



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 207 OF 2013

FRANCIS KALAMA MULEWACLAIMANT

VERSUS

KENYA COMMERCIAL BANKRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant brought this suit on 17/7/2013 and amended it on 18/7/2013 and again on 8/4/2014. He accuses the respondent of unfair termination of his employment on 23/8/2012 and prays for terminal dues plus compensation for unfair termination. He also seeks permanent injunction to restrain the respondent from disposing of or interfering with his property known as LR No. Kwale/Ukunda/3183.
2. The respondent has however denied liability for the alleged unfair termination and averred that the dismissal was fair both substantially and procedurally. She further avers that the claimant has defaulted in his loan repayment in breach of express terms contained in the letter of offer, charge and further charge dated 2/3/2002 and 16/5/2002 respectively. Before the hearing parties agreed to mark all the documentary evidence filed as duly produced without calling the makers.
3. The suit was heard on 26/6/2014, 28/8/2014 and 7/10/2014 when the claimant testified as CW1 and the respondent called Daniel Ngala, Lucy Nuradera and Carolyne Mutua as RW1, 2 and 3 respectively. Thereafter counsel for both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 told that he was employed by the respondent on 21/2/1994 as a clerk and later promoted through the ranks to become Branch Manager Watamu branch on 7/1/2011. His duties as Branch Manager included overall leadership, development and growth of branch asset portfolio and monitoring of branch liabilities. He contended that at the time of his appointment as branch manager, the Watamu branch was a loss making branch but he turned it round into profit making branch. Although his profit target in 2011 was kshs.0.97 million he posted an impressive ksh.2.334 million which was 240.6% achievement. His target for customer satisfaction 2011 was 80% but he scored 91.04% for the same period. He had a target of 8455 customers valued at ksh.167.32 million and he achieved 8126 customers valued at ksh.177.21 million which translated to a score of 96% customers and 105.1% value. In his opinion he achieved and even exceeded his targets.
5. CW1 explained that on 27/4/2012, at 11.00am he received an email from the Regional Business Manager (Coast) requesting CW1 to call on him Monday 30/4/2012 at 11.00 am. On the same

- 27/4/2012, the Fortfolio Regional Manager(RW1) visited the branch without prior notice and audited the bank until 28/4/2012. He also wrote a letter to CW1 concerning some overdrawn accounts and advised him to avoid such overdrafts. He also asked CW1 to state by 10/5/212 the steps he was giving to take to recover the overdrafts. In the meanwhile CW1 went meet the Regional Business Manager (Coast) at Mombasa on 30/4/2012 at 11.00am as directed on 27/4/2012. She enquired about the overdrawn accounts and gave CW1 a memo dated 30/4/2012 which demanded for a written explanation of the overdrawn accounts by 2pm the same day. That was a tall demand according to CW1 because the overdrawn accounts were domiciled at Watamu Branch and he need to refer to the records for purposes of responding to the memo.
6. After delivering his response to the first memo, CW1 was given another memo requiring him to list down all the cheques he had paid against the uncleared effects that led to the overdraft by 2/5/2012. The memo also gave CW1 12 days forced leave. While CW1 was on leave, the Regional Operations Manager telephone him on 1/5/2012 and asked him to report to Watamu Branch to meet with a Mr. Felix from the Forensic Department. CW1 went there on 2/5/2012 where Felix interviewed him and Mr. Reginald Ngala who has overdrawn the accounts in issue. Felix also took a copy of the memo which was requesting for the cheques used in the overdrawing the accounts. CW1 contended that as a Branch manager he had the mandate to allow overdrafts under KYC (know your customer). According to CW1, he had no limit of the amount of payments to a customer.
 7. When his leave ended on 16/5/2012, CW1 was called to Mombasa by the Regional Operations Manager by phone who gave him a suspension letter dated 16/5/2012. The reason for the suspension cited was irregularities he had allegedly committed. The suspension was indefinite and the letter required CW1 to remain at his Watamu Residence unless authorized to leave. After 93 days suspension CW1 received a call on 16/8/2012, from the Regional Operations Manager, asking CW1 to report to the HR office in Nairobi on 21/8/2012. CW1 was also asked to state a colleague who would accompany him to the HR Employees Relations Manager's office. CW1 went to HR office on 21/8/2012 as directed and the manager told him that he was constituting a Disciplinary panel. The panel started at 11.00 am and was chaired by Mr. Mukulu from Credit Division.
 8. When the proceedings started, the chairman did not read any charges to CW1 but only asked him if he had anything to add to his earlier report which would make the panel to change its decision. CW1 gave the panel a copy of email written by Mr. Reginald Ngala on 13/6/2012 which had been written to the RW1 proposing a scheme of settlement of the overdrafts. He denied being shown any charge sheet and the interview form either before or on 21/8/2012 when he went for the disciplinary hearing at Nairobi. CW1 however admitted that he was asked some questions including whether he was interviewed for the job, whether he was asked about his hands-on knowledge about credit management and about other departments he had worked before appointment as Branch Manager. According to CW1 the hearing took about half an hour after which he was released to go. On 23/8/2012 he was served with a dismissal letter dated 23/8/2012 citing the gross negligence as the reason for the dismissal.
 9. CW1 contended that both the suspension and the dismissal were unfair and in breach of contract. He explained that under the respondent's Terms of Service and HR Procedures Guide for Managers, suspension is limited to 60 days unless the manager is awaiting prosecution. He also cited clause 5A(c) (i) of the KCB Disciplinary Rules and Procedures (2008) which limits suspension period to 30 days and Clause 10 which provides for dismissal only when an employee fails to improve after warning. CW1 denied ever receiving any warning or reprimand before his dismissal. He maintained that he was not given ample time to explain himself as he was on forced leave and thereafter suspended indefinitely followed by a dismissal without a fair hearing.
 10. He prayed for ksh.165,357 being one month salary in lieu of notice. He also prayed for salary for May, June, July and August 2012 (suspension period) being ksh.661,404. He also prayed for 12 months salary for unfair termination being ksh.1,984,212. He also prayed for gratuity at the rate of 1 ¼ months salary for each year he served as per the KCB Kenya Staff Restructuring Package terms being ksh.3,397,500. He prayed for 16 days leave days being ksh.94,486.30. CW1 explained that he used to receive half salary (ksh.82,000) during the period of suspension and prayed for salary arrears for the said period of suspension. He also prayed for his bonus for 2012 being 12 months x gross salary x19.25%x1.19 = 303022. According to him he performed well

