being given any warning or opportunity to be heard on the alleged negligence of duty; the Respondent making a false report to the police that he had committed criminal offences; the investigation by the police was based on no justifiable cause; and the Respondent not recognizing that he had served it for years with a clean record.

He avers that he was arraigned in court in **Criminal Case No. 307/2009** with two counts of stealing and fraudulent false accounting and that he was maliciously tried and prosecuted. That on 3<sup>rd</sup> November 2011 the court acquitted him on both counts under section 215 of the Criminal Procedure Code. That he made written requests to the Respondent on 14<sup>th</sup> October 2010, 23<sup>rd</sup> November 2011 and 7<sup>th</sup> December 2011 to have the Kshs.1,733,000/= frozen in his account released to him but it has adamantly failed to release the said money. That the Respondent's act of freezing and appropriating the said account amounts to unjust enrichment because the said money was proceeds from the sale of his property LR Number Ngong/Ngong/26605, which he received while the criminal case was ongoing.

The Claimant continues to aver that due to his wrongful dismissal, he has been deprived of his salary and employment benefits which he would have earned and obtained in the course of his employment and further that he has not gained alternative employment thus he continues to suffer loss and damage. He avers that the Respondent contravened the rules of natural justice and the law. Further that the respondent violated his right to property and secure protection of the law. That if the Respondent's unlawful acts are not reversed and stopped by this Court, gross injustice would be visited upon him. That the Respondent has failed, neglected or refused to make good his Claim despite demand being made and notice of intention to sue having been given. The Claimant thus prays for judgment against the Respondent for:-

- a) General damages for loss of character and reputation.
- b) Damages for breach of contract.
- c) Damages for wrongful dismissal.

- d) Reinstatement to employment.
- e) Specific damages of Kshs.1,733,000/=
- f) Withheld salaries, allowances and other benefits including terminal benefits.
- g) Interest in (a – f) above.
- h) Costs of this suit.

The Respondent filed a Memorandum of Response dated 12<sup>th</sup> July 2013 in which it denies that the Claimant's contract of employment was wrongfully terminated or breached or that it dismissed him maliciously. It avers that it summarily dismissed the claimant on the basis of **Clause A5 (a) of the applicable CBA** as well as **Section 44 of the Employment Act**. The respondent denies the particulars of malice as set out by the Claimant. The respondent pleads that it lodged a complaint with the police after due internal investigations raised reasonable grounds that the Claimant was part of a well-co-ordinated syndicate of fraudsters that misappropriated funds through manipulation of its core banking system. That the said manipulation caused foreign exchange/cross rates on swift transfers to effect transfers remitting funds in Kenya Shillings into US Dollar denominated accounts without converting. That as a result, foreign currency denominated accounts were being credited as though the incoming transfer funds were in the same currency denominations thus availing excess funds to those accounts. That the same is detailed in an internal forensic investigation report showing that the Claimant was actively involved in the fraudulent scheme. That the police prosecuted him solely on the basis of their own investigations and evidence at their disposal. Further, that the Claimant cannot mount a legitimate cause of action on the basis of his prosecution vide criminal case 307/2009 without joining the police to such proceedings.

It avers that the contents of the termination letter dated 3<sup>rd</sup> June 2009 were not published but were only addressed to the Claimant and copied to its officers who had a corresponding interest and duty of knowledge and so the allegation of injury to reputation by the Claimant has no basis in law or fact. That the contents of the said letter are substantially true. That the Claimant is not entitled to the alleged sum of Kshs.1,733,000/= as the funds form part of the misappropriated funds from the respondent. That the Respondent is therefore entitled to benefit from those funds on application of the equitable principles of tracing and restitution as well as the principles of law on unjust enrichment.

That the Claimant's claim with regard to termination of his employment is time barred by virtue of **section 90 of the Employment Act** and that in so far as the alleged injury to reputation is concerned, the same is statute time barred by virtue of **section 4(2) of the Limitation of Actions Act** and is therefore not justiciable. That further and without prejudice to the foregoing, this Court has no jurisdiction to hear and determine the claim herein in so far as it is premised on the alleged malicious prosecution in criminal case 307/2009 or the withholding of the funds as under **Article 162(2) of the Constitution** read together with **section 12 of the Industrial Court of Kenya Act, 2011**. It contends that the same represent causes of action that can only be agitated and resolved by a court exercising civil jurisdiction. That it thus reserves the right to raise and argue preliminary points of law. The Respondent prays that the Claimant's claim be dismissed with costs.

