



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2424 OF 2012

FREDERICK KARIUKI KAMAU CLAIMANT

VERSUS

BANK OF INDIA RESPONDENT

JUDGEMENT

Mrs G N Gichuhi instructed by G.N. Gichong'I Gichuhi & Co. Advocates for the Claimant

Mr Mituga instructed by Sign Gitau Advocates for the Respondent

1. The issue in dispute herein is the unprocedural, illegal and unconstitutional dismissal of the Claimant as assistant manager Industrial Area Branch of the respondent, Bank of India.
2. The claim herein was filed on 4th December 2012 and witness statements dated 10th June 2013. the defence filed on 2nd March 2013 where the Respondent admit having employed the Claimant but he voluntarily resigned from his position and even in a case where he had not resigned, there existed valid reasons for his summary dismissal and thus denies the outlined claims. In evidence, the Claimant supported his case and the Respondent called Ms Rebecca Nabwire Osoro as their witness. At the close of the hearing, both parties filed their written submissions on 18th March 2015 and 6th May 2015 for the Claimant and Respondent respectively.

Claimant's case

3. The Claimant was employed by the Respondent as an Assistant Manager, Industrial Area Branch of the respondent, a limited liability company owned by the Government of India and having branches in Kenya carrying out banking business in Kenya with its head office in Bank of India Building, Kenyatta Avenue, Nairobi. Vide letter dated 8th November 1983 the Claimant accepted employment with the Respondent where he diligently served for a period of over 27 years until June 2010.
4. In early 2010, the Respondent started frustrating the Claimant in his employment by creating difficult circumstances not suitable for the performance of his duties thus affected his morale and the Claimant was forced to tender his resignation which was rejected and instead, the Respondent summarily dismissed him on 2nd June 2010. The Respondent made allegations that the Claimant was involved in fraudulent acts which resulted in the loss of Kshs.6, 519,049.00 and proceeded to institute criminal proceedings without proper investigations where the Claimant was arrested on 14th May 2010 and subsequently charged in Criminal case No. 891 of 2010. Upon trial, the Claimant was acquitted. The summary dismissal was unilateral and without basis as no investigations had been conducted nor was the Claimant given a hearing before the summary action.

5. Due to the unfair process the Claimant was subjected to that resulted in the loss of his employment he is seeking compensation for loss of work and salary he could have earned until retirement at age 55 and based on the balance of his 6 years and 5 months all being kshs. 12,813,262,00; claim for gratuity for 33 years accruing from 1st October 1983 to October 2016 the date of retirement at the rate of 1 month pay for each year worked all being kshs.5,118,498.00; medical allowances from the period of termination up to October 2016 at retirement at Kshs.70,000.00 per year all being kshs.420,000.00. The Claimant is also seeking compensation for unfair termination as his resignation was rejected and instead he was unfairly summarily dismissed.

6. In evidence, the Claimant relied on his witness statement dated **3rd December 2012** and testified that he is currently unemployed and relies on small business ventures to sustain himself and family since his summary dismissal by the respondent. He commenced work with the Respondent in 1983 and for 28 years has worked diligently and earned promotions the last being the Assistant Manager at Industrial Area branch. This was until 14th May 2010 when he resigned from his position but when he went to collect his property from his office, he was arrested and charged in Criminal Case No. 981 of 2010 and after 2 years trial was acquitted.

7. The Claimant also testified that when he resigned, this was not accepted and 3 weeks later he was served with a letter of summary dismissal on the reasons that he was suspected of having committed a criminal offence. Before the summary dismissal, the Claimant was not given a hearing and instead he was arrested and subjected to a criminal trial. The Claimant later learnt that other employees resigned especially Ephraim Kaige Mbutia who was a prosecution witness in the criminal case. His resignation was unconditionally accepted by the respondent. The claimant thus felt discriminated against in the treatment accorded to other employees.

