



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 95 OF 2015

(Formerly Cause No. 927 of 2014 at Nairobi)

GEORGE KIHARA MATHENGE.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd December, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 04.06.2014 through Muma & Kanjama Advocates. The claimant prayed for judgment against the respondent for:

- a) The sum of Kshs.6,056,590.00 being damages for unfair termination- being 3 months' pay as reasonable pay in lieu of the termination notice Kshs.427,524.00 at Kshs.142,508.00 per month; service payment at 1.5 months per year served for 18 years Kshs.3,847,716.00; 12 months' pay for unfair dismissal Kshs.1, 710,096.00; and 15 days' pay for due annual leave.
- b) Interest on the above at 14% from the date of termination letter until payment in full.
- c) General damages, including aggravated damages and exemplary damages for deceit, injurious falsehood and breach of confidence.
- d) General damages, including aggravated and exemplary damages for defamation.
- e) Interest on (c), and (d) at court rates from the date of the judgment till payment in full.
- f) Certificate of service.
- g) Costs of the suit and interest thereon.
- h) Any other orders the court may deem fit to grant. The respondent filed the memorandum of response on 03.12.2014 through Macharia-Mwangi & Njeru Advocates and prayed for:
 - a) A declaration that the respondent did not summarily dismiss the claimant.
 - b) A declaration that the respondent procedurally, regularly, and lawfully terminated the employment contract of the claimant.

- c) A dismissal of prayers (a), (b), (c), (d), and (e) of the memorandum of claim.
- d) A declaration that the respondent had duly issued the claimant a certificate of service.
- f) The claimant to bear the costs of the suit.

The claimant's service history with the respondent is not in dispute. The claimant was initially employed by the respondent as a messenger on 18.04.1995 and promoted to a clerk and later to a supervisor. On 19.10.2012 the claimant was promoted and appointed as the respondent's Assistant Manager, Service Quality and Compliance, Nyeri Branch, with a gross salary of Kshs.142,508.00. Prior to that promotion, the claimant testified that he was promoted and served as the respondent's Section Head-Back Office Operations Nyeri Branch.

The claimant received an internal memo dated 23.01.2013 titled, **"Fraudulent Withdrawals Kshs.2,174,000 I.N.O Alexander Mwendo Account 1108492118 and 1119844215."** The memo requested the claimant to explain thus:

- a) Why the claimant failed to effectively check the cashiers' transactions report the result of which the claimant did not detect that a number of CTV's, personal cheques as well as the current account transfer form had not been signed by the complainant and or that the vouchers were missing.
- b) Why disciplinary action should not be preferred against the claimant for failure to verify the same.
- c) The written explanation to reach the undersigned by close of business on 24.01.2013.

The claimant replied by his internal memo dated 24.01.2013. The claimant stated as follows:

"I refer to your memo dated 23.01.2013 on the above subject. Prior to leaving on voluntary retirement the complainant was a teller and was in very good and close relationship with the team. He seems to have owed several people a lot of money which I believe he was paying with excitement but in good faith. As I checked the work I could notice the irregularities such as debits done on the strength of telephone conversation or without voucher but I could see a copy of advice for the same. I verbally and through email guided the tellers to avoid such practice as it was irregular, I also copied the emails to the managers to see if they could push for compliance. On particular entry of Kshs.1,000,000 Mr. Mwendo claims in his letter to have been wisely advised by a senior manager in branch to invest in a samba account hence one among the debit to transfer the funds on the strength of a telephone conversation. Also some transactions were beyond teller limit and as such I presumed the cash manager had authorized the same. This matter is also under forensic investigations by the forensics department with whom I have recorded statement on the same and clarifications can be sort with them in case of need. It is in view of the above that I request for leniency."

The claimant's structured information given to the forensic investigators is at page 104 of the respondent's bundle. The statement is dated 17.10.2012 and the claimant described himself as the respondent's Section Head – Teller Services at the Nyeri Branch. The claimant stated that he had learned that the transactions as listed in his statement and being part of disputed transactions were in fact processed and paid by the Nyeri Branch tellers during the claimant's tenure as the Section Head – Back Office. The claimant then stated thus,

"I have noted that am the one who checked and ticked the said tellers' transactional reports as evidenced by the crossings in red ink, as well as my signatures on the said reports."

The extract of the statement is not signed by the claimant but there is no reason to doubt that the same was the claimant's position in the matter as in any event that position was not in dispute throughout the hearing.

