



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 715 OF 2012

PATRICIA WANGARI MUNENE.....CLAIMANT

VS

EQUITY BANK LIMITED.....RESPONDENT

AWARD

Introduction

1. Patricia Wangari Munene, the Claimant in this case was an employee of the Respondent Bank from November 2003 until November 2006, when she was summarily dismissed. She brought this action by way of a Memorandum of Claim dated 26th April 2012 and amended on 15th April 2015.
2. The Respondent filed an amended reply on 21st April 2015 to which the Claimant responded on 27th April 2015. The Claimant testified on her own behalf and the Respondent called its General Manager-Operations, Joseph Miring'u Ng'ang'a.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Clerk/Cashier at a consolidated monthly salary of Kshs.25,000.00 effective 24th November 2003. She rose through the ranks to the position of Branch Accountant as at the time she left the Respondent's employment. Her last monthly salary was Kshs.40,000.00.
4. On 22nd November 2006, the Claimant was arrested and detained at the KICC Police Station. She was later charged jointly with Peter Kariuki Kanyoko and Miriam Waheti Warutere with the offences of conspiracy to defraud contrary to Section 317 of the Penal Code and stealing by servant contrary to Section 281 of the Penal Code.
5. The Claimant states that there were no credible investigations preceding her being arraigned in Court and she was consequently acquitted. She avers that in addition to facing malicious prosecution, she was subjected to indignity as a result of incarceration before she could raise bail. She adds that on account of the false and malicious allegations made against her by the Respondent, her right to freedom from inhuman and degrading treatment were violated. She prays for compensation for violation of her constitutional rights.
6. Pursuant to the allegations that the Claimant had been involved in defrauding the Respondent, she was summarily dismissed by letter dated 27th November 2006. The Claimant pleads that the said dismissal was unlawful. After her dismissal, the Claimant procured employment with Diamond Trust Bank but the Respondent advised her new employer that she was not a trustworthy person. The Claimant

was thus forced to resign.

7. It is the Claimant's case that the Respondent's action in this regard aggravated and compounded previous wrongs meted against her. She avers that the cumulative actions and omissions of the Respondent constitute a violation of her right to fair labour practices under Article 41 of the Constitution.

8. The Claimant's claim is as follows:

- a. A declaration that she was entitled to reinstatement upon her acquittal in Nairobi Chief Magistrate's Court Criminal Case No 2180 of 2006;
- b. A declaration that the Respondent's actions and omissions violated her right to freedom from subjection to torture and ill treatment and her right to fair labour practices;
- c. Special damages in the sum of Kshs.2,880,000.00;
- d. Compensatory damages in lieu of an order for reinstatement;
- e. Compensatory damages for violation of her constitutional rights;
- f. General damages for the destruction or negation of the her banking career;
- g. Costs and interest.

The Respondent's Case

9. In its amended Reply to Statement of Claim filed on 21st April 2015, the Respondent states that the Claimant was summarily dismissed for grave misconduct, dishonesty, fraud and corrupt dealings. According to the Respondent, the Claimant failed to explain the circumstances leading to the fraudulent dealings in spite of being afforded the opportunity to do so.

10. The Respondent contends that the termination of the Claimant's employment was effected procedurally within her contract of employment and the law. The Claimant was accorded the chance to defend herself but she failed to give an account of how fraudulent adjustments were made in some customers' bank accounts.

11. In response to the Claimant's claim for malicious prosecution, the Respondent states that the Claimant was handed over to the Police, which is an independent body mandated to investigate crimes and all suspects are subjected to the same procedure. There was no violation of the Claimant's rights as she was taken through the required procedure. The Respondent adds that incarceration is part of that procedure.

Findings and Determination

12. The following are the issues for determination before the Court:

- a) Whether the termination transaction violated the Claimant's constitutional rights and whether the termination was justifiable and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

13. In her amended Memorandum of Claim, the Claimant states that the events leading to her summary dismissal amounted to a violation of her constitutional rights. In the well known case of *Anarita Karimi Njeru v R [1979] KLR 124* it was held that a party alleging violation of a constitutional right or freedom

must first; state with reasonable precision the right or freedom in issue and second; describe how the right or freedom has been violated. The Claimant states that her right to freedom from inhuman and degrading treatment and her right to fair labour practices have been violated.

