



**REPUBLIC OF KENYA**

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

**CAUSE 1935 OF 2015**

**JOHN KUNGU KIARIE.....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK (K) LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant averred that he was employed by the respondent on 22<sup>nd</sup> May, 1984 as an officer at Grade 4. He was subsequently on account of his diligence and high level of achievement promoted within the ranks until he attained the rank of Director Risk Management reporting to the Chief Executive Officer of the respondent.

2. On 16<sup>th</sup> May, 2013 the claimant was arrested and placed under police custody for a period of three days and later arraigned in court on what he considered wrongful criminal charges preferred against him by the respondent's customer who filed a civil claim against the respondent seeking injunction to prevent the respondent from placing the customer under receivership.

3. When the claimant reported to work after his release from custody, the respondent through Mr Ruturi in presence of "Director of Human Resource presented the claimant with a letter terminating his services on three months' notice. In the termination letter the respondent's Chief Executive Officer referred to irregularities highlighted in various reports in the recent past, some of which had been discussed with him. According to him, the allegations were unknown to him since throughout his work he had never been accused of any wrongdoing or been subjected to any disciplinary action.

4. The claimant further averred that he was entitled to a fair hearing before termination of his employment. According to the claimant his position was prestigious and attracted respect and admiration in the top echelons of society and as such his terminal benefits would have to reflect such status. The claimant therefore sought a declaration that he was entitled to compensation for breach of contract. The claimant further sought special damages in the sum of Kshs 337,703,597/63.

5. The respondent on its part pleaded that the claimant was employed by it as its officer to serve and work in areas of claimant's core business which involved management of its customers and their money as opposed to non-core banking. According to the respondent the claimant's services was terminable by notice or by summary dismissal in cases of gross misconduct as per his contract.

6. The respondent further pleaded that the claimant remained in its employment until 2003 during which he was promoted on a number of occasions. The claimant's promotions attracted different remuneration reviews and levels only but did not and could not vary the fundamental nature of the contract especially with regard to termination. The respondent further pleaded that it became aware of a number of irregularities arising from the claimant's conduct and performance. The claimant was guilty of malfeasance as various irregularities were discovered in the standard of his work.

7. The respondent further pleaded that the claimant's employment was terminated on grounds which would amount to gross misconduct making him liable to summary dismissal and more particularly he was suspected of committing an offence against his employer and a customer and thus the basis for the criminal charges against him. The respondent further pleaded that the claimants terminal dues were remitted into the respondent's account with the respondent bank and in compliance with the claimant's contract of employment hence the respondent was discharged from its obligations and the relationship then became banker-customer subject to rules and regulations applicable thereto.

8. In his oral evidence, the claimant further stated that on 16<sup>th</sup> May, 2003 he was arrested from the respondent premises and charged in court with theft. According to him, no one from the bank came to find out why he was arrested. He was released on bond and one week later, he was called by the respondent and issued with a termination letter. The letter cited irregularities highlighted in various reports. He denied knowledge of previous reports. He further said there were no previous discussions on the issue.

9. In cross-examination, he stated that he was not on a fixed term contract and could work until retirement. The claimant further conceded that he could leave employment for any reason before retirement. It was further his evidence that he was arrested as a result of a complaint

by a client of the bank. The client complained that the claimant stole from him. He further stated that there were terms of service in existence at the time of his promotion. Upon termination he was paid three months salary in lieu of notice but was not paid the rest of his terminal benefits.

10. The respondent's witness Mr Laban Sogomo stated that he was working for the respondent as Head of Employee Relations and Wellness and he was in the same position when the claimant was working for the respondent. He further stated that the contracts were open ended and terminable by notice or pay in lieu. It was evidence that the claimant was terminated on account of adverse reports. There was a criminal case against the claimant and this posed a reputational risk to the respondent.

11. In cross-examination, he stated that the claimant was terminated on account of irregularities highlighted in various reports. He however could not remember if the claimant's services were terminated before or after the commencement of the criminal case. He further could not recall any previous disciplinary issue regarding the claimant. According to him discussions were held with the claimant and the matter taken to the board. Mr Sogomo further stated that the respondent lost no bonds or money and further that no funds were lost from the customer's account and further that the bank did not believe the allegations.

12. The claimant's services were terminated on 22<sup>nd</sup> May, 2003 hence the applicable law then was the repealed Employment Act (Cap 226). The current Act came into operation on 2<sup>nd</sup> June 2008. Under the previous Act, there was no provision for unfair termination. There was by law no obligation on the employer to give reason for termination of service. Internal Human Resource Manuals and Policies and practice generally showed that most termination letters stated reason for termination of service. It was rare to find an employee whose services was terminated for no reason. Further under the repealed law there was no provision for twelve months equivalent of salary as compensation for unfair termination of service. The measure of damages payable was equivalent to the notice period provided in the contract. In absence of agreement to the contrary the court invariably awarded the money equivalent of notice period.

13. The claimant herein sought an order of this court to be paid salary until retirement, increments, annual leave until retirement, leave allowance and non-contributory pension. The claimant however did not produce any contract to prove that he was entitled to these heads of compensation upon termination of his services. The claimant has simply based his claim on the fact that he was a senior person in the bank and was therefore in his view entitled to a better exit package. The claims by the claimant therefore have no basis in law and his contract of employment hence cannot be granted.

14. Further, the claimant's claim for salary and other benefits until retirement is unreasonable because his contract had a termination clause hence could have been brought to an end prematurely by either party for any reason. The claimant was paid three months' salary in lieu of notice of termination of services. This was the measure of damages payable under the repealed Employment Act and no more even if the court were to find that he was wrongfully dismissed or unlawfully terminated.

15. In the circumstances, the court finds the claim without merit and hereby dismiss the same with costs.

16. It is so ordered.

**Dated at Nairobi this 9<sup>th</sup> day of August, 2018**

**ABUODHA J. N.**

**JUDGE**

**Delivered at Nairobi this 9<sup>th</sup> day of August, 2018**

**ABUODHA J. N.**

**JUDGE**

**In the presence of:-**

.....for the Claimant

.....for the Respondent.