



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.743 OF 2013

JOHN KINYANJUI GATERU.....CLAIMANT

VERSUS

THE FAMILY BANK LTD.....RESPONDENT

JUDGEMENT

The issue is dispute – unlawful/wrongful summary dismissal

Claim

1. The Claimant was employed by the Respondent on 1st September 2000 initially as a Management Trainee. He worked diligently and was promoted through the ranks to Manager, Thika Branch. His salaries were reviewed with the last pay being Kshs.200, 000.00.

2. On 14th October 2011 the Claimant was issued with a suspension letter with allegations that from the audit of his Thika branch between September and October 2011 there were noted irregularities. The details were not set out nor was the audit report or investigations made brought to his attention. The Claimant was directed to report back to work on 31st October 2011. The reporting back was changed to 1st November 2011 at the head office. On the due date the Claimant met the HRM, the legal officer, the Chief Retail Manager and Credit managers. The HRM read the allegations made against the Claimant that;

- 1) several credit files were reported missing;
- 2) incidences of loans disbursed prior to issuing a letter of offer;
- 3) loans issued without supporting documents;
- 4) loans issued with either wrong signatures or no signatures at all;
- 5) loans issued contrary to credit committee recommendations or without convening a credit committee; and
- 6) Several files with missing securities.

3. The Claimant asked for time to prepare for his defence but he was told to collect his summary dismissal letter the following day on 2nd November 2011. He was never given a hearing or notice of the allegations against him to be able to give his defence. The alleged audit report and the noted irregularities

were never brought to the attention of the Claimant to enable him respond effectively. The allegations made amount to criminal acts but the Respondent did not conduct investigations or invite the police to do the same. The allegations that the Respondent would have potentially lost cash is not supported by any evidence.

4. The claim is that the summary dismissal was malicious and unlawful. The Claimant is seeking;

- a) Notice pay for 3 months at kshs.600,000.00;
- b) 2 days' pay in November 2011 at kshs.13,150.70;
- c) Accrued leave 21 days kshs.161,538.30;
- d) Overtime all at kshs.1,398,021.00;
- e) House allowance Kshs.1,080,000.00;
- f) Severance pay for 11 years kshs.1,269,229.50;
- g) Compensation;
- h) Service pay Kshs.3,300,000.00; and
- i) Certificate of service.

5. Together with the Memorandum of Claim, the Claimant filed his Notice of Motion and application with regard to his motor vehicle registration No.KBH 413N impounded by the Respondent through Bensure Auctioneers and seeking restraining orders and a return of the same to him on the grounds that the car was secured through a loan facility the Claimant enjoyed through his employment with the Respondent and due to the unlawful summary dismissal has been unable to repay the loan due and the act of impounding the same was to defeat his rights over the motor vehicle.

6. The Claimant also testified in support of his claim that upon his employment by the Respondent vide letter dated 29th August 2000, he worked diligently until his summary dismissal on 2nd November 2011. He started as management Trainee at Thika branch. He moved to Limuru branch as Credit Supervisor; to Mombasa as acting Assistant manager; to Kisumu and then Kangari as Branch Manager; then to Nyahururu and his last station was Thika as Branch Manager. His salaries were reviewed with the last salary being kshs.200, 000.00 but house allowance was never paid.

7. That following an alleged audit at the Thika branch, the Claimant was suspended on 14th October 2011 and directed to report at the head office where he was called to a meeting with Respondent senior officers, the HRM, company secretary and legal officer, director credit and head of banking. Several allegations were read to him and when he asked for time to go back to his branch and retrieve files so as to respond, he was directed to report back on 2nd November 2011 to collect his letter of summary dismissal.

8. The Claimant was asked to resign or do a voluntary retirement and he did a letter for retirement. He was however not allowed to retire but was given a letter of summary dismissal. His dues were not paid.

