



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 180 OF 2016**

**JOHN MURIUKI MUTHUI.....CLAIMANT**

**VERSUS**

**SIDIAN BANK LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 21<sup>st</sup> July, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 29.08.2016 through Kihanga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.
- b. An order directing the respondent to reinstate the claimant back to employment without loss of position, status or benefits or in alternative payment of Kshs.77,248 x 12 x 25 = 23, 174, 400.00 being loss of income for remainder of productive years up to 55 years of age.
- c. Special damages of Kshs. 25, 236, 921.00 being unpaid salary for April to September 2013 Kshs.463, 488.00; 21 days of unpaid leave Kshs.54,074.00; Gratuity Kshs. 617, 984.00 at Kshs.77, 248.00 per each of 8 years service; claim under section 49(1) (c) Kshs.926, 975.00; and loss of earnings for remainder of 25 years to retirement Kshs.23, 174, 400.00.
- d. Costs and interest on (a) to (c) above at court rates from the date of filing of the suit until payment in full.
- e. Any other relief that the honourable court may deem fit to grant in the interest of justice.

The response to the memorandum of claim was filed on 31.10.2016 through Gikeria & Vadgama Advocates. The respondent prayed that the claim be dismissed with costs.

It is not in dispute that the claimant was employed by the respondent as Data Bank Clerk on 11.07.2002. The claimant served and was promoted through the ranks of Bank Clerk, Teller, Cash Officer, and Clearing Officer in 2009 and his title changed to Operations Officer in 2010. It is the respondent's case that from 2011 to 2013 the claimant held the position Senior Teller until his termination on 06.09.2013.

The termination letter was dated 06.09.2013 and was addressed to the claimant. It stated as follows:

**“Dear John,**

**RE: TERMINATION OF EMPLOYMENT**

**Reference is made to the subject of your failure to observe Bank Policies and Procedures on 27.05.2013 resulting in the successful robbery of Kshs. 12, 306, 637.70 from the Branch.**

**After due investigations and having considered what you have stated in your written explanations and during the Disciplinary Hearing Committee held on 14<sup>th</sup> August 2013 in that respect, we are satisfied that:**

- 1. You failed to ensure that the main door was securely locked after business hours thus facilitating entry of the robbers into the Bank.**
- 2. You failed to arm the strong room and to lock the safe inside thus facilitating success of the robbery.**

**The Bank therefore finds you to have been grossly negligent in performance of your duties.**

**In view of this, the Bank is not prepared to have you continue in its services and accordingly, your services are terminated with immediate effect in accordance with section 8.2.1 (c) of the Bank’s HR Policies and Procedures Manual. Your final dues will be paid as follows:**

- 1. Days worked up to and including 9<sup>th</sup> September 2013**
- 2. Leave days earned but not taken**
- 3. One month salary in lieu of notice**
- 4. Less any monies owed to the Bank**

**Please acknowledge receipt of this letter by signing the attached copy and returning it to this office.**

**Yours sincerely,**

**Signed**

**Wilson Muthaura**

**Head – Human Resources”**

The claimant has filed the present suit in view of that termination.

The claimant was dismissed under section 8.2.1 (c) of the Bank’s HR Policies and Procedures Manual. The section prescribes the offence of negligence or carelessness resulting in damage or loss to the bank’s property, resulting in damage to the business of the bank, complaints from clients or members of the public.

The **1<sup>st</sup> issue** for determination is whether as at time of termination, the respondent has established that there existed a valid reason for termination as provided in section 43 as read with section 47 (5) of the Employment Act, 2007. The stated reasons for termination are that the claimant failed to ensure that the main door was securely locked after business hours thus facilitating entry of the robbers into the Bank; and that the claimant failed to arm the strong room and to lock the safe inside thus facilitating success of the robbery.

The claimant's evidence is that at the time of the robbery he was not the custodian responsible for locking the main door. It was his evidence that custodians were appointed on rotation and the branch manager had overall responsibility of being custodian. It was the claimant's evidence that on the material date the custodians were the branch manager one Simon and the cashier one Esther Njeri. Further, the custodians on duty were recorded in a register on change of keys and the register would show that he was not a custodian of the keys on the material day.

RW one Simon was the respondent's branch manager at Mwea branch on 27.07.2013 when the robbery took place at about 12.30pm to 01.00pm outside the normal working hours. It was his testimony that the main door to the bank was expected to have been shut and locked but it was not. He was the first person the thugs encountered and they held him at a gun point. They then took him to the back office. The door to the back office also known as the trap door was not locked because a security guard not authorised to access the back office had accessed it and left the trap door not locked. The robbers ordered everybody to lie down including tellers, operations manager and the claimant and RW was ordered to sit at the entrance to the strong room. The claimant was asked to open the strong room door which was locked but not armed on the alarm; ordinarily, safe room door should be alarmed and locked – but it was locked but not alarmed. The robbers then accessed the safe – ordinarily the safe had two custodians and had to be locked throughout – but RW testified that he did not know if it was locked or not. RW testified that on the material date it was the claimant and one Esther Njeri that were in charge of locking the bank's main door.

