



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.464 OF 2012

THOMAS NYANGI MWITA CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LTD RESPONDENT

JUDGEMENT

1. The issue in dispute is the unlawful and wrongful dismissal of the Claimant by the respondent.
2. The Claimant was on 4th December 2007 employed by the Respondent as a Retail Manager. The respondent, a commercial bank with various branches all over the region issued the Claimant with a letter of appointment on 4th December 2007. On 20th July 2011, the Respondent dismissed the Claimant from his employment. the claim is that this dismissal was effected maliciously and without due regard to the claimant's rights and that the Respondent failed to give notice of the intended dismissal; there was no fair hearing; humiliated him as there was no time given for defence; and the dismissal was without basis or justification.
3. The claim is also that as a result of the dismissal, the Claimant suffered great financial loss, psychological stress and damage. That the Claimant had expected to work until his retirement at age 60. At the time of dismissal, the Claimant earned a monthly salary of Kshs.266, 603.00 and on this basis he is seeking 3 months' pay in lieu of notice at Kshs.697, 809.00; payment in lieu of leave for 11 years at Kshs.2, 932,633.00; loss of earnings for 11 years Kshs.35, 191,596; and all being Kshs.38, 924,038.00. The claimant is also seeking that his dismissal should be declared unlawful and wrongful and thus be reinstated to his previous job without loss of benefits and in the alternative he should be paid damages and full compensation for wrongful dismissal, and costs of the suit.
4. In evidence, the Claimant testified that he is professionally trained as a Banker and was employed by the Respondent as the Branch Manager and posted to Bungoma Branch. He undertook his duties diligently and became one of the best performing managers, had no bad record until his dismissal on 20th July 2011. That he met all his targets and for this his salary was increased earning Kshs.266, 603.00 as a Senior Branch Manager. The dismissal came as a shock as there was no prior warning, a show cause or any hearing. The Claimant was called by the Regional Manager Kisumu and was issued with the letter of dismissal without being told anything. The letter stated that the Respondent had established that there was evidence of gross misconduct and that whatever the Claimant dues he was entitled to would be paid less the loans he had taken which would continue to have interest at staff rates until 31st July 2011.
5. The Claimant also testified that on 22nd July 2011 he lodged an appeal giving a detailed account of

what he knew. Upon dismissal, the Claimant had called the human resource office to establish why such action had been taken against him and that is when he learnt of allegations against him. Such allegations related to;

- a. Makwata construction company & Makwata Construction & Engineering Company A/C Nos. 1106237937 & 1112987649 respectively;
- b. Mwenzangu Hardware Ltd;
- c. Peter Miyanda;
- d. M Big Limited; and
- e. Gordon Sewe Okelo

6. The allegations were that the Claimant had authorised the opening of an account and paid Makwata Construction Company Kshs.200, 000.00 but he denied this and stated that at the time the account was opened he was not at Bungoma Branch. He also did not offer any loan facility once the account was opened as alleged. That at the time of dismissal, there was no overdrawn account in his branch. With regard to M Big Limited, the customer had an existing account and was enjoying overdrafts. On the allegations with regard to Gordon Sewe Okelo, this customer did not enjoy overdraft facility at all but the Claimant being the manager of the branch, he had the discretion to allow for overdraft. On the case of Peter Miyanda, the Claimant opened the account and authorised the grant for an overdraft facility. All SME loans were authorised from the head office as the Claimant had no role in this regard. Where overdrafts were given, the Respondent policy was followed to the letter as the Claimant had the guidelines which allowed him to issue overdraft and did not breach his authority.

7. The Claimant also testified that upon his appeal, he was called for a hearing where he raised his defence against dismissal and was told that more investigations would be conducted. After 3 months the Respondent wrote and confirmed the dismissal. Such rejection of the appeal was done without the Claimant being told the outcome of the investigations, the report was not shared and there was no prior notice. The hearing only arose upon appeal as no show because had been given hence the reasons for termination were not valid or justified.

8. The claim is that since the Claimant was dismissed he has not been able to get a new job as the banking sector is very sensitive and once one is dismissed it is near impossible to get a new employer in the same sector. The Claimant having trained as a Banker is therefore jobless by virtue of his dismissal by the Respondent. That this has caused him psychological suffering and distress and the Respondent is liable. Leave for 4 years was not paid and he had 11 years before retirement as in 2011 he was 47 years old and had planned to work until retirement at 60 years of age. Thus compensation and damages should be paid.

9. The Claimant also testified that in the defence filed by the respondent, it is noted that there was a complaint against him made by Makwata construction and Engineering Company, but he did not get such a complaint. That this complaint has no basis at all. As the Branch Manager in Bungoma, the Claimant had Shadrack Musani and Judith Nekoye as his juniors – Musani and Nekoye opened the Makwata company account and the monies deposited in this account was done by Nekoye. When the Respondent did their forensic investigations, there is no role shown to have been undertaken by the Claimant in this account.

