



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 552 OF 2012

(Before D. K. N. Marete)

ANNE MUTHONI MUTURI.....CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 30th March, 2012. The issues in dispute are therein cited as;

Wrongful termination of employment of the claimant, ANNE MUTHONI MUTURI being aggrieved by such wrongful termination files the claim herein.

The respondent in a Memorandum of Reply dated 24th April, 2012 denies the claim and prays that this be dismissed with costs.

The claimant in a Supplementary Memorandum of Claim dated 21st June, 2012 answers the respondent's Memorandum of Reply and prays that the same be struck out and the judgement entered in her favour.

The claimant's case is that at all material times, she was an employee of the respondent.

The claimant's further case is that she was employed by the respondent on or about 10th June, 1996 as a Secretary to the Branch Manager in the Respondent's Mombasa Branch. This was under a letter of appointment offering gross monthly salary of Kshs.15,000.00 paid in arrears. She was confirmed on appointment on completion of 6 months probation period. At the time of her dismissal this had risen to Kshs.148,896.00.

The claimant's further case is that she was transferred to the respondent's headquarter at Nairobi on promotion as secretary to the Deputy Managing Director. It is also her case that following restructuring and subsequent abolition of secretarial posts within the respondent's abolition of secretarial posts within the respondent's organization in 2004, The claimant was identified as a potential employee to be developed along the general banking line and that she was subsequently posted to Koinange Street Branch for six months with a view to eventual suitable placement in the bank.

The claimant avers that she was subsequently transferred to the Trade Finance Department as a Trainee with effect from 21st March, 2005 and then the Central Operations Unit as the officer in charge with effect from 1st July, 2006. In this period, she acted in the capacity of Branch Operation Manager and was transferred to the position of Branch Operations Manager, River Road Branch, Nairobi on 15th November, 2010, a position she held until her termination on 19th September, 2011.

It is her further case that the letter of appointment touched on her terms of service relating to *inter alia*, salary, hours or work, promotion, notice of termination of employment, terminal benefits, termination, redundancy and severance pay, retirement, leave, allowances, loans and advances, insurance, pension scheme et al and applicable *inter partes*. The parties also referred to the Human Resources Policies and Procedures Manual of the respondent which provided a frame work and guidelines to assist managers and employees to undertake their operational responsibilities and promote harmony and equity in the organization.

The claimant further avers that on 12th March, 2009 the respondent changed her terms of employment in relation to Notice of Termination of employment issuable by either party to one month before termination or a month's salary in lieu of such notice.

The claimant's other case is that on or about 19th September, 2011, the respondent without any justifiable and fair cause unlawfully

terminated the claimant's service without any notice whatsoever. This was also not in accordance with justice and equity. She puts it thus;

14. *The Claimant avers that the Respondent's action of purporting to terminate her employment with the Respondent was purely capricious, malicious, and discriminatory and did not comply with applicable provisions of the Respondent's Human Resources Policies and Procedural Manual and the Employment Act 2007.*

19. **FURTHER, IN THE ALTERNATIVE WITHOUT PREJUDICE TO THE FOREGOING**, the Claimant seeks the Honourable Court to issue an order revoking her unlawful termination of employment and declaring that the Claimant be admitted to the Respondent's exit package for its management staff with the Respondent accordingly:-

i. *Paying the Claimant 1½ months' gross salary for each of 15 years worked by the Claimant with the Respondent that is Kshs.3,350,160 (i.e Kshs 148,896/= per month plus Kshs 74, 448/= - ½ month thus Ksh 223, 344/= x 15)*

ii. *Continues to apply interest rate applicable to the Respondent's staff (at the time of the Claimant's termination of employment) in respect of any existing loan(s) (then existing) that the Claimant had with the Respondent from the date of termination to the date of payment in full.*

iii. *Reverse the Claimant's transaction account number 0120650243300 from ordinary customer status to ex-staff status as provided in the Respondent's Human Resource Policies and*

Procedural Manual.

She prays as follows;

a) *A declaration that the Claimant's employment with the Respondent was unlawfully and/ or unfairly terminated;*

b) *The Claimant to be unconditionally re-instated as Branch Operations Manager, River Road Nairobi with the Respondent without any loss salary, allowances and benefits and to be treated as if his employment had not been terminated;*

c) *ALTERNATIVELY, the claimant be unconditionally re-engaged by the Respondent in work comparable to that which the Claimant was employed prior to her termination that is Branch Operations Manager or other reasonable suitable work, at the Respondent's Nairobi Branches (and or such other Branches as shall be convenient and suitable to the Claimant) at the same gross monthly salary, allowances and benefits for the period from the date of her termination that is 20th September, 2011 to the date of re-engagement.*

d) **FURTHER, IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE FOREGOING**, a declaratory order that the Claimant be admitted to the Respondent's exit package for its management staff and accordingly the Respondent

i. *Pays the Claimant Kshs.3,350,160/= (being 1½ months' gross pay that is Kshs.233,344/= multiplied by 15 i.e. the years worked by the Claimant with the Respondent).*

ii. *Continues to apply interest rates applicable to the Respondent's staff (as at 19th September 2011) in respect of any loan(s) (existing as at 19th September 2011) that the Claimant had with the Respondent as from 19th September 2011 till payment in full.*

iii. *Reverse the Claimant's transaction account 01206450243300 (with the Respondent) from the ordinary customer status to ex-staff as provided in the Respondent's Human Resource Policies and Procedures Manual (with the Claimant continuing to enjoy privileges that she did prior to 19th September 2011).*

