



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1094 OF 2011

JOSEPH MRABU MWERO CLAIMANT

VERSUS

K-REP BANK LTD 1ST RESPONDENT

Mr Nyaanga for Claimant

Mr Ochieng for Respondent

JUDGMENT

1. This suit was brought by way of a memorandum of claim dated 5th July 2011 and filed on 6th July 2011.
2. The Claimant seeks compensation for alleged unlawful and unfair termination of employment and in addition payment of terminal benefits to wit;
 - a) In lieu of three (3) months notice in the sum of Kshs.495,000;
 - b) Service pay calculated at thirty (30) days for each completed year of service for eleven (11) years in the sum of Kshs.1,815,00;
 - c) Housing allowance calculated at 15% of the basic salary in the sum of Kshs.3,280,200 for eleven (11) years;
 - d) In lieu of seven (7) days leave not taken in the sum of Kshs.38,500;
 - e) Provision of certificate of service;
 - f) Costs of the suit.

Pleadings

3. The facts brought out in the memorandum of claim and annexures thereto are as follows;
4. The Claimant was first employed by the predecessor of the Respondent, known as Kenya Rural Enterprise programme vide a letter of appointment dated 31st March 1995 with effect from 3rd April 1995.
5. The Claimant served continuously until when the business was transformed to K-Rep Bank

- Limited and the Claimant was re-appointed vide a letter dated 26th July 1999 to commence permanent employment with effect from 1st August 1999.
6. In terms of the letter the Claimant was entitled to twenty five (25) days leave per year.
 7. The Termination Clause provides that the Respondent would terminate the employment by giving three calendar months' notice in writing or a one month salary in lieu of such notice without assigning reasons thereto. This was without prejudice to the employer's right to summarily dismiss the employee for misconduct.
 8. The Claimant was appointed Branch Manager, Meru with effect from 1st April 2008, vide a letter dated 14th April 2008. This was in job Grade K6 at a consolidated gross salary of Kshs.165,000 per month subject to applicable taxes and statutory deductions. This represented a 56% increase of salary. The Claimant was also entitled to bonus in terms of a scheme to be announced later in the year.
 9. The increase in salary was according to the Respondent a demonstration of the Banks confidence in the Claimant and the Bank was keen to see a return on investment and that claimant was expected to deliver 100% of the objectives set for him.
 10. By a letter dated 4th April 2011, the Claimant was served with a letter to show cause following a normal annual audit review carried out at Nanyuki Branch on 21st and 26th March 2011.
 11. The charges levelled against the Claimant were:

(i) On 26th August 2009, the Claimant placed a fixed deposit (FD) of Kshs.420,000 with Nanyuki Branch for three (3) months on account 010110000631 for Stella Mbeya. The same was to mature on 26th November 2009. However on 18th September 2009, the Claimant instructed the Branch Manager Nanyuki to terminate the FD, transfer money and interest earned back to the account. The Claimant further instructed the Branch Manager to re-fix Kshs.400,000 for three (3) months. The same was lifted and full interest for three (3) months was credited to the account despite liquidating the FD before maturity date.

(ii) On 22nd September 2009, a FD of Kshs.400,000 on account 019110000631 was placed for three (3) months and was to mature on 21st December 2009. However on 10th November 2009, the Claimant issued instructions to the Branch Manager to liquidate the FD. The same was lifted and full interest for three (3) months credited to the account despite FD liquidation before maturity date.

(iii) On 13th November 2009, the Claimant placed FD of Kshs.200,000 on account 01911000631 for three (3) months. The FD receipt could not be traced. On 15th December 2009, the Claimant instructed the Branch Manager Nanyuki to liquidate the FD, transfer Kshs.50,000 to account 001030000591 and re-fix Kshs.150,000. The same was lifted and full interest was credited to the account despite liquidation of the FD before maturity date.

(iv) On 15th December, the same day, a FD of Kshs.150,000 was placed for three (3) months on account 019110000631. However, on 2nd January 2010, the Claimant instructed the Branch Manager to liquidate the FD. The same was lifted and full interest for three (3) months was credited to the account despite liquidation of FD before maturity date.

(v) On 2nd January 2010 the Claimant placed a FD of Kshs.100,000 for three (3) months on account 09110000631. However on 30th January 2010, the Claimant instructed the service delivery manager through email to liquidate the same. The same was lifted and full interest of three (3) months was credited to the account despite liquidation of FD before maturity date.