10. The Claimant is seeking to be reinstated back to his position and in the alternative he should be paid damages with costs.

11. In cross-examination, the Claimant testified that he was not given any reasons for his dismissal and it was only upon appeal that he got to know of some issues that the Respondent had raised. In appeal the Claimant noted several issues with regards to the Makwata Company account; the advance of Kshs.100, 000.00 to Makwata Company; the overdrawn account; and the non-performing SME. This followed a letter dated 25th may 2011 sent by the Respondent referenced on irregularities to which the Claimant had responded to. That in this letter the Claimant was to show cause why disciplinary action should not be taken against him for breach of policy but that how the issues were framed was not a show cause letter.

Upon his reply on all the matters raised by the respondent, he was never called for a meeting or a hearing as the next letter was a dismissal. The allegations made with regard to the Makwata Account was that the Claimant had authorised an overdraft of kshs.200,000.00 but this was not true as at this time, a second account had been opened while the Claimant was not the manager hence not the responsible person. He had been officially sent to another branch, Rongo and only came to Bungoma after 6 months and found that on 1st August 2009 a second account for the same customer had been opened. Musani was acting branch manager and had approved the opening of the account with Nekoye. He summoned these two officers over the serious anomaly of opening the two accounts and giving overdraft on 0 balance and then directed them to regularise the same. That this was an operational issue within the Respondent business. The allegation by Makwata Company that of the kshs.200, 000.00 overdraft, Kshs.100, 000.00 was kept for the Claimant is not true as no such evidence exists. He compelled the two officers to refund the overdrawn money as they had not followed the set procedure.

12. In the case of Mwenzangu Company the allegations of unauthorised overdraft was regularised and that the Claimant had authority and discretion to grant overdraft in that account. The lending manual gave him the authority and discretion to pay overdraft. That all Manager had the lending discretion; had authority to open an account and grant an overdraft; and it was gross misconduct for the subordinates to open an account and give overdraft as they had no such discretion which was only to the branch manager. The case of Mwangaza Company was not part of complaints the Claimant was asked to respond to. Peter Miyanda was the sole proprietor of Mwangaza hardware and the Claimant opened his account and granted an overdraft on kshs.250, 000.00 on 0 balance as there was the discretion to so grant. There was a certificate of director with Teresa Miyenda being the co-proprietor.

13. On the case of Gordon Sewe Okelo, the Claimant was alleged to have authorised an overdraft of Kshs.130, 000.00 on 6th July 2011 where the account had no sufficient funds. That in this regard he had the discretion to give the overdraft so as to maintain good customer relations. Such lending and grant of overdraft was not time specific and the monies were repaid. The policy then was on a *know your customer* basis and no security was required. The Respondent as not exposed to any losses as all the customers paid.

14. The Claimant also testified that he last went on his leave in 2011.

15. That his two juniors Musani and Nekoye were made to repay money overdrawn from a customer account and as a result they wrote statements against the Claimant accusing him unfairly. When the Claimant left to attend work at Rongo branch, his two juniors miscondacted themselves by acting beyond their authority – opened accounts and allowed overdrafts – which was unprocedural. They repaid such monies to regularise the same. The Respondent did not lose any monies.

Defence

16. In defence, the Respondent admitted that they had employed the Claimant as a Retail manager, Bungoma Branch at a basic salary of Kshs.190, 000.00 per month. On 6th April 2011, the Respondent received a complaint from one customer in Bungoma branch, Patrick Makwata that on 1st August 2009 the Claimant had authorised a facility of Kshs.200, 000.00 to him and out of which the Claimant obtained Kshs.100, 000.00. That the Claimant refused to repay this money and started harassing him [Makwata] and eventually caused the institution of malicious recovery proceedings against him where his car was impounded by auctioneers. Upon investigations, the Respondent found out that the Claimant had facilitated the opening of a new account for the customer while he had a non-performing loan. The statements taken from the acting manager Musani indicated that the Claimant called him with directions to open the account and that the Claimant was in the habit of authorising overdraft of accounts without authority in several other cases. Ms Nekoye the Respondent Bungoma branch business Manager also wrote a statement and confirmed that she had introduced Makwata to the Claimant so as to open an account with the Respondent. That this customer had previously asked for a facility of Kshs.700, 000.00 which was declined but on 1st August 2009 he came to see the Claimant but by this time he was in the Rongo branch and Musani assisted the customer. That it had been agreed between Musani and the

Claimant that the customer should be given kshs.200, 000.00 facility through a new account. Nekoye assisted the customer to open account No.1112987649 and was paid immediately upon the Claimant and Musani holding telephone conversations. The account had zero balance; there was no loan application form; and the customer had not repaid previous loan. On 25th February 2011 Nekoye and Musani were called by the Claimant and directed to regularise this account or lose their jobs. Nekoye helped clear the debit and paid kshs.100, 000.00 through her son's name so as to retain evidence to which the Claimant confirmed that once the customer paid, she would get back her money. That on 1st August 2009 the Claimant called Nekoye and directed her to receive Kshs.100, 000.00 from Makwata and keep it for him to be collected later.

