REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1552 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 26th September, 2018)

VICTOR OWOUR OKEYO.....CLAIMANT

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 13.9.2011 through the firm of Enonda, Makoloo, Makori and Company Advocates alleging unfair, unlawful and unprocedural termination of his employment by the Respondent.

2. The Claimant averred that he was employed by the Respondent on 1.11.2010 as a Branch Manager in Respondent's bank as per his employment letter Appendix A. He avers that on or about 24.1.2011 he was suspended from employment until 7.2.2011 in a letter posted on 28/1/2011 (Appendix B).

3. The suspension was ostensibly to allow the Respondents perform investigation as regards the alleged loss of some money at the Respondent's Libra House Branch along Mombasa Road.

4. The Claimant avers that in the interim he was arraigned in Court over the loss of the said cash in Criminal Case No.126 of 2011 on 25/2/2011 (Appendix C).

5. The Claimant inquired over the suspension letter and was told to await further instructions and communication. On 10.2.2011 he was terminated (Appendix D).

6. The Claimant contends that he suffered loss and harm and demands compensation totaling 1,477,233.31 as per his claim.

7. The Claimant contends that the summary dismissal letter indicated that he had deserted duty yet he had been sent on suspension pending investigations over the alleged loss of money in the bank.

8. The Claimant exhibited in his appointment letter which shows that his basic salary was 91,000/=, house allowance was 25,000/= and utility allowance was 10,000/= per month all totaling 126,000/= per month. He was to be on probation for 6 months with effect from 1.11.2010 which period was to end by April 2011. He was however dismissed in February 2011. During probation, the contract could be terminated by giving 7 days' notice.

9. The Claimant also gave his oral evidence in Court and he reiterated the averments made in his Statement of Claim. In cross-examination, the Claimant admitted that he was dismissed while still on probation. He also stated that he was charged for theft by servant and convicted and sentenced to 5 years imprisonment. He appealed the conviction and sentence and the appeal is currently pending in Court.

10. He seeks payment of his terminal dues but he admits that he has not cleared with the bank, as he has nothing belonging to the bank in his custody.

11. The Respondent filed their Response to the Memorandum of claim on 14.9.2012 through Miller and Company Advocates. They submitted that the claim is baseless, frivolous, and vexatious and does not disclose any case of action against the Respondent.

12. They denied the claim. They aver that the Claimant was on duty and he requested for 21 million to be delivered to Libra branch on

17.1.2011 to meet a customer demand (Exhibit 3). On 19.1.2011 the money requested was delivered but there is no record of any large cash withdrawal being made by its customers.

13. On 24.1.2012, the Respondent discovered the loss of 25,367,600/=, USD 2462, GBP 50 and 360 Euros that was in the safe at their Libra House Branch. The Claimant failed to report to work without just cause or prior warning.

14. On the same day, the Respondent suspended Claimant from duty to pave way for further investigations and he was asked to report to the Human Resource Department in 7 days (Exhibit 4A and Exhibit 4B).

15. Investigations were done and the matter reported to police on 25.1.2011 (Exhibit 5). On the 25/1/2011, the Claimant and another were arrested and charged with stealing by servant contrary to Section 281 of the Penal Code.

16. On 10/2/2011, the Respondent went ahead and summarily terminated the Claimant's employment for desertion of duty (Appendix 6A and 6B).

17. The Respondent aver that Claimant is not entitled to reliefs sought as he was paid what was his entitlement including 6 days leave, 10 days worked in February 2011 and January 2011 salary all totaling 185,375.34.

18. The Respondents contend that they dismissed Claimant summarily as provided for under Section 44 of Employment Act. They pray that this claim be dismissed accordingly.

19. The Respondent also called one witness who gave evidence as per their defence. In cross-examination, the witness indicated that the Claimant was on probation when he was dismissed.

20. The parties filed their respective submissions. I have considered the averments of both parties and their respective submissions.

21. I note that the Claimant was dismissed while still on probation. By virtue of the employment contract dated 18/10/2010, paragraph 6, the probation period was 6 months and either party could terminate it by giving 7 days' notice in lieu.

22. Section 41 of Employment Act does not apply for contract under probation. Issues of due process or issuance of reasons before termination could not therefore apply.

23. In my view, the claim by the Claimant is untenable save for payment of the 7 days' notice and any salary and leave due and not paid. I only find for the Claimant in terms of:-

> ***1. 10 days salary for days worked in February 2011 – 10/30 x 126,000=42,000/=.***
>
> ***2. Salary for January 2011 = 126,000/=.***
>
> ***3. Leave encashment for 6 days = 6/30 x 126,000= 25,200/=.***
>
> ***4. 7 days termination notice = 7/30 x 126,000= 29,400/=.***
>
> ***<u>TOTAL = 222,600</u>/= - Less statutory deductions.***
>
> ***5. This is as tabulated in Respondent's Exhibit 7.***
>
> ***6. Since there is no evidence, that the Respondent paid these dues, they shall pay costs of this suit.***

Dated and delivered in open Court this **26th day of September, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

<u>JUDGE</u>

<u>In the presence of:</u>

Ongegu holding brief for Enonda for Claimant – Present

Mohamed holding brief for Deya for Respondent – Present