The court has considered the reasons for the termination together with the respondent's operational policies. Clause 3.2 provides for procedures of handling a bank robbery (during the robbery). The pertinent provisions are as follows:

- a. The alarms must be instantly activated as soon as possible. However precaution must be taken by staff who is exposed so that they do not attract the attention of the robbers by their action.
- b. All staff must remain calm as possible and only carry out instructions as given by the robbers.
- c. All staff are advised not to behave or make any movements which can irritate the robbers.
- d. Cashiers must strictly obey the robbers.
- e. Staff are encouraged to give in and not to show any signs of resistance.

In view of the stated standing policies, the court returns that once the robbers entered the bank, the staff including the claimant were obligated to obey the robbers – so that whether the trap door, or the strong room or the safe were locked, in any event the staff with the relevant keys or the custodians as they were referred to would immediately be subject to the robbers' orders to get access per the robbers' evil designs. Accordingly, the court returns that the claimant would be culpable only if it is established that he was the custodian (together with Esther Njeri) of the main bank's door at the time of the robbery and failing to lock the door as was expected, the robbery took place.

RW testified that appointment of the custodians was recorded in the key register and the key register at the material time had not been filed or referred to at the time of the disciplinary hearing. On the other hand, the vault register would show the amount stolen in the robbery but which register was not referred to or filed in court. In view of that evidence, the court finds that the respondent has failed to establish that the claimant was the custodian of the keys to the main door as at the time of the robbery. RW was the branch manager and the overall responsibility rested with him and he failed to produce the relevant register to show that on the material day, the claimant had been appointed as the custodian for the main bank's door.

Accordingly, to answer the 1<sup>st</sup> issue for determination the court returns that the termination of the claimant's employment was unfair for want of a valid reason as envisaged in section 43 as read with section 47 (5) of the Employment Act, 2007.

The 2<sup>nd</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

a. The court has already found that the claimant is entitled to a declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.

b. The claimant prayed for an order directing the respondent to reinstate the claimant back to employment without loss of position, status or benefits. The termination was on 09.09.2013. Section 12 (3) (vii) of the Employment and Labour Relations Court Act, 2011 provides that an order for reinstatement of an employee would be within three years of dismissal. The three years lapsed on or about 09.09.2016. Thus the court finds that an order of reinstatement will not issue as it is time barred under that provision.

c. The claimant prayed that in alternative to reinstatement the claimant be payment of Kshs.77, 248 x 12 x 25 = 23, 174, and 400.00 being loss of income for remainder of productive years up to 55 years of age. The court returns that the prayer is not justified as the claimant has not showed that following the termination he will not get alternative gainful engagement until he attains 55 years of age. The court considers that the claimant would be entitled and is expected to mitigate his circumstances by seeking alternative gainful engagement.

d. As the termination has been found to have been unfair, the court returns that the claimant is entitled to the unpaid salary for April to September 2013 being **Kshs.463, 488.00** as prayed for and unfairly withheld during the period of suspension. While making that finding the court upholds its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”**

e. The claimant is entitled to 21 days of unpaid leave **Kshs.54, 074.00** as prayed for and as promised in the termination letter.

f. The claimant has prayed for gratuity Kshs. 617, 984.00 at Kshs.77, 248.00 per each of 8 years service. The submissions made for the claimant and the evidence on record offered no justification for the prayer. The court returns that the same will fail in view of section 35(6) of the Employment Act, 2007 but with a qualification that the claimant is entitled to the pension or gratuity or provident dues as per any prevailing arrangements between the parties as at the time of termination.

g. The claimant has claimed under section 49(1) (c) **Kshs.926, 975.00**. The court has considered the long service of over ten years. The court has considered that the claimant did not contribute to his termination in any manner. It could be that the robbery occurred and it occasioned the respondent a serious loss but there was no evidence to render the claimant culpable in that regard. The claimant clearly desired to continue in the respondent's employment. In view of those

considerations, the court returns that the claimant is entitled to maximum compensation under the section and as prayed for.

h. As the claimant has substantially succeeded in his claims, the respondent will pay his costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a. The declaration and finding that the termination of the claimant's employment with the respondent was unlawful and unfair.
- b. The respondent to pay the claimant **Kshs.1, 444, 537.00** by 01.10.2017 failing interest at court rates be payable thereon from the date of the suit, 29.08.2016 till full payment.
- c. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 21<sup>st</sup> July, 2017.**

**BYRAM ONGAYA**

**JUDGE**