17. The defence is also that, the Respondent obtained a statement from Ms Gladys Malanga a teller on 1st August 2009 who stated that on this date she opened an account No.1112987649 for Makwata which was debited with Kshs.200, 000.00 from a nil balance upon Musani authorisation and the voucher had details indicating Musani had talked with the Claimant.

18. On 28th April 2011, Makwata wrote to the Respondent as follow up to his complaint. He stated that the Claimant directed him to open a new account after his loan application had been declined and on the same date he applied for a facility of Kshs.200, 000.00 which was approved by the Operations Manager as the Claimant was in the branch. Upon his withdrawal of Kshs.200, 000.00, he left kshs.100, 000.00 with Ms Nekoye as directed by the Claimant. That he is not the one who deposited Kshs.185, 000.00 and Kshs.100, 000.00 into his account on 25th February 2011 which then had a reversal debit of kshs.85, 000.00 and only got to learn of these transaction during Court recovery proceedings against him on 12th March 2011.

19. The defence is also that, on 23rd May 2011 the Claimant wrote his statement and disputed any involvement with Makwata. That the alleged account transactions on 25th February 2011 were made by Ms Nekoye who also made arrangements to regularise the overdrawn account. The Claimant admitted to giving instructions to a law firm without involving the Respondent legal department so as to recover the debt from Makwata. That he authorised the debit of kshs.300, 000.00 on account of Mwenzangu hardware within his lending discretion on 13th April 2010; he authorised a debit of Kshs.250, 000.00 to Peter Miyenda on 23rd June 2010.

20. Upon these findings, on 25th May 2011 the Claimant was asked to show cause why disciplinary action should not be taken against him for various anomalies and policy breaches he had allowed at the branch. Such anomalies related to the accounts of Makwata Construction & Engineering Company, Mwenzangu Hardware limited, Peter Miyenda, M Big Limited, Gordon Sewe Okelo, 8 SME loan contracts.

21. On the SME loans, the Claimant was asked to send a comprehensive report on the irregularities but he failed to do so. On 28th May 2011 the Claimant replied and stated that he was not responsible for the cited anomalies. That in the period of 2008/2009 several customers applied for SME loans but did not service them. The customers applied for the loans to support bank account statements for list of stocks and business permits issued by Mumias county council; the Claimant did not verify the authenticity of stated bank accounts with Barclays and Equity banks as stated in the application forms; the companies which audited the customer's books of account were never investigated as to whether they had valid registration; and that no searches were done on these audit companies. That the Claimant had directed lawyers to file suit upon advice by the Respondent advocates noting that the Respondent would not incur any legal costs.

22. On 17th June 2011 the Respondent regional business manager – western evaluated the Claimant responses and found it not satisfactory. He found that the Claimant could not be trusted in lending the Respondent money as he was reckless in lending.

23. On 6th July 2011 the Respondent received a forensic investigations report on the Bungoma branches. The investigations were with regard to an irregular facility of kshs.200, 000.00 advanced to Makwata by

the Claimant and the use of kshs.100, 000.00 by the Claimant and the potential loss of kshs.6, 909,686.89 through irregular disbursement of SME loans against fraudulent applications in favour of 9 customers from one family.