14. With regard to the right to freedom from inhuman and degrading treatment, the Claimant pleads that her arrest at the Respondent's behest, subsequent incarceration and arraignment in Court amounted to violation of her constitutional rights. In response, the Respondent states that the Claimant was handed over to the Kenya Police, being the competent authority to conduct investigations into and prosecute for criminal offences.

15. In my view, an arrest, incarceration and arraignment in Court undertaken within the law, do not in themselves amount to violation of rights. The scale would tip over only if in the course of these transactions, a specific right, say the right to fair trial or bond pending trial are violated. On the right to fair labour practices, no details were given on the alleged violation. The Court therefore found no basis for the Claimant's allegation of violation of her constitutional rights.

16. In *Peter Adika v National Police Service Commission & Another [2015] KLR*, this Court held that not every termination of employment is a violation of constitutional rights. Employees are however not left without recourse as there are adequate safeguards under statute.

17. Both the Claimant and the Respondent made extensive reference to the Employment Act, 2007. However, at the time the Claimant's employment was terminated in 2006, this law had not come into effect. The applicable law would therefore be the repealed Employment Act (Cap 226).

18. The Claimant's letter of summary dismissal dated 27th November 2006, states as follows:

“Dear Ms. Munene,

RE: ...SUMMARY DISMISSAL

Following the completion of investigations in the case involving you, and whose details you are familiar (sic), we regret to inform you that your integrity and credibility as an employee have been severely compromised, and Equity Bank Limited has lost confidence in you as an employee. Arising from this, we regret to advise that you have been summarily dismissed from the services of the Bank with effect from 16th November 2006. The decision to dismiss you is in accordance with the Employment Act Cap 226, paragraph 17(g).

You will be paid up to and including 15th November 2006, which was your last date of service.

Please arrange to hand over any company property in your possession to the Business Growth and Development Manager- KNUT House. In addition, ensure that you have cleared with all the departments and hand over the duly completed clearance form to the Payroll Accountant, after which your final dues will be payable on the next payroll date. Further note that any pending debts will be recovered from your final dues.

Yours faithfully,

EQUITY BANK LIMITED

(Signed)

L'parnoi Lengewa

Head of HR & Organization Development”

19. Section 17 of Cap 226 provides as follows:

17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -

(a) if, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work;

(b) if, during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work;

(c) if an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) if an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

(f) if, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released on bail or on bond or otherwise lawfully set at liberty;

(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

20. The Claimant was summarily dismissed under Section 17(g) above which provides for summary dismissal of an employee who commits or is reasonably suspected of having committed a criminal offence against the employer. The Claimant was accused of the offence of conspiracy to defraud contrary to Section 317 of the Penal Code with a second count of stealing by servant contrary to Section 281 of the Penal Code. She was acquitted of both counts on 3rd December 2011.

21. From the evidence on record, the Claimant's woes arose from a round table inter branch reconciliation exercise undertaken at the Respondent Bank. The Claimant told the Court that she was detailed to represent Mama Ngina Branch during the exercise.

22. The Respondent's witness, Joseph Miring'u Ng'ang'a, who was also involved in the reconciliation exercise testified that the Claimant initiated a transaction that facilitated a fraudulent transfer of funds from the general ledger to a customer's account.

23. The fraud was discovered by the Respondent's security team, eight months later. For some reason, the documents giving rise to this transaction could not be traced. Ng'ang'a told the Court that the documents were in the custody of one Francis Njuguna who was a Branch Accountant based at the Head Office.

24. In the absence of these documents, the Court was unable to verify the Claimant's involvement in the alleged fraud and therefore finds the Claimant's summary dismissal unjustifiable. Consequently, I quash the summary dismissal and convert it to normal termination with all benefits, including notice, as set out in the Claimant's terms and conditions of employment. The Respondent is directed to formally withdraw

the letter of summary dismissal dated 27th November 2006 and issue a letter of normal termination, as provided under Cap 226, backdated to the date of dismissal, within the next 30 days from the date of this award.

25. I find no basis for the other remedies sought by the Claimant.

26. The Respondent will pay the costs of this case.

27. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF NOVEMBER 2015

LINNET NDOLO

JUDGE

Appearance:

Mr. Kibe Mungai for the Claimant

Miss Kisaka for the Respondent