



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2314 OF 2015

(Formerly ELRC Cause No. 151 of 2015 at Nyeri)

LABAN MUTUNGI MULINGE.....CLAIMANT

- VERSUS -

PARAMOUNT UNIVERSAL BANK LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 04.09.2015 through Mitey & Associates Advocates. The claimant prayed for judgment against the respondent for:

- a) Damages for wrongful dismissal being 12 months' salaries Kshs. 1, 320, 000.00.
- b) Service pay of Kshs. 660, 000.00.
- c) Unpaid leave days Kshs.33, 000.00.
- d) Benefits from pension scheme as and when they fall due.
- e) A declaration that the termination of the claimant's employment was unlawful.
- f) Costs of the suit.
- g) Interest on (a), (b), (c), (d), and (f) above at Court rates.
- h) Any other relief that the Honourable Court may deem fit to grant in the circumstances.

The respondent's statement of response was filed on 22.10.2015 through Mwaniki Gachoka & Company Advocates. The respondent prayed that the suit be dismissed with costs.

To answer the **1st issue** for determination the Court returns that there is no dispute that the parties were in a contract of employment. The respondent employed the claimant by the letter dated 26.05.2003 and effective 26.05.2003 as a management trainee. The claimant was confirmed in service after successful probationary service. He served until his dismissal from service.

To answer the **2nd issue** for determination the Court returns that the claimant's employment was terminated by the letter dated 16.12.2014 upon the following grounds:

- a) On 17.11.2014 the management received a complaint against the claimant from Ms. Safina Muhamed Assistant Manager for Industrial Area Branch for harassment.
- b) On the same date the claimant was notified about the allegations and the claimant's response was received.
- c) On 17.11.2014 the claimant was suspended from duty pending investigations into the allegations.

d) On 15.12.2014 the claimant was invited to Head Office for disciplinary committee hearing and the claimant invited one Kennedy Ochieng (Head of Finance) to accompany him as a witness.

e) The Committee gave the claimant an opportunity to defend himself and the CCTV footage was played for all to witness.

f) The disciplinary committee concluded that the claimant had violated section 4.3 of the respondent's Standards of Conduct and his employment was accordingly terminated. He was to be paid one month salary in lieu of notice as terminal dues payable after clearance with the respondent.

The **3rd issue** for determination is whether the termination was unfair. The evidence is that the claimant was accorded due process of a show-cause notice and disciplinary hearing as per section 41 of the Employment Act, 2007.

Was the reason for termination unfair? It is not in dispute that section 4.3 of the respondent's Standards of Conduct provides that sexual or other unlawful or unwelcome harassment including sexual harassment is a misconduct that may attract disciplinary action.

The allegation in the show cause letter was that on 15.11.2014 at about 11.30 am the claimant had gone to the respondent's Industrial Area Branch when he touched Ms. Safina Mohamed on her buttocks without her consent knowing well that was inappropriate and a violation of her person. The statements by two employees present at the time show that the said Ms. Safina was heard shouting and in particular the claimant's official driver who was waiting at the reception heard Ms. Safina shouting to the claimant thus, "**Don't do that to me again Mr. Mutungi.**" That was at the time the claimant and Mr. Ken the Branch Manager as well as Ms. Safina were standing at the counter.

The claimant's response in his reply (dated 17.11.2014) to the show cause letter was as follows, "**My mission to the branch was to obtain an inventory of branch keys held by the officers after which they were to be sealed in an envelope for onward storage at Koinange BRANCH as instructed by the General Manager – Operations. After sealing the said keys the officers were to sign the register which they did finally in the banking hall. Present were Mr. Muhumuzu – Branch Manager, Carol Muli – Senior Officer, a guard barely five feet from the counter where we were signing and a camera fully functional which I believe would not have missed out recording. All along Mrs. Mohamed was complaining that they have been made to sign in many areas. At this point she was resisting to sign the register. I pulled her gently reminded her that we were running late considering that we were to make it to our Koinange Branch and have the driver pick Admin police by 12.30pm.**

This was in no way I intended to harm her or even to insubordinate her or even. To this she reacted angrily and I said I was sorry. I also respect other people's religion and beliefs. I find this allegation extremely cruel and damaging."

At the disciplinary hearing it is recorded that as at the time of the incident, the claimant stated that things were tense and the claimant was standing next to Ms. Mohamed and pulled her gently by her flap to have her sign the register. The claimant when pressed to explain the flap he had pulled, he insisted it was on the side of Ms. Mohamed's trouser. He later admitted that the jeans trouser only have flaps on the backside. The claimant stated that the incident happened in presence of other employees and he could not have done it with ill intention. It is recorded that the CCTV footage was then played and it showed thus, "**During the incident it could be seen that Ms. Mohamed pushed away the hand of Mr. Mutungi and angrily pointed to him and was said to have told him something. Mr. Mutungi when asked whether he recalls what was said to him he said he could not recall.**" The Committee including the claimant's representative present agreed that the incident took place. The claimant told the meeting that he had apologised and said he was sorry thereafter to Ms. Safina Mohamed.

As submitted for the respondent the contract and law is as follows:

a) The respondent's code of conduct provided that actions, words, jokes or comments based on an individual's sex, race, ethnicity, age, religion or any other legally protected characteristic will not be tolerated. The claimant signed the code and it was binding.

b) Violence and harassment in the world of work is defined by the International Labour Organization (ILO) Violence and Harassment Convention 2019 as "**....a range of unacceptable behaviors and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.**"

c) Section 6(1) (d) of the Employment Act, 2007 provides that an employee is sexually harassed if the employer or that employee or a representative of that employer or a co-worker shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.

d) Article 28 of the Constitution of Kenya, 2010 provides that every person has inherent dignity and the right to have that dignity protected. That sexual harassment violates that inherent human dignity.

e) Section 6(3) of the Employment Act, 2007 requires every employer to institute a policy on sexual harassment which requires the employer to take disciplinary action against an employee who subjects another to sexual harassment as per section 6(3) (b) thereof. The claimant was terminated from employment accordingly.

The Court returns that by the claimant's own admission in Court and before the disciplinary committee, the respondent has established that the claimant touched the said Ms. Safina Mohamed inappropriately amounting to sexual or physical harassment contrary to the respondent's anti-sexual harassment policy and the applicable law. The final terminal dues having been paid including a month's pay in lieu of notice; 16 days worked in December; 15 leave days; and pension due and, the claimant having confirmed receipt thereof by signing on 17.12.2014, the suit is liable to dismissal with costs. In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the

claimant's suit with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday 25th October, 2019**.

BYRAM ONGAYA

JUDGE