



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2593 OF 2016

MARY NJAMBI NJENGA.....CLAIMANT

VERSUS

EQUITY BANK KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

JUDGMENT

The memorandum of claim was filed on 19.12.2016 through Musyoki Mogaka & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) A permanent injunction:
 - a) Against any active or pending proceedings arising from the complaint letter dated 20.05.2016.
 - b) Against any other open investigations and proceedings arising thereof from (a) above and up to the filing of the claim.
- 2) An order compelling the respondent to release the claimant's salaries, medical benefits, employee share ownership plan contributions and many other benefits.
- 3) Costs of the claim plus interest.
- 4) Any other relief the Court may deem fair and just to grant.

The respondent filed a reply to claim and counterclaim on 02.02.2017 through Robson Harris & Company Advocates. The respondent counterclaimed that as a result of the claimant's illegal and irregular actions the respondent suffered astronomical financial loss in the sum of Kshs.42, 435, 025.00 and the respondent surcharged the claimant a sum of Kshs.20, 354, 179.00. The respondent prayed for judgment against the claimant for:

- a) Kshs. 20, 354, 179.00.
- b) Interest thereon at court rates.
- c) Costs of the suit.
- d) Any other relief that the Honourable Court may deem fit and just.

The claimant filed an amended memorandum of claim on 27.11.2017 through Gladys Mwangi & Company Advocates and prayed for:

- 1) A permanent injunction:
 - a) Against any active or pending proceedings arising from the complaint letter dated 20.05.2016.

b) Against any other open investigations and proceedings arising thereof from (a) above and up to the filing of the claim.

2) An order compelling the respondent to release the claimant's salaries, medical benefits, employee share ownership plan contributions and many other benefits.

3) A declaration that the respondent's action of suspending the claimant indefinitely without pay amount to the phenomenon of constructive unlawful dismissal.

4) A declaration that the respondent's action of suspending the claimant from employment for a period of more than 6 months without pay was unlawful, malicious, in breach of the terms of the claimant's employment and in contravention of fair labour practice.

5) A declaration that the respondent's action of terminating the claimant's employment upon filing the suit in court amount to victimization and the said dismissal letter is null and void.

6) An order that the respondent do reinstate the claimant forthwith without any form of victimization to her position or an equally suitable position with the respondent, with all her back salary, allowances, benefits, and any other legal dues.

7) In alternative and without prejudice to the foregoing the respondent be ordered to pay the claimant:

a) 1 month salary in lieu of notice.

b) Kshs. 880, 000.00 being withheld salary from May 2016 until December 2016.

c) Damages for unfair termination equivalent to 12 months' salaries.

d) Damages for diminished employability and in compensation for related damages outlined in the claim.

e) Leave pay for the year 2016 and 2017 totalling Kshs. 220, 000.00.

f) Service pay at the rate of 1 month salary for 10 years, ten months worked.

8) The respondent to be ordered to issue the claimant with a certificate of service.

9) Cost of the claim and interest from May 2016 until payment in full.

10) Any other relief the court may deem fair and just to grant.

The amended reply to amended memorandum of claim and counterclaim was filed for the respondent on 13.02.2018. The respondent sustained its prayers against the claimant as earlier made.

The claimant filed the reply to counterclaim on 20.06.2018 and stated that the respondent had not given sufficient particulars of the purported irregular and un-procedural loan appraisals to enable the claimant to respond substantively. Further the counterclaim was about matters that had not been raised during the employment of the claimant by the respondent.

To answer the **1st issue** for determination there is no dispute that the respondent employed the claimant. The claimant was employed on 22.02.2006 as a Micro-Credit Officer at monthly remuneration of Kshs.25, 000.00. The claimant rose through the ranks to the position of Relationship Manager – Credit Risk as at the time of dismissal from employment with a basic salary of Kshs.110, 000.00.

The **2nd issue** for determination is whether the suspension of the claimant from employment was unfair or irregular or unlawful. The respondent suspended the claimant from employment by the letter dated 20.05.2016. The suspension letter stated that it was in regard to the case of fraudulent asset finance loans and whose details the claimant was aware of. The claimant was suspended from 20.05.2016 until the conclusion of the case. During the period of suspension the claimant would cease to draw any benefits and allowances from the respondent.

The claimant's case is that the suspension was unfair and irregular because it breached clause 15.7.2 (19) which states , "**Effort should however, be made to ensure the matter is resolved within the shortest period possible but not more than 30 days except in cases which involve police investigations.**" The claimant's case is that she was on suspension beyond 30 days. However the claimant's own pleadings and exhibits show that she was under investigation by the police (the Anti- Banking Fraud Police) and police investigations were therefore involved. In view of the police investigations, the Court returns that the suspension was within the contractual clause and in view of the investigations there was nothing outside the clause when the suspension continued beyond the 30 days.