9. At the time of summary dismissal, the Claimant had a car loan with a balance of Kshs.433, 549.17. He had made repayments through check off. The Respondent took possession of the vehicle on 21st August 2013. The loan was based on the salary and the loan is admitted save that due to non-payment of terminal dues, the Respondent should not impound it. The auctioneers who impounded the vehicle reported that they found it packed in Thika town outside Leen's Supermarket after failing to trace the claimant. They called the police who helped to tow it to their yard. That from 9th August 2013 the Claimant had possession of the vehicle in Thika when it was towed by the auctioneers. There is evidence of the

Claimant paying the ticker for parking to the County officers.

10. The Claimant also testified that he was never given housing or paid an allowance by the Respondent and the same should be paid. He worked overtime and was never compensated. That he lost business due to his vehicle being towed and impounded by the Respondent and should be compensated for the same. That the vehicle was towed despite existence of court orders. The vehicle storage charges were incurred due to the acts of the Respondent and the Claimant should not be made to pay.

11. In cross-examination the Claimant testified that when he was posted to Mombasa branch he had differences with the manager and he was issued with a caution letter but transferred and later promoted. The transfer was a disciplinary action against the claimant. That while in Nyahururu branch a customer complained that the Claimant was rude to him. That while in Thika branch he was cautioned due to staff under his supervision misusing passwords. That during the Thika branch audit, he was never briefed by the audit team and the records required were all in the branch and the alleged missing files he was never given a chance to retrieve them. That he was not aware of wrong issuance of loans or failure by the credit committee members in following procedures in giving loans without security. That the Claimant asked for time to address the noted irregularities in the audit report but instead he was summarily dismissed.

12. The Claimant admitted to owing the Respondent money through loan secured to purchase a vehicle. He was servicing the loan until his termination and last payment was on 12th October 2012 which was before the case was filed in August 2013. The loan repayment was on an 8% staff rate.

Defence and Counter-Claim

13. In defence, the Respondent admit they had employed the Claimant but he was never diligent in his duties. He worked in various capacities and in different stations. There was a consolidated salary paid and reviewed periodically.

14. The defence is also that the claimant's tenure was characterised by a very poor disciplinary record which did not correspond with the responsibility and trust bestowed on him by the respondent. Between December and October 2006 while acting Assistant Branch Manager in Mombasa Branch the Claimant was accused of dereliction of duty and wilful disregard to authority which occasioned his transfer and cautioned; in September 2008 while at Kangari Branch he disregarded his duties and in breach of operational guidelines failed to submit to the head office daily figures of the branch and was cautioned; in December 2009 while at Nyahururu Branch he was accused by a customer of treating him rudely and unprofessionally; and in August 2010 while serving at Thika branch he was issued with first warning for negligent performance of his duties when he exposed customers to losses due to flouting of password management procedures by staff under him in the branch.

15. That the Claimant had a clear job description but failed to adhere to the terms. He failed to discharge his duties as defined and was careless and failed to comply with laid down policies and procedures putting the Respondent at risk. During a routine internal audit from 29th August 2011 to 21st September 2011 it revealed operational lapses, irregularities and failure to follow policy or set regulations. The issues arising from the audit were discussed with the claimant. By a letter dated 1st November 2011 the Claimant offered to resign from his position through voluntary early retirement. There was no request to defer the disciplinary hearing and at the time of hearing, the Claimant had been given sufficient time to address the irregularities noted and he admitted to neglect of duty vide letter dated 2nd November 2011. The Claimant also offered to remedy the irregularities noted at Thika branch.

16. On the claims made, the defence is that the Claimant was paid a consolidated salary that included his house allowance; his hours of work were agreed upon and there was no overtime work and any claim thereof is not merited; the summary dismissal was justified under section 44(4)(c) of the Employment Act. At the time of dismissal, the Claimant had accrued 14 days leave; salary for 2 days worked in November and such were computed and went into offsetting the loans due from him; claim for severance pay does not arise as this was dismissal and not redundancy; and the dismissal was for a lawful cause and no compensation is due.

17. In counter-claim, the respondent's case is that it granted the Claimant financial accommodation in car loan and he purchased motor vehicle registration No.KBH 413N. The loan was to be repaid together with interest, commissions, bank charges and recovery costs in terms of the registered instrument of chattels mortgage created in the respondents' favour by the Claimant over the motor vehicle. As such the motor vehicle was jointly registered in the name of the Respondent and Claimant and who signed a transfer form and the Respondent became entitled to take possession of the security motor vehicle in the event the Claimant defaulted in the payment of any amounts payable under the advanced facility.

18. The Claimant defaulted in his repayments of the loan facility and has an outstanding balance at Kshs.500, 191.00 as at 30th November 2013 and which continues to attract interest at 18% per annum until paid in full. In view of the default in repayment the Respondent instructed auctioneers to take possession of the security but the same has since been released to the Claimant vide court order of 5th December 2013 after the auctioneer charges all at Kshs.24,000.00.

19. That the Respondent was entitled to take possession of the security motor vehicle upon the Claimant defaulting. He has an unpaid loan of Kshs.500, 191.00 as at 1st December 2013 and recovery costs. The Respondent claim and seek a declaration that they were entitled to repossess from the Claimant its security motor vehicle no. KBH413N in view of the default; an injunction restraining the Claimant from selling the vehicle to the detriment of the Respondent interest thereon; repayment of outstanding loans due in full; payment of Kshs.40,535,53 and 16,000.00 being auctioneers and storage charges incurred by the Respondent as a result of recovery costs; and costs of the suit.

20. In evidence, the Respondent in support of its case called three witnesses.

21. Robert Githinji testified that he is the Audit Manager with the Respondent from March 2013. Before he was Senior Internal Auditor and his duties include ensuring the Respondent is in compliance with Central Bank regulations and is not exposed to any risks such as credit risks, operational, liquidity, reputation, and regulatory. Due to the nature of Respondent bank business and dealing with public funds, all monies borrowed must be secured and all set procedures followed to avoid exposing the Respondent to sanctions.

22. Under his mandate, Mr Githinji planned the internal audit for the claimant's branch at Thika and had to start with an entry meeting where the previous audit is table the reviews are addressed noting the challenges in addressing the previous audit issues. At the end of the audit, an exit meeting is conducted to debrief with the manager and address emerging concerns.

23. In this case, based on the present audit plan for the overall business, Thika branch was visited. Thika is a busy branch and a cash cow for the Respondent due to its strategic location and business volume and it is in the interests of the Respondent that it functions well. Before October 2011 there was the 2010 audit report of the Thika branch. The audit findings were that the branch was not performing well and was rated as of poor performance. It was subject to further observations as internal controls were found to be weak. It took 18 days at the branch – 29th august 2011 to 21st September 2011.

24. There was an entry meeting between the audit team and branch manager with progress on the 2010 audit issues. The team needed flow of information within the branch to facilitate the audit. There were serious issues noted but the Claimant as the manager did not share all information required. The audit noted the biggest exposure was in credits where the Respondent was losing cash or at risk of losing the same. The main audit findings were that;

- 1) There were missing files – the Claimant could not provide 15 loan files for the audit and the Claimant could not give a proper explanation and this potentially exposed the Respondent to a loss of over 5.9 million as most loans were not being repaid and all such loans were granted between October 2010 to June 2011 which were less than one-year old. This implied that the branch was exposed to losing money and that management was careless in handling the same or staff were colluding with customers to destroy files and erase evidence and or there was fraud being committed. It was recommended that a stock taking be done to determine if all files were in order

and disciplinary measures be taken against those responsible

2) Missing securities – there were 4 loans granted under asset finance but the security records were not available and thus chattels mortgage had not been created. The implication was that without any security the Respondent was exposed to losses and the branch management were casual about it. The recommendation was that a 100% check on all files be done and the missing securities be reported to appropriate government agencies.

3) Loans granted at longer repayment periods – the branch allowed customers to enjoy longer repayment period than what is required under the Respondent policy or without approval of head office. The implication was that the exposure of Respondent to huge liquidity and customers were exposed to higher interests. It was recommended that all loans should be reviewed and customers advised on new repayment plans.