- that year and the bank made profit.
11. CW1 explained that he got staff loan at the rate of 7% but after his termination it was converted to commercial rate of 20%. He contended that such conversion had increased the loan balance by ksh.550085 and prayed the court to recalculate the loan based on the original 7%. Finally CW1 prayed for a certificate of service to enable him secure another job.
 12. On cross examination by the defence counsel, CW1 said he had gained wide experience in general banking procedures. He admitted that he allowed clean lending (without security being offered). He further admitted that he lend money without any written agreement with the customer. He further admitted that it was a risk business and not a conventional lending in banking business. He further admitted that he exposed the bank to a risk. He also admitted that he sought no authority from Discretion Holders who are based at the KCB Headquarters. He however contended the case at hand was overdrafts and not conventional lending where discretion is required.
 13. CW1 agreed that Reginald Ngala had 2 accounts being No. 1122494688 for Kenya shillings and No. 1122494777 for Euros. CW1 admitted that he allowed overdraft against uncleared cheques which had been deposited. He admitted that he should not have done so. He admitted further that the said cheques deposited by the customer were dishonored but denied that he pursued the customer secretly. He maintained that his Regional boss was aware of the matter or had the reason to know from the monthly reports. That when he pursued the customer, he never paid the overdraft but instead he opened another account being No. 1131631129 in the name of Chigz, a company name where Reginald Ngala is the principal shareholder. CW1 admitted that he again allowed an overdraft to Chigz company against uncleared cheques which had been deposited in her said new account. CW1 contended that he had a history of the defaulter through other accounts in the branch which had no problems.
 14. CW1 admitted that in issuing a loan at overdraft, the bank should be protected. He admitted that a written agreement under conventional banking was required. He admitted that when a loanee defaults, the bank should take action against the defaulter. In the case at hand, however, CW1 contended that after the default, the customer gave a written undertaking to pay and offered to deposit his logbook but the bank refused. On being shown overdraft balances of ksh.5,470,859 euro 16,669 and ksh.1,822,141 in the accounts of Reginald Ngala and Chigz Company CW1 denied that he had exposed the bank to risk and maintained that he would have recovered the said money by now had he not been dismissed. He also denied that the money had been lost and maintained that it will be recovered.
 15. He admitted that he took a staff loan from the bank where he gave security but paid nothing in servicing the same after his dismissal from employment. He explained that the loan was payable from his salary which was no longer available. He admitted that the bank has the right to recover the loan but maintained that the loan in dispute is the unsecured personal loan of Ksh.400,000 from the Treasury Square Branch Mombasa. He argued that he cleared the house loan secured by the title in issue by the time he was dismissed and therefore the security cannot be auctioned to recover the unsecured loan. He admitted that clause 3 of the Charge for the house loan provided for 14% interest but denied that the same could apply to the unsecured loan.
 16. CW1 admitted that he was served with a memo about overdrawn amounts for Mr. Ngala and then sent on suspension. He also admitted that after the suspension he was called for a hearing at Nairobi where he went with Elijah Nzai, Branch Manager Kisauni. CW1 however contended that his dismissal was already predetermined and the disciplinary hearing was only to fulfill procedures. He confirmed from KCB Disciplinary Rules and Procedures 2008, Clause 12(b) that suspension period for managers was upto 120 days. He also admitted that the clause 11 of the said Rules and Procedures provides for dismissal of an officer if he grossly misconducts himself by serious and unacceptable loss to the bank. He however denied that the money was lost and maintained that it can be recovered.
 17. On Re-examination by his counsel, CW1 said that he had verified with Imperial bank and confirmed that the defaulter had money. He maintained that he cleared the house loan before dismissal because by 23/6/2013 the loan balance was ksh.28683.17. He explained that he was repaying by installments of ksh.11225.9 per month which was deducted from his salary in June and August according to his payslips. He further explained that as at 19/9/2012, the unsecured loan balance was Ksh.119,496.35 and the personal staff loan ksh.577,644.20. He denied that the loans were amalgamated with the house loan.

