



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 180 OF 2013

JULIUS NGANGA MBUGUACLAIMANT

VERSUS

RAFIKI DTM [K] LTDRESPONDENT

J U D G M E N T

The claimant has sued the respondent claiming terminal dues for unlawful termination of his employment on 7/6/2013. In total he claims for ksh.169100 plus any other relief which the court may deem fit and just to grant. The respondent has denied liability for unlawful termination and contended that the claimant was dismissed for gross misconduct.

The suit was heard on 27/8/2013 when the claimant testified as CW1 and Mr. Onesmus Irungu Kamau represented the respondent as RW1. CW1 told the court that he was employed by the respondent on 1/9/2011 as a graduate trainee – Business Development and continued until 1/3/2012 when he was confirmed as permanent staff. That in July 2012 he was promoted to Relations Officer in the Credit Department although he had no training in the new appointment. That the promotion was orally communicated by Caroline Mumbi Kimondo after Mueni Matangi resigned.

On 11/6/2013 he received a letter from RW1 dated 7/6/2013 terminating his services on ground of non-performance and insubordination. That letter also offered to pay salary for 7 days worked in June 2013 and 4.5 days accrued leave less the loan balance of ksh.15,567.95. That the termination was unjustified and without notice and the computation of dues was wrong. He maintained that he performed his duties well despite many challenges emanating from the new procedures for credit facilities introduced by the respondent. He denied the allegation of insubordination and maintained that the delay in meeting the RW1 in time on 29/5/2013 was because the summons was by email which was sent while he was in the field work and only saw it after 5pm. That when he went to see the RW1 at 6pm on the same day he postponed the meeting to 30/5/2013 when they discussed his performance and his expectation by the head office. That in the said meeting they also discussed rewards for best performers and his transfer to Nairobi. That the RW1 signed his approval on the application letter for the transfer during the said meeting.

He admitted receipt of show cause letter dated 7/5/2013 which he complied with. He denied both allegation of poor performance and insubordination. He produced medical notes to show that he was hospitalized with notice to the respondent and was not deliberately skipping work without notice as alleged by the respondent. He prayed for declaration that the termination was unfair and unlawful. He further prayed for service pay of Ksh.40000/, salary in lieu of notice, compensation for unfair termination, leave allowance, leave pay for the year 2011 and 2012 and salary for 11 days worked in June 2013. He

also prayed for general damages for embarrassment and distress.

On cross examination he contended that until 2013 he was not given any targets. That in the year 2013 he was given a target of ksh.15 million lending to customers. That by the show cause letter he was required to indicate his strategy which he was to follow in order to hit his target but he was not told to increase his performance. On the issue of transfer, he maintained that he applied to the HR Manager through the branch Manager. That the request for the transfer was done after discharge from the hospital. He admitted that his letter of contract provided that he was Business Development Officer but could be given other duties. He also admitted that the letter of appointment provided for forfeiture of leave not taken. He further admitted that in 2011 he was trainee until 1/3/2012 when he was confirmed.

He admitted that he had not returned employers mobile phone and staff card. He also admitted that he owed the respondent a loan balance of ksh.15,567.95 as at June 2013.

RW1 is the Branch Manager of the respondent's Likoni Branch since 2012. He confirmed that the CW1 was employed by the respondent as a Credit Officer until June 2013 when he was dismissed. The dismissal letter is dated 7/6/2013, but was delivered on 11/6/2013. That he was required to fill clearance forms and surrender staff budge, phone, security swipe card and pay loan balance of ksh.15,567.95. That loan continues to accrue interest at commercial rate plus penalty every month.

On 29/5/2013 he wrote email to the CW1 asking him to see him to discuss performance but he never complied until on 30/5/2013 when he called him by phone. That when he came to see him he told him that he was insubordinating him by seeking transfer without involving him and that his performance was poor. That he was to work on a target of ksh.15,000,000 and make daily report to him but he never did that. That in May he did only ksh.120,000 loan which was very low. He further contended that as a trainee the CW1 was not entitled to any leave. That he took leave in march 2013 and his leave balance was only 4.5 days.

On cross examination he denied knowledge of any loan facility for Benson Ngugi of ksh.200000 and Ephraim Chuma of ksh.100,000/ being processes by CW1. He maintained that CW1 colluded with clients to apply for loan and then share the proceeds. He admitted that in may 2013 there was a report by a Mr. Mutua to the General manager but he could not remember whether the claimant's figure was ksh.320,000.

He admitted that the reasons for dismissal was poor performance and insubordination which are the same reasons cited in the defence. He also admitted that he could not confirm whether CW1 skipped work until he verifies from the register. He admitted that the claimants salary was ksh.40,000/ per month. He however did not know whether the CW1's performance was evaluated and promoted by RW1's predecessor.

He denied that CW1 came to see him on 29/5/2013. he maintained that he saw the claimant on 31/5/2013 when he signed his transfer letter but erroneously stamped on it 30/5/2013. That when he asked CW1 why he never came to see him on 29/5/2013, he just walked out and brought a transfer letter. He did not know whether CW1 was in the office on 29/8/2013 when he send the email. He further maintained that he had previous meetings with CW1 wherein they discussed his performance. He admitted that he was on leave when he was called to go and serve the dismissal letter to the CW1.