4) Unpaid loans – 33 loan accounts were granted with huge arrears unpaid. The total loans were 4.8 million and due to non-repayment increased to 6.8 million. The management was increasing the loans given but lacked care on quality and required monitoring.

5) Loans performance were not followed up or monitored – most loan accounts were in arrears without proper records and or monitoring. There was need to call and have updates from the customers with non-performing loan facilities.

6) Various irregularities – a customer Top care Feeds was advanced kshs.300,000.00 without security; Sophia Wanjiru Mwangi was advanced kshs.200,000.00 yet the approved amount had been kshs.100,000.00 and no security was deposited; Dominic Onyango Opiyo was advanced moneys without the necessary clearances and approvals; and Chania Oils Company was paid Kshs.1 million into a personal account of a director. This implied reckless lending contract to Central bank regulations the management had failed to adhere to set policy regulations.

25. The witness also testified that the impression created was that the Claimant was never at his branch or had ceded power and authority to his junior staff and were left without supervision. There was a cash difference of Kshs.857, 776.00 from the old banking system to the new. The ATM had a difference of kshs.34, 370.00 and another had a difference of Kshs.753, 070.00. The suspense account held by the cashier had a balance of kshs.3.4 million than the previous system. There was high individual transaction at half a million. The branch therefore had a cash management with a casual handling of the same. The operational manager had not done any incident report of the lapses noted and overall the Claimant as the responsible person exposed to the Respondent to serious regulatory sanctions and reputation for bad practices.

26. The next witness was Faith Njuguna who testified that she is in the human resource department of the respondent. That she worked a lot with branch manager and therefore knew the Claimant well. From his file records he had a chequered disciplinary history with various disciplinary issues.

27. In October 2011, the Claimant branch in Thika was audited. The report was shared with management and various heads for follow up. Due to the emerging disciplinary issues and the exposure the Respondent was placed at, action was taken. There was negligence on the part of the claimant. On 14th October 2011 the Claimant was suspended to help conduct investigations. He was invited to disciplinary hearing on 1st November 2011.

28. The witness testified that she was not at the disciplinary meeting as her predecessor Ms Mburu was in attendance. From the disciplinary hearing the minutes show the proceedings taken and the allegations against the claimant. The findings were that the Claimant was negligent and exposed the respondent. This was a case for summary dismissal. His dues were computed but he had liabilities, a loan facility, a car loan and Sacco loan all amounting to kshs.101, 882.80 which were offset but there is a balance the Claimant has not paid.

29. The Claimant lodged an appeal but there is no decision on the same. The offer by the Claimant to a voluntary early retirement was rejected. Upon the decision to dismiss the claimant, the offer to retire was overtaken by events.

30. The next witness was Bernard Muriuki Gaturuku trading as Bensure Auctioneers and testified that on 8th august 2013 he got instructions from the Respondent to repossess motor vehicle KBH 314N. He gave 7 days' notice to the Claimant and upon lapse of notice he traced the vehicle outside a supermarket in Thika Central business area – Leens supermarket. There was a driver with the vehicle to took the notice but refused to sign the proclamation. The witness did a certificate in accordance with the auctioneers' rules. On 19th august 2013 he seized the vehicle after more than 7 days. He filed a report with the claimant, the Respondent and issued his bill of Kshs.24, 000.00.

31. Mr Gaturuku also testified that on 21st august 2013 he was served with a court order, 3 days after seizing the subject motor vehicle. The Claimant went to his office on 23rd august 2013 when repossession had already taken effect. The Respondent advised on the court order but by then the Claimant had reported him to the Auctioneers board.

The Claimant was not present when the motor vehicle was proclaimed. He had left a driver in charge. The driver refused to sign the proclamation and had to call the police to assist in towing the same.

Submissions

32. The Claimant submit that the summery dismissal in his case was unlawful as the Respondent failed to comply with the provisions of section 41 of the Employment Act. He was never issued with notice of any allegations against him and was not given a hearing. He was also not accorded his right to have a fellow employee present at the hearing. This is contrary to section 43 and 45 of the Employment Act and compensation is due. The Claimant was also entitled to notice pay of 3 months as under his contract of employment.