The **3rd issue** for determination is whether the termination of the claimant's employment was unfair. The claimant was dismissed from employment by the letter of summary dismissal dated 05.12.2016. The dismissal was effective 05.12.2016 for irregular and un-procedural loan appraisal and analysis for customers exposing the bank to a total loss of Kshs. 42, 435, 025.00 contrary to the respondent's lending policies and procedures. She was to be paid outstanding leave, if any, less amounts owed to the bank as at 05.12.2016.

The claimant's case is that she was not served with the show cause notice and invitation to attend the disciplinary hearing. The letter of summary dismissal states that the show-cause letter was dated 11.11.2016 and the disciplinary hearing was fixed for 02.12.2016 but the claimant failed to respond and to appear respectively.

The respondent has exhibited the copies of the show-cause notice and the invitation for the disciplinary hearing with internal instructions that they be posted via registered mail to the claimant at her last address P.O. Box 1103 – 20117 Naivasha – and the claimant confirmed it was the last postal address she gave to the respondent but further stated that the address no longer worked. The show-cause letter sets out details of alleged irregularities and un-procedural loan processing with respect to 7 accounts and invites the claimant to reply by 15.11.2016. The letter of invitation for disciplinary hearing sets the hearing date for 02.12.2016 at 10.00am at the respondent's Head Office. The respondent's legal officer one Samuel N. Wamaitha sent the an email on 29.11.2016 at 10.04am to the claimant's then Advocates, Musyoki Mogaka & Company Advocates forwarding the show-cause letter and inviting the claimant to the disciplinary hearing of 02.12.2016. The claimant testified that she had appointed Musyoki Mogaka & Company Advocates to act for her in the matter. The Court has considered that evidence and returns that the respondent effectively served upon the claimant the show-cause notice and the invitation to attend the disciplinary hearing – first by posting to her last postal address by registered mail and second by serving the letters upon the claimant's advocates. The Court returns that the respondent accorded the claimant a chance for a notice and hearing as per section 41 of the Employment Act, 2007 and the procedure as invoked by the respondent was fair as envisaged in section 45 of the Act. The respondent's witness (RW) was Lilian Mirie, the Senior Officer, Employee Relations, and there is no reason to doubt her evidence that prior to posting the mails, the claimant could not be reached on email or telephone.

The claimant's case was that she saw the termination letter in the respondent's documents filed in this suit in February 2017. However, the Court has considered the reasons for termination against the preliminary investigation report dated 29.06.2016 on record as well as the claimant's own evidence in the letter dated 24.11.2017 by the Central Bank and the letter by the Director of Public Prosecutions dated 21.07.2016. The preliminary report shows the detailed discrepancies constituting the fraud. The Central Bank letter by B. Ngatia Iregi, Director, the Banking Fraud Investigation Department finds that the claimant did not unilaterally approve the fraudulent loans alone and could not be said to be entirely responsible for the non-performing loans. The Court returns that the details of the fraud were established and the claimant was not entirely culpable but was implicated. In absence of any other material before the Court, with such material before the respondent and the claimant having failed to reply the show-cause notice and having failed to attend the disciplinary hearing, the Court returns that the respondent had a genuine reason to dismiss the claimant as at the time of termination.

Thus the Court finds that the summary dismissal was not unfair both in procedure and merits.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court finds that the dismissal having been not unfair, the prayers for reinstatement or compensation will collapse as not justified. However, the claimant is entitled to a certificate of service as per section 51 of the Employment Act, 2007.

RW confirmed that the claimant was entitled to monthly pay during suspension but did not know if she was paid. The claimant testified she was entitled to full pay per clause 15.7.2 (20) which provides that upon completion of the investigation, if found guilty, the employee will be paid up to the last day worked at the bank. She was suspended on 20.06.2016 and dismissed on 05.12.2016 making 6 months x Kshs. 110, 000.00 making **Kshs. 660, 000.00** awarded under that binding clause 15.7.2(20). RW confirmed the claimant was entitled to 19.5 days of leave in 2016 making **Kshs. 102, 312.00** which is awarded. She was a member of NSSF and the claim for service pay is found unjustified as per section 35 of the Act. The Court finds that nothing was established and attributable to the respondent that made it difficult for the claimant to engage in alternative gainful activities. The prayer for damages for loss of employability will fail especially that the dismissal has been found not to have been unfair and such referral report to potential employers would be an honest report.

The **5th issue** is whether the respondent has established the counterclaim. The evidence is that the claimant and other staff were implicated in the fraud and then the resultant losses. However the respondent failed to specifically plead the particulars establishing the claimant's culpability with respect to the amount as counterclaimed. Similarly the evidence by RW including the preliminary report of 29.06.2016 does not apportion the amount due from the claimant. Thus the counterclaim will fail with costs.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant **Kshs.762, 312.00** by 15.12.2019 failing interest to be payable thereon at Court rates from the date of filing the amended memorandum of claim till full payment.
- b) The dismissal of the counterclaim with costs.
- c) The respondent to pay the claimant's costs of the claim.

Signed, dated and delivered in court at **Nairobi** this **Friday, 1st November, 2019.**

BYRAM ONGAYA

JUDGE