The respondent case is that the claim has omitted certain details relating to her employment record in her attempt to depict herself as an ideal employee. These are as follows;

i. *On 12th November 2010 the Claimant threatened one of her colleagues one Mr. Cosmas Mutaiti with the words "if I cannot deal with you within I can deal with you think about it". Consequently the Respondent convened a disciplinary hearing on 22nd November 2010 which determined that the Claimant's management skills were wanting and it was recommended that she attend a training course on how to manage herself and other employees, See Annexure 1. She was then issued with a caution about her unprofessional conduct by the Branch Manager River Road through an internal memo dated 7th April 2011. See Annexure 2.*

ii. *Further the Claimant on or about 14th March 2011 walked out of a meeting convened by the Branch Manager to discuss official business in the Branch and was subsequently issued with a caution on the same day.*

iii. *On 23rd to 27th May 2011 the Claimant was absent from work without official permission from her immediate superior, as a result of which the Claimant was issued with a warning from the Branch manager on 25th May 2011 and a disciplinary committee was convened on 9th and 13th June to clarify the alleged misconduct. See Annexure 3.*

iv. *The disciplinary committee concluded that the Claimant's action warranted disciplinary action and she was to be issued*

with a warning letter and it was further agreed that she would not be paid for the 5 days she was absent from her duties. See Annexure 3 above.

v. Consequently the Respondent's Chief Executive Officer sent the Claimant a warning letter on 20th June 2011 which noted that she had been cautioned previously regarding her unprofessional conduct and further warned her that the Respondent would not tolerate that kind of attitude and behavior and that a repeat of the same would render her liable for dismissal. See Annexure 4.

vi. In view of the above it is clear that the Claimant's relationship with the Respondent had become strained and any other failure on the Claimant's part to discharge her duties as expected would inevitably lead to dismissal.

vii. On or about 24th February 2011 the Claimant as the Branch Operation Manager who as such had a responsibility of protecting the Respondent against any loss, received account opening documents for a company known as Metscec Cables Limited. Upon perusal of the same she noted that the name of the account had been altered and upon enquiry from the personal banker was informed that it was a typing error, it was agreed that any alterations must be signed for by the person making the alterations the Claimant failed to follow up on this and went ahead to open a fraudulent account and further released the documents to head office despite having noticed the glaring anomaly.

viii. That on 7th March the Claimant received communication from the Branch Operation Manager Thika requesting that the Claimant authorize the said Branch Operations Manager Thika to make payment of Kshs.205,000.00 despite the fact that she had not verified from the head office whether or not the account was compliant. The Compliance check is a process aimed at ensuring that the details given by prospective customers are correct to reduce cases of bank fraud. See Annexure 5.

ix. On 9th March 2011, the fraudsters further withdrew Kshs.45,000.00 from the above mentioned account at the Respondent's River Road Branch. The money was disbursed on the basis that the account details were passed by the Claimant as being okay; which was a direct result of the Claimant's previous actions.

x. The Claimant therefore through her negligence, incompetence and failure to follow laid down operational procedures caused the Respondent to lose a total amount of Kshs.250,000.00

xi. The Respondent in following the rules of fairness and natural justice through a letter dated 14th September 2011 gave the Claimant an opportunity to explain her actions See Annexure 6, which she did through a statement dated 16th September 2011. See Annexure 7. However the explanation was not satisfactory and confirmed to the Respondent that the Claimant had exercised her duties negligently and without due care expected of her.

xii. The Respondent was therefore, in view of the previous warnings, and the Claimant's failure to follow its operational requirements, left with little choice but to terminate the employment of the Claimant on 19th September 2011 See Annexure 8 as it is entitled to do under provisions of the contract of Employment and the Employment Act.

The respondent's further case is that this suit is an abuse of the process and powers of this court. It is also an attempt at unjust enrichment without full disclosure of the substantial loss and exposure she subjected the respondent by her own misconduct. The termination was therefore procedural for the reasons produced in the letter of termination dated 19th September, 2011. She was paid one months salary in lieu of notice.

Further, the respondent denies paragraph 16 of the claim and avers as follows;

i. That the Respondent duly computed the Claimant's terminal dues and she was paid fully in accordance with the terms of her contract of employment and in compliance with the applicable laws See Annexure 9 above and See Annexure 11;

ii. That the law does not provide for compensation in the circumstances pleaded by the Claimant;

iii. That the Claimant has failed to show why she should be entitled to Kshs.1,786,752.00 beyond what is provided for by law and in her contract of employment;

Her penultimate case is that the claimant is not entitled to the orders sought in that;

i. Termination of the Claimant's employment was fair, valid and followed due procedure therefore lawful;

ii. It will not be possible for the Respondent to reinstate the Claimant, nor does the Respondent wish to do so;

iii. The Respondent does not wish to re-engage the Claimant in any capacity having lawfully terminated her employment and paid her severance dues accordingly;

iv. That the Claimant's prayer that she be admitted to the Respondent's exit package for its management staff is ill conceived and invalid, in that there is neither a legal nor a factual basis for the making of such an order;

v. The claim for twelve months' compensation for alleged unlawful termination of employment is also invalid there is neither a legal nor a factual basis for the making of such an award.