33. The Claimant also submit that under section 31 of the Employment Act he was entitled to a house allowance or housing which was not done by the Respondent and this is due. That the basic pay note din the pay slip is not inclusive of house allowance.

34. At the time of dismissal the Claimant had worked for 2 days in November 2011, he had earned 21 days of leave and such should be paid. All over time hours worked should be compensated. That service charge is payable for the 11 ½ years of service to the Respondent together with issuance of a Certificate of Service.

35. That the Claimant has made every effort to pay in instalments the loans due despite the fact he is jobless – on 28th March he paid Kshs.64, 076.33;

- 12th june 2012 he paid Kshs.1,045.00;
- 12th October 2012 he paid Kshs.50,000.00;
- 13th May 2013 he paid Kshs.1,045.00; and
- 16th May 2013 he paid Kshs.48, 820.00.

Totals paid is Kshs.116, 654.53.

36. That the Claimant was surprised when the Respondent added penal interest on the loan repayment on 31st July 2014 at kshs.162, 201.40 and 35,560.56 as interest accrued which amounts should not be included on the principal amounts. That Motor Vehicle KBH 413N was involved in an accident and APA insurance has written it off and informed the Claimant that they will pay Kshs.351, 000.00 for the same. This amount shall be paid directly to the Respondent to reduce the principal amount on the loan.

37. That the court should make a finding that the Claimant was unfairly dismissed. That he should be awarded Kshs.10, 581,939.80. That costs are also due.

38. The Respondent submit that the dismissal of the Claimant was fair and lawful. There is evidence that throughout the claimant's employment with the Respondent he had several cases of misconduct and following internal audit various irregularities and breaches of the Respondent policy and regulations were realised and the Claimant as the overall branch manager, Thika was responsible. Efforts to have the Claimant address these irregularities and breaches by the audit team were not taken seriously. The breaches were serious and had serious implications to the Respondent business in terms of customer and public funds and the legal and Central Bank of Kenya regulations, hence the decision to dismiss the claimant. The Claimant offered to return to the bank to retrieve all the missing files and correct anomalies noted, that this was his admission that indeed the findings of the audit team were true.

39. The Respondent also submit that the hearing process contemplated under section 41 of the Employment Act is not similar to a trial before court. This is an administrative session to give an employee a chance to address disciplinary matters.

40. That Respondent also submit that the Claimant is not entitled to the remedies set out as his dismissal was justified and lawful. The Claimant has not made a case for unfair termination to warrant the grant of compensation. Notice pay for 3 months is not due as the Claimant was sent on suspension before dismissal and therefore had sufficient time and notice that his action warranted dismissal. In the letter of dismissal, the Respondent admit that the 2 days worked in November is due but due to the loans unpaid, such dues were consumed therein. The untaken leave days were 14 and the same were converted to offset the loan due.

41. That there is no basis for the overtime claim as the Respondent is a member of the Kenya Bankers Association with a CBA with BIFU and no claim for overtime work has been filed under the applicable CBA between the parties. For the 11 years the Claimant was employed, he never made such a claim. No overtime work was allowed by the respondent. House allowance is not due as the Claimant got a consolidated pay package. He cannot claim housing outside of such salary. Severance pay is only due in a section 40 of the Employment Act situation of a redundancy which was not the case here. No service charge is due as the Respondent remitted all statutory dues.

42. On the counter-claim, the Claimant admitted to owing the Respondent a loan and motor vehicle KBH 413N was used to secure the same. By the time the Claimant came to court the vehicle had been repossessed and the Respondent had incurred costs. The loan amounts are therefore due with the attendant costs for the attachment and storage with interests due. The Respondent has relied on the case of **Bamburi Cemenet Ltd versus Farid Aboud Mohammed [2016] eKLR**. The Court of Appeal held that where there are valid reasons for termination relating to misconduct, the remedies under section 49 of the Employment Act are not available. That where an employee is informed of the reasons for termination, the termination is not unfair and no compensation is due as held in **CFC Stanbic Ltd versus Danson Mwashako Mwakuwona [2015] eKLR**.

