



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 830 OF 2010

(Before Hon. Justice Mathews N. Nduma)

FREDRICK NYAGARI NYARIBO.....CLAIMANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

J U D G M E N T

1. The suit was filed on 23rd July, 2010 seeking the following reliefs:-

- (a) Unpaid leave days.
- (b) Salary for days worked.
- (c) Service pay for the years worked.
- (d) Damages for the wrongful dismissal.
- (e) Costs of the suit.

2. The relief sought is based on the following facts:-

The Claimant was employed by the Respondent as a Debt Recovery Officer on 18th November, 2008 and got a letter of appointment on the even date.

The Claimant worked faithfully, diligently and continuously until 30th June 2010 when he received a telephone call from the head office Human Resources Department where upon arrival he was handed a letter of summary dismissal.

3. The Claimant states that he had not breached any terms of the employment contract; did not receive any written charges against him; was not given a notice to show cause nor was he taken before a disciplinary panel. He states that the summary dismissal was not for a valid reason and was not effected in terms of a fair procedure.

4. The Claimant testified under oath in support of the particulars of claim and prays that the suit be allowed with costs.

Memorandum of Reply

5. The Respondent filed a Memorandum of Reply on 1st September, 2010 in which is admitted the particulars of employment of the Claimant.

6. The Respondent opposes the Claim and avers that the Claimant breached the implied obligation of trust and confidence on account of dishonest behavior by defrauding third parties and the Respondent became aware of such conduct after several complaints by the third parties to the Respondent. As a result, the Respondent's reputation suffered.

7. Furthermore, the Claimant had issued bouncing cheques to his creditors and the matter was escalated to the bank and affected the bank's image. The Claimant was not living the core values of the bank.

8. The Bank states it had the right under the contract of employment to terminate the employment of the Claimant for misconduct by giving one month notice and even to summarily dismiss the Claimant for gross misconduct.

9. The summary dismissal was due to the breach of trust and confidence since he was in a position of trust and was entrusted large sums of money by the Respondent hence the dismissal.

10. The Respondent called RW 1 Leah Chepkoech, Acting Manager, Employment Relations. She relied on her witness statement filed on 16th April, 2018 and bundle of documents filed on 29th June, 2011. She stated that the Bank received complaints by three (3) persons who the Claimant had failed to pay and had issued them bouncing cheques. The cheques were produced in court. The same were not marked 'refer to drawer' but RW 1 stated that the cheques were not honoured for lack of funds. RW 1 was not involved in any disciplinary process against the Claimant and no record of disciplinary process was produced by her. She produced a letter by the Claimant pleading for his job. RW 1 stated that the Claimant was a good performer but had breached the Bank's Code of Conduct. RW 1 stated that the claimant was called to a meeting at the head office and was summarily dismissed.

11. RW1 was unable to show any Bank Policy which prevented an employee to issue bouncing cheques to a third party. RW1 however insisted that it was gross misconduct for a banker to issue a bouncing cheque. The cheques were drawn from Stan chart Bank and were not marked 'refer to drawer'.

12. It was put to RW 1 under cross examination that these allegations were baseless and not proved. RW1 insisted that the Respondent relied on the complaints made by the creditors. According to RW 1, clause 18(10) of the Bank Policy & procedure manual, employees were to conduct private affairs without embarrassing the Bank. The Claimant had breached this clause.

13. The Respondent prays the suit be dismissed with costs.

Determination

14. The issues for determination are:-

- (i) Whether the summary dismissal of the Claimant was for a valid reason and in terms of a fair procedure.
- (ii) Whether the Claimant is entitled to the reliefs sought.

Issue i

15. The Claimant has testified that he was summoned to the Bank Head Quarters and handed a letter of Summary Dismissal. That he did not receive any notice of any charges of misconduct against him prior to the summon, was not asked to show cause why he ought not to be summarily dismissed nor was he afforded an opportunity at a disciplinary hearing to defend himself.

16. RW 1, was unable to provide any evidence of charges made against the Claimant, a notice to show cause or any evidence that a disciplinary hearing was held to provide opportunity to the Claimant to defend himself.

17. Instead RW 1 only made unsubstantiated allegations against the Claimant to the effect that he had issued bouncing cheques to three, third parties who had made complaints to the Bank.

18. Copies of alleged two bounced cheques of Kshs.3,367 and Kshs.25,817 dated 29th July, 2009 and 29th August, 2009 respectively were produced by RW 1. Both had no evidence on the face of them that they had been presented before a bank and rejected for lack of funds. The evidence by RW 1 was pure speculation. RW 1 also produced copies of purported letters of complaint to the Bank by third parties dated 15th December, 2009 and 5th May, 2010 without calling their maker. These copies were clearly not admissible and by themselves did not constitute any breach of the employment contract between the Claimant and the Bank. These were again unsubstantiated complaints by third parties. The Claimant was not given any opportunity to explain these complaints prior to the summary dismissal.

19. The manner the Respondent approached the matter violated sections 41, 43 and 45 of the Employment Act, 2007 in that no opportunity was afforded the Claimant to explain allegations made by the parties against him. The employer lost the opportunity therefore to establish the validity or otherwise of the said allegations.

20. Accordingly, the summary dismissal of the Claimant was both substantively and procedurally wrongful and unfair. The court so finds.

Issue ii

21. The Claimant was Summarily Dismissed unlawfully and unfairly. He is entitled to payment of one month's salary in lieu of notice in the sum of Kshs.75,000.

22. Furthermore, in terms of section 49(1) (c) as read with sub-section 49(4), the Claimant is entitled to compensation for the wrongful and unfair termination of employment. In this respect, the Claimant had served the Respondent diligently for about two years. He lost his source of income unfairly and prospects of future income therefore. The Claimant wished to continue working and wrote a letter pleading for reinstatement since he had done no wrong against the Respondent.

23. The Claimant got a blemish, which is difficult to erase especially in the Banking sector and this is an aggravating circumstance, especially because he got no opportunity to explain the circumstances that led to third parties making complaints against him to his employer.

24. The court grants the Claimant four (4) months' salary in compensation for the wrongful and unfair dismissal in the sum of Kshs.300,000.

25. Furthermore, the Claimant seeks payment of 29 days unpaid leave in the sum of Kshs.75,000 which prayer is granted and Kshs.2,500 in respect of one (1) day worked in July 2,500.

26. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

(i) Kshs.300,000 being the equivalent of four (4) months' salary in compensation for unlawful and unfair dismissal.

(ii) Kshs.75,000 in lieu of one month notice.

(iii) Kshs.75,000 in lieu of 29 days leave.

(iv) Kshs.2,500 in respect of one day worked in July, 2010.

Total award Kshs.452,500.

(v) Interest at court rates from date of judgment till payment in full.

(vi) Costs of the suit.

Dated and Signed in Kisumu this 12th day of October, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 26th day of October, 2018

Maureen Onyango

Judge

Appearances

Mr. Moses Odawa for Claimant

Mr. Sichangi for Respondent

Daniel Ngumbi – Court Clerk