24. On the irregular advance of kshs.200,000.00 to Makwata account, the investigations revealed that the Claimant had on 1st August 2011 called Musani and the payment voucher had written comments to this effect; this was corroborated by Ms Nekoye who stated that the customer left akshs.100,000.00 with her to issue to the claimant; upon the customer defaulting the Claimant coerced Ms Nekoye and Musani to regularise the account with their own deposits of kshs.185,000.00 and kshs.100,000.00 after which the Claimant instructed Respondent advocates to commence recovery proceedings against the customer. That the Claimant failed to refer the matter to the Credit support department or to the legal department who were to refer the matter to external advocates. That upon consent in court, the Claimant and Musani recovered kshs.87, 000.00 from the customer's account unprocedurally as they raised a voucher and debited the same without the involvement of the customer. By the time the recovery proceedings were undertaken, the customer account was in credit and therefore there was no justifiable grounds to give such instructions and the Claimant conduct in instructing the advocates for the recovery proceedings corroborates the assertions of Ms Nekoye and Musani that they had been coerced to regularise the customer account. The Claimant also failed to take any disciplinary action against Ms Nekoye and Musani upon the realisation that they had advanced a facility of kshs.200, 000.00 without authority. The investigations also found out that the Claimant had unprocedurally authorised overdrafts in other accounts to Peter Miyenda, Mwenzangu hardware, and to Gordon Sewe Okelo and that the Claimant did not have a lending discretion of kshs.400, 000.00 and even where he had such discretion, this could only be exercised against uncleared effects and micro loans. The investigations also revealed that there was no malice on the part of Nekoye or Musani in their statement that the Claimant had directed them to give a facility of kshs.200, 000.00 where he received Kshs.100, 000.00 as the evidence of the customer was in support of such statements and evidence.

25. The investigations carried out by the Respondent found that the Claimant had acted dishonestly by allowing customers to enjoy irregular overdrafts contrary to the Respondent lending policy. The investigation recommended that the Claimant should be terminated from employment for gross abuse of office and disregard to operational guidelines.

26. The investigations also found that the actions of the Claimant There was potential loss of Kshs.6,909,686.89 through irregular disbursement to SME loans when he failed to make regular visits to the applicant's businesses to appraise them in the credit quest; failed to monitor loans repayments and overdraft limits and report to the regional and head offices; the loans were to family members who used fraudulent permits which were forged and recycled with no security; there were no registration certificates to authenticate ownership of the businesses granted loans; documents attached to the applications for the loans were not authenticated; charged documents were irregularly signed; and the Claimant failed to adhere to approval conditions by ensuring an insurance cover over stock was taken or to follow up to ensure the customers made regular banking or file reports as appropriate. The investigations therefore found the Claimant to have been reckless, failed to follow the lending policy and failed to consider the business risks.

27. On 20th July 2011 the Claimant was dismissed for gross misconduct. The terminal dues were to be paid upon the Respondent recovering what the Claimant owed. The Claimant filed an appeal and on 1st December 2011 the appeal was dismissed. The dismissal was lawful and fair. This was done upon investigations revealed and found a series of irregular transactions which included opening a new account for a customer despite having a non-performing loan so as to circumvent bank process, failure to obtain prerequisite authority before allowing overdrafts and instituting legal action against a customer which his account had credit and without consulting with the respondent's credit and legal officers, and failure to follow procedure in the approval of SME loans of over 7 million Kenya shillings. Such actions amounted to negligence under section 44(4) (c) of the Employment Act that warranted summary dismissal. The Claimant was given a chance to defence himself, he appeared before the appeals committee but failed to give satisfactory responses. There was no malice and the claims sought are not justified and the same should be dismissed with costs.

28. In evidence, the Respondent called Alloys Okari Ombui the Forensic Investigator tasked with duties at investigating internal fraud within the Respondent business. He has served at the Respondent since 1999 and has been undertaking his duties for the last 26 years. He was asked to investigate the Bungoma branch with regard to the claimant's case where 2 cases had been reported. The SME loans were irregularly approved and the Respondent lost over 6.9 million Kenya shilling and that there were 2 accounts that had been irregularly opened and overdrawn on the same day contrary to the lending policy. The beneficiaries were allowed to draw funds that they did not have at the time – Peter Miyenda under Mwangaza hardware, a business registered in Kisii and the sole proprietor was Teresia Nyaboke.

29. Upon these findings, he recommended disciplinary action be taken against the Claimant. That the people who got the loans be followed up for recovery. The mistake done by the Claimant is that he failed to make calls or visits to the applicants to verify details given in the applications. In the SME loans given, only Mr Sakani had a business and all the others were selling polythene paper bags without any registered business and did not qualify for a loan by the Respondent. All the alleged loanees were visited and Sakani confirmed they were from the same family and only he owned a business but all loans had been approved.

30. That the Claimant was also faced by the case of Makwata. He investigated case of bribery between the Claimant and the customer but the Claimant denied these allegations and interviews with Nekoye and Musani revealed details that through Nekoye, the Claimant was given Kshs.100, 000.00 as a bribe. There were 2 accounts for Makwata Construction Company with an application for a business loan which was approved and Nekoye was given Kshs.100, 000.00 to give the Claimant as at the time he was in Rongo branch. The irregularity arose out of the fact that the overdraft was approved and the Claimant directed the opening of a new account to facilitate the transaction. The Claimant did not make an enquiry into the actions of Nekoye and Musani in this case as he had given them directions as noted in the payment voucher to the customer. The customer was also charged in Court and a civil case filed to recover monies salary credited into his account without the credit and legal officer's knowledge. Where Musani and Nekoye misconducted themselves, the Claimant should have escalated their cases to the human resource for action.