43. In this case the Claimant has admitted that the audit report was not good and he was willing to go back to the branch and retrieve missing file and records. However, the damage caused to the Respondent business was apparent and thus the claim herein should be dismissed with costs and the counter-claim confirmed.

Determination

Whether the Claimant was unfairly dismissed;

Whether there are any remedies due; and

Whether the counter-claim should be allowed.

44. The Claimant offered to voluntarily retire early on 2nd November 2011 but this was not accepted and instead he was summarily dismissed. With this decision to summarily dismiss the claimant, it is trite, the Respondent was placed under a duty to comply with the provisions of section 41(2) of the Employment Act. Further, even where the Claimant had grossly misconducted himself as alleged, the law required that the allegations against him be brought to his attention to enable him respond and where necessary, be given an opportunity to state his defence.

45. The evidence given by the Respondent is that on 14th October 2011, the claimant was suspended from duty to allow for investigations. The law requires, even in the serious case that warrant summary dismissal, the employee be given a hearing however brief the notice is. This is to ensure that there is a fair chance to give an explanation to the allegations made. It is therefore imperative that where the Respondent conducted an audit over a period, irregularities were noted, and such should have been brought to the attention of the Claimant in good time to enable him respond effectively. In any case, the suspension that the Claimant was directed to take was supposed to lead to a hearing within the context of section 41 of the Employment Act. In **Frederick Oweggi versus CFC Life Assurance Cause No.1001 of 2012** the court held a suspension should be followed with a notice to show cause for the employee to be able to respond thereto otherwise, the purpose of the suspension would be lost. In **Amrick Gonzales versus Mara Ison Technologies Kenya Ltd, Cause No.2538 of 2012** the court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.

46. I therefore find, even where there were sufficient grounds to dismiss the claimant, the Claimant by his own admission having confirmed the issues set out in the internal audit especially the missing records that went into the integrity of his work, the Respondent failed to adhere to the mandatory provisions of the law. The meeting called by the Human Resource Manager on 1st November 2011 which was followed by the summary dismissal is not what is contemplated under section 41(2) of the Employment Act. There was no notice of the very serious allegations the Claimant faced and was required to respond impromptu. He was not accorded the right to have a fellow employee present and the Respondent has failed to set out the special circumstances that existed so as not to follow the provisions of section 41 of the Employment Act. The Claimant was entitled to procedural fairness before his dismissal. Had such safeguards been met, there is a high chance the decision taken to summarily dismiss him would have been different.

47. Save for the procedural lapses by the Respondent It is clear from the records, the evidence of the respondent, the Claimant was not keen on his duties. The audit report notes several irregularities and policy breaches. When the Claimant was called at the head office on 1st November 2011, he offered to go back to Thika branch to address the irregularities. Such implicates him as the manager of such branch as he allowed serious work ethics lapses, did not supervise his staff properly and in the process exposed the Respondent to serious damage and loss going contrary to his employment and set regulations by the Central Bank of Kenya. Had the Claimant been diligent in his duties, when called upon to account, he should have readily have had all files in his branch for the access of the internal audit team. Where the audit team remained at his branch for the period of over 14 days, this was his best chance to meet them and indeed address all possible anomalies on the shop floor. the Claimant chose to ignore the audit team and go out to meet clients at the expense of his core duties – being accountable for all records, staff and information within the Thika branch. Such conduct cannot be ignored.

48. An employee who fails to perform his duties properly, is not responsible and accountable to the duties allocated is in direct breach of his employment as set out under section 44(3) of the Employment Act. The sanction is dire, summary dismissal.

49. Section 45(5) of the Employment Act requires the court to put into account all the previous work records of an employee in arriving at the circumstances leading to a dismissal thus;

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider—*

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(f) the existence of any previous warning letters issued to the employee

[emphasis added].

50. The warning letters, cases of discipline and work ethic of the Claimant are not in dispute. In this case, the Claimant had a litany of warnings letters, caution letters and this led to the summary dismissal. Overall, I find the Claimant was not diligent in his duties at all. Such are matters the court will take into account in assessing the remedies sought.

Remedies

51. Notice before termination is set out under the claimant's terms and conditions of work vide his letter of salary review and dated 14th May 2010. The provision therein noted the claimant's grade of work and placed it at 3 months' notice or pay in lieu thereof. On the basis that the procedural requirements leading to dismissal were not adhered to, such notice pay is due. The Claimant was earning kshs.200, 000.00 as his past gross pay and on this basis is awarded Kshs.600, 000.00 as notice pay.

52. 2 days worked in November 2011 are admitted and thus due. This is confirmed at kshs.13, 150.70.

53. The Claimant is seeking 21 days leave and the Respondent submit that he was entitled to 14 days. Work records are kept by the employer and noting the time of dismissal, the letter of dismissal was clear that as at 2nd November 2011, the Claimant had earned 14 days accrued leave day and leave allowance prorated for 10 months. I therefore confirm and award leave due at Kshs.92, 054.80 and the due allowance at kshs.33, 335.00.

54. Section 19 of the Employment Act allow an employer to deduct all lawful dues and commitments the employee has entered into. Where the owing dues are by a check off through the salary, the employer must put this into account before paying terminal dues. Equally section 49(2) of the Employment Act requires an employer to deduct all statutory dues and deduction such as the taxes due before paying an employee. Such deduction apply to terminal dues as well.

55. On the claim for a housing allowance is on the basis that the Claimant received a basis pay without provision for a house allowance. Claimant admitted he was not unionised. In the letter of employment, a clear terms set out therein is that the Claimant was paid a consolidated pay. This was not changed in the subsequent reviews and promotions. I therefore find no evidence that house allowance was due through any agreement or letter issued in this regard. The pay slips attached to the pleading indicate the gross pay

which the Claimant earned over the years. The claim is declined.

56. Overtime claimed on the basis that the Claimant reported to work early and worked extra hours. Hours of work are set out in the letter of employment and the details in the overtime hours are not given and whether such time was sanctioned by the employer and where not sanctioned, the Claimant does not set out that he brought this to the attention of the respondent. I find no merit in the claims for overtime pay. Such is declined.

57. On the vehicle and loans due, the Claimant has admitted to owing the Respondent monies in terms of the loan secured to purchase a vehicle. Save for the wrongful summary dismissal, he should have remained at work to settle the same. The work benefit and loan facility repayable at 8% was specific to the Respondent employees and had that employment subsisted, the benefit should have remained intact. As such, the Claimant should repay the full loan dues at 8% in accordance with terms secured while in employment.

58. Severance pay, and as submitted by the Respondent is only due in a redundancy situation. This case related to summary dismissal and I find no evidence of a redundancy to justify the claim for severance pay.

59. Service charge of service pay is due under the provisions of section 35 of the Employment Act. Such dues are not payable to an employee who is registered with the NSSF and NHIF. The Claimant submitted his pay statements which include statutory deductions in this regard and no service pay is due.

60. Compensation for unfair termination is pursuant to such a finding and the remedies set out under section 49 of the Employment Act. The remedies are discretionary as the court must put into account the provisions of section 45(5) of the Employment Act. As set out above at paragraphs 47 to 50 and putting into account the award of notice pay, no compensation shall be awarded.

Counter-claim

61. On the respondent's counter-claim, the Claimant admit that he had a loan and the vehicle KBH 314N was secured through a chattel mortgage. The Claimant had knowledge that his work had terminated. That did not affect his repayment plan as he had enjoyed a staff facility and should have made all efforts necessary to proceed with the repayments. The evidence that his last loan payment was 12th October 2012 and has made subsequent payments up to and until 16th May 2013, a few months before filing the claim herein does not speak of a person keen to pay a loan facility they are enjoying. The claim herein was filed in August 2013 and the trigger for the same was the threat to the vehicle being impounded for non-payment of the loan. Where the Claimant knew that he had such a facility, he should have been prudent and negotiated with the Respondent on how to repay the same or have the vehicle dealt in a manner that the burden of the loan was eased from his shoulders. The reality of the summary dismissal should have been immediately addressed. The Claimant chose to continue in the use of the vehicle well aware that the same had a liability not fully settled.

