



**REPUBLIC OF KENYA**

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

**CAUSE NO.90 OF 2014**

**JEREVASIO GITONGA.....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 24<sup>th</sup> March, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 22.07.2014 through Karweru & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that his dismissal from employment was discriminatory, unlawful, and malicious and an order for reinstatement.
- b. Damages.
- c. Damages for defamation.
- d. Costs plus interest.

The respondent filed the statement of response on 05.09.2014 through Gathara Mahinda & Company Advocates. The respondent prayed that the respondent's suit be dismissed with costs.

The claimant was employed by the respondent as a cashier and was promoted through the ranks to the position of currency centre manager at the respondent's Nyeri branch. He worked for the respondent for 20 years.

By the letter dated 22.03.2013 the claimant was invited to a disciplinary hearing scheduled for 28.03.2013 at 9.00a.m and advised about his right to be accompanied with a representative. The allegations as set out in the letter were that one Alexander Mwendo, a former member of staff had alleged fraudulent withdrawals aggregating to Kshs. 2,174,000.00 from account No. [particulars withheld] and No. [particulars withheld] held at the respondent's Nyeri branch between 26.07.2010 and 24.12.2010. The disciplinary hearing proceeded as scheduled.

The record of the proceedings is clear. The said Mwendo worked at the respondent's Nyeri branch together with the claimant. Mwendo was due to retire under the respondent's voluntary early retirement scheme but under circumstances that the said Mwendo was under difficult financial times. The claimant and other persons (staff of the claimant and others not being staff of the claimant) operated a group account with the respondent's Nyeri branch. In a friendly and informal arrangement the claimant facilitated the said Mwendo to borrow from the group Kshs. 261,000.00 being the principal amount and interest. The understanding was that Mwendo would repay the loan out of the early retirement dues. Upon retirement of Mwendo and his account being credited with the retirement dues, the claimant prepared the

relevant withdrawal voucher (which Mwendo had earlier on signed when he borrowed the money) for Kshs. 261, 000.00, dated it and presented it for payment. The transaction was authorised by the Cash Manager at Nyeri branch and the cash was credited into the group's account at the same branch.

At the disciplinary hearing, the claimant stated that the transaction was not fraudulent and he pleaded for a second chance and promised not to repeat the same mistake in future. The three pertinent issues at the disciplinary hearing were thus, the claimant had completed the blank CTV withdrawal Voucher Mwendo had signed by stating the amount to be debited, dating it and presenting it for payment; debiting the customer's account with Kshs. 261,000.00 without the customer's authority; and why the claimant had engaged in the irregular practice of lending funds to staff which amounted to conflict of interest since he was engaged in the same business as the respondent bank. It appears that the disciplinary hearing concluded on 02.04.2013.

By the letter dated 16.04.2013, the claimant's employment was terminated on account of gross misconduct and loss of confidence from employment with effect from 16.04.2013. The claimant invoked the internal disciplinary process by appealing against the termination but the termination was upheld by the letter dated 29.10.2013.

The claimant filed the present suit.

The **1<sup>st</sup> issue** is whether the termination was unfair. The claimant was given a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The main issue for determination is whether the reason for the termination was genuine as envisaged in section 43 of the Act. The letter inviting the claimant to the disciplinary hearing was that the claimant had engaged in fraudulent dealings with respect to Mwendo's account. The evidence has showed that there was no such fraud as was levelled against the claimant because Mwendo signed the blank Voucher to access the friendly loan which the claimant facilitated Mwendo to get from the group. Thus at the time of termination, the court returns that the respondent has not showed that fraud as alleged existed and the court finds that the termination was unfair under section 41 of the Act.

The **2<sup>nd</sup> issue** for determination is whether the claimant was defamed. The claimant by evidence did not show the defamatory words and the publication of such words. The claimant testified that he had applied for jobs and reference of his previous service was in issue but he did not know if the respondent gave positive referral reports. In view of that evidence the court returns that the claims and prayers with respect to defamation will fail.

The **3<sup>rd</sup> issue** is whether the claimant is entitled to reinstatement. First the court has evaluated the evidence. The court returns that the claimant in a way contributed to his predicament by getting involved in the group and running the group's account outside the respondent's policies. It is clear that the respondent's managers and other involved staff who approved the transaction in issue were retained in employment. The court finds that it was discriminatory under section 5 of the Employment Act, 2007 for the respondent to single out the claimant for termination. There is no material before court to show why it would be impossible for the claimant to continue in the respondent's service. The court has considered the claimant's dedicated and long service with the respondent of over 20 years. Taking all the circumstances of the case into account, the court finds that it will be fair for the respondent to re-engage the respondent into its service effective not later than 01.04.2016 in lieu of the prayer for reinstatement. While making that finding the court is guided with the principle of proportionality under section 3 of the Employment and Labour Relations Court Act, 2012 and it is the considered court's opinion that re-engagement will balance the parties' interests and justice. Thus, for purposes of the continuous period of service, the period between the date of termination 16.04.2013 and the date of re-engagement 01.04.2016 will be treated as leave without pay.

In alternative, the court considers that 8 months' gross salaries in lieu of re-engagement will meet the ends of justice. In making that award the court has considered the claimant's long service of over 20 years, and that the claimant in a way contributed to his predicament by getting involved in the group and running the group's account outside the respondent's policies. Thus, at Kshs. 167, 614.00 per month for 8

months pay, and not the maximum 12 months' pay, under section 49(1) (c) of the Act being **Kshs. 1,316,912.00** will meet the ends of justice in the present case.

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

- a. The declaration that the termination as conveyed to the claimant by the respondent in the letter dated 16.04.2013 was unfair.
- b. The claimant is hereby re-engaged in the respondent's service in the position he held before the termination and with full prevailing remuneration, terms, conditions and benefits effective not later than 01.04.2016 at 8.00a.m when the claimant will report to the respondent's Director of Human Resource for appropriate deployment.
- c. The period between the date of termination 16.04.2013 and the date of re-engagement 01.04.2016 will be treated as leave without pay.
- d. In alternative to orders (b) and (c) above, the respondent to pay the claimant **Kshs. 1,316,912.00** by 01.05.2016 in default interest to be payable thereon at court rates from the date of this judgment till full payment.
- e. The respondent to pay 65% of the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Thursday, 24<sup>th</sup> March, 2016.**

**BYRAM ONGAYA**

**JUDGE**