8. It was the claimant's evidence that his duties as the Assistant manager were taking care of current accounts, savings accounts and staff matters like payments and salaries. On 26th January 2010; Cheques Number 027447 for kshs.595, 500.00,

Cheque Number 027501 for kshs.550, 270.00;

Cheque Number 027456 for kshs.530, 230.00;

Cheque Number 02450 for kshs.670, 400.00;

Cheque Number 027445 for kshs.775, 350.00; and

Cheque Number 027454 for kshs.490, 220.00;

9. All from Account No. 2270006001 of Alpharama Ltd were paid to customers and when brought to the claimant's desk for supervision, he went through then using the UV light, he compared the signatures and which looked okay. He cancelled the cheques and was also taken to the manager for a second signature.

On 28th January 2010 3 more cheques;

Cheque Number 027446 for kshs.786, 420.00;

Cheque Number 027500 for kshs.680, 340.00; and

Cheque Number 027448 for kshs.720, 209.00

10. All cheques from Alpharama limited account No. 2270006001 were taken through the same process. These cheques were brought to the Claimant for supervision after they had been paid. He checked them through the UV light and the signatures were okay based on UV light assessment. He cancelled these cheques then took them to the manager for second signatures.

11. On 1st February 2010 at around 10am, the Chief Executive of Alpharama Limited Mr Jagan Nathan brought cheque No. 027445 for Kshs.118, 119.00 to be transferred to an account in Mombasa. The posting clerk Ms Rebecca Osoro tried to do the posting through the system, but this was rejected noting that the cheque had already been paid. The Claimant was informed and when he checked he noted that a similar cheque had been posted and paid on 26th January 2010 for kshs.775, 350.00. The cheque was retrieved and taken to the manager in the presence of Mr Jagan who stated that the earlier cheque was a fraud. 9 other cheques were retrieved and going through them, Mr Jagan said they were all a fraud. The matter was reported to the Banking Fraud unit and the Claimant was arrested on 14th May 2010 and charged in Criminal case. After trial he was acquitted.

2. The Claimant also testified that he is aggrieved as the Respondent acted in a rush manner without proper investigations, he was harassed and accused of clearing fraudulent cheques whereas he had checked them through the UV light and the manager too had confirmed and signed the cheques. That Mr Subodh Kumar the branch manager and Mr Mishra signed some of the cheques but they were never arrested and charged. The Respondent thus wanted to malign the Claimant and to find a way of summary dismissal without giving the Claimant a hearing after serving for 27 years. This caused the Claimant to suffer mental anguish because of harassment.

13. It was the evidence of the Claimant that before he was arrested by the police, he was depressed and decided to resign from his position with the Respondent but the same was rejected and instead he got a summary dismissal letter. This was wrong, unlawful and unfair and he was not given a hearing. The Claimant is thus seeking damages for wrongful dismissal and special damages for his entitlements in employment.

14. In cross-examination, the Claimant confirmed that from his resignation, he was entitled to his terminal dues. The investigation report on the fraud was never given to him nor was he accorded a hearing to state his case. He approved all cheques beyond kshs.100, 000.00 these were also signed by the manager as the second person.

15. The Claimant also confirmed that the Respondent paid him kshs.177, 391.00 on 5th July 2010 being a salary for 14 days, pay for leave days. There was no other payment. The kshs.1.4 million was from the provident fund from his contributions with Kenindia Insurance.

Respondent's case

16. In defence the Respondent admitted that they had employed the Claimant but his service was marred with acts of impropriety, misconduct, negligence and was issued with several warning letters. Further on 1st February 2010 it came to the attention of the Respondent that 10 forged cheques had been encashed on diverse dates between 26th January 2010 to 1st February 2010 for an accumulated amount of Kshs.6, 519,049.00. this was reported to the Director of Central Bank of Kenya, the Banking Fraud Investigation Division pursuant to which independent investigations were conducted by the police and this led to the arrest and charging of the Claimant on 14th May 2010 with the offences on conspiracy to defraud, making a false document and theft in **Criminal Case No.891 of 2010 in Republic Versus Frederick Kariuki Kamau.**

17. The Respondent also stated that they provided the Claimant with a conducive working environment, his resignation was voluntary and only meant to circumvent any anticipated dismissal under section 44 of the Employment act following his being implicated in criminal charges. Although the Claimant was acquitted on 23rd August 2012, the Claimant was put on his defence against charges made against him and hence the summary dismissal on 2nd June 2010 was justified. There existed valid reasons for dismissal, there were warnings on procedural lapses and absence from work. Due to poor work record, the Claimant is not entitled to his claim, he never planned to work for the Respondent until his retirement as he absconded duty and subsequently resigned from his position. The circumstances leading to the Claimant leaving work even in a case where he had not resigned, it was not possible to accord him a hearing. Based on the claimant's conduct, he is only keen to coerce the Respondent into paying him

additional dues over and above what had already been calculated and paid to him at Kshs.177, 391.00 as his salary and leave days due. An amount of Kshs.1, 485,705.00 was also paid.

