



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CASE NO. 663 OF 2017

HASSAN ANDALE.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued his erstwhile employer seeking relief after his dismissal from employment. The Claimant averred that he worked as a clerk in the operations division of the Respondent at the head office in charge of stock movement. The Claimant was dismissed on 16<sup>th</sup> February 2005 after audit of stock movement revealed computer binders worth Kshs. 5,947,200/- missing.

2. In the defence filed, the Respondent averred that the Claimant had failed in his duties by not undertaking the functions of his office to the best interests of the Respondent. It was averred that the Claimant was unjustly enriched to the detriment of the Respondent as he breached his fiduciary duty to the Respondent by failing to keep proper records of stock in abdication of his duty and that he stole stock worth Kshs. 5,947,200/-. The Respondent averred that the Claimant was called upon to give an explanation and the matter referred to the Baking Fraud Unit and investigations undertaken leading to criminal charges preferred against the Claimant. The surcharge of Kshs. 5,947,200/- was debited into the Claimant's account held at the Respondent leading to a debit balance. It averred that the Claimant's pension was credited to the said account reducing the deficit balance marginally to Kshs. 5,583,630/-. The Respondent sought the dismissal of the Claimant's suit with costs.

3. The Claimant testified as did the Respondent's witness Tabitha Munanye Mutwa, employee relations officer of the Respondent. The Claimant asserted that he was dismissed for no cause as he was not responsible for the loss. The Respondent's witness testified that the Claimant was found culpable for the loss and was charged with the offence. The Claimant was acquitted in the criminal trial and he maintained he was innocent. The Respondent's witness confirmed that the amount of the loss was credited to the Claimant's account held with the Respondent leading to a debit balance and that it was to this account that the retirement benefits of the Claimant amounting to Kshs. 377,660/- were credited reducing the deficit marginally.

4. Parties were to file submissions but as at the time of penning the judgment only the Claimant had filed submissions. The Claimant submitted that he was entitled to the remedies sought. He submitted that the pension ought not have been placed in the account which had a debit balance. He submitted that the pension dues were not amenable to assignment and that it was illegal under the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations, 2000 under Section 22 to deny him access to the funds from 30<sup>th</sup> April 2005 when the funds were received by the Bank. The Claimant submitted that he was entitled to damages for the malicious prosecution which charges were dismissed by the trial court on 28<sup>th</sup> October 2008. He relied on the case of **Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR** where the Court awarded Kshs. 300,000/- for mental anguish. The Claimant sought Kshs. 500,000/- as general damages for the infarctions by the Respondent. The Claimant also sought costs of the suit.

5. The Claimant was dismissed after an audit revealed losses at the Respondent related to computer binders. The Claimant was accused of the theft of the binders and causing the stock loss for which he faced criminal charges. It is common ground that the Claimant was acquitted of the charges. The loss the Respondent incurred was debited to the Claimant's account. The Claimant had been charged alongside a colleague Jennifer Awuor Andai. The Claimant's retirement benefits were credited to the account leading to a reduction in the deficit. The Claimant asserts that the debit and the deposit of his retirement benefits into the account were unlawful. The Claimant sought damages for the dismissal and for causing him mental anguish. The Retirement Benefits Act makes provision against the conversion of an employee's pension. Under Section 22 of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations, 2000, it is unconscionable and in fact illegal for an employer to assign the employee's retirement benefits. To the extent that the Respondent converted the funds to repay a debt allegedly owed to it, the Respondent breached the provisions of the Retirement Benefits Act and are entitled to make full restitution of the sums due as pension together with interest thereon at court rates from the date the funds were deposited with the Respondent on 30<sup>th</sup> April 2005 till payment in full. As regards the sum debited into the Claimant's account, the Respondent was required under law to seek recovery in a civil suit and could not surcharge its former employee solely for the alleged loss yet even in the criminal trial two former employees were charged. There was caprice in the debit as no legal process preceded the debit and accordingly the debit made by the Respondent is hereby reversed. The Claimant is entitled to recover compensation for the Respondent's actions which I assess at Kshs. 500,000/-. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. **Kshs. 377,660/- together with interest thereon at court rates from the date the funds were deposited with the Respondent on 30<sup>th</sup> April 2005 till payment in full**
- b. **Kshs. 500,000/- as damages**
- c. **A reversal of the debit of Kshs. 5,947,200/- in the Claimant's account No. 012500284900 held at the Respondent's bank.**

**d. Costs of the suit.**

It is so ordered.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of December 2018**

**Nzioki wa Makau**

**JUDGE**