31. On the case on Mwenzangu account, the witness investigated the same and found out that an account was opened on 13th April 2010 by the Claimant and he paid Kshs.100, 000.00 on the same day to peter Miyenda without authority. The Claimant authorised the debit in this transaction but the company proprietor was Teresa Miyenda wife of Peter Miyenda thus paid a third party over an account that was irregularly opened. This exposed the Respondent as the transaction was contrary to Central Bank of Kenya guidelines where peter Miyenda not being a proprietor of a company was allowed to open an account using the company names and was given credit on the same day. There was irregular movement of funds from the Respondent business and this amounted to stealing.

32. In cross-examination, the witness testified that when the Makwata company account was opened and kshs.200, 000.00 paid, the Claimant was in Rongo Branch and Musani was the acting manager in Bungoma branch. Musani had 100% control of operations at the Bungoma branch when the Claimant was away. That there was no cash lost in the bank books but there were noted irregularities. The alleged bribe of kshs.100, 000.00 by Makwata was not part of the disciplinary action against the clamant. The audit statement for the Respondent is not attached to the investigations report and the report only notes that there was potential loss of 6.9 million Kenya shillings.

33. On the SME loans the witness stated in cross-examination that there is a procedure once an application is submitted. Each application must be appraised and attached documents verified and the recommendations of the branch manager is what the head office relies upon. The procedures document is not in Court or attached to the report. During the investigations at Bungoma branch, the Claimant was not present, he was away on sick leave. There was no meeting between the witness, Musani, Nekoye and the Claimant so as to assess their joint evidence. Upon investigations, the Claimant was not given a copy to see what had been found against him so as to reply.

34. The witness also testified that in the dismissal letter, the gross misconduct was not stated. The Claimant did not know what he was supposed to respond against.

Submissions

Whether the Claimant was unlawfully/wrongly dismissed

Whether there are any remedies

35. The basis of the claim herein is that the Claimant was unlawfully and or wrongly dismissed from employment. That the dismissal was malicious and these factors led to unfair terminal of employment.

36. In a case of wrongful termination of employment, the primary and statutory burden placed upon parties in such a complaint is found under the provisions of 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.

37. On the other hand, Section 43 states that where the employer fails to prove the reason or reasons for termination, the termination shall be deemed to be unfair within the meaning of Section 45 of the Employment Act 2007. The context here is that in law and fact an employer is required to prove the reason(s) for the termination otherwise the termination shall be deemed unfair. These reasons must be the ones which genuinely existed and caused the employer to terminate the services of an employee.

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.

38. The employer is therefore required to have genuine, and also must prove that the reasons for the termination are both valid and fair if the reasons relate to an employee's conduct, capacity, and compatibility or are based on operational requirements. See section 45(2) (a) and (b) thus;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility

Or

(ii) based on the operational requirements of the employer;

39. The above provisions under section 47, 43, and 45(2) set out the substantive issues/reasons that relate to a termination that must be established before an employer can arrive at the decision to dismiss an employee. Where genuine reasons, that are valid and fair exist, then the employer must give regard to the procedural requirements set out under section 41 of the Employment Act by ensuring that the employee has notice of any allegations against them, is given a hearing so as to state their defence and that where an

appeal is allowed, such is permitted to take its course.

40. In this case, on 20th July 2011 the Claimant was dismissed from employment. He was issued with a letter stating;

DISMISSAL FROM EMPLOYMENT

This has reference to the correspondence exchanged and discussions held with your line manager.

We advise that it has been established that you committed acts of gross misconduct, details of which are well within your knowledge. As a consequence, you have been dismissed from employment with effect from today's date.