18. In view of the defence, the claim should be dismissed with costs.

19. The Respondent also called two witnesses in support of their case, Ms Rebecca Osoro and Allan Mburu. Ms Osoro testified relied on her signed witness statement and testified that she was an employee of the Respondent working with the claimant. On 26th January 2010 cheque no. 027445 for Kshs.775, 350.00 were presented for payment by Patrick Mundia who had his original ID No.8812526. She checked the cheque via UV light to verify and she found it valid, the systems signatures were also verified and were found to be a perfect match. Upon all confirmations she took the cheque to the Claimant as she could not pay above Kshs.100, 000.00. Upon his checking through the system and UV light the Claimant signed the cheque and the witness paid. On the same day, a second cheque was presented No.02450 by Francis Herbert ID No.6958304 and she verified all details and the cheque and there was a match. She however noticed an error on the cheque as it had one digit missing. All cheques had 6 digits, but this one had 5. The first digits were supposed to be 027 but this one had 02450. She took the cheque to the Claimant and all supporting documents, he checked through the UV light, the system signatures and all were matching. On the missing digit, the tow confirmed that this must have been a printing error as the number of the cheque on the paying slip was correct. She was thus instructed to pay cheque No.02450 upon verification of the cancelling, signature and initials noting there was a typing error.

20. The witness also stated that the Respondent had procedures for the payment of third party cheques of high value that she followed in this case. In this case all the paid cheques were counter-signed in approval.

21. In cross-examination the witness confirmed that she has since left the employment of the Respondent upon arrest and being charged together with the claimant. She paid out two cheques out of the total 10 cheques that are in issue. One of the cheques had one digit less; cheques No.024540 for kshs.670, 000.00 and Cheque No.027445. All the cheques she paid that were above Kshs.100, 000.00 were signed by the Claimant and Mr Mishra. In the two cheques she paid, the Claimant and Mr Subodh signed in approval. In the criminal case she faced with the claimant, Mr Subodh was a state witness. Other cheques were paid by Ephraim and Etter but these two were not charged and if there was any fraud, Mr Subodh should have been charged. Ephraim paid 5 cheques and Etter paid 3 cheques.

22. The witness also stated that she was made to write her statement by the Respondent in terrible circumstance as the Respondent was trying to see if the insurance could pay for the money loss and where there was no reported case in Court this could not have been paid by the insurance. The Respondent was looking for the most likely person to be charged which was the Claimant and herself as the cheque with fewer digits was approved by them. The Respondent was looking for a scapegoat as the branch Manager had already made a statement noting that none of his staff were involved in any fraud as the case should have been traced to the cheque manufacturer who noted that a cheque book was missing from them and that is how it was presented to the respondent. The company that supplied the cheques discovered one paper for printing cheques was missing. If there was fraud, none of the respondent's staff were involved.

23. The second witness for the Respondent was Allan Ng'ang'a Mburu. he confirmed his signed statement as filed and testified that on 1st February 2010, the chief Executive manager of one client, M/s Alpharama Ltd came to the branch to encash a salary cheque and upon its presentation to the cashier, he was informed that the particular cheque been paid. The client requested for a statement of the company account No. 2270006001 and upon going through it, he discovered that a total of kshs.6, 519,049.00 from 10 cheques had been fraudulently withdrawn. These cheques were;

- i. Cheque Number 027447
- ii. Cheque Number 027456
- iii. Cheque Number 027501
- iv. Cheque Number 027454
- v. Cheque Number 027445

- vi. Cheque Number 02450 posted as 027450
- vii. Cheque Number 027448
- viii. Cheque Number 027500
- ix. Cheque Number 027446
- x. Cheque Number 027449

24. This customer wrote a complaint on the same date and demanded a refund and upon receipt of this component, the Respondent wrote to the Banking Fraud Investigations Department on 8th February 2010 seeking assistance in investigating the matter. The Central Bank Banking Fraud Investigations Division visited the Respondent branch where the alleged fraud took place and took statements from the claimant, the senior manager and Ms Rebecca Osoro and other cashiers.

