



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1576 OF 2012

BENEDICT KIVUNZA MUMO.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

JUDGEMENT

Introduction

1. Benedict Kivunza Mumo was a long serving employee of the National Bank of Kenya, having joined the Bank in January 1992 as a clerical staff and rising through the ranks to the position of Credit Officer, as at 24th April 2012, when his employment was terminated. He brought this claim seeking compensation for unfair termination.

2. The claim is contained in a Statement of Claim dated 5th September 2012 and filed in court on 6th September 2012. The Respondent filed a Memorandum of Reply on 29th October 2012. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Head of Employee Services, Linet Anyika. Both parties also filed written submissions.

The Claimant's Case

3. By a letter of appointment dated 28th January 1992, the Claimant was employed by the Respondent as a clerical staff at a starting salary of Kshs. 6,151 which was progressively increased up to Kshs. 195,965 as at the time of leaving employment.

4. On 21st September 2011, four fraud cases involving unsecured personal loans were detected at the Respondent's Ruiru Branch where the Claimant worked as Credit Officer. The Branch Manager issued the Claimant with an internal memo on the same day, requiring him to explain the circumstances under which the loans were processed and approved. The Claimant gave his response and also recorded a statement with the police.

5. The Claimant was suspended by letter dated 27th September 2011, pending further investigations and on 24th April 2012, his employment was terminated.

6. The Claimant contends that there was no valid reason for the termination and that he was not afforded a fair hearing. He now claims the following:

- a) Reinstatement without loss of benefits and continuity of service

-) Service gratuity @ 15 days per year.....Kshs. 2,261,135
- c) 12 months' salary in compensation.....2,351,580
- d) Certificate of service
- e) Costs plus interest

The Respondent's Case

7. In its reply dated 29th October 2012 and filed in court on even date, the Respondent admits having employed the Claimant as a clerk on 2nd January 1992. The Claimant was confirmed in his appointment on 1st January 1992 and as at the time he left employment on 24th April 2012, he was in charge of the Credit Administration and Analysis Department at the Respondent's Ruiru Branch.

8. According to the Respondent, the Claimant's duties, as an officer in the Credit Administration and Analysis Department included:

- a) Conducting due diligence on customers in accordance with the Banks' credit/lending policy;
- b) Confirming the authenticity of signatures, seals and stamps from the relevant institutions that employed potential borrowers;
- c) Conducting the Bank's Know Your Customer (KYC) procedures to confirm the authenticity of potential borrowers.

9. On 21st September 2011, it was discovered that the Claimant had authorized the disbursement of unsecured loans to fictitious persons including:

No.	Name	Date	Amount
1.	Lukas Macharia Kimani	April 2011	1,544,986.30
2.	Joseph Muriithi Gitau	May 2011	1,515,689.00
3.	Daniel Munene Ndambiri	August 2011	1,077,918.00
4.	Peter Wainaina Ndungu	August 2011	1,172,825.00

10. The Respondent states that as a result of the Claimant's negligence, it incurred a loss of Kshs. 5,280,000.

11. On 21st September 2011, the Respondent wrote a memo to the Claimant, requiring him to explain how the loans had been disbursed. The Claimant wrote five internal memos in response, four dated 21st September 2011 and one dated 22nd September 2011.

12. The Respondent also lodged a formal complaint with the Banking Fraud Investigation Unit which led to the Claimant's suspension on 27th September 2011. Further, the Claimant recorded statements with the police.

13. The Respondent goes on to state that it terminated the Claimant's employment on 24th April 2012, after being satisfied that the Claimant was negligent in the performance of his duties between April and August 2011, leading to the loss of Kshs. 5,280,000. The Respondent cites the following particulars of

negligence:

- a) Failing to observe KYC procedures established by the Bank;
- b) Failing to observe the lending policy of the Bank;
- c) Failing to conduct due diligence over each of the customers at the Respondent's Ruiru Branch, in accordance with the Bank's credit/lending policy;
- d) Failing to confirm the authenticity of signatures, documents, seals and stamps from the relevant institutions that employed the alleged borrowers;
- e) Failing to inquire into the identity of Daniel Munene Ndambiri and Peter Wainaina Ndungu who allegedly worked for the Department of Defence;
- f) Failing to confirm that the customers/applicants worked for the institution provided;
- g) Failing to scrutinize documents accompanying the loan applications and to confirm their authenticity;
- h) Failing to confirm the existence and identity of the alleged borrowers.

14. The Respondent avers that the Claimant did not follow the laid down procedure leading to the Bank incurring a loss of Kshs. 5,280,000. The Respondent adds that it is entitled to recover the said loss from the salary or benefits due to the Claimant.

15. It is the Respondent's case that the termination of the Claimant's employment was lawful and fair. Further, the Claimant was paid his terminal dues amounting to Kshs. 1,239,603.50, made up of leave pay for 9 days, suspended salary and 3 months' salary in lieu of notice.