The Claimant filed a reply to the Respondent's Response denying that he was a party to any fraud or misappropriation of funds as was confirmed by the court in the criminal case no. 307/2009. That his claim cannot be statute barred for as long as the Respondent unduly holds the said Kshs.1,733,000/=. He avers that the Response as filed is incompetent and incurably defective contrary to the mandatory legal requirements of **Rules 13(1) and 13(4) of the Industrial Court (Procedure) Rules, 2010** and that he reserved the right to raise and argue preliminary points of law in respect thereof. He prays that the said Response be dismissed with costs to the Claimant and judgment entered as prayed in the Memorandum of Claim.

The Claimant also filed his Witness Statement dated 26<sup>th</sup> July 2013 in which he states that while at the Head Office, he worked as a Clerk in charge of swift payment from April 2001 to June 2003. That he was promoted to Section Head of swift payments from 2003 to May 2008 when he was seconded to KCB-Uganda to establish a Swift Centre and train employees. That when his term in Uganda expired in mid-January 2009, he was sent back to assume his earlier duties at the Swift Centre Head Office, Kencom House and that it was during his normal duties that he was suspended and handed over to the police on account of fraudulent activities at the bank. That his immediate manager served him with a show cause letter on 16<sup>th</sup> February 2009 which he replied to. That he was later handed over to forensic department who handed him to the police. That he did not appeal to the HR disciplinary committee as he was already facing charges in court. That as a result of the Respondent's restriction of the funds held in his account at the bank, he has suffered enormous financial constraints including lack of rent and school fees for his children.

At the hearing the Claimant testified that he was only paid half of his basic salary for the year 2008 and that he was not paid any bonus due to the pending disciplinary case. In re-examination, he stated that he had abandoned the claim for reinstatement.

The Respondent did not call any witness to testify on its behalf. It also did not file any witness statement. It opted to proceed by way of documents on record and written submissions.

#### **Claimant's Submissions**

The Claimant submits that although the Respondent had the opportunity to raise a defence and produce any exhibits to rebut his case, it elected to waive that right. That there are no exhibits in the court's record challenging his case for unlawful dismissal. That further, the Respondent did not put him through any substantive disciplinary processes for him to defend himself and it is therefore a mystery how it concluded that he was guilty of the allegations against him. He refers the court to the case of *John Kisaka Masoni –v- Nzoia Sugar Co. Limited* [2016] eKLR where the court found the dismissal of the claimant procedurally unfair for failure to subject him to a disciplinary hearing as provided under Section 41.

He submits that long after he had been acquitted of the criminal charge, the Respondent informed him vide a letter dated 15<sup>th</sup> December 2011, that the funds in the said account “had been applied by the bank to reduce the loss caused by the Claimant’s negligence during his employment with the bank” which was unlawful and ought to be refunded. He cites the case of Kenya Commercial Bank Ltd -V- Bryceson N. Kuboka [2016] eKLR where PJO Otieno J. stated that:

“My understanding of the bank-customer relationship is that so long as there is credit balance on the account the customer has the right to access and withdraw it at will unless where there is a contract to the contrary. As it were the bank merely keeps the money safe on behalf of the customer. It has no right or indeed any claim over the property in the money. The money simply does not belong to it to deal with it as it pleases.”

With respect to the prayer for damages to compensate the Claimant for loss of character and reputation, the Claimant refers to the case of Naqvi Syed Omar -V- Paramount Bank Limited & the Attorney General [2015] eKLR where the court observed that where the employee’s attractiveness to potential employers is damaged or diminished as a result of the actions of the employer in the process leading to termination of employment, the court may grant damages to compensate the lost employability. That in the instant case, the Respondent knew very well, the claimant was not in Kenya at the time of the occurrence of the alleged fraud and that there is no way he could have authorized the fraudulent transfers of money. That these allegations and the instigation of the criminal proceedings have caused him negative publicity which has affected his employability. That he is therefore entitled to compensation by way of damages.

Further, that he merits his arrears of salary from 16<sup>th</sup> February 2009 when his salary was stopped up to June 2009 when his employment was terminated. The Claimant finally submits that his dismissal contravened Sections 41, 44 and 45 of the Employment Act for want of fair procedure and valid and fair reason and urges this Court to allow his claim.