25. The Claimant was later arrested on 14th May 2010 after the police concluded their investigations and was charged in Criminal Case No.981 of 2010 with the offence of conspiracy to defraud, theft and making false document. The Claimant was not treated any different from other staff during the investigations or on any other time. The Respondent was not moved by malice with regard to the arrest as reports were made to the relevant authorities who on their own investigations charged he claimant.

26. The witness also stated that the Claimant is not entitled to any claim as all his terminal dues were settled. Gratuity was payable to staff who had done 21 years and above in service with the Respondent based on unblemished record. The Claimant had several warnings and caution letters on his record which removed him from enjoying the gratuity. This payment has now been discontinued by the Respondent as it was discretionary but for the old staff who have earned 21 year and more can be awarded based on clean record. There is no discrimination in the Respondent business that warrants the claim for damages to the claimant. Where the Claimant was treated differently the witness would have known as their office spaces were close to each other. That the police investigations and interview were conducted in closed room. The claims by the Claimant lack basis and should be dismissed.

Submissions

27. At the close of the hearing both parties filed their written submissions. The Claimant submitted that upon the employment of the Claimant by the Respondent on 8th November 1983, he served diligently until his dismissal on 2nd June 2010. He earned Milestone Award for good service on 18th October 2008 after serving for 25 years without blemish.

28. In 2010, the Respondent lost kshs.6, 519,049.00 through fraudulent acts where a client Alpharama Ltd had their cheques forged. The Claimant and Ms Osoro were arrested and charged in Criminal Case No.891 of 2010 but were acquitted on 23rd August 2012.

29. The Claimant submitted that while he was employed by the respondent, his duties entailed operations of the bank by taking care of current accounts, savings and staff matters. On 1st February 2010, 10 cheques from Alpharama Ltd were paid to various persons and this was only discovered when the Chief Executive officer of the client brought Cheque No.027445 for payment. Upon investigation of the account with the branch manager, several other fraudulent cheques were discovered. This commenced a series of harassment upon the Claimant causing him to suffer depression and eventually opted to resign on 14th May 2010. When he went to collect his personal effects he was arrested from his office and charged in court. He had to pay his advocate kshs.250, 000.00 for legal representation.

30. The Respondent rejected the resignation and instead on 2nd June 2010, he was summarily dismissed. The claim is that this was illegal, not justified and wrongful as it was contrary to the law. The Claimant submits that he was not given a chance to be heard before he was summarily dismissed and the Respondent instigated his arrest and arraignment in Court over criminal charges. The summary dismissal had no basis as all the cheques that were presented for payment were checked thought the UV light and also signed by the supervisor in approval. The claimant's authority alone was not sufficient to pay the cheques and despite getting the requisite authorisation for payment, only the Claimant and Ms Osoro the

accounts clerk were victimised.

31. The Claimant also submitted that the payments given to him were of his salary and leave due and the sum of 1.4 million was with regard to his provident contribution from Kenindia Insurance and not terminal benefits paid by the respondent. He is thus entitled to his terminal dues and notice pay as there was no basis for the summary dismissal. He is entitled to his gratuity as he had a good record.

32. It was the claimant's submissions that the officials from System Media Technology Ltd conducted investigations at the Respondent industrial Area branch and accepted that the security paper used in the making of cheques in question was stolen from their offices. They noted that they would undertake further investigations and share the outcome with the respondent. The Claimant was therefore arrested before investigations were complete and hence there is no justification for the case of summary dismissal.

33. With regard to the applicable law, the Claimant submitted that the Contract Act and the Employment Act apply in that section 44(3) and (4) of the Employment Act set out the parameters for summary dismissal. Section 41 provides that before such dismissal, an employee must be accorded the right to be heard. The applicable law was not adhered to hence the outlined claims are due.