62. The court cannot shield the Claimant from meeting his financial obligations. The loan was secured through employment and that has since terminated. The Claimant is still enjoying the facility advanced by the Respondent without making well his repayments commitments. The Claimant has remained in possession of the subject vehicle and cannot do so at the expense of the Respondent sorely because he has filed this suit.

63. In evidence, the Claimant testified that he is currently a business person in Thika. However, he has since not made effort to pay the loans due to the Respondent at the staff rate or at all. To therefore seat and wait to file suit when danger strikes, this does not work to the advantage of the Claimant at all. Whatever happened to the vehicle and forming a large portion of proceedings herein was through the contribution of the claimant.

64. The only linkage here is that save for the procedural unfairness in the claimant's dismissal, he should

have remained in employment and enjoyed the payment of his loan facility at a staff rate. The rationale is set out in **Christopher Onyango & Others versus Heritage Insurance Co. Ltd, Cause No.781 of 2015** thus;

... the employment relationship generates rights and obligations. Such are to be found in the employment contract, human resource policy, and the law. The common denominator is – employment. Within such employment, the Claimant enjoyed the benefits of various loans. Such cannot be separated to create a different set of rights outside the employment relationship.

65. In the case of **BIFU versus Consolidated Bank of Kenya Limited, Cause No. 900 of 2012** the Court held;

... The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment.

66. The Claimant shall therefore repay the loans due and owing to date at the current going staff/employee rate. To put the Claimant at a commercial rate is to sanction the unfair procedure in his dismissal. The costs, charges and all auctioneer fees due following efforts by the Respondent to secure and reduce loan burden advanced to the claimant, these shall be borne by the claimant. The dues owing from the Claimant with regard to the loan should be computed at this rate for his repayment. The Claimant shall however repay the same together with charges incurred by the Respondent in making efforts to recover the loans due which includes costs to the auctioneers.

67. The counter-claim is allowed to the extent that the Respondent is entitled to repossess from the Claimant its security motor vehicle KBH 314N in view of default and upon the submission that the vehicle has since been in an accident and written off, the duty is upon the Claimant to ensure the owing dues to the Respondent in terms and loan facilities advanced are repaid as directed. The Claimant shall also repay all dues owing in terms and monies advanced as loans or other advances of monies while in employment at staff rates. The sum of Kshs.40, 533.53 and kshs.16, 000.00 due to Bensure Auctioneers shall be paid by the claimant.

Conclusion

Judgement is hereby entered for the Claimant in the following terms;

1) The Claimant shall repay the loans and money facilities advanced to him by the Respondent at the current going rate for staff;

(a) Notice pay awarded at kshs.600,000.00;

(b) 2 days' pay at kshs.13,150.70;

(c) 14 days leave at Kshs.92,054.80;

(d) Leave allowance Kshs.33,335.00;

(e) The dues above are subject to the provisions of section 49(2) of the Employment Act;

(f) The Claimant shall be issued with a Certificate of Service;

(g) The dues above shall be paid less what the Claimant is owing the Respondent in terms of the counter-claim award herein.

Judgement is entered for the Respondent against the Claimant in the following terms;

2) I declare the Respondent is entitled to repossess from the Claimant its security motor

vehicle KHB 314N in view of default in repaying the banking facility granted to him;

(a) The Claimant shall repay all outstanding loan facility account owing to the Respondent to date at staff rate interests;

(b) The dues owing (2)(a) above shall be computed and an advice given to the Claimant to settle within the terms and conditions set by the parties in the chattels mortgage;

(c) The Claimant shall pay the sum of Kshs.40,535.53 and Kshs.16,000.00 being auctioneer and storage charges;

3) Each party shall bear own costs.

Orders accordingly.

Delivered in open court at Nairobi this 30th day of September 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: David Muturi

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