



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 93 OF 2014

GERALD NYAMU MUNENE..... CLAIMANT

VERSUS

CONSOLIDATED BANK LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 27th May, 2016)

JUDGMENT

The claimant filed the statement of claim on 28.07.2014 through Karweru & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that his termination was unprocedural, unlawful and illegal and it is set aside and he be reinstated.
- b. A declaration that the variation of interest rates resulting from the termination of services by the respondent is unconscionable, unlawful and inequitable and it be set aside.
- c. Damages for unlawful termination.
- d. Costs plus interest.

The respondent's statement of defence was filed on 24.10.2014 through Muteithia Kibira & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant was employed by the respondent as a clerk effective 01.11.1999. At the time of his termination he was the branch operations manager at the respondent's Maua branch. The letter of summary dismissal was dated 22.05.2014. It stated that following investigations into the loss of Kshs.4, 980,000.00 which had been fraudulently withdrawn at Embu branch from the account of Charles Kimathi Mwambia, a customer domiciled at Maua branch and the disciplinary hearing held on 28.04.2014, it had been established as follows:

- a. On 7.03.2014 the claimant was negligent and unresponsive to customer requests as he delayed in responding to the request from Embu branch for authority to make payment of Kshs.2.9 Million to a customer whose account was domiciled at Maua branch. That enabled the fraud to take place.
- b. The claimant acted ignorantly and did not demonstrate capacity to manage the operational risk of the bank which was a key role of a branch operations manager.
- c. The claimant did not take his duties seriously as he never saw the email sent on 03.03.2014 requesting for authority to pay 200,000.00 to the customer until after 2 days.
- d. The claimant did not seem to know his customers well as he could not identify Charles Kimathi Mwambia on 28.04.2014 when he was shown his image which was captured in the bank's system yet on 5.03.2014 the claimant authorised the Embu branch to make a payment of Kshs.1.88 Million to the said customer as the claimant claimed he had confirmed that he was the one at the

Embu branch on 05.03.2014.

The letter concluded that the bank had suffered great financial loss and consequently the claimant was summarily dismissed from the respondent's services with effect from 23.05.2014 on grounds of gross misconduct under section 44 of the Employment Act, 2007.

Regarding the withdrawal of Kshs.2.9 Million in the fraud, the claimant testified that the Embu branch conveyed scanned copies of the voucher for withdrawal to the Maua branch for verification while the claimant was out of office. The claimant's colleague one Amy Wanja also being a branch operations manager like the claimant (but the claimant being the head of operations at the branch) telephoned the claimant about the withdrawal and the claimant advised Wanja to wait. The said Kimathi was the claimant's customer and the claimant tried to call Kimathi on the cell phone but he was unable to trace him on the phone. Later the claimant saw a manager working under the claimant called Mutwiri who called Kimathi and Kimathi confirmed that he was at his place of business and not in Embu. By the time the Maua branch called the Embu branch, the Embu branch had already paid out the Kshs.2.9 Million in the fraud case. The claimant's case was that as the operations manager at Maua branch, there was nothing he would have done to prevent the Embu branch from paying out the Kshs.2.9 Million and if the Embu officials had withheld payment to await the confirmation then the payment would not have been made.

Regarding the fraud, the disciplinary hearing report filed by the respondent on 24.10 2014 together with the defence found that Amy Wanja was negligent as she flouted the bank's operational procedures and made a payment of Kshs. 2.9 Million to customers from another branch without any written authorization from the mother branch as well as the head of operations, the claimant. When she made the payment she disregarded procedures on paying customers away from branches and took comfort in the fact that this was not the first time she was paying the customer. As for the claimant the report concluded that his delay in responding was questionable and depicted an element of total negligence and unresponsiveness to customer requests. Thus he had to be dismissed because in the position he held, he posed a high risk to the bank's business.

The **1st issue** for determination is whether the claimant's dismissal was unfair. First it is clear that the claimant was afforded a notice and a hearing as provided for in section 41 of the Employment Act, 2007. The issue is whether at the time of termination the respondent had a valid reason to terminate as envisaged in section 43 of the Act. The evidence is clear that the claimant was not directly involved in authorisation for the payment of the Kshs. 2.9 Million leading to his termination. The termination was unfair as far as the respondent did not find the claimant culpable as at the time of the dismissal in view of the findings of the disciplinary hearing report. The termination was unfair under section 43 of the Act. Nevertheless, the court finds that the claimant has not made an explanation for his absence at the office at the material time and the court finds that the respondent's finding that the claimant's delay in responding was questionable and depicted an element of total negligence and unresponsiveness to customer requests was a valid aggravating factor leading to the claimant's termination. In view of that aggravating factor, taking into account the claimant's long service from 1999 and that the claimant wished to continue in employment, the court finds that the claimant substantially contributed to his termination at 25% and is awarded 9 months' salaries instead of 12 months' salaries (under section 49(1) (c) of the Employment Act, 2007) at Kshs. 154, 912.00 per month making **Kshs.1, 394, 208.00**.

The **2nd issue** for determination is whether the claimant is entitled to continue paying the loan at staff interest rates. The respondent has showed that the policy conveyed to all staff was that except for people proceeding on retirement on age or medical grounds and those affected by retrenchment, all people leaving the bank would have their loan facilities revert to commercial interest rates after six months of departure and, all staff leaving the bank on disciplinary grounds will have their loans revert to commercial interest rates immediately on departure. The court finds that the policy was binding upon the claimant. However, the court has also found that the termination was unfair. Under section 3 of the Employment and Labour Relations Court Act, 2011, this court is required to exercise its jurisdiction by giving effect to the principal objective of the Act that the Act enables the court to facilitate the just, expeditious, and proportionate resolution of the disputes brought before the court. In the circumstances of this case, it is the finding of the court that it will be just and proportionate for the claimant to pay the loan at the staff

interest rates for the period from the date of termination 23.05.2014 to the date of this judgment 27.05.2016 and thereafter to continue paying any outstanding loan amount at commercial interest rates. For that purpose the court deems the claimant partially reinstated without pay for the period 23.05.2014 to 27.05.2016.

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

1. The declaration that the respondent's termination of the claimant's employment was unfair.
2. The respondent to pay the claimant **Kshs.1, 394, 208.00** by **01.08.2016** failing interest to be payable thereon at court rates from the date of this judgment till full payment.
3. The claimant to pay the loan at the staff interest rates for the period from the date of termination **23.05.2014** to the date of this judgment **27.05.2016** and thereafter to continue paying any outstanding loan amount at commercial interest rates.
4. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 27th May, 2016**.

BYRAM ONGAYA

JUDGE