34. The Respondent on their part submitted that the Claimant voluntarily resigned from his position on 14th May 2010 and when he was summarily dismissed instructed his advocates stating that he had resigned. This act in itself then removed the Claimant from seeking any terminal dues as in any event where he had not resigned; his case was of the nature that he would have summarily been dismissed. There was a justifiable cause for summary dismissal as the Claimant was charged in Court on fraud based on police investigations that the Respondent had nothing to do with. The Claimant was put on his defence noting that he had a case to answer as the prosecution had established the basis of his arrest. The Claimant relied on the case of **Alphonse Maghanga versus Operation 680 Ltd, Cause No.146 of 2012 (Mombasa)**.

35. The Respondent also submitted that there is evidence that the Claimant failed to follow the process required for cheques clearance, upon presentation of cheques by Ms Osoro noting that one had a missing digit; the Claimant went ahead and cleared it. This failure, negligence and lapse in adherence to procedures caused the Respondent the loss of Kshs.6,519, 046.00. This was only discovered after the client lodged a complaint with the Respondent and the Claimant as the responsible person had not discovered any such loss. The Respondent in due compliance was responsible and hence informed the Banking Fraud union and who based on their investigations arrested the claimant. There were therefore good grounds for summary dismissal even in a case where the Claimant had already voluntarily resigned.

36. In this case, payment of gratuity is not due as it is discretionary and based on unblemished service at the Respondent bank. No future earnings are due as this is regulated by section 49 of the Employment Act which grant compensation in cases of unfair termination and this is not such a case. Gratuity cannot be paid as there exist two warning letters dated 30th May 2007 and 3rd July 2008 as evidence in this regard. The Respondent challenged the cases the Claimant relied upon noting in **George Onyango Akuti versus G4S Security Services Kenya Ltd, Cause No.107 of 2013 (Mombasa)**, the Claimant was arrested and could not be released within 14 days hence not relevant here.

Determination

The issues for determination in this matter are threefold and can be summarised as;

Whether this was a case for summary dismissal or voluntary resignation

Whether there was discrimination against the claimant

Whether there are any remedies

37. Before delving into the issues set out above, I wish to refer parties herein to the requirements set out

under Rule 4(e) of the industrial Court (Procedure) Rules.

4. *A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out—*

...

(e) Any principle or policy, convention, law or industrial relations issue or management practice to be relied upon

38. Parties are required to set out and indicate in the pleadings or submissions, *any principle or policy, convention, law or industrial relations issue or management practice* relied on. This gives the other party and the Court the basis of the claim well in advance also relevant at the stage of writing a judgement instead of putting this at the submissions stage. The nature of proceedings before this Court to allow the other party have the evidence to be relied upon well in advance which is a procedure slightly different from the Civil Procedure Act and the Rules thereto.

39. The first issue for determination in this case has to do with the circumstances surrounding the termination of the Claimant's employment. It was the Claimant's case that on 1st February 2010 a client from Alpharama Ltd lodged a complaint upon discovery of forged cheques used to withdraw money from the company account. This resulted into investigations by the Central Bank, the Banking Fraud Unit and the police and the Respondent was also undertaking internal investigations. The claimant's further evidence was that from this point he was put under a lot of pressure and discrimination that he tendered his resignation on 14th May 2010. When he went to clear his desk at the office he was arrested, put in custody and charged in Criminal Case No.981 of 2010. On 2nd June 2010, he received a letter rejecting his resignation and a summary dismissal.

40. The Respondent did not contradict the Claimant's evidence but maintained that the resignation was voluntary, he was not entitled to any terminal dues and in any event, had the Claimant not resigned voluntarily, his case warranted summary dismissal hence no benefit at all. That the dismissal notwithstanding, the Respondent the Claimant his terminal dues owing – salary for days worked and leave due and provident fund.

41. Termination and resignation are matters of law or can be agreed upon by mutual consent of the contracting parties. An employee is allowed to resign and or terminate the contract of service upon giving notice or making payment in lieu of the agreed notice period. Equally and employer can exercise similar right of terminating an employee with notice or make a payment in lieu of such notice. Such a resignation notice by the employee has to be accepted for it to take effect as to reject it and have the employee continue serving or under the requirement to work is a violation of section 5 of the Employment Act which prohibits forced labour. In this case, on 14th May 2010 the Claimant wrote;

...

