



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 105 OF 2013**

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 27<sup>TH</sup> NOVEMBER, 2014)

PATRICK NYAKONU OMBATI ..... CLAIMANT

**-VERSUS-**

CREDIT BANK LIMITED ..... RESPONDENTS

**JUDGMENT**

The claimant herein filed his case against the respondents by a memo of claim dated 12.4.2013 through the firm of M/s Gichaba & Co. Advocates. The claimant's case is that he was an employee of the respondents appointed on 1.8.97 as clerk/cashier at a salary of Kshs 16,733/=. He was put on probation for 6 months which he completed and on 14.2.98 he was confirmed in employment and his salary rose to Kshs 20,080/= with a house allowance of Kshs 2,001/=. The claimant rose up the ranks and on 21.7.98 he was promoted to a management trainee and was now in the management team and his salary was no longer under union negotiation.

He subsequently rose up the ladder and on 25.7.2001 he was transferred to Kisumu branch as a bank officer. On 31.1.2004, he was promoted to Ag. Accountant which is same rank as Assistant Manager. He was confirmed as Accountant on 28.6.2004. His salary was further reviewed on 3.12.2005.

In January 2006 he received a letter dated 21.1.2006 sending him on compulsory leave. It was in respect of a bankers cheque apparently issued in respect of Teenage Mothers & Girls Association (Kenya). He does not know the outcome of the investigations and he never received any other letter lifting the compulsory leave. What followed is that on 2.2.2006, he was arrested and charged in court in Kisumu Criminal Criminal Case No. 84/2006. He was charged with the offence of stealing by servant. On 6.2.2006, his services with the bank were terminated. The letter never referred to the compulsory leave. On 19.11.2010, the criminal case was terminated and he was acquitted under S. 210 of CPC. The claimant contends that he was not the only signatory to the bank account. Others were of Asian descent and none were charged. He claims that he was discriminated against due to his race and this aspect was considered by the trial court at pg 45 line 12 of the proceedings. He stated that he used to contribute to the retirement scheme and he expected to receive Kshs 399,234/= which he never received to-date. Kenindia had sent a cheque to him for the said pension amount but he was unable to access his account though the amount was credited to his account. The bank apparently made some unauthorized debits from the account.

The claimant prays that he be paid 18 months salary in lieu of notice, unpaid salary for February 2006, loss of salary for the period the criminal case was pending in court (58 months), damages for wrongful termination of employment, pension from Kenindia Assurance, damages for loss of employment upto 25 years, damages for racial discrimination by being prosecuted in the criminal case, damages for malicious prosecution, exemplary damages for termination of employment all totaling Kshs 40,031,593/=. He also

wants this court to declare that he was wrongfully, unlawfully and unfairly terminated from employment.

In cross examination the claimant told court that the respondents is a limited liability company and it's chairman is Hon. Simeon Nyachae who is a Kisii like himself. He also stated that the bank had 14 staff members out of which 5 were of African origin and rest of Asian origin. He however maintained that he was discriminated against but had been promoted over the period on merit. In relation to the termination, he stated that the contract of service had a termination clause being 1 month's notice. He avers that before his termination, he was placed on compulsory leave to facilitate investigation into the issuance of banker's cheque to one customer – Teenage Mothers & Girls Association (K) through unauthorized transfer. The bank had issued a banker's cheque to this client and it was signed by 2 of the staff, the claimant and another – Reshma Budhdev. Reshma was a bank officer and therefore the claimant's junior. In the criminal case, the claimant was charged with one Abdul Kaid – another cashier and claimant's junior.

It is the claimant's position that his termination was unfair and unlawful and since then he is unemployed. It is also claimant's position that the criminal proceedings established he was discriminated against at line 12 of pg 45 where the honourable court found that whereas all transactions were authorized by the (accused 2) and PW1 (branch manager) or accused 2 (Waidi Abdi) and PW2 Reshma only the claimant and accused 2 were charged. He also states that his termination letter does not state reasons for the termination.

The respondents filed their statement of defence on 31.5.2013 through the firm of Bruce Odeny and Co. Advocates. They denied the claimant's assertions. They aver that if the claimant was in respondents employment, and was dismissed from employment as alleged, then the dismissal was summarily and on account of gross misconduct on the part of the claimant that constituted stealing by servant and misappropriation of the respondents money held by the claimant and under the control and management of the claimant totaling to Kshs 5,722,716.75. The respondents notified the police of this theft. The police did their own investigations and charged claimant with criminal charges.

The respondents denies that the claimant is entitled to the remedies he has sought. The respondents called 5 witnesses. RW1 denied the issue of racial discrimination in the respondents firm stating that the respondents has a policy for equal employment opportunity and that the bank has 14 branches and on the board – 4 are Africans and 4 are Asians. RW2 also told court that at the branch where he works, i.e Koinange, they have 14 members of staff and all are of African origin.

RW3 told court that he was involved in investigating the claim against the claimant and prepared a report which was given to BFIU and the claimant was charged. From the report, there were 65 fraudulent transactions where money was being removed from customer A and when the customer come money will be removed from another customer B to fix up customer A. The final beneficiary of these transactions was Mr. Ombati the claimant herein. The board then discussed the matter and recommended removal of branch manager at page 3 of respondents list of documents.

RW4 produced the criminal case file to show that the claimant was charged in court. RW5 the respondents legal officer told court that the claimant was investigated and found to be involved in fraudulent activities and then charged. On issue of pension , he told court that this is payable by Kenindia. In cross examination he admitted that claimant's termination letter did not give reasons for the termination. On the Human Resource Policy, he said it was published in 2007 after the claimant had been terminated.

After hearing the parties herein and upon considering their submissions, the issues for determination are as follows:-

- 1. Whether there were valid reasons to terminate claimant's employment**
- 2. Whether claimant was subjected to due process**
- 3. Whether claimant is entitled to remedies sought.**

On 1st issue, the claimant was in his termination letter informed that his services were being terminated.

No reason was given. The letter stated as follows:-

**“We refer the letter of appointment ref CBL/0210/98 dated July 1998, accepted by you on 23rd July 1998.**

**In terms of the above letter of appointment, we hereby advise you the termination of your employment with immediate effect.**

**Your terminal benefits, if any, will be settled in due course, subject to your surrendering bank assets, if any in your possession including banks ID Card to the branch Manager.**

**Yours faithfully,**

**For: Credit Bank Ltd**

**signed. ”**

The terms of this letter show that no reason was given for the termination. The claimant was terminated on 6.2.2006 during the dispensation of the Employment Act – Cap 226 (now repealed). Since the claimant was going to be paid his terminal dues, this was not a summary dismissal. However, the law as it was then, did not demand that reasons be given before termination provided that 1 month's notice is given.

The 2nd issue, is on due process. The process envisaged too did not connote any hearing processes as under the current law. The claimant was terminated as per the law of the land at the time and paid his terminal dues. Any dues pending from the pension scheme can also be collected by him accordingly. I therefore find there is nothing more to award to the claimant. I therefore dismiss the claimant's case. Each party to meet it's costs.

**HELLEN S. WASILWA**

**JUDGE**

**27/11/2014**

**Appearances:-**

Gichaba for claimant present

Miss Olango h/b Odeny for Respondents present

CC. Wamache