#### Respondent’s Submissions

The Respondent submits that the Claimant was issued with a suspension

letter in accordance with **Clause 5C (i) of the CBA** pending investigations regarding the loss of monies. That the termination of his employment was valid and fair, substantive procedure having been followed. That the Claimant failed to make out a case for unfair termination or wrongful dismissal and did not prove any elements of loss of character and reputation. That he also did not lead any evidence touching on the issue. That an award of damages for breach of contract is not tenable as it is not captured as a remedy available under the Employment Act and that it must therefore fail.

It relies on the case of *CMC Aviation Ltd –v- Mohammed Noor [2015] eKLR* where the Court of Appeal set aside an award of 12 months’ gross salary as compensation for wrongful dismissal after noting that the contract of employment had a provision for termination by one month’s notice or one month’s salary in lieu of notice which would have been reasonable compensation. The Respondent submits that if the court is inclined to award damages for wrongful dismissal, it should be guided by the termination clause which provides for one month notice and no more.

It further submits that the Claimant never raised and/or demonstrated the claim for withheld salaries, allowances and terminal benefits during the hearing or lead evidence on the issues therein or how much should be awarded under the said claim and the same should therefore fail. That the Claimant has not satisfied the burden of proof while the respondent has explained the reasons for dismissal. It urges this court to dismiss the case with costs to the Respondent.

#### Determination

The first issue for determination is whether the Claimant was wrongfully, unfairly and unlawfully terminated by the respondent. The second issue is whether the withholding and appropriating of the funds in the Claimant’s bank account by the respondent was justified. The third issue for determination is whether the Claimant is entitled to the reliefs sought.

It is the claimant’s submission that he was not subjected to a disciplinary hearing by the Respondent before he was dismissed. The Respondent has argued that it followed due procedure under the CBA and the law. The respondent did not plead nor submit documents to court to prove that there was a disciplinary hearing before the claimant was summarily dismissed. Further the respondent did not lead any evidence to rebut the claimant’s evidence.

In the case of *Donald Odeke -V- Fidelity Security Ltd, Cause No. 1998 of 2011*, Ndolo J. observed that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. That it does not matter what offence the employee is charged of, if the employee is not heard, the termination is *ipso facto* unfair.

On the issue of the funds withheld by the Respondent, the Respondent did not lead any evidence to prove justification for not releasing the funds to the Claimant. In the case of *Kenya Commercial Bank Ltd –v- Bryceson N. Kuboka [2016] eKLR* cited above, the Court held that bank is only mandated to keep a customer’s credit balance safe on behalf of the customer unless there is a contract that the customer cannot access or withdraw from the account. The respondent did not adduce any evidence to prove that the monies in the claimant’s account could be traced to the monies belonging to the bank that it alleged to have been obtained illegally by the Claimant, or controvert the claimant’s averment that the money was proceeds from the sale of property as alleged by the claimant. The same is the property of the Claimant and ought to be placed at his disposal.

Having found that the Claimant’s termination was unfair, he is entitled to compensation for the unfair termination. Taking into account all circumstances of the case, the actions of the Claimant that contributed to the termination and the length of service I award the Claimant 6 months’ salary as compensation in the sum of KShs.567,858 based on his last gross salary as per payslip for the month of July 2008 that is on record.

With regard to the claim for damages for breach of contract, the same is not recoverable as was held in **Civil Appeal 61 of 2018, Central Bank of Kenya v James Kabinga Kibugu & another [2019] eKLR** where the Court of Appeal buttressed the position in **Kenya Tourist Development Corporation V Sundowner Lodge Limited [2018] eKLR** wherein it observed that;

*“...as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR. The same situation applies to the case at par in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs.30 million merely because he believed that the respondent “had suffered serious damages” (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms, which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.*

*Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent’s claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages.”*

The Claimant did not prove or give evidence on the claim for withheld salaries, allowances and terminal benefits which he made as a blanket claim without specific figures. The claim therefore fails. I accordingly dismiss the same.

Final judgement is thus entered for the claimant against the respondent as follow:

i. Compensation	Kshs.567,858.00
ii. Refund of deposits in account	Kshs.1,733,000.00
<b>Total</b>	<b>Kshs. 2,300,858.00</b>

The Respondent shall pay claimant’s costs. The decretal sum shall accrue interest as follows:

Item (i) from date of judgement

Item (ii) from date of filing suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**