Resignation

I hereby tender my resignation with immediate effect.

Please recover any debt I owe to the Bank by way of my terminal benefits.

If by chance there is any shortfall please contact me by the above address.

Thank you by [for] giving me the chance to serve in this great bank.

Please acknowledge on copy enclosed

...

42. On 2nd June 2010 the Respondent wrote;

Re: summary dismissal of your employment

We refer to your letter of 14.05.2010 tendering your resignation. We regret that the Bank is not prepared to accept your resignation.

As you may be aware, the bank has lost a sum of ksh.6, 519,049/- as a result of fraudulent acts committed by some members of the staff in collusion with outsiders.

You are suspected on reasonable grounds of having [been] involved in the fraud that has led to the loss of Kshs.6,519,046/- in the captioned account and were accordingly arrested by investigating officials of Banking Fraud Investigations Unit on 14.05.2010 and charged with stealing and defrauding the bank.

In terms of section 44(3) and 4) of the Employment Act and also in terms of Clause 24(a) of Man Power policy of the bank – any of the following acts on part of an employee shall constitute gross misconduct and/or serious neglect and shall justify instant dismissal...

43. In this regard therefore, the resignation tendered by the Claimant was unequivocally rejected by the respondent. 14th May 2010 to 2nd June 2010 is a span of two weeks within which time the Claimant had been arrested and released on bond and within that time the Respondent had the power, means and policy to address any misconduct that based on their investigations they felt the Claimant had committed as noted in the letter of summary dismissal that ‘...*You are suspected on reasonable grounds of having [been] involved in the fraud..*’.

44. The Court does not find any legal basis for the Respondent's position that the Claimant is not entitled to terminal benefits because he issued his resignation notice as it was rejected. The Court also finds the Claimant's evidence that he was denied the opportunity to work credible. The pressure put on the Claimant is evident as upon arrest, there is no communication by the Respondent that he absconded duty, failed to attend to his duties or he had misconducted himself until the letter of summary dismissal rejecting the resignation.

45. Going back on the merits of the case and the question of summary dismissal, where an employer does terminate an employee, sections 43 and 47 of the Employment Act applies. In a case of summary dismissal the legal requirements are set out under section 47. The burden is upon the employee complaining of unfair termination of employment or wrongful dismissal to prove such dismissal as wrongful. Section 47(5) of the Employment Act. The section provides that;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

46. An unfair dismissal may be proved on the grounds that there was no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be varied based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer. On the side of the employer, apart from the requirement in section 47(5) of the Employment Act to justify the grounds of termination, section 43 demand that the employer prove the reasons for the termination, while section 45(2)(a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons.

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be

deemed to have been unfair within the meaning of section 45.

(2) *The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

47. In a case of summary dismissal for fundamental breach of contractual obligations or gross misconduct, section 41(2) of the Employment Act obliges the employer to hear and consider any representations which the employee may wish to make. Section 41 thereof creates a statutory obligation upon employers to notify and hear representations from employees when contemplating termination the employment contract. This is what is called *natural justice* under the common law. In the Industrial relations/employment relationship it is known as *procedural fairness*. Dismissals pursuant to section 44 of the Employment Act, 2007 are also subjected to the requirements of procedural fairness in section 41 of the Employment Act, 2007. the implications and import of section 41 of the Employment Act, 2007 and the requirements of procedural fairness is now established ***Gilbert Nyabuto Mosome v the Standard Limited, Cause No. 697 N of 2009*** and ***Jorum Gakumo v Thika Coffee Mills Ltd. Cause No.693 of 2012,***

48. In this case, the Respondent in the letter of summary dismissal to the Claimant state that the reasons for such termination was that he was suspected on reasonable grounds of having been involved in the fraud that led them into losing kshs.6,519,049.00. In this regard, the Claimant defended himself noting that the alleged forged 10 cheques when presented to him were checked and verified within the system signatures, the identification documents of those who presented them and upon confirmation, he signed in approval. He was not the last person to confirm as his supervisor also had to counter-check and sign on the cheques for their payments. He took all possible diligence in passing the cheques through the UV light. This evidence is supported by Ms Ogoro who gave an outline of the procedures taken with regard to the payment of third party cheques. She was satisfied on her part that the cheques were matching for payment but since she could not pay cheques that were over Kshs.100, 000.00 and the Claimant had to approve together with his supervisor, in this case Mr Subodh.