DEFENCE CASE

18. RW1 is the KCB Regional Portfolio Manager Mombasa a position he has held since 2004. He confirmed that CW1 was working as the branch Manager Watamu. He explained that CW1 allowed account No. 1122494688 (Kenya shillings Account) and No. 1122494777 (Euro account) held by Reginald Ngala to be overdrawn against uncleared effects. According to RW1, that was wrong because any lending must be supported by some agreement in writing. Secondly the CW1 should have consulted the Credit Unit at the HQ Nairobi. RW1 contended that CW1 misconducted himself and exposed the bank to risk because the customer failed to pay the overdrafts.
19. RW1 explained that the defaulter who is the principal share holder and director in Chigz Group Ltd opened another account No. 1131631129 in the name of the company and again CW1 allowed the account to be overdrawn against uncleared effects in similar circumstances as in the defaulter's personal accounts. CW1 again never sought authority from the Credit Unit at the HQ Nairobi before giving a clean lending to Chigz Group Ltd. RW1 dishonored the overdraft from the monthly report which is normally send to him form the HQ. He picked the engineer Ngala's account because of the magnitude of the overdraft. When RW1 raised the matter with CW1, the latter admitted lending without seeking authority promised to pursue the defaulter. When RW1 noted no progress being registered, he visited CW1's branch. According to RW1 by allowing the overdraft without authority from the HQ, CW1 had committed gross misconduct which warranted summary dismissal.
20. On cross examination by the claimants counsel, RW1 did not produce any KCB lending policy document letter to the claimant that limits his power or prescribes the procedure of giving loans and overdrafts. He clarified that, he discovered the overdraft in November 2011 and on 28/4/2012 he gave CW1 time schedule to regularize the anomaly by 10.5.2012. He confirmed that before CW1 could regularize the overdraft, he was send on forced leave on 1/5/2012 till 16/5/2012 when he was suspended. He explained that CW1 was the first Branch manager Watamu and he had no previous disciplinary issues. He could not deny or confirm whether CW1 had improved the branch because there was no CW1's predecessor to compare with.
21. RW2 works at KCB Watamu Branch since 1986. he confirmed that CW1 was her Branch Manager. She explained that on 7/2/2002 CW1 was awarded a house loan of ksh.932,068. He was again given a furniture loan of ksh.104000 on 30/5/2002 and a further personal loan of ksh.200000 on 24/10/2008. According to RW1, the first loan was secured by a charge over the house in title LR No. Kwale/Ukunda/3183. The second loan was unsecured but the third loan was secured by a further charge over the said house.
22. She explained further that CW1 was given another unsecured loan of ksh.400000 on 3/9/2009. He was on 2/6/2011 given a top-up loan (new loan added on the outstanding balance of ksh.294,445. The said outstanding loan balance was made up of ksh.154609 in respect of the first loan of 7/2/2002 and 139836 in respect of the loan given on 24/10/2008 both secured by the charge over the house. The new balance as at 2/6/2011 became ksh.780,000. The said balance was to be repaid by monthly installments of ksh.18956 for 48 months upto June 2015. The loan was secured by the same house Kwale/Ukunda/3183 according to RW2. RW2 witnesses CW1 signing the letter of offer of the new loan and verified it. She explained that as at 30/5/2013 the loan balance was ksh.801,762.62 and had at the time of her testimony the outstanding balance had increased to ksh.1,111,517.82.
23. On cross examination by the claimant's counsel, RW2 confirmed that she has worked for KCB for 28 years. She maintained that the first loan given in 7/2/2002 for ksh.932,068 and the other of ksh.200000 given on 24/10/2008 were secured by a charge over the house in LR No. Kwale/Ukunda/3183. That the two loan balances were amalgamated on 2/6/2001 and secured by the said house. She explained that top-up loans are only available for secured loans and not for unsecured loans. She confirmed that interest loan for all the staff loans is ksh.7% while for non-staff customers is 20%. She admitted that she does not deal with staff loan repayment and confirmed that the same is done from Moi Avenue branch Nairobi.
24. RW3 works for KCB in the HR Department as the Senior Manager Industrial Relations. He confirmed that CW1 was formally employed by KCB. He told the court that CW1 was given a memo by his line manager dated 30/4/2012 detailing specific offenses and responded in writing.

He was later invited to a disciplinary hearing where he attended accompanied by Elijah Nzai, the Branch Manager Kisauni Branch. RW3 attended the hearing as a member of the Disciplinary Committee. The charge against CW1, according to RW3, included firstly, allowing payment against uncleared effects; secondly failure to comply with guidelines which bar payment against uncleared effects; thirdly allowing overdraft without authority; fourthly allowing opening of account for Chigz Group Ltd despite knowing Reginald Ngala's irregular position; and finally continuing to pay against uncleared effects and thereby exposing the bank to financial risk. According to RW3, CW1 admitted all the charges and requested for time to recover the debt. The committee however found him guilty of breaching banking regulations and exposing the bank to potential loss of ksh.8.9 million. The committee then recommended that CW1 be dismissed for gross negligence. RW3 maintained that the dismissal was done in compliance with the law. He concluded by stating that as at the time of his testimony the ksh.8.9 million overdraft had not been paid.