He admitted that he told the staff including the CW1 to go out to the field and look for business because the branch was doing badly. He contended that he used email to summon the claimant so as to leave written record as opposed to telephone communication. That the performance list from the headquarters showed that the claimant was the lowest performer. After the close of the hearing the parties agreed to file written submissions. I am satisfied that the court has jurisdiction to determine the dispute herein by dint of Section 12 of the Industrial Court Act read with Article 162 of the constitution.

The issues for determination arising also from the pleadings and evidence and submissions are:

- a. **whether the dismissal of the claimant was unfair.**
- b. **Whether the claimant is entitled to the reliefs sought.**

To answer the first issue, the court has considered the dismissal letter dated 7/6/2013 and evaluated it against the evidence and the law. The letter cited poor performance and insubordination as the reasons for the dismissal. Section 41 of the Employment Act provides that before an employer terminates the employment of an employee on ground of poor performance, incapacity or misconduct under Section 44 of the Act, the employer shall explain the reason for the intended dismissal to the employee in the company of another employee or shop floor union representative of his choice. The Section provides further that before the dismissal, the employer shall hear and consider any representation from the employee and his companion. This in my view is what is otherwise called a disciplinary hearing which must be accorded to any employee before dismissal for misconduct, poor performance and incapacity. It was not done in this case.

The reason for the foregoing finding is that the letter for dismissal was written by the Assistant HRM before hearing the claimant and was served through RW1 who was called from leave to go and deliver the same to the claimant. To that extent the dismissal was unlawful and therefore unfair. The court however has considered it necessary to consider the substantive aspect of unfair termination as provided under Section 43 of the Employment Act. The said section provides that in any court dispute challenging the fairness in the termination, the burden shall be upon the employer to prove the reason for the termination.

In the present case two reasons have been cited. Firstly, the claimant is accused of insubordination in that he applied for transfer to Nairobi without informing his Branch manager and secondly that he failed to comply with email dated 29/5/2013 by which he was invited to meet RW1. The court's observation from the evidence adduced is that email was not the best means of communicating urgent and important information to the claimant. It is clear from the evidence that the respondent had given the claimant a mobile phone which could have been used to summon him to the 29//5/2013 meeting. If the written record was mandatory, logic would dictate that after sending the email, the RW1 should have telephoned the claimant to alert him about the email and possibly request him to return to the office in time. In the court's view the claimant acted diligently despite the fact that he read the email after 5pm on 29/5/2013 by at least going to see RW1 who postponed the meeting to 30/5/2013. That the meeting took place on 30/5/2013 and that is the time when the transfer letter was endorsed by the RW1. I find that insubordination was not proved.

The second ground is poor performance and the court finds that the respondent also failed to prove it in evidence. RW1 alleged that there was a performance agreement with the claimant but non was produced. In fact the RW1 admitted on cross-examination he told the staff including the claimant to go and look for business in the field because the branch was doing badly. That to me sounds like it was non-personal problem. It had nothing to do with the claimant as an individual.

In addition, the appointment letter did not give a clear job description for the claimant. The letter did not indicate that if the branch was doing badly, the claimant would be send out to the fields to look for business without any fresh training. Employment is contract and cannot be left to the discretion of the employer to keep on shifting goal posts to suit his desperate business targets. The matter is made worse by the respondents demands that the claimant devises his own ways without any training to hit the annual target of ksh.15,000,000/-. The court will not watch such labour malpractice with hands folded. The banking sector must employ workers within the provisions of the law.

Consequently and in view of the foregoing findings and observations, the court holds that the dismissal of the claimant was both procedurally and substantially unlawful and therefore unfair. As regards the prayers sought the court makes several observations.

Firstly, the court notes that the claimant was unrepresented by counsel and therefore he may not have understood that after praying for declaration that the dismissal was unlawful, he needed to ask for compensation. Secondly, the prayer for service pay cannot stand because the claimant was a member of NSSF and Employer's Pension Scheme as per the copies of payslips produced by the defence. The court

has therefore awarded one month's salary in lieu of notice, salary for 11 days worked in June 2013, and 12 months salary for unlawful and unfair dismissal. The prayers for service pay and leave allowance are dismissed for lack of merit and in view of my earlier observation of the claimant's membership to a Pension Scheme and NSSF. Such exclusion of the claimant is by dint of Section 35 of the Employment Act.

In summary therefore, the court enters judgment for the claimant against the respondent as follows:

- a. **The termination of the claimant's employment by the respondent is declared unlawful and unfair.**
- b. **The respondent to pay the claimant the following**

(I) one month salary in lieu of notice	40,000.00
(ii) 11 days salary	14,667.70
(iii) 12 months salary for unfair termination.....	<u>480,000.00</u>
	<u>534,666.70</u>

- c. **Costs and interest.**

Signed, dated and delivered this 27th September 2013

ONESMUS MAKAU

JUDGE