49. The evidence of the Claimant is supported by the report of Mr R. M. Pandey, Investigating officer who in his report dated 18th May 2010 notes at page 6 and 7;

... All these cheques are passed by the Officer Administrator Mr F K Kariuki at payment point and the transactions are supervised in the system by him. After completion of transaction of the day, these cheques were brought to Chief Manager/IBO for counter sign at the end of business hour. The said cheques transacted on 26/01/2010 are counter checked/signed by Chief Manager Mr D P Kumar and on 28/01/2010 are counter checked/signed by Mr Subdh ... the stated forged cheques in original have been taken by investigating officer CBK-BFID, for their further investigations ...

50. Where there was established fault on the part of the Claimant in the course of his work, due process required that before his summary dismissal, the Respondent should have complied with section 41, 43, and 47. These are mandatory steps that give an employee faced with serious suspicions such as the d] Claimant had, that of fraud, to have a chance to defend himself. To summarily terminate the Claimant without affording him the opportunity to be heard resulted in an unfair process and the resultant effect of the dismissal a nullity.

51. The defence offered by the Claimant in the course of the various investigations are that he procedurally went through all the cheques presented to him and confirmed that they all matched the systems checks for approval. Where the UV light system in place was not sufficient to detect the genuineness of a cheque or the security details on a cheque, then the duty to have appropriate work took to facilitate the good performance of the Claimant while at work rested with the respondent. Where the only available tools of work were inadequate or not sufficient to detect a forged cheque with the naked eye, such discrepancies in the tools of work cannot be visited upon the claimant. this was also confirmed by Ms ogoro in her evidence that once a customer came to the bank with a cheque, it is put under the UV light to confirm its genuineness; the system is opened to check the amount in the account; the signature is

checked; cheque number is confirmed then the manager is given the cheque for verification and a payment is effected. The evidence of the Claimant is that he interrogated all the cheques presented and even the one that had less digits, he went through all the supporting documents and noting the salary slip had the correct bank number, arrived at a conclusion that there was a typing error as all the other security checks with regard to the cheque being authentic corresponded to what he was supposed to check. This is so as his supervisor who is also supposed to check these cheques at close of hours or day and append their signatures also came out with similar outcomes of checks. Otherwise, had the facilities/tool/equipment at the disposal of the Claimant been faulty, and then his supervisors should have been able to detect the fraud immediately and not on 1st February 2010 when a complaint was made.

52. Of interest here is the evidence by Ms Osoro that Systems Media Ltd, the company that was responsible for printing cheques for the bank confirmed that all the cheques passed thought the UV light test. These cheques were printed on paper from this company which paper had been stolen. The presented cheques were received and paid by different cashiers. To therefore have the Claimant charged and not charge Mr Ephraim Mbutia who paid majority of the cheques or Mr Kumar the Industrial Area branch manager or the supervisor of the claimant, is to overreach the systems put in place and lay a victim bare. The ultimate of it is that, I find no legal basis, rationale or reasonable cause as to the existence of reasons for the eventual dismissal of the claimant. The entire process resulted in both a procedural flaw that was coupled with lack of a substantive ground for dismissal according to the provisions of the Employment Act. This is unfair and equivalent to unfair labour practices.

53. On the question of whether there was discrimination against the claimant, this Court in the case of **Collins Osoro Lukhele versus AAA Growers Limited, Cause No. 100 of 2012** held;

... where a person is treated differently from others similarly situated like him, this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified.