12. The Claimant was to respond to the charges by close of business on 6th April 2011 two (2) days later.
13. The Claimant responded vide undated letter addressed to the Head of Human Resource.
14. The Claimant admitted fixing the deposits in his daughter's Msingi account domiciled in Nanyuki

- Branch. The Bank at the time was looking for fixed deposits and had requested staff to market the facility to relatives and friends and Ungana groups. The Claimant decided to fix his money in the bank.
15. The Claimant admitted giving instructions to the Branch to liquidate the fixed deposits and pay earned interest at the time and withdrew the amount he intended to use at the time and re-fixed the balance. The Claimant admitted he did that several times.
 16. The Claimant explained that as a customer of the bank, he was not in a position to tell how the interest was calculated. That he understood this to be a system generated process and was an operations and IT issue which he believed the department had a better understanding.
 17. Regarding the missing vouchers/documents, Claimant stated it was for the Nanyuki Branch to explain and himself as a customer had no role in that.
 18. The Respondent found the Claimant to have violated the Bank's laid down policy on premature fixed deposits. The Bank further found that, the Claimant being an experienced and senior member of staff, the bank expected him to not only obey and respect its policies but also to ensure that the policies were observed at all times.
 19. For these reasons, the Claimant's services were terminated with effect from 29th April 2011.
 20. The Claimant was in terms of the letter to be paid one month's salary for days worked up to 29th April 2011; leave days not taken; less outstanding loan of Kshs. 416,409.05 and any other funds owed to the bank.
 21. The Claimant denies the allegation by the Respondent and prays that the Court finds that the termination of this employment was wrongful and unfair and award him as prayed in the suit.

Defence

22. The Respondent filed a statement of Response dated 27th April 2012 with annexures in support of its case.
23. The Respondent while admitting the employment particulars of the Respondent denies that the termination of the Claimant's employment was wrongful and unfair.
24. The Respondent under paragraphs 6 & 7 restated the misconduct by the Claimant in issuing instruction to Nanyuki Branch Manager to fix deposits and to terminate the deposits prematurely. The Respondent asserts that the Claimant in all the five instances cited received interest for the entire three (3) months period of the deposit, in disregard of the premature termination to the loss and detriment of the Bank.
25. That the conduct by the Claimant being a senior and experienced Banker was contrary to the Bank's policy and warranted termination of the Claimant's employment.
26. The Respondent avers that the Claimant in response to the letter to show cause admitted the particulars of misconduct and gave a flimsy excuse that being a customer at Nanyuki Branch, he had no way of knowing how the interest was calculated.
27. The Respondent states that the Claimant on 27th April 2011 admitted wrong doing and apologised saying that the misconduct was not intentional and offered to refund the excess interest earned from the fixed deposits.
28. That this happened at a disciplinary hearing which took place on 27th April 2011 in which the Claimant had been advised, he was at liberty to be accompanied by a peer of his choice. That the Claimant participated fully at the hearing in answering the charges and reasons for the termination were given in the letter of termination.

Oral testimony

29. The Claimant testified under oath in support of the particulars of claim and his evidence confirmed the averments in the memorandum of claim regarding his employment record, and the events that led to the termination of his employment.
30. Similarly, the Respondent called RW1 Julius Kyalo and RW2 Leah Githomi who explained to the Claimant the circumstances that led to the termination of the employment of the Claimant. The two witnesses prayed the Court to find that the termination of the Employment of the Claimant was for a valid reason and the same was done in terms of a fair procedure.

Determination

- (i) Was the termination of the employment of the Claimant for a valid reason?
- (ii) Was the termination in terms of a fair procedure?
- (iii) What remedies if any are available to the Claimant?