The claimant in a supplementary memorandum of claim answers the respondent's response. She literally reiterates the contents of her claim and *in toto* denies the allegation (s) contained in paragraph i – xii of the defence: which she deems extraneous.

In the penultimate, she avers as follows;

12. In reply to paragraph 14 of the Memorandum of Reply, the Claimant denies the contents therein in totality and avers that without prejudice to the averments hereinbefore, the Memorandum of Reply is a sham, lacks merits and should be struck out and or rejected by the Honourable Court in its entirety.

The matter variously came to court until the 19th October, 2018 when the court ordered the claimant to draw, file and serve their written submissions in support of the claim.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant did not file any written submissions in support of her case.

The respondent in her written submissions dated 10th October, 2018 reiterates a case as pleaded and therefore concludes a case of lawful termination of employment. This is by a verbatim restatement of her case as follows;

- On 12th November, 2010 the claimant threatened one of her colleagues, Cosmas Mutaiti with the words “if I cannot deal with you within I can deal with you think about it”
- The Respondent convened a disciplinary hearing on 22nd November 2010 which determined that the Claimant's management skills were wanting and it was recommended that she attend a training course on how to manage herself and other employees.
- She was then issued with a caution about her unprofessional conduct by the Branch Manager, River Road, through an internal memo dated 7th April 2011.
- On or about 14th March 2011 the claimant walked out of a meeting convened by the Branch Manager to discuss official business in the Branch and was subsequently issued with a caution on the same day.
- On 23rd to 27th May 2011 the Claimant was absent from work without official permission from her immediate superior, as a result of which the Claimant was issued with a warning from the Branch manager on 25th May 2011 and a disciplinary committee was convened on 9th and 13th June to clarify the alleged misconduct.
- The disciplinary committee concluded that the Claimant's action warranted disciplinary action and she was to be issued with a warning letter and it was further agreed that she would not be paid for the 5 days she was absent from her duties.
- Consequently the Respondent's Chief Executive Officer sent the Claimant a warning letter on 20th June 2011 which noted that she had been cautioned previously regarding her unprofessional conduct and further warned her that the Respondent would not tolerate that kind of attitude and behavior and that a repeat of the same would render her liable for dismissal.
- In view of the above it is clear that the Claimant's relationship with the Respondent had become strained and any other failure on the Claimant's part to discharge her duties as expected would inevitably lead to dismissal.
- On or about 24th February 2011 the Claimant as the Branch Operation Manager who as such had a responsibility of protecting the Respondent against any loss, received account opening documents for a company known as Metscec Cables Limited. Upon perusal of the same she noted that the name of the account had been altered and upon enquiry from the personal banker was informed that it was a typing error, it was agreed that any alterations must be signed for by the person making the alterations the Claimant failed to follow up on this and went ahead to open a fraudulent account and further released the documents to head office despite having noticed the glaring anomaly.
- That on 7th March the Claimant received communication from the Branch Operation Manager, Thika, requesting that the Claimant authorize the said Branch Operations Manager Thika to make payment of Kshs.205,000.00 despite the fact that she had not verified from the head office whether or not the account was compliant. The Compliance check is a process aimed at ensuring that the details given by prospective customers are correct to reduce cases of bank fraud.
- On 9th March 2011, the fraudsters further withdrew Kshs.45,000.00 from the above mentioned account at the Respondent's River Road Branch. The money was disbursed on the basis that the account details were passed by the Claimant as being okay; which was a direct result

of the Claimant's previous actions.

· The Claimant therefore through her negligence, incompetence and failure to follow laid down operational procedures caused the Respondent to lose a total amount of Kshs.250,000.00

· The Respondent in following the rules of fairness and natural justice through a letter dated 14th September 2011 gave the Claimant an opportunity to explain her actions See Annexure 6, which she did through a statement dated 16th September 2011. See Annexure 7. However the explanation was not satisfactory and confirmed to the Respondent that the Claimant had exercised her duties negligently and without due care expected of her.

The respondent was therefore, in view of the previous warnings, and the claimant's failure to follow its operational requirements, left with little choice but to terminate the employment of the Claimant on 19th September 2011.

The claimant's case ends up as unmitigated disaster. It is not salvable. I agree with the respondent's case and submission that the claimant's case is an abuse of the power and process of court with a view to unjustly enriching herself. What with the overwhelming case of the misconduct of the claimant at the work place coupled with appropriate disciplinary process leading to her dismissal? The claimant, despite her dismissal from employment was paid all her terminal dues at departure. This matter should rest as such. I therefore find a case of lawful termination of employment and hold accordingly.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Dated and signed this day of 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

No appearance for the parties.