



**REPUBLIC OF KENYA**

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

**CAUSE NO. 809 OF 2011**

***(Before D.K.N. Marete)***

**ROBERT KETER.....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

**JUDGEMENT**

By a statement of claim dated 16th May, 2011 and filed on 20th instant the claimant brought this matter to court. The issue in dispute is;

**Unfair termination of employment of the claimant by the respondent and refusal to pay terminal benefits.**

The respondent on 5th June, 2012 filed a memorandum of defense dated 31st May, 2012 denying the claim and prays that the suit be dismissed with costs.

The claimant's case is that he was employed by the respondent bank on 3rd March, 1997 as a clerk at a monthly salary of Kshs.13,816.00. He thereupon worked diligently and faithfully and his salary was Kshs.43,136.00 at the time of termination of his contract on grounds of loss of confidence.

The claimant further submits that the respondent did not give his case a fair hearing and that she (respondent) disregarded the claimant's defense. That the termination was high handed and not in tandem with the principles of natural justice and therefore urges the court to remedy the situation by granting suitable relief.

The respondent admits the initial employment but submits that on 12th April 2005, the claimant was issued with a letter to show cause as to why disciplinary action should not be taken against him from failure to credit account No. 233 540 043 for Africa Expedition in August, 2004 with a cash deposit of Kshs.34,905.00 after receiving the same and instead crediting the same to account no. 233 540 032 for Mr. Musa Ngerere Muibu.

Further, on 12th April, 2005 the claimant was further addressed on another show cause as to why disciplinary action should not be taken against him for suppressing to difference of Kshs.7,215.00 which had occurred while transacting in foreign currency on 5th April 2005. On the same letter, the claimant was informed that he had purchased two travellers cheques for USD 50 each and had given the value at Kshs.1430.00 instead of Kshs.7,215.00 thereby incurring a cash shortage of Kshs.7,215.00. The claimant's explanation on this was not satisfactory – see appendix 4 and 5 of the response.

On 27 April, 2005, the respondent received a complaint letter from a client, Loriston, Account No. 234 621 591, that Kshs.10, 000, 00 was missing after Kshs.228,800.00 was deposited to her account on 11th April, 2005. On investigations the following findings came out;-

8.1 *The figure reflected in the client's statement was Ksh.218,800.00 instead of Ksh.228,800.00 as deposited on that day thus the difference was Ksh.10,000.00.*

8.2 *According to his general report, the claimant had received Ksh,288,800.00 at 11.30 a.m. on 11th April, 2005 and issued a credit advice for the same to the client, however, two hours later, the transaction was deleted and an amount of Ksh.218,800.00 was posted at 13.53 p.m.*

8.3 *The claimant decided to print another voucher for Ksh.218,800.00, stamped it and appended his signature in the place provided for the customer. This advice was not issued to the customer.*

8.4 *During the meeting held on 27th April, 2005 with the customer and the cash manager, the claimant told the customer that he realized the difference after he had left. Copies of the letter to the claimant dated 5th May, 2005 giving the details and seeking his explanation and the two vouchers are annexed as appendices 7, 7A and 7B (of the defense) respectively.*

Again the claimant was asked to show cause why disciplinary action should be taken against him for this unprofessionalism and he was strictly asked to explain the following;

9.1 *How the difference of Ksh.10,000.00 occurred after he had counted and confirmed the cash in the presence of the client as required and also after issuing the correct receipt for the deposit of Ksh.,288,800.00.*

9.2 *Why it took him two hours to realise that the cash deposited by the customer was short by Ksh.10,000.00.*

9.3 *Why he neither bothered to contact the customer or inform the cash manager about the transaction and instead he did a deletion(sic) and posted a lower figure of Ksh.218,800.00 to recover his cash difference.*

9.4 *What really happened? – See letter of query at appendix 7 of the defense.*

No credible explanations were issued on these episodes but only denials were forthcoming from the claimant.

The respondent submits that the termination of the claimant was lawful and fair. It was due to serious irregularities which the claimant would not abstain from and therefore the issue of a summary dismissal in accordance with section 17(c) of the Employment Act, Chapter 226 Laws of Kenya (now repealed) which provides as follows;

Section 17(c) and (g)

*Any of the following matters may amount to gross misconduct so as to justify summary dismissal of an employee for lawful cause, but the enumeration of such matter shall not include an employer or an employee from respectfully alleging or disputing the facts giving rise to the same, or whether any of the matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal.*

a. ....

b. ....

c. *if an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly or improperly performs any work which from his nature it was his duty, under his*

- contract, to have performed carefully and properly*
- d. ....
  - e. ....
  - f. ....
  - g. *if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.*

Fair procedure was also adopted in that the claimant was awarded several opportunities to explain his conduct to which he failed *in toto*. His inactions were fraudulent and criminal and fell with section 17(g) hereof.

The issues for determination in the instant case are:

1. Was the termination of the claimant's employment wrongful and unlawful?
2. Was the claimants conduct tenable in law?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this suit?

The first issue for determination is whether the termination of the claimant's employment was wrongful, unfair and unlawful. The law applicable in the circumstances of this case is the old law of employment the termination having occurred on 23rd June, 2005. It is not as elaborate as it is in the current expression of section 45 of the Employment Act, 2007 and therefore issues of fairness are only discernible from the process of termination vis -a - vis the rules of natural justice and other applicable provisions of labour legislation.

The respondent's submission to a large degree go on to interrogate a case of fairness or otherwise of the claimants termination. As is demonstrated in all the correspondence *inter partes*, issues are raised and he was always requested to explain and even show cause why disciplinary action should not be taken against him. He was not able to satisfactorily do this. His termination of employment therefore is a culmination of a turbulent working relationship where he demonstrated lack of ability to cope. He was living from one financial scandal to another, inasmuch as these were of minor magnitude in terms of figure involved. The termination of employment was therefore fair and lawful and by all means in compliance with the applicable law on summary dismissal.

The second issue falls on the wayside upon the finding of issue number 1 above. The claimant severally misconducted himself doing his tenure of office. It can safely be concluded that he was from the onset not suitable for the job he was employed to do. Misconduct of this nature is outrightly unlawful and therefore not tenable in law. And this answers issue number 2 above.

The third issue for determination is whether the claimant is entitled to the relief sought. I find this in the negative. The claimant should not be allowed to benefit from his own mischief and misdeeds. He cannot be rewarded for his shoddiness and misadventure otherwise the spirit and letter of the law would loose sense and grounding. The claimant is therefore not entitled to any relief and leaves the scene empty handed.

The last issue for determination is who is to bear the costs of this case? I note that this matter has been ongoing for the last three years since May, 2011. All involved must have incurred quantifiable costs in managing this matter so far. This court must be instrumental in stopping careless litigants from littering its corridors with weeping litigation as is the case here. In this regard, the costs of the case must be borne by the claimant and paid to the respondent.

Overall, this claim is dismissed with costs and I so hereby order.

Dated, delivered and signed the 10th day of May, 2013.

**D.K. Njagi Marete**

**JUDGE**

Appearances

1. Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the claimant.
2. Mr. Njiru instructed by the Federation of Kenya Employers for the respondent.