



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 137 OF 2015**

*(Before D. K. N. Marete)*

**MICHAEL OTIENO OYOMBE.....CLAIMANT**

**VERSUS**

**ECO BANK KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter is originated by way of a Memorandum of Claim dated 15th May, 2015. It does not disclose an issue in dispute on its face.

The respondent in a Response to Memorandum of Claim filed on 9th July, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is a termination of employment was on 7th March, 2013 after a three years stint of service. His last gross salary was Kshs. 81,561.00. It is his case that he was terminated/suspended prematurely and suddenly without reason or notice and before he had attained the mandatory retirement of 60 years. He has to date not been employed.

The claimant's further case is that he was terminated on 7th March, 2013 without notice or disciplinary process and also without pay. This suddenly made him a suspect, idler, busybody and disabled in providing for his family and himself.

The claimant's other case is that on 7th March, 2013, the respondent lodged a malicious complaint at Kisii Police Station against the claimant whereas he was arrested and charged in Kisii Criminal Case No. 246 of 2013. He was acquitted of all the charges under Section 210 of the Criminal Procedure Code.

It is the claimant's case that he was terminated without a right of appeal nor any pay at all. This was at age 30. He would have worked till retirement at 60 years and would have progressed in his career with abundant salary increments and benefits.

Again, the claimant has not been paid any terminal dues nor issued with a termination letter. The claimant is a banker aged 30 years at the time of termination and claims the loss of future earnings for the years he would have been in employment till retirement at age 60 since he is not likely to be employed in the banking industry or at all.

The claimant in finality avers that his termination of employment violates section 35,41,44,45,49 and 51

of the Employment Act, 2007. This is unlawful, unwarranted and threatens the employment rights and fundamental freedoms of workers and denies the workers their right to earn a living. It is also discriminative and violates the rights of the claimant contrary to the constitution of Kenya. He is willing to resume work with the respondent.

He prays for;

*(i) Claims/prays for terminal dues as follows;*

*a. Terminal dues:- Last Gross Salary x 15/30 x 4 years*

*i.e 81,561 x 15/30 x 4 = 163,122/=*

*b. Leave days not taken for 4 years (81,561 x 4) = 326,244/=*

*c. Compensation under section 49 (c)*

*d. One month's Gross salary in lieu of notice*

*e. Prospective future earnings (81,561 x12x30) = 29,361,960/=*

**TOTAL = 30,911,619/=**

*f. Certificate of Service*

*(ii) Costs and interest.*

*(iii) Any other relief this Honourable court may deem fit to grant.*

The respondent's case is that the claimant was her employee whose termination vide a letter dated 7th March, 2013 was valid and for fair reason. The decision to terminate the claimant's employment was arrived at fairly after investigations were carried out to ascertain the culpability of the claimant in respect of funds lost and in terms of fraudulent transaction in respect of cheques owing to Dados Hotel. This is as follows;

*7. The respondent further avers that through investigations carried out by the Audit department into the conversion and theft of funds from Dados Hotel account no.00900250101125601 to Justine Onyisi Mangera account no.0093195012452301 between 5<sup>th</sup> October and 18<sup>th</sup> February, 2013, the criminal investigations department while investigating the matter found sufficient evidence to charge Michael Oyombe with fraud.*

The claimant was implicated in collusion with Justine Onyisi Mangera, holder of Account No. 0093195012452301, leading to fraud and loss of funds.

The termination was premised on the audit investigation report which decisively determined that;

*a. The claimant was involved in unethical relationship with the fraudster, Justine Onyisi Mangera.*

*b. All cheques were swiped through the CTS Machine and the claimant used the password of a member of staff.*

*c. Michael Otieno Oyombe has been engaged in unethical conduct with the fraudster Justine Onyisi as disclosed through CCTV playback.*

*d. The criminal investigations department while investigating the matter found sufficient evidence*

*to charge Michael Oyombe with fraud.*

The respondent's further case is that she has a right to undertake disciplinary action for good reason or reasons where an employee is found to have committed any acts of gross misconduct or acted in a manner putting the employer into loss. This was so in the instant case where funds in respect of Dados Hotel to the tune of Kshs. 800,986/= were fraudulently transferred to a personal account with the collusion of the claimant. This indeed occasioned loss of funds and also loss of customer faith in her activities and fund management of customer funds.

She justifies the termination as follows;

- a. An employee's negligence in discharge of functions is a valid ground for termination of employment;*
- b. The actions of the claimant point to at best a failure to discharge his duties to the level expected, and at worst point to negligence as well as deliberate and intentional wrongdoing;*
- c. The respondent lost money through fraudulent transactions involving the claimant and the respondent was justified in holding him accountable;*
- d. Arising from the investigations carried out; there was a valid reason to move the respondent to terminate the employment.*

It is the respondent's case in conclusion that the claimant was afforded an opportunity to be heard as investigations were on going and to present his version of the facts as well as any explanations as to the cheques in respect of the Dados Hotel which were not accounted for. The respondent admitted having been the one who effected the transactions as well as being the person who processed outward cheques after the initial transaction by other branch tellers. He also admitted using another employee's password whenever he was absent which amounted to breach of bank policy on use of staff password. This is as follows;

*17. Further to the above, the respondent avers that the claimant in breach of the bank policy as well as the duty owed to the customers, the claimant fraudulently in collusion with one Justine Onyisi Mangera defrauded the bank in his capacity at the bank.*

*18. Banks are in the business of handling other people's money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face. The claimant's conduct fell below this standard and the respondent had a valid reason for terminating his employment.*

*19. The respondent avers that the claimant's claim is baseless and this honourable court should find that the claimant should have been summarily dismissed under section 44 (4) (g) of the Employment Act, 2007 where an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

The issues for determination 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 parties canvass their respective cases in the written submissions dated 20th January, 2017 for the claimant and 15th December, 2016 for the respondent. It is, however, notable that from the onset, the respondent's case overwhelms that of the claimant. This is clearly established by the respondent's evidence of *inter alia*, admission of involvement in fraud by the claimant.

The respondent also establishes a case of substantive and procedural fairness by walking the claimant through appropriate disciplinary process. He cannot therefore be heard to complain but would always be expected to controvert the defence which he miserably fails to do. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not having lost on a case of unlawful termination of employment he is disentitled to the relief sought.

I am therefore inclined to dismiss the claim costs to the respondent.

Delivered, dated and signed this 26th day of April 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Oumo instructed by Oumo & Company Advocates for the Claimant
2. Miss Mitei holding brief for Karanja instructed by Mirugi Kariuki & Company Advocates for the Respondent.