



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2307 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th October, 2019)

MICHAEL KIPRONO LANGAT.....CLAIMANT

VERSUS

JAMII BORA BANK LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent on 15th March 2014 as a branch manager, a position he held until his employment was terminated. He filed this cause on 23rd December 2015 to challenge the termination of his employment and to seek payment of his terminal dues together with compensation for unlawful termination of his employment. In particular, he seeks the following:-

- 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. 45,360,000.00.*
- iii. Special damages of KShs. 4,366,000.00 as computed below:-*
 - a. Unpaid salary for the month of September 2015 of KShs. 140,000.00.*
 - b. Unpaid salary for the month of November 2015 of KShs. 140,000.00.*
 - c. 30 days unpaid leave days of KShs. 140,000.00.*
 - d. Unpaid salary from November 2014 to November 2015 amounting to KShs. 1,800,000.00.*
 - e. Unpaid pension for the month of September 2014 to November 2015 at*
- iv. Costs and interest on (ii) and (iii) above at court rates from the date of filing this claim until 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 Claimant avers that the terms of his employment were permanent and pensionable with all the attendant benefits.

3. It is the Claimant's case that he was issued with a letter for summary dismissal on 12th October 2015 on the grounds of soliciting for favours and insubordination based on a report that he failed to submit. He refused to acknowledge the letter, which was then withdrawn and amended with a suspension letter wherein he was accused of being involved in fraudulent transactions. He was sent on suspension without pay and later summarily dismissed.

4. It is his position that the dismissal was actuated by malice because the allegations that formed the basis for his summary dismissal were trumped up. It is his further position that the procedure for termination breached the provisions of the law and the Respondent's Human Resource Policy Manual.

5. The Respondent filed its response on 8th May 2016 but which was later amended on 29th May 2019. The Respondent avers that in June 2015 it received complaints from a section of customers at its Ongata Rongai branch that the Claimant had been soliciting for favours and kickbacks in exchange for bank services, intimidating customers, breaching client confidentiality which contravened the Respondent's code of conduct and his employment contract. Internal investigations were conducted and the findings confirmed the allegations and revealed that the Claimant had failed to meet his performance targets.
6. The Claimant was issued with a suspension letter dated 18th June 2015 to pave way for further investigations. He was invited to a disciplinary hearing on 7th July 2015, to show cause why disciplinary action should not be taken against him. The Claimant did not respond to the bribery allegations and instead issued the Respondent with his resignation letter dated 7th July 2015.
7. The Respondent avers that being in an industry that demands the highest level of integrity, trust and confidentiality, it had lost confidence in the Claimant as an employee.
8. The Respondent denies terminating the Claimant's employment as he resigned.
9. The Claimant filed a rejoinder on 17th April 2019 contending that he was issued with a notice of the intended disciplinary hearing on the eve of the hearing making it impossible for him to adequately respond to the allegations raised, as such the hearing was merely an academic exercise. It is his case that his resignation was as a result of coercion by the acting human resource manager hence amounted to constructive dismissal.
10. The Respondent filed the witness statement of John Wamwati filed on 22nd March 2019 where he reiterated the Respondent's averments in its Reply.
11. The matter was dispensed with by way of written submissions.

Submissions by the Parties

12. The Claimant in his submissions dated 17th April 2019 submits that the Respondent's actions were driven by malice and were in breach of article 47 of the Constitution and Sections 41, 43 and 45 of the Employment Act and relies on the decision of **Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited [2014] eKLR**, **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR** and **Jane Wairimu Machira vs. Mugo Waweru and Associates [2012] eKLR**. He was not issued with a warning letter before he was suspended and the Respondent failed to prove anything to the contrary. Further, the decision to terminate his employment was based on unsubstantiated allegations.
13. The Claimant submits that he was coerced to resign amounting to constructive dismissal. The manner in which the Claimant conducted himself indicated that it no longer intended to be bound by the contract of employment and relies on the case of **Edwin Beiti Kipchumba vs. National Bank of Kenya Limited [2018] eKLR** and **Rose Mwikali Nzuki vs. Food for the Hungry Kenya [2015] eKLR**.
14. The Claimant further submits that he is entitled to the reliefs sought pursuant to section 49 of the Employment Act which provides for the remedies available to an employee upon unfair termination of employment. He relied on the case of **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers vs. Timber Treatment International Limited [2013] eKLR** to support his case for reinstatement of employment and relied on the case of **Beatrice Achieng Osir vs. Board of Trustees Teleposta Pension Scheme [2012] eKLR** to support his case for the claim of future prospective earnings.
15. In their submissions filed on 13th June 2019, the Respondent submits that the Claimant is bound by his pleadings. The issue of constructive dismissal was not raised in the claim but was raised in the Claimant's rejoinder to the Respondent's Reply. If the Claimant sought to rely on that issue, then he ought to have sought leave to amend his pleadings. Further, the issue having been raised in a rejoinder, denied the Respondent the opportunity to respond to the same.
16. The Respondent submitted that the Claimant's resignation was done in bad faith with the aim of defeating the disciplinary proceedings instituted by the Respondent. It is their further position that the Claimant's resignation was willful and therefore binding upon the Respondent hence took effect immediately. They rely on the case if **Edwin Beiti Kipchumba vs. National Bank of Kenya Limited [2018] eKLR**, **David K. Cheruiyot vs. Barclays Bank of Kenya Limited [2015] eKLR** and **John Kebaso Mose vs. Uchumi Supermarket [2017] eKLR** which were to the effect that an employee had the right to terminate the employment contract and could not be held in an employment relationship against their will.
17. The Respondent also submits that the right procedure was followed up until the point the Claimant decided to resign. The Claimant was given the opportunity to defend himself but opted to resign and therefore cannot complain about the procedure that he refused to submit himself to. They rely on the case of **Kennedy Obala Oaga vs. Kenya Ports Authority [2018] eKLR**.
18. The Respondent submits that the Claimant has failed to prove the case for unfair termination hence is not entitled to the reliefs sought.
19. I have examined evidence of the Parties herein plus submissions filed herein.
20. The Respondents contend that the Claimant resigned willfully after he was summoned for a disciplinary hearing but the Claimant's contention was he was constructively dismissed.
21. On 7/7/2015, the Claimant was due to appear for a disciplinary hearing before the Respondent. He however issued the Respondent with

a resignation notice stating as follows:-

“I refer to your letter dated 18th June 2015 suspending me from my duties pending a hearing on the allegations made by alleged clients.

I have carefully weighed on the pending hearing and opted to take the option to resign from my duties as stipulated in my employment letter. I wish to take this opportunity to thank the organization for according me the opportunity to serve as I have gained valuable experience and knowledge over the two years I have worked. I had planned for a longer stay but the season has come and this I bow out with great pride and relief of having made my contribution”

22. There is no indication in the letter that the Claimant was coerced to leave or resign. The letter is dated 7.7.2015. After 7.7.2015, the Claimant ceased to be an employee of the Respondent.

23. Due to the said resignation, which I take to be voluntary, the Claim for salary for September and November 2015 cannot be merited.

24. Having resigned therefore, the only remedy the claimant is entitled to is his leave for the year which I put at 7 months prorated;-

$$7/12 \times 140,000 - 81,667/=$$

25. The rest of the claim fails and is dismissed.

26. Each party will meet its own costs.

Dated and delivered in open Court this **16th day of October, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njoroge holding brief Kihang'a for Claimant – Present

Sigei holding brief Macharia for Respondent – Present