40. The Claimant testified that as the Branch Manager, Bungoma, he received a letter dated 25th May 2011 noting that there was several irregularities at his branch. The noted irregularities related to six (6) issues to which he gave his responses. The first related to Makwata Construction Company where it was alleged that he authorised the opening of account No.112987649 which was irregular as the customer had another non-performing debt and also proceeded to authorise the withdrawal of kshs.200,000.00. The Claimant explained that at the time of these transactions he was in Rongo branch and Musani was acting manager Bungoma who authorised the transactions and there is no record of his involvement. Secondly, the Claimant was alleged to have authorised Mwendangu Hardware Ltd to open an account on nil balance and a withdrawal of kshs.300,000.00 without lending discretion and the Claimant stated that he had the authority and discretion to grant the overdraft to the customer as a businessperson in Bungoma town and well known to him. the third issue was that he allowed Peter Miyienda to open an account on nil balance and drew a cheque of Kshs.250, 000.00 and a cash withdrawal of Kshs.250, 000.00 without authority and also failed to send reports to the Line manager to which he stated that this was a customer and proprietor of Mwendangu hardware Limited doing business in the town and bringing business to the Respondent at the Claimant Bungoma branch. Fourth was the case of M Big Limited where the Claimant was alleged to have allowed payment of cheques on this account without it having sufficient funds or authority to do so and he replied that this was one of the high net worth corporate accounts managed by the corporate relationship managers and reports were submitted on the transactions. Fifth was the case of Gordon Sewe Okelo who was granted overdrafts even without sufficient funds in his account and the Claimant replied that this was a good performing client and when he borrowed it was due to the death of his mother, his vehicle was in an accident and he took time to regularise his account. Sixth issue was that the Claimant failed to give reports with regard to 8 SME loan contracts at his branch to which he stated that these loans were managed from the head office and at Bungoma the accounts were managed by two staff members and one retired but all these loans were co-guaranteed by US-AID.

41. The Claimant thus faced with 6 allegations against him, did his reply challenging each and every one by giving his explanations. The notice of 20th May 2011 had also required the Claimant to show cause why he should not be disciplined over the allegations against him. Did he meet the satisfaction of the respondent? Was his explanations found sufficient?

42. The Claimant gave his Responses thus on 28th May 2011. What is apparent from the record, on 17th June 2011 the Regional officer – Western filed a report to the Respondent human resource on *advances irregularities at Bungoma branch* with focus on the Claimant. Soon after Okari Ombui submitted his investigations report on *Forensic Investigations Report* at the Bungoma branch. This officer of the Respondent also testified in Court with regard to his investigations and findings. That he interrogated all the issues facing the Claimant and made findings that on the Makwata Construction & Engineering Account, this had been opened upon the authorisation of the Claimant who called Musani the acting branch manager Bungoma but all documents were signed by Musani and upon a withdrawal of kshs.200, 000.00 Judith Nekoye was given kshs.100, 000.00 to give to the Claimant as a bribe. That to conceal these transactions, when the Claimant resumed duty at Bungoma branch, he instructed a firm of advocates to commence recovery proceedings against the customer who had failed to pay the facility advanced to him and that such proceedings were not authorised and were against a customer who had enough credit.

43. From the investigations report, and the evidence of Mr Ombui, he never interviewed the Claimant. The call records made by the Claimant allegedly to authorise the opening of the Makwata Construction & Engineering Account were not available so as to link him with the entire transaction and at paragraph 10 of the report annexure APP-10 to the defence it states;

We have therefore not found evidence to show that the operations Manager, Shadrack Musani and the Business Banker, Judith Nekoye, may have been motivated by malice in their assertions that the Branch Manager had asked them to authorise the facility of the Kshs.200, 000/- and also receive the sum of Kshs.100, 000/- from the customer respectively; their evidence corroborates that of the customer.

44. At this point the Claimant was still an employee of the Respondent but on sick leave. He was formerly out of his work place due to a good cause known to the employer. It is not clear why these investigations failed to consider his defence and or be made in his presence similar to investigations conducted in the presence of Musani and Nekoye. Without the telephone logs to link the Claimant and Musani or evidence that indeed Nekoye collected Kshs.100,000.00 to hand over to the Claimant as a bribe from the customer under account of Makwata Construction & Engineering Account, even with the best effort, the circumstances are far removed to link the Claimant. The serious nature of these allegations, which bored on criminal activities were of the nature that the forensic audit/investigations should have been firm and to the point. To leave them hanging without the crucial 'culprit' the Claimant being questioned and despite his statement in response to the show cause notice, I take it that the investigations were a further inquiry as to what exactly took place. The examination/questioning/presence of the Claimant was imperative.

45. That as it may, the next forensic investigations related to the 8 SME loan accounts. The investigations relied on the statement of the claimant; the in-charge advances Brigid Wafula; Ibrahim Imbiza Sakani and various documents. Various recommendations are made part of which are that severe disciplinary action should be taken against the Claimant for laxity and failure to ensure that operational guidelines were exercised while accepting loan applications from customers. Which is of concern is recommendation that;

The business to make it mandatory for authentication of all documents presented by customers in support of facilities lodged in the branches before disbursement of such loans to protect the [and] curb fraudulent customers.

46. What then led to such a recommendation? It is that there were no authentication of all documents requirements or this was left at the discretion of the assessing officer? this recommendation leave little to imagination as what is clear is that there lacked a mechanism of authentication of all documents presented by customers in support of facilities lodged in the branches hence the need to make it mandatory.