By the letter dated 22.03.2013 the respondent invited the claimant to a disciplinary interview scheduled for Thursday 28.03.2013 at 9.00am in regard to the said Alexander Mwendu's alleged fraudulent withdrawals in the sum of Kshs.2,174,000 from accounts no. 1108492118 and 1119844215 held at the respondent's Nyeri Branch between 26.07.2010 and 24.12.2010.

The record of the disciplinary interview is dated 04.04.2013 and is page 192 of the respondent's bundle. The claimant signed that record and the substance of the record is as follows:

- a) The claimant acknowledged his failure in discharging his duties as a checker in isolating any anomalies noted from journals, and consequently the claimant failed to query the missing vouchers.
- b) The claimant acknowledged that he was aware that several transactions in the branch were done using wrong crediting and debiting instruments, but as a checker, he never took any action to curb the breaches in the bank procedures.
- c) The claimant pleaded with the bank not to terminate him because he had been faithful and discharged his duties diligently for the period he had been working for the respondent and that he would not repeat the same mistakes in future.

By the letter dated 16.04.2013 the respondent terminated the claimant's employment. The letter stated in part,

“This has reference to the correspondence exchanged and the disciplinary interview held on 02.04.2013. We have carefully considered the explanations you gave in writing and verbally and have concluded that you committed acts of gross negligence, details of which are well within your knowledge. As a consequence, you have been terminated for loss of confidence from employment with effect from today's date. Any money that may be due to you including one month's salary in lieu of notice will be paid to you in due course.”

The **1st and main** issue for determination is whether the termination of the claimant's contract of employment was unfair. The court has considered the evidence on record. First, there is no doubt that the claimant was accorded a notice and a hearing as envisaged in section 41 of the Employment Act, 2007 and the court returns that the claimant was accorded due process throughout the disciplinary proceedings.

Second, in replying the allegations, in the statement given to the forensic investigator and at the disciplinary interview, the claimant admitted that he was the Section Head – Back Office at all material time and charged with the duty to check the transactions in issue and to report any irregularities. There is no material on record to show that the claimant reported the irregularities. Instead and per evidence on record as reproduced in this judgment, the claimant as the responsible checker acknowledged that he was aware that several transactions in the branch were done using wrong crediting and debiting instruments, but as a checker, he never took any action to curb the breaches in the bank procedures. The claimant further acknowledged his failure in discharging his duties as a checker in isolating any anomalies noted from journals, and consequently the claimant failed to query the missing vouchers. The claimant, acknowledging his poor performance as was leveled against him by the respondent, pleaded for lenience. The respondent decided to terminate the contract of employment. In such circumstances, the court returns that as at the time of termination, the respondent had a genuine reason to terminate the contract of employment and as envisaged in section 43 of the Employment Act, 2007.

To answer the 1st and main issue for determination, the court returns that the termination was not unfair.

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

- a) The claimant prayed for a sum of Kshs.6,056,590.00 being damages for unfair termination - being 3 months' pay as reasonable pay in lieu of the termination notice Kshs.427,524.00 at Kshs. 142, 508.00 per month; service payment at 1.5 months per year served for 18 years

Kshs.3,847,716.00; 12 months' pay for unfair dismissal Kshs.1,710,096.00; and 15 days' pay for due annual leave. The termination was not unfair and the court returns that the prayer is not justified. The claimant's final dues advice dated 16.04.2013 indicated negative leave days and the prayer for pay of leave days will fail.

b) The claimant prayed for general damages, including aggravated damages and exemplary damages for deceit, injurious falsehood and breach of confidence. The court finds that deceit, injurious falsehood and breach of confidence was not established as against the respondent and the claimant is not entitled to the remedy.

c) The claimant prayed for general damages, including aggravated and exemplary damages for defamation. The court has found that the claimant admitted and acknowledged the allegations as were leveled against him and the contract of employment was subsequently terminated. Defamation was not established and the prayer will fail.

d) The certificate of service dated 11.09.2013 was issued and the prayer for the certificate is found superfluous. The same is declined.

The **3rd issued** is whether the respondent is entitled to the remedies as prayed for. The court makes findings that the claimant was not summarily dismissed as was alleged and consequently, taking into account the findings by the court as earlier stated in this judgment, the respondent is entitled to the remedies as prayed for.

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

- a) The declaration that the respondent did not summarily dismiss the claimant.
- b) The declaration that the respondent procedurally, regularly, and lawfully terminated the claimant's employment contract.
- c) The claimant is not entitled to the prayers as made in the memorandum of claim.
- d) The declaration that the respondent had duly issued the claimant a certificate of service.
- e) The claimant to bear the costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 2nd December, 2016.**

BYRAM ONGAYA

JUDGE