Findings and Determination

16. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

17. The Claimant's employment was terminated by letter dated 24th April 2012 stating as follows:

"Dear Sir

RE: TERMINATION OF EMPLOYMENT

*This letter serves to confirm the Bank's decision to terminate your employment on account of our being reasonably satisfied of amongst other things your gross negligence in performance of your duties between **April-August 2011** as a result of which a fraud amounting to Kshs. 5,280,000=00 was perpetrated the full particulars whereof are well known to you.*

Your termination is effective from the date of this letter and you will be paid your three (3) months' salary in lieu of your contractual notice entitlement. Any items constituting Bank property such as passwords, official documents, books, keys, staff identity card, etc must be returned to your Manager.

Arrangements will be made to compute and pay you your terminal dues less any monies owed to the Bank.

Kindly acknowledge receipt of this letter by signing and returning the copy thereof to this office through your Manager.

Yours faithfully,

JARED RABURU

GENERAL MANAGER HUMAN RESOURCES”

18. In his claim before the Court, the Claimant pleads that there was no valid reason for the termination of his employment. Section 43 of the Employment Act, 2007 provides as follows:

43.(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.

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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.

19. Jurisprudence emerging from this Court is to the effect that the burden placed on an employer by Section 43 above cited is to demonstrate a valid reason that would move a reasonable employer to terminate employment. This was the holding of this Court in **Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Limited [2015] eKLR**, from which I have no reason to depart.

20. Prior to his termination, the Claimant had penned several memos in response to the accusations of negligence made against him. He had also recorded statements in the presence of the Banking Fraud Investigation Unit and the police. In his memo to the Branch Manager dated 22nd September 2011 and titled ‘*Fraud Cases*’, the Claimant states inter alia:

“I erred by not going to the institutions to confirm the documents which I deeply regret. On other hand, I believe I have been trying every best (sic) to protect our interest.”

21. In his testimony before the Court, the Claimant alluded to coercion in making some of the statements in his memos and statements. He however did not provide any particulars of coercion on which the Court could rely.

22. In determining whether an employer has discharged its obligation under Section 43 of the Employment Act, the Court is not expected to supplant the employer’s decision with its own. All the Court is required to do is to ask whether in the circumstances of the case, the employer acted reasonably and if the answer is yes, then the Court should not interfere.

23. In the case now before me, the Claimant himself admits having made an error of judgment, which the Respondent connects to the loss of the sum of Kshs.5, 280,000. Applying the reasonableness test in this instance, the Court finds that the employer had a valid reason for terminating the Claimant’s employment.

24. The next question has to do with the procedure antecedent to the termination. Section 41 of the Employment Act, establishes the following procedure for handling disciplinary cases leading to termination of employment:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee and/or their representative.

25. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

26.

Prior to his termination, the Claimant had been placed on suspension on half pay from 27th September 2011 until the date of termination, being 24th April 2012. The suspension letter states in part:

“This is to advise that following the discovery of fraudulent transactions involving Unsecure Personal Loans in which you have been implicated, it has been decided to suspend you from duty with immediate effect to facilitate thorough investigations to establish your role in the matter.

Once the on-going investigations are completed and a decision made on the matter you will be suitably advised.”

27. The Respondent takes the position that the exchange of correspondence between the parties and a meeting between the Claimant and the Branch Manager were enough to satisfy the procedural fairness requirements established under Section 41 of the Employment Act. In this regard, the Court was referred to the decision in ***Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR*** where the Court of Appeal held that the fairness of a hearing is not determined solely by its oral nature.

28.

While it is indeed true that not all disciplinary cases may call for an oral hearing, each case must be examined in light of the prevailing circumstances. In the present case, the Claimant was sent on suspension pending investigations. From the evidence on record, the Claimant was not involved in the investigations nor were the findings thereof made available to him. Further, the Respondent’s witness, Linet Anyika admitted in cross examination that the Claimant was not summoned to any disciplinary hearing.

29. Overall, the Court finds that in effecting the termination of the Claimant’s employment, the Respondent failed the test set by Section 41 of the Employment Act, thus rendering the termination unfair for want of procedural fairness.

Remedies

30. Before determining the remedies available to the Claimant, I need to dispense with the issue of the indemnity executed by the Claimant in favour of the Respondent on 28th May 2012. The Respondent’s view in this regard is that upon execution of the indemnity, the Claimant waived his right to pursue a claim against the Respondent on account of the termination of his employment. In advancing its argument, the Respondent cited the decision in ***Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR*** where the Court of Appeal rendered itself as follows:

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”

31. I do not think however, that the decision in *Thomas De La Rue (supra)* can cure an otherwise unlawful termination of employment. In light of the foregoing, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service tempered with the finding that the Respondent had a valid reason for the termination.

32. The other claims were abandoned in the course of trial.

33.

Ultimately, I enter judgment in favour of the Claimant in the sum of Kshs.1, 175,790 which will attract interest at court rates from the date of judgment until payment in full.

34. The Claimant is also entitled to a certificate of service and the costs of the case.

35. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 29TH DAY OF SEPTEMBER 2017

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JUDGE

Appearance:

Miss Oswera for the Claimant

Mrs. Omondi for the Respondent