47. What then can the Claimant be said to have failed to do? Was he required to respond to the issues raised in these investigations reports as noted above? Mr Ombui was emphatic that he never met the Claimant and did not interview him. What about Brigid Wafula the in-charge advances? Other than the mention of a statement from such an officer, it is not set out as to what role with regard to the 8 SME loans was undertaken.

48. Upon these reports on investigations against the claimant, on 20th July 2011 he was dismissed. The reasons for dismissal are not set out save that it is noted that...*reference to the various correspondences and discussions held with your line manager* are referred to. What then led to the dismissal of the claimant? The investigations noted above related to two (2) issues only – the Makwata Construction & Engineering Account and the 8 SME loans. Were they proved as genuine, valid and fair reasons for dismissal?

50. On the evidence of the claimant, upon his show cause letter, he responded to the best of his knowledge to all the allegations against him. The respondents then conducted their own investigations vide reports filed by the Regional Officer-Western and the forensic investigation. These did not involve the Claimant nor were they shared with him. These leaves serious gaps in terms of the principles set out

above at section 43 and 45(2) with regard to what the employer is required to prove. Further, to adherence to the principles thus set out so as to establish the substantive issues against the employee, the employer is required to meet requirements as set out in the case of **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012** and the Court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.

51. Where an employee is still under investigations, and while such investigations are ongoing, the employee is not yet found culpable until there is a good cause to show cause and upon such show cause, the employee should be given a hearing. To issue a sanction upon the show cause response is not what section 41 of the Employment Act envisages. Even where the misconduct is gross that amount to a case for summary dismissal, regard must be given to section 41(2) of the Employment Act thus;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

52. The Respondent relied on the case of **Moses Chavangi versus Barclays Bank Ltd Cause No.646 of 2010**, but the facts therein I find to be different and separate as herein. The Claimant in the cited case was taken through a show cause notice, evidence against him was shared/made available and he was invited to a disciplinary hearing before the dismissal. There was an appeal after the dismissal. Such cannot be said to be similar circumstances under which the Claimant herein was subjected to as he was only given a hearing upon dismissal and during his appeal. That is not the procedure envisaged under section 41 of the Employment Act.

53. Therefore I find that upon the Claimant responses to the show cause, he had set in motion compliance with regard to his statutory mandate under section 47(5) and what next should have followed is to the Respondent to prove that indeed there existed reasons to dismiss him from his employment. The Claimant was dismissed for reasons gross misconduct and it was incumbent upon the Respondent to prove the validity and fairness of the reasons. Based on the evidence of Mr Ombui that the Claimant was linked to the transaction of Makwata Construction & Engineering Co. Ltd Account by the linkage of his colleagues Musani and Nekoye one through a telephone call and the other through the handover of money for a bribe, and based on the stated regulations of the Respondent that required the responsible officer to sign and authorise the transaction for opening of bank account and withdrawal of cash, which were signed by Musani and Nekoye respectively, then such officers of the Respondent take responsibility. The authorisation of the Claimant to the two subject transactions is too far removed to lay blame on him. further on the 8 SME loans, upon the responses made by the Claimant on 28th May 2011, upon investigations and filing of reports, he was never challenged on his responses or given a chance to be heard and was condemned without being heard. Such a hearing via his responses to the show cause is not what is envisaged under section 43 read together with section 45(2) and 41 of the Employment Act.

54. Further, the Respondent did not submit the *lending policy* upon which the Claimant was challenged as not having the authority and or discretion not to authorise the transactions he did. Without such a document being made available to assess the role of the Claimant vis-à-vis what he ought to have done as the branch manager, Bungoma, the defence is left exposed. On the SME loans, the alleged transactions, potential losses and irregularities can only be confirmed through an audit report. The Respondent being an institution of the nature of a commercial entity, a corporate, and regulated under the Central Bank of Kenya is as a matter of course required to file financial reports or audit reports. These are records that

without doubt would have shed light on the financial transactions that took place at Bungoma branch during the tenure of the Claimant. See **Elizabeth Omoro versus Nairobi Bottlers limited, Cause No.2493 of 2012.**

55. I therefore find the Respondent has failed to prove that the dismissal of the Claimant due to gross misconduct was a valid and fair reason to warrant the dismissal. The procedures adopted by the Respondent in addressing the alleged gross misconduct by the Claimant failed the set statutory standards. The dismissal was also substantively unfair.

Remedies

56. The Claimant is seeking reinstatement back to his position and without loss of benefits. Where there is no substantive reasons for dismissal, a reinstatement would be an appropriate remedy for an employee who has been forced out of work and still cannot be able to get an appropriate job in a sector such as the one undertaken by the respondent – banking. Reinstatement back to employment without loss of benefits is a remedy available under section 49 of the Employment Act which can be awarded together with other remedies available therein thus;

*49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee **any or all of the following**—*

[emphasis added].