54. This position was further reaffirmed in the case of **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No. 60 of 2013** on the finding that When there is a claim that a Claimant has been discriminated against, effort must be put in giving evidence in this regard. So serious is such an allegation that where cited, the Court must look at the intricacies at the work place to ensure that such an unconstitutional practice is not taking place within the private and public spheres of life and where this relates to a work environment section 5 of the Employment Act apply. At section 5(1) and (2) provides;

5. (1) It shall be the duty of the Minister, labour officers and the Industrial Court—

(a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and

(b) to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

55. Therefore a party who claims that they have been discriminated against must outline the circumstances for such a claim and clearly make a distinction as to how those circumstances as contradistinguished create a scenario for discrimination. though the Claimant set out the circumstances

leading to his resignation following undue pressure upon him and the eventual summary dismissal, upon a report of fraud and subsequent investigations, all the employees of the Respondent wrote/gave their statements that included Ms Osoro and Mr Allan Mburu. This cannot thus be said the Claimant was set aside and placed in a position that he suffered discrimination. I find all the staffs of the Respondent was taken through the same investigatory procedures, only the process and the outcome were biased as the Claimant was dismissed without due process and the reasons for the dismissal were not valid. I find no instance of discrimination against the Claimant in this case.

Remedies

56. On the finding that the summary dismissal of the Claimant was unfair, the Claimant is entitled to his terminal dues. The Claimant is seeking compensation for the salary he would have earned until his retirement at age 55 and noting that he had 6 more years to work and being aged 49 he is unable to get new employment in the same sector he had invested his 28 years. The cause of action having arisen in 2010 found in force the operations of the Employment Act that now cap the remedies available upon the finding of unfair dismissal at section 49 of the Act. Upon the provision for termination on one month's notice in the contract of service issued to the claimant, the parties herein had contemplated an end otherwise the time limit. This is now comprehensively addressed under section 49 with provision that upon a finding that a dismissal is unfair, the Court has to factor the maximum allowable compensation in each case. Noting the number of years served by the Claimant and the circumstances of his dismissal, a compensation of 12 months is found as adequate.

57. Notice pay is due where procedural lapses occur. I note the letter of appointment issued to the Claimant upon employment, though 32 years old, the termination period was envisaged at one month notice or payment for one month in lieu. Considering the contract of employment and sections 35 and 36 of the Employment Act, I would hold that the Claimant is entitled to one month pay in lieu of notice of Kshs 166,406.00.

58. Gratuity pay is herein claimed. The evidence of the Claimant is that he was entitled to his gratuity for the period served. The Respondent on their part stated that gratuity was discretionary and based on unblemished service pegged at 21 years. That the Claimant had 2 caution letters dated 30th May 2007 and 3rd July 2008 that blemished his record and thus not entitled to gratuity. Mr Allan Mburu confirmed that indeed all employees of the Claimant who attained 21 years and above of service were eligible for gratuity. The Claimant had served for over 25 years vide his Milestone Award issued in 2008. In labour relations a caution or warning has a time limit. Such notices cannot be kept hanging over the shoulders or neck of an employee until retirement. Reason demands that fair relations should factor employee benefits as such and where earned due to good and long service there is no discretion. Gratuity is a work benefit that can only be removed by consent or a statutory provision. I find no justification for the Respondent to remove the gratuity benefit from the enjoyment of the Claimant on a caution letter that had lapsed in time at the time of his unfair dismissal. This shall be awarded at 30 day's pay per year for the 21 years that it was due all amounting to kshs.3,494, and 526.00.

59. There is the claim for medical allowances for 6 years until the retirement age. This claim is speculative and on the finding that notice was due before termination and this having been awarded to award for medical benefit is double pay as such is a benefit given while at work and not when outside the work place. This is declined.

60. The Claimant is seeking the payment of legal fees while defending himself in Criminal case No.891 of 2010 at kshs.250,000.00. receipts paid to his advocate were also submitted all amounting to kshs.300,000.00. this claim though arising from the criminal charges levelled against the claimant, there is no linkage with the Respondent with regard to the same as the charges were levelled by the state and the Respondent officers were only called as witnesses. The labour relations issues have herein been removed from the criminal process as the burden of prove required in one is different and the legal requirement for the same are different. Employment is regulated by the Employment Act while the criminal process is regulated by the Criminal Procedure Code and the Penal Code. This is declined.

Conclusion and Orders

In conclusion, I do find and declare that the summary dismissal of the Claimant was unfair in procedure and substance or in accordance with justice and equity and therefore enter judgement for the Claimant against the Respondent for;

- a. Compensation at kshs.1,996,872.00**
- b. Gratuity at kshs.3,494,526.00**
- c. Notice pay at Kshs.166,406.00**
- d. Costs of the suit.**

Delivered in open Court , dated and signed in Nairobi on this 19th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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