25. On cross examination by the claimant's counsel, RW3 said that RW1 gave CW1 upto 10.5.2012 to rectify the error and CW1 requested for 7 days leave to pursue the defaulting customer. RW3 admitted that CW1 was suspended from 16/5/2012 for over 90 days. He further admitted that under KCB Terms of service Hr Procedure Guide for managers limits suspension to 60 days unless the manager is awaiting prosecution. He admitted that CW1 never requested for leave but 7 days extension to time within which to respond to the charges in the memo dated 30/4/2012. RW1 further admitted that CW1 was never served with the charges before the hearing date, and that CW1 was invited to the hearing by phone. RW1 however maintained that the charges were read to CW1 during the hearing. He further maintained that CW1 breached banking policy but failed to produce any policy documents when challenged. He also maintained that CW1 exposed the bank to financial loss although the bank is still pursuing the debt.

ANALYSIS AND DETERMINATION

26. After carefully considering the pleadings, evidence and submissions by both sides, it is clear the parties herein were related as employer and employee. There is also no dispute that the said relationship was terminated by the respondent on 23/8/2012 on grounds that the claimant had committed gross negligence. There is also no dispute that at the time of such termination, the claimant had outstanding loan balance with the bank which remains unpaid to date. The issues for determination include whether the termination of the claimant's employment was unfair and whether reliefs sought by the suit should be granted.

Unfair termination

27. Under Section 45 of the Employment Act unfair termination occurs when an employer dismisses his employee without a valid and fair reason and without following a fair procedure. A fair reason is one which relates to the employees conduct, capacity or compatibility; or one based on the employers operational requirements. A fair procedure on the other hand refers to due process which requires that disciplinary hearing be accorded to an employee before dismissal. The procedure of the said hearing is prescribed under Section 41 of the Act and it entails the employer explaining the reason for the intended dismissal to the accused employee in the presence of a union shop floor representative or another co-employee of his choice. Thereafter the employer must invite the accused employee and his companion to make their response to the charges before the employer pronounces his decision to dismiss the employee. Such proceedings must be conducted in a language that both the accused employee and his companion understands.

28. Under Section 47(5) of the said Act, the burden of proving the alleged unfair termination lies with the employee who accuses his employer of unfair termination like in the present suit. Once the burden is discharged, the burden of proof shifts to the employer to justify the ground for the termination and prove that fair procedure was followed. In the present case the claimant denied any gross misconduct and contends that he was not accorded any fair hearing before termination. The respondent has on the other hand adduced evidence to prove that the claimant made three overdrafts against uncleared effects without the authorization from the Credit Unit of the respondents HQ at Nairobi. The overdrafts were given in similar circumstances to the same

customer Engineer Reginald Ngala either directly or through Chigz Group Ltd where the said Engineer Ngala was the principal share holder and director.

29. Having considered all the facts and evidence on record, the court makes a finding on a balance of probability that the dismissal of the claimant on 23/8/2013 was fair both substantially and procedurally. It is clear from the evidence tendered before this court that the claimant allowed overdrafts against uncleared effects without authority from the credit unit of the bank. The sums overdrawn was in millions and therefore not safe lending. The claimant did not prove that he had the authority to allow such large overdrafts without first seeking authority from the relevant credit unit. He consequently acted in gross negligence of the respondents banking policy not once but 3 times. In all the cases until now, the customer has not repaid the overdraft. The respondent was therefore entitled to dismiss the claimant for the said misconduct. The court is also satisfied that the procedure followed was fair because the claimant was given several chances to explain himself out in writing before finally being invited for an oral disciplinary hearing where he was allowed to be accompanied by co-worker of his choice. Consequently the procedure as followed was fair within the meaning of Section 41 *supra* and the court proceeds to answer the first issue for determination in the negative.

RELIEFS

30. By the Re-amended claim dated 8/4/2014, the claimant prays for one month salary in lieu of notice. The letter dismissing the claimant did not specify whether the dismissal was summary or not. Similarly the recommendation by the Disciplinary Committee did not specify whether the claimant was to be dismissed summarily or not. The submissions by the defence admitted that the claimant is entitled to the salary in lieu of notice being ksh.165,351 save that the same should be withheld for loan repayment. Considering the above observations, the court awards the claimant ksh.165,351 as salary in lieu of notice. The claimant is further awarded ksh.333404 being the salary arrears withheld during his 4 months suspension. The prayer for the 16 leave days is also granted being ksh.88186.66 since the defence never produced any leave records to rebut the said claim for leave due.

31. The prayer for compensation for unfair termination is however dismissed in view of the courts finding above that the dismissal of the claimant was fair. The prayer for gratuity is also dismissed because the claimant was member of the KCB Pension Fund and he did not produce any evidence to prove that he was entitled to both pension and gratuity. The court also finds the allegation that CW1 could benefit from the 2013 KCB Staff Restructuring Program Package Terms as far fetched because he was not terminated under the Restructuring Program but on disciplinary grounds. The claim for house allowance is also dismissed for lack of evidence. The claimant cannot allege that his gross salary was ksh.165351 per month and again claim another ksh.20000 per month as house allowance. Likewise the prayer for bonus is also dismissed because according to the evidence on record, bonuses only accrue at the end of the year and as such the claimant having been dismissed in August 2012, could not qualify for 2012 bonus.

32. The last issue to consider is whether the respondent should be restrained from selling the suit premises in exercise of his Statutory Power of Sale to recover the outstanding loan and whether the court should award damages to the claimant in respect of the loss he has allegedly suffered when his loan balance of ksh.706249.81 was converted from staff loan to commercial loan and interest changed from 7% to 20% per annum. The court has carefully perused and considered various letters of offer and acceptance signed and exchanged by the parties herein between February 2002 and 2009, the Charge and Further Charge in favor of the respondent dated 6/3/2002 and 16/5/2002 respectively. The last letter of offer was dated 2/6/2011 for consolidating the aforesaid 2 secured loans and topping up the outstanding balance by Ksh.485,555 to make a new balance of ksh.780,000. Clause 6.3 of the said Letter of offer cites the security for the loan as Kwale/Ukunda/3183. The Claimant accepted the offer in writing and signing on all pages of the letter. The claimant has admitted that he has defaulted in his loan repayment since the day he was dismissed from employment. According to him the staff loan was only repayable by salary. No legal or factual basis was shown to support the foregoing allegation. The court therefore find and holds that the claimant breached the terms of the loan contract and the court will not come to his aid. The only ground upon which the court can interfere with contracts like the one before the

court is when there exists a mistake or misrepresentation of material facts. In this case the claimant neither pleaded nor proved any mistake or misrepresentation. Consequently the claimant shall remain bound to pay the consequence of breaching the said loan contract.

33. Finally the prayer for injunction to restrain the respondent from enforcing her rights under the contract is dismissed. There is no evidence produced to show that the respondent breached the law or the claimant's rights while recovering her debt, or in any other manner. The court also dismisses the prayer for the alleged loss resulting from conversion of interest rate from staff rate of 7% to commercial rate of 20%. The alleged loss was not proved because the claimant admitted on oath that he has paid nothing towards the loan account since his dismissal from employment. The claimant has also not proved that the bank has made wrong calculations of interest.

DISPOSITION

34. For reasons stated above the court enters judgment for the claimant in the sum of **ksh 586,941.66** plus costs and interests. The interest on the judgment debt shall accrue at court's rate from the 23/8/2012 when the claimant was dismissed until payment in full. In the absence of any counter claim the proceeds of this suit shall be paid to the claimant unless he otherwise decides. The claimant will also have a certificate of service as prayed.

Orders accordingly.

Dated, signed and delivered this 13th day of March 2015.

O.N. Makau

Judge