57. The remedies available can be awarded singularly or together with – *any or all of*. Such is the nature of the law which must be applied in the context of each case.

58. However, the dismissal of the claimant took effect on 20th July 2011. It has been over 4 years since and the prayer being sought is that of specific performances, I take cognisance that the Respondent has since moved on and the Claimant is required to mitigate his circumstances. Despite the damage occasioned to the Claimant due to the unfair termination, and in the face of evidence that he has since not been able to secure new employment noting the very sensitive sector within which he was trained at as a banker, I am guided by the provisions of section 12(3) of the Employment and Labour Relations Court Act read together with section 49(1) and (3) of the Employment Act. Noting the finding above with regard to the unfairness in the dismissal, other remedies shall be considered as the order for reinstatement is hereby declined.

59. The Claimant is also seeking damages for premature and unlawful termination. The Claimant gave evidence that he was dismissed at his prime when he was 47 years and had hoped to work for 11 more years until retirement at 60 years. At the time of termination the Claimant was servicing loans and these were converted to commercial rates causing his loss and damage and that due to the nature of his position with the Respondent he cannot be able to get a new job in the sector and has hence remained jobless since. This has caused the Claimant psychological suffering and thus seek damages. However, the claim for general damages for wrongful and or unlawful termination is a common law claim that is not changed by the application of section 49 of the Employment Act. The law now sets out the parameters within which upon the Court finding that dismissal or termination of employment is wrongful or unfair, the remedies are set out. This is different from the previous legal regime where damages were due in cases of wrongful termination but even then, the terms of the employment contract had to be put into account as held in the case of **Cyrus Nyaga Kabute v Kirinyaga County Council, Civil Appeal No. 29 of 1985** thus;

supposing that he had shown that his dismissal had not been justified, he would not have been able to get any of the prayers for which he prayed in the plaint even though the dismissal may be wrongful it stands, and what flows from the breach of conditions of service, is damages according to the terms of the contract. Those damages would not have been aggravated damages and would not have given him benefits up to his 60th birth-day, nor arrears of salary from July 1980.

60. The terms of the contract had to be brought into account. I take into account here the finding of the Court in the case of **Henry Musemate Murwa versus PSC & AG, Cause no. 546 of 2011** where the Court awarded exemplary damages and not general damages as the breaches suffered were of the nature that there was malice as against breach of the employment contract. In the case of **Mary Mutanu Mwendu versus Ayuda Ninos de Africa-Kenya (Anidan-Kenya), Cause No.50 of 2012** the Court awarded the Claimant loss of income/salary and not general damages. Therefore, even without awarding reinstatement taking into account that the claimant should not have been dismissed in the first instance, malice is apparent. This has resulted in the loss of income and the court shall award based on the provisions under section 12(3)(viii) of the Employment and Labour Relations Court Act to;

(viii) *any other appropriate relief as the Court may deem fit to grant.*

61. On the finding that the Claimant was unfairly dismissed, compensation is due as under section 49 of the Employment Act and as set out above, the remedy for reinstatement having been declined and the evidence that the Claimant lost income due to the unlawful conduct of the respondent, he should have remained in employment save for that. To therefore only award compensation and not consider factors resultant from the unlawful conduct would be the injustice. The Claimant filed his claim on 21st March 2012 soon after his dismissal. He was in Court in good time and had he been heard and the findings herein made before the lapse of 3 years, a reinstatement and payment of back wages would have adequately compensated him. Therefore due to no action of his own he has lost in this regard. On the claim for loss of salary for 11 years, this will reasonably be capped at 3 years being 36 months and last salary of Kshs.266,603.00 all awarded at Kshs.9,597,708.00.

62. As set out above, compensation can only be awarded at a maximum 12 months. The Claimant is therefore awarded kshs.3, 199,236.00.

63. The employment contract dated 4th December 2007 governing the terms of employment gave notice period at 3 months or payment in lieu. No notice was given prior to the claimant's dismissal. Payment in lieu of notice is awarded at kshs.799, 824.00.

64. The claim for leave was on the basis that the Claimant hoped to remain in employment until retirement. Such will not be awarded as loss of salary is herein awarded.

Conclusion

- a. **I find the Claimant was unfairly dismissed;**
- b. **Loss of salary awarded at kshs.9, 597,708.00;**
- c. **Compensation awarded at kshs.3, 199,236.00;**
- d. **Notice pay awarded at kshs.799, 824.00;**
- e. **The above dues shall be subject to the provisions of section 49(2) of the Employment Act;**
and
- f. **Costs of the suit.**

Orders accordingly.

Delivered in open court at Nairobi this 16th day of December 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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