Issue i

- 31. It is not in dispute that the Claimant issued instructions to the Nanyuki Branch of the Respondent to fix deposits on his behalf in an account belonging to his minor child on five (5) different occasions and each time issued instructions to the Branch to terminate the fixed deposit prematurely and partly en-cashed the fixed amount and re-fixed the balance.
- 32. It is also not in dispute that the fixed deposit period was three (3) months for the five fixed deposits done by the Claimant.
- 33. It is also common cause that notwithstanding the premature termination of the fixed deposits, the Claimant received full interest on the fixed deposits for the three months period.
- 34. It is without or the three months period.
- 34. Claimant received full interest ocontroversy that the Claimant received more interest than that earned contrary to the bank policy.
- 35. What is in dispute is whether the Claimant was aware that he was contravening bank policy each time he received more interest than that which he deserved.
- 36. The Claimant states that he was a customer just like any other at the Nanyuki Branch since he was the Branch Manager of the same Bank at Meru at the time.
- 37. The Respondent on the other hand states that the Claimant being a senior and experienced banker in the position of a Branch Manager was very much aware that he had received more interest than he deserved each time he terminated the fixed deposit prematurely, partly withdrew the money fixed and at the end of the three months period, received the full interest on the initial fixed amount.
- 38. It is the Court's considered view that the Claimant knowingly received excess interest from the fixed deposits he placed on five (5) different occasions vide his minor child's account at Nanyuki Branch.
- 39. That the Claimant had knowledge of internal operations of the Bank being a Branch Manager in Meru and was not an ordinary customer at Nanyuki Branch as he purports.
- 40. The Claimant knew exactly what he was doing by fixing; terminating; partly withdrawing; and re-fixing the deposits.
- 41. The action by the Claimant amounts to dishonest conduct for which he could have been summarily dismissed in terms of Section 44(3) of the Employment Act. However, the Respondent was lenient in Court's view to terminate the employment of the Claimant normally and by so doing enabled the Claimant to earn his terminal benefits including full pension.
- 42. The Court finds that the termination of employment of the Claimant was for a valid reason.

Issue ii

- 43. The Court is satisfied that the Claimant was issued a notice to show cause containing the particulars of misconduct.
- 44. The Claimant responded in writing to each of the allegations made against him.
- 45. The Claimant also appeared before a disciplinary panel and was able to fully explain why his employment should not be terminated.
- 46. The Claimant had sufficient time to prepare for his case and the Court finds that the Respondent did not only adhere to its own disciplinary and governance procedures, but the Respondent also complied with Section 41 of the Employment Act. The Claimant had opportunity to be accompanied by his own peer at the disciplinary hearing but he did not take advantage of that.
- 47. Accordingly, the Claimant has failed to discharge the onus placed on him in terms of Section 47(5) of the Employment Act, 2007.

48. The termination of the employment at the Claimant was in conformity with Section 45(2) (a) and (c) of the Act in that same was for a valid reason and the termination was effected in terms of a fair procedure.

Issue iii

49. The letter of appointment dated 26th July 1999 vide which the Claimant was employed by the Respondent provides under termination clause thus;

“the Bank may terminate the Agreement by giving a three calendar months’ notice, in writing, or one month salary in lieu of such notice.” A plain reading of this Clause discloses material contradiction in this term of service, in that, whereas, the employee is entitled to serve three (3) months’ notice upon termination, which service is to be done with full pay, the right is taken away by the subsequent part of *the* Clause which offers only one month’s salary in lieu of notice.

50. This Clause is contrary to the provision of employment Act, in that an employer cannot grant a gain to an employee on one hand and take it away with the other.

51. Whereas the statutory minimum notice for a permanent employee in terms of Section 35(1) (c) is twenty eight (28) days, where the notice is not given, payment in lieu of notice must be equivalent to the salary for the entire period of notice.

52. It is the Court’s further finding that this particular Clause is inequitable and must be construed in favour of the employee.

53. The Court therefore finds that the Claimant is entitled to payment of three (3) months’ salary in lieu of notice in the sum of Kshs.495,000 and the Court orders accordingly.

54. Secondly, the letter of appointment to the position of Branch Manager Meru clearly provides that the salary of Kshs.165,000 payable to the Claimant monthly was a consolidated salary. This means the monthly salary was inclusive of basic salary and house allowance. Indeed the same Clause uses the term “*gross*” salary also.

55. The Claim for 15% house allowance in addition is therefore misconceived and the same is dismissed.

56. Thirdly, the claim for seven (7) days accrued leave in the sum of Kshs.38,500 has not been challenged and the same is awarded to the Claimant.

57. Fourthly, the Court finds no basis for the claim for payment of service pay calculated at 30 days salary for each completed year of service from the pleadings and the letters of appointment produced by the Claimant.

58. The claim is denied by the Respondent and found not to have been proved by the Claimant on a balance of probabilities. The same is dismissed.

59. The total award to the Claimant is therefore Kshs.533,500 comprising of three months’ notice pay and seven days in lieu of leave days not taken. The award is payable with interest at Court rates from date of filing suit till payment in full.

60. The Respondent will pay costs of the suit.

Dated and Delivered at Nairobi this 9th day of December, 2015

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE