



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1359 OF 2011

SAMMY KIPMELI YATER CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYA RESPONDENT

JUDGMENT

1. The suit is based on an amended memorandum of claim dated 2nd August 2012. The suit was initially filed on 10th August 2011.
2. The Claimant seeks maximum compensation for unlawful and unfair summary dismissal and payment of terminal benefits to wit;
 - a. two months salary in lieu of notice in the sum of Kshs. 323,046.00;
 - b. service pay for fifteen (15) years calculated at fifteen (15) days salary per year in the sum of Kshs.1,211,422.50.
 - c. house allowance for two (2) months in the sum of Kshs.25,214;
 - d. provision of certificate of service.

Facts of the Claim

3. The Claimant was employed as a supervisor Grade 2 at Nakuru Branch earning a basic salary of Kshs.98,141.00 and house allowance of Kshs.12,607.00 per month.
4. The Claimant worked diligently according to performance appraisal documents dated 11th June 2002, 26th February 1999, and 5th February 1998. The Claimant received merit salary increments and promotion in recognition of his good performance.
5. By a letter dated 4th June 2007, the Claimant was suspended from duty pending investigation of loss of Kshs.1,796,300.00 at Nakuru Branch. The suspension was on half pay.
6. On 6th July 2007 the Claimant was issued a first warning letter for flouting the cash and cash movement procedures as stipulated in the staff operations manual thereby occasioning loss of bank funds. The suspension was lifted with effect from 6th July 2007.
7. On 11th September 2007, the Claimant received a letter of summary dismissal following disciplinary hearing held on 15th August 2007. The dismissal was in respect of the same charge of loss of Kshs.1,796,300.00 for which he had received a first warning letter on 6th July 2007.
8. The Claimant was to repay a house loan of Kshs.1,366,332.00 and car loan of Kshs.185,167.00 totaling Kshs.1,551,499.00
9. The Claimant wrote an appeal dated 13th September 2007 to the Chief Manager Human Resource Development the officer who had given her the 1st warning letter and summary dismissal on the same charge.

10. He pleaded innocent of any wrong doing stating that he was a dedicated team member and had served the Respondent for fifteen (15) years. The Claimant added that he was a father of six young children and would suffer greatly if not reinstated to his job.
11. The Claimant testified in support of the particulars of Claim and prays the suit be allowed with interest and costs.

Response

12. The Respondent filed a statement of Response with supporting documents, that were produced as evidence in Court.
13. The Respondent admits employment particulars of the Claimant and that the Claimant had an excellent work record in the years 1998, 1999 and 2002 and that this was not a measure of the Claimant's performance during his entire period of service with the Respondent.
14. The Respondent admits it suspended the Claimant from duty for loss of Kshs.1,796,300.00 on 4th June 2007 which occurred on or about 15th May 2007.
15. That the Claimant was acting Operations Manager at the time whose duties included the custody of the strong room. That the suspension was pending investigation.
16. That prior to the suspension the Claimant had been requested to show cause vide a letter dated 31st May 2007 but the Claimant's response was found to be unsatisfactory.
17. The Respondent admits that the Claimant was served a warning letter and reinstated back to work on 6th July 2007. The warning was for flouting the cash and cash movement procedures occasioning the loss of the stated amount.
18. The Respondent admits that it subsequently summarily dismissed the Claimant based on the allegation of wilfully and/or negligently allowed or facilitated the loss of the aforesaid sum of Kshs.1,796,300.00.
19. The Respondent called RW1 Susan Nyaberi to testify in support of the Respondent's case. The Respondent prays that the Claimant's suit be dismissed with costs.
20. **Determination**

- i. Was the Claimant summarily dismissed for a valid reason?
- ii. Was the dismissal done in terms of a fair procedure?
- iii. What remedy if at all is available to the Claimant?

Issue i

21. The following facts are not in dispute;

The Claimant was the acting Operations Manager of the Nakuru Branch at the material time.

The Branch experienced loss of Kshs.1,796,300.00 arising from a money transfer from Oriental Commercial Bank to the Respondent Bank.

That the amount physically transferred from the Bank was thirty million Kenya Shillings (Kshs.30,000,000) and it emerged later that the bundles had a shortage of one million seven hundred and ninety six and three hundred (Kshs.1,796,300.00).

22. That the money was collected from Oriental Bank by employees of the Respondent in the name of Leonard Surmat and Cyrus Mwangi. That the Claimant was not part of the collecting team although by virtue of his job, as acting Operations Manager, he had responsibility as a cash custodian together with the Branch Manager.
23. That the normal procedure was for the issuing Bank to deliver the cash on the receiving Bank but in this case, employees of the Respondent went to collect the cash.
24. Mr. Cyrus Mwangi was the Branch Manager and senior to the Claimant whereas Mr. Leonard Surmat was a cash officer junior to the Claimant. It was unclear why the two did not follow the laid procedure.

25. RW1 admitted that the Claimant was given 1st warning for the same transaction for which he was subsequently summarily dismissed for.
26. RW1 also admitted that the staff operations manual did not provide for double punishment for the same offence.
27. It is the Court's considered view that the Bank acted wrongly by flouting its own operations manual by first subjecting the Claimant to a disciplinary process and gave the Claimant a 1st warning and then later on without any reasonable explanation summarily dismissed the Claimant from employment for the same offence.
28. From the evidence before Court, it is the immediate superior of the Claimant, the Branch Manager together with a cash officer who flouted the Bank's rules by electing without any cause shown to go and collect thirty million shillings from Orient Bank and not wait for the money to be delivered at the Nakuru Branch of the Respondent.
29. The obvious inference from this untoward conduct by the two officers was that they had an ill motive in doing that and are *ipso facto* to blame for the loss of the money that was discovered later through the Bank accounting processes.
30. The Claimant has demonstrated on a balance of probability that the Respondent acted unlawfully and unfairly in placing the blame on the Claimant for the misadventure of the Claimant's superior.
31. Secondly, the Respondent acted unlawfully in punishing the Claimant twice in respect of the same offence.
32. It is the Court's considered view that the Respondent had no valid reason to summarily dismiss the Claimant from employment having granted the Claimant a 1st warning for the same offence.
33. The procedure followed by the Respondent was against the provisions of its own internal disciplinary procedure and was in violation of the principle of legality which prohibits double jeopardy.
34. Accordingly, the action by the Respondent was in violation of Section 45 (2) (a) & (c) of the Employment Act, in that the summary dismissal was not for a valid reason and the dismissal was not done in terms of a fair procedure.

Issue ii

35. The Claimant is entitled to compensation for the unlawful and unfair summary dismissal in terms of Section 49 (1) (c) as read with Section 49 (4) of the Employment Act.
36. The Claimant lost a good job in the lucrative banking industry. It is difficult to get another job in the sector once accused of loss of money albeit indirectly. The Claimant suffered loss of his source of income. He had big loans to pay at the time, and young children to take care of. The Claimant lost his job without notice or payment in lieu thereof and suffered loss and pain as a result.
37. The Claimant had served the Respondent for a period of fifteen (15) years and was at the prime of his career.
38. Taking all this into consideration and the maximum compensation provided under Section 49 (1) (c) of twelve (12) months salary, the Court awards the Claimant ten (10) months salary as compensation for the unlawful and unfair summary dismissal.
39. **Terminal benefits**

(i) Notice pay

The Claimant is entitled to payment of one month's salary in lieu of notice as provided under Section 1.2 of the Staff Manual in the sum of Kshs.98,141.00 the summary dismissal having been declared unlawful and unfair by the Court.

(ii) Severance pay

The Claimant has not established that he was entitled to payment of severance pay as claimed or at all and the Claim is dismissed.

(iii) House allowance for two months.

The Claimant has shown that he was entitled to payment of house allowance for the two months. This Claim was not specifically addressed by the Respondent in the statement of Response and this amounts to an admission of the same. The Court finds that the Claimant is entitled to Kshs.25,214.00 being two months house allowance.

(iv) **Certificate of service**

Provision of a certificate of service is a mandatory requirement under the Employment Act, 2007. Failure by an employer to provide one, is an aggravating factor in assessment of compensation because it deprives the dismissed employee leverage in seeking alternative employment.

40. The Respondent is directed to provide the Claimant with a certificate of service within thirty (30) days from today.

41. In the final analysis the Court awards the Claimant as against the Respondent;

- i. Kshs.981,410.00 compensation for unlawful and unfair termination (ten (10) months salary).
- ii. Kshs.98,141.00 in lieu of one month's notice;
- iii. Kshs.25,214.00 being two (2) months house allowance.

Total award Kshs.1,104,765.

42. The award is payable with interest at Court rates from date of filing suit till payment in full. The Respondent is also to pay the costs of the suit.

Dated and Delivered at Nairobi this 18th day of December 2015

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE