



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.441 No. OF 2015

HUSSEIN MOHAMED AWADH.....CLAIMANT

VERSUS

FIRST AMERICAN BANK OF KENYA LTD.....RESPONDENT

J U D G M E N T

Introduction

1. The claimant was employed by the respondent as a cashier in March 1991 and worked until 31.1.1998 when his services were terminated. His salary at the time of his termination was ksh 30,848. Before termination he was charged with criminal offence related to his work. He brought this suit on 5.9.2001 accusing the respondent of wrongful termination of employment and malicious prosecution and urging the court to award him damages plus terminal dues.

2. The respondent has denied the liability for wrongful termination of the claimant's employment and also for the alleged malicious prosecution of the claimant. It is the respondent's case that the claimant's services were properly terminated under the collective Bargaining Agreement (CBA). Between the claimant's union and the Kenya Bankers Association. She further averred that if the claimant suffered any loss or damages as a result of the criminal proceedings, then compensation should not be claimed from her.

3. The suit was heard on 10.5.2007, 3.4.2008, 12.7.2010, 9.2.2011, 4.5.2011 and 8.11.2012 when the claimant testified as Pw1 and called Mr Samuel Bays as Pw2. On the other hand the respondent called Mr. Ian Irungu as Dw1 and thereafter both parties filed written submissions. Before any judgment was written the file was transferred to this court from the High court on 15.6.2015. All what this court has done in this suit is only to receive further written submissions and to write this judgment.

Analysis and Determination.

4. After perusing and considering the pleading, evidence and written submissions from both parties, the court found no dispute about the employment relationship between the parties herein and the duration of the said relationship. There is also no dispute that in early 1997 the claimant was involved in bank transactions during his course of duty which led to internal as well as police investigations on him. That one of the said transactions was payment of USD 20000 to a customer called Mr Shabir on 27.4.1997 and reverse of the said transaction through refund of Ksh 1.07 million on 30.5.1997. That the claimant was served with show cause letter which he replied on 21.9.2014 and therefore he was served with a termination letter dated 9.12.1997 whose effective date was 31.1.1998. That in the meanwhile the claimant was arrested by police from Central Bank Mombasa who later charged him with criminal offence but he was later acquitted of the criminal charges. Lastly it is common ground that after

termination the claimant was paid his terminal dues. The issues for determination are:

- a) Whether the respondent maliciously prosecuted the claimant.
- b) whether the termination of the claimant's services was wrongful.
- c) whether the reliefs sought should be granted.

Malicious Prosecution

5. Cw1 testified that after the internal investigation about the USD 20000 transaction, he was picked from the office in November 1997 by the Central Bank fraud investigations and taken to Nairobi to record a statement and the following day he was charged before Mombasa law court with criminal case No 3497 of 1997. That on 28.3.1999 he was acquitted. On cross examination he admitted that the criminal proceedings touched on the USD 20000 transaction which he handled on 29.4.1997. He further admitted that the criminal court found that he went contrary to banking regulations. He also admitted that it is the police that investigated him and did the prosecution on suspicion that he had committed an offence. The court put him to his defence but it gave him the benefit of doubt and acquitted him. Dw1 in his evidence contended that the claimant paid out the money irregularly and was charged on suspicion that he had misappropriated the bank's funds. He denied that the claimant was maliciously prosecuted.

6. The court has considered the evidence by the witnesses summarized above and is of the view that the tort of malicious prosecution has not been proved on a balance of probability. The overwhelming evidence on record is to the effect that, the exercise of investigating the claimant's conduct was done by the Central Bank fraud investigators. That it was the same investigator who formed the opinion that the claimant was a suspect of misappropriation of funds and decided to charge him. That it was the said investigators who arrested the claimant, locked him up and later arraigned him in court to face charges in criminal case No 3497 of 1997. That the said investigators later prosecuted the claimant until the court put him to his defence before acquitting him. Without belaboring the point, this court is of the opinion that it's the said investigator through the office of the AG (now under the DPP) who should have been sued for the tort of malicious prosecution or at least enjoined as a defendant herein. The respondent herein had no control over the investigations by the Central Bank investigators and there is no evidence showing that the respondent influenced the decision by the investigator on whether or not to charge the claimant and whether or not to continue with the prosecution till judgment. Had the police failed to charge and prosecute the claimant the respondent would not have compelled them to do so.

Wrongful Dismissal

7. The claimant testified that on 29.4.1997 he paid out USD 20,000 to a customer called Shabir on the basis of a cheque that had been deposited and on the authority of the Operations Manager Mr. Hussein Juma Hussein. He produced a copy of the entry bearing the Operations Manager's signature and endorsed "approved". That the said customer was very influential and was usually served from the office of the operation manager and sometimes even after the banking hours. That the customer, Mr. Shabir returned the money on 30.5.1997 but in Kenya shillings.

8. The claimant explained further that in June 1997 the Operation Manager went on leave and the Chief Manager Mr Ikabe raised queries about the said entries to which he gave oral explanation. However in September 1997 the chief manager also asked for written explanation of the entry which he described as a forgery. Pw1 wrote a letter on 21.9.1997 saying that the entry had been authorized by the operations manager but the chief manager responded accusing pw1 of colluding with the operations manager. Pw1 was then arrested by Central Bank investigators and later charged with criminal offence and later acquitted. That in the meanwhile pw1 was served with termination letter dated 9.12.1997. He explained that his appointment letter provided for a termination notice of at least 4 weeks but he was not given any notice. He contended that the termination was actuated by malice after he was charged with a criminal case.

9. Dw1 in response contended that Pw1 had made irregular payment of money to Mr. Shabir. That the claimant admitted that he made the irregular payment but with the authority of the operations manager. he criminal court also made the finding that pw1 had made payment of money to a customer in breach of banking regulations. This court is also satisfied by the evidence before it that the claimant made irregular payment of funds to Mr. Shabir on 29.4.1997 in breach of banking regulations. He was given a chance to defend himself in writing but his explanation was not satisfactory to the employer. The employer was justified to dismiss him summarily under section 17 of the Employment Act (repealed). She however served a termination notice dated 9.12.1997 which was to take effect on 31.1.1998. The court does not see any wrong doing on the part of the respondent with regard to the termination of the claimant's services through the letter dated 9.12.1997 because it was in accordance with the appointment letter. That as at the time of terminating the claimant's services, the CBA produced as exhibit 10 by Rw1 had not yet been concluded and registered. The CBA was concluded on 17.2.1998 and was registered by the court on 23.3.1998. Consequently, the respondent was not expected to have complied with a nonexistent CBA.

Reliefs

10. The claimant admitted that he was paid his terminal dues including pension salary and accrued leave days. The court will not therefor order any further payment in view of the findings above that the termination of the claimant's services was not wrongful and that the respondent was not to blame for the charging and prosecution for the claimant in criminal case No 3497 of 1997.

Disposition

11. For the reasons and findings made above the suit herein is dismissed with no order as to costs.

Signed, Dated and Delivered at Mombasa this 18th day of November 2015.

ONESMUS MAKAU

JUDGE