



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 332 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

STEPHEN MAINA THUMBI.....CLAIMANT

-VERSUS-

EQUITY BANK LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant instituted a suit by way of a Memorandum of Claim filed on 13th March 2013 seeking the following reliefs against the Respondent:

- a. A finding that the termination of the Claimant's contract was unfair and unlawful.*
- b. Compensation in the sum of Kshs. 9,509,600 .*
- c. Exemplary damages.*
- d. Interest on (b) and (c) above at court rates from date of termination until payment in full.*
- e. An order compelling the Respondent to issue the Claimant with a certificate of service.*
- f. Costs of these proceedings and interest thereon at court rates from the date of judgment until payment in full.*

2. The Respondent filed its Memorandum of Reply on 30th April 2013 denying the averments in the Memorandum of Claim. Despite, being instructed to file, the Respondent did not file its submissions.

Claimant's Case

3. The Claimant avers that he had served the Respondent as an Assistant Internal Auditor from the 9th of July 2007 through a letter of appointment dated 16th June 2007 and thereafter as the Respondent's Garissa Branch Relationship Manager from 23rd July 2009 to the date of his termination.

4. The Claimant avers that through a letter dated 29th November 2011 the Respondent without any lawful cause summarily dismissed him allegedly for his involvement in the theft of cash at the ATM machines that had occurred at the Branch.

5. The Claimant particularised the Respondent's acts of malice and unlawfulness as including the failure to invite any independent investigation on the purported incident, failing to follow due process in the termination and deducting Kshs. 224,000 from the Claimant's final dues given to him purportedly to recover the amount lost in the bank.

6. The Claimant further particularised the particulars of damage occasioned upon him being the loss of earnings for the 1 months notice, loss of earnings of Kshs. 224,000, loss of his family medical insurance and the cancellation of his mortgage of Kshs. 5,300,000 leading to the sale of the property by public auction.

7. During the hearing, the Claimant testified that in August 2011 one of the ATMs lost a sum of Kshs. 224,000 but the loss was a one-off

event. A process was instituted to establish the cause of the loss which was thereafter discovered that there was an actual shortage. This finding was made known to the Head of Office operations. He testified that the security department commenced investigations and recommended that the Claimant does take full responsibility.

8. The Claimant testified that the custodians of the ATM were the operations manager and the cash officer. The Claimant testified that he was never charged in a court with any criminal offence relating to the incident.

Respondent's case

9. The Respondent avers that the Claimant was involved in serious criminal misconduct involving theft of ATM funds at Garissa branch which fact the Claimant admitted in a letter dated 30th November 2011. The Claimant had proposed to repay the money in monthly instalments. The Respondent admitted the Claimant's summary dismissal for gross misconduct pursuant to Section 44 of the Employment Act but denied the dismissal was malicious.

10. The Respondent further avers that the Claimant's mortgage is still running and continues to incur interest at the prevailing commercial lending rate as per Clause 4 of the Facility letter.

11. RW1, Daniel Mwamiti, a former employee at the Respondent's investigations department, testified that he knew the Claimant as a former employee at the Respondent.

12. RW1 testified that the activities taking place in the ATM were evidenced in the ATM journals produced in Court which he used in his investigations. RW1 testified that in his investigations he interrogated the ATM custodians including the Claimant. The main ATM custodian during the loss was Dennis Owino. RW1 testified that the ATM journals did not have any indication that the claimant was the one accessing the loading.

13. RW1 testified that he prepared the report after investigations but the Report was not produced in Court since the Respondent stated that the said Report was confidential.

14. RW2, Leah Chepkoech, the Respondent's Human Resource Manager testified that she was in custody of the employee records. In cross-examination, RW2 testified that the Claimant was dismissed for misconduct and that due procedure was followed before his dismissal.

Claimant's Submissions

15. The Claimant submitted that he was never accorded an opportunity to be heard or respond to the allegations made against him. Further, the Claimant was not provided with the Investigations Report.

16. The Claimant submitted that the right to a fair hearing as provided under Article 159 of the constitution requires that individuals are not penalised by decisions affecting their rights or legitimate expectations. He also submitted that Section 41 of the Employment Act provides that an employer is to give a reason before an employee is terminated on grounds of misconduct. The Claimant's right to fair hearing cannot be limited in anyway.

17. The Claimant submitted that the Respondent had failed to explain why the Claimant was the only one terminated and that no reason for termination was given to the Claimant. The Claimant therefore submitted that his termination was unfair as the termination did not meet the criteria set out under Section 45 of the Employment Act. The Claimant relied in the case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** where the Court held:-

"In view of the foregoing, we find that the appellant's act of summarily dismissing the respondent from its employment without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the Employment Act. In KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS V MERU NORTH FARMERS SACCO LIMITED, [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case for termination as well as in a case that warrants summary dismissal. See also MARY CHEMWENO KIPTUI v KENYA PIPELINE COMPANY LIMITED [2014] eKLR. We respectfully agree. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination."

18. The Claimant submitted that the Respondent was not justified to deduct the sum of Kshs. 244,000 and that the Respondent cancelled the Claimant's facilities after his summary dismissal. The Claimant finally submitted that he was entitled to the reliefs sought.

19. I have examined all the evidence on record from both parties. The issues for determination are as follows:-

1. Whether Respondent had valid reasons to terminate the services of the Claimant.

2. Whether the Claimant was given a fair hearing before the dismissal.

3. Whether the Claimant is entitled to the remedies sought.

20. On issue No.1, the Claimant was summarily dismissed due to:-

“Your involvement in the case of theft of ATM cash at Garissa Branch and whose details you are well aware of. You were the Relationship Manager Operations and also one of the ATM custodians, when this loss of cash amounting to Kshs.224,000/= occurred. As a result of this we regret to inform you that your integrity and credibility has been severely compromised and Equity Bank has lost confidence in you as an employee.....”

21. The Respondent indicated that the Claimant admitted his involvement in the crime vide a letter dated 30th November 2011. The letter the Respondent are relying on states as follows:-

“Re: Summary Dismissal

Following your letter to me on 29th November 2011 on my dismissal and request for clearance of the cash lost that resulted in my dismissal, I would like to propose that the cash be cleared in smooth Kshs.40,000 be paid every month until the whole amount is cleared.

Yours faithfully

Signed

Stephen M. Thumbi”.

22. In this letter, the Claimant has not in any way admitted involvement in commission of this crime. Infact, the letter comes after the dismissal and so could not have been the basis for the dismissal.

23. RW1 in his testimony indicated the activities taking place in the ATM were evidenced in the ATM journals produced in Court. He stated that he interrogated the ATM custodians including the Claimant and found that the main ATM custodian during the loss was Denis Owino. He also testified that the ATM journal did not have any indication that the Claimant was the one accessing and loading.

24. The evidence of RW1 in my view seems to exonerate the Claimant in the commission of any offence.

25. Section 43 of Employment Act states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

26. The requirement that the employer must give reasons for the dismissal cannot be over **emphasized** and must prove them.

27. The Respondents dismissed the Claimant ostensibly for involvement in ATM theft which they refer to and indicate they have lost faith in him. There is however no evidence that has been produced by the Respondent to prove Claimant was involved in the said theft. Lack of trust must also be based on tangible evidence and occurrence.

28. In the Claimant’s case however, I find that the Respondent had no valid reason to summarily dismiss the Claimant.

29. On the issue of due process, the Claimant told the Court that he was not subjected to any hearing. That fact is true because there is no indication that the Claimant was ever given any hearing as envisaged under Section 41 of Employment Act.

30. Section 41 of Employment Act states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

31. Given that the Claimant was dismissed without a valid reason and without following due process, it is my finding that his dismissal was unfair and unjustified.

32. In terms of remedies, I therefore find for Claimant and award him as follows:-

1. Amount deducted from Claimant's final dues – Kshs.224,000/=

2. Accrued leave not taken in 2011 = Kshs.125,400/=

3. 1 month salary in lieu of notice = 125,400/=

4. 12 months' salary as compensation for wrongful and unfair termination = 125,400 x 12 = 1,504,800

Total = 1,979,600/=

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement save for 1 and 2 above where interest will be paid with effect from the date of filing this suit.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Momanyi holding brief Webale for Claimant – Present

Wafula for Respondents – Present