



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 844 OF 2012

BETWEEN

STEPHEN MBUTHIA

WABURI.....CLAIMANT

VERSUS

K-REP BANK

LIMITED.....RESPONDENT

Rika J

CC. Leah Muthaka

Mrs. Ochieng' instructed by Olotch and Company Advocates for the Claimant

Mr. Kago and Ms. Musembi instructed by S.N. Gikera and Associates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 21st May 2012. The Respondent filed its Statement of Reply on 29th June 2012. The Claimant testified and closed his case on 2nd November 2012. The Respondent testified through its Human Resources Manager Leah Gathoni Githiomi on 31st January 2013, and on 22nd February 2013 when the Respondent closed its case. The Claimant filed his Closing Arguments on 8th March 2013, while the Respondent did so on 18th March 2013. Mrs. Ochieng and Ms. Musembi highlighted their respective briefs on 16th May 2013, after which the Court advised Award would be read on notice.

2. The Claimant told the Court he was employed by the Respondent Bank on 11th June 2007 in the position of Audit Assistant. He was promoted to be the Internal Auditor on 11th June 2008, and confirmed as such on 1st December 2008. He subsequently rose to become a Senior Internal Auditor. On 1st March 2012 however, the Respondent terminated the Claimant's contract of employment. The letter of termination is dated 1st March 2012 and states:-

“reference is made to the subject of the information you furnished the bank regarding completion of your

degree course at the University of Nairobi; the alteration on the letter dated 27th September 2006 from the University; and our deliberations in the hearing and appeals committee meetings held on 18th January 2012 and 29th February 2012 respectively. After due investigations and having considered what you have stated in that respect, we are satisfied that you were dishonest by informing the bank that you were expecting to graduate in December 2007, whereas you knew you had some units you were yet to re-sit by that time. You also altered the date on the confirmation letter issued by the University to indicate that you were to graduate in December 2007, while the truth was that you were to, and had failed to graduate in December 2006. In view of the above, the bank is not prepared to have you continue in its services and accordingly, your services are terminated with effect from 29th February 2012. We shall pay you one month salary in lieu of notice.’’

The reason given by the Respondent in justifying termination therefore, revolved around the Claimant's failure to graduate from the University of Nairobi as he had promised he would, when he was employed by the Respondent. On the periphery were accusations of alteration of the University Papers by the Claimant. At the time of termination, the Claimant earned a salary of Kshs. 66,250.

3. The Claimant explained that he made full disclosure to the Interview Panel convened by the Respondent at the time of the Claimant's recruitment. He was shortlisted on the basis of copies of his certificates and testimonials which were verified against the originals. He disclosed to the Panel that he had failed to graduate in December 2007. The Panel had specifically asked the Claimant why he had not graduated 9 years after he joined the University of Nairobi. He disclosed to the Panel that he had failed some units, and honestly expected he would graduate in December 2007. He was after his appointment, subjected to the routine Human Resource Assessments. His promotions were based on favourable Appraisals. During these Appraisals the Respondent reviewed the certificates and testimonials submitted by the Claimant, and none were found to have been offered with the aim of misleading the Respondent. The alteration was on a copy of the University completion confirmation letter issued by the School of Business University of Nairobi, which copy was in the Claimant's Employment File at the Respondent's Human Resource Department. Alteration was not done by the Claimant. The Claimant testified that he did not alter the document before employment or at all. He was not dishonest, and revealed to the Interview Panel that he intended to re-sit his papers between June and December 2007, expecting to graduate in December 2007.

4. Subsequent to December 2007, the Claimant went through various appraisals, and the Respondent was aware he did not graduate in December 2007 as expected. He did not present any degree certificate to the Respondent subsequent to December 2007. He was promoted to the position of Internal Auditor in June 2008; confirmed in the same position in December 2008; before promotion as the Senior Internal Auditor. This career progression came well after December 2007 when he had indicated he would graduate.

5. The documents given by the Claimant to the Panel upon interview were all verified as required by the Human Resource Policy and Procedures 2005. The documents were in the custody of the Human Resource Department and the Claimant did not have access to them. He could not have made alteration of a document to which he had no access. He had the original confirmation letter which he annexed to the Claim at page 19; the original did not have any alteration. The reasons given by the Respondent in justification of termination therefore were not valid reasons.

6. The Respondent's Human Resource [HR] Policies and Procedures 2005 required that, *‘‘charges of any offence which may call for disciplinary action shall be made in writing, clearly stating the nature of the offence and inviting the employee to reply to the charge and show cause why disciplinary action should not be taken against him in respect of an offence for which an employee has been charged.’’* The Respondent did not give the Claimant in writing any charges, or give him an opportunity to defend. He was only given the charges on 19th January 2012 upon termination. The Human Resource Manual was supplemented by the Disciplinary and Grievances Procedure 2010 which stated, *‘‘ The employee shall be informed of his/her right to reply and given time when to respond in writing.’’* The Claimant was not provided with the minutes of the disciplinary hearing and the subsequent appeal meeting. He was denied the right to an exit interview. The Disciplinary and Grievance Procedures stipulated that,

“Termination and dismissal shall only be issued on the authority of the Managing Director and suspension letters issued on the authority of the Human Resource Manager.” The Claimant’s letter of termination was issued by Head of Internal Audit, and no authority of the Managing Director was exhibited. The Claimant urges the Court to Award-:

- a. A declaration that the termination was unlawful, unfair and un-procedural.
- b. Compensation the equivalent of 12 months’ salary.
- c. Reinstatement
- d. Interest from the date of termination until payment in full.
- e. Costs of the Claim, and any other suitable remedy.

7. Cross-examined, the Claimant testified that he was interviewed before employment. He was given a letter of employment. He signed the contract of employment, accepting the terms and conditions of employment. He was required to supply the identity card, certificates and confirmation that he was free to contract. He was to produce his degree certificate after employment, to confirm he had graduated. He gave the Respondent several documents on employment. He filled the Employment Application Form on 17th August 2007. In it, he indicated he expected to graduate from the University of Nairobi with a second class honours degree. He did not avail a degree certificate to the Respondent any time after employment. He indicated he would graduate in 2007. The letter from the University of Nairobi dated 12th January 2012, marked annexure 1 [a] of the Response showed the Claimant’s registration number as D33/1167/02, while he joined the University in the year 1998. He did not notice this inconsistency and had no idea who made the alteration in the letter dated 27th September 2006 to show he would graduate in December 2007, rather than 2006. The original letter from the University stated the Claimant would graduate in 2006. The altered document stated he would graduate in 2007, which was the same date the Claimant gave to the Respondent on recruitment.

8. Waburi testified further on cross-examination that he wrote to the University of Nairobi on 26th January 2012, seeking to re-sit the papers. In the letter, he wrote that he was unable to graduate in 2006. He was aware the Respondent discussed the matter on 6th February 2012, at a meeting in which the Claimant was present. He signed the minutes and requested for a copy. The Managing Director advised him a copy would be availed. The letter of termination was signed by Head of Internal Audit. Clause 1.5 of the Disciplinary and Grievance Procedures stated certain Officers “ *may impose penalties.*” Dismissal was to be carried out on the authority of the Managing Director. The Claimant did not know if the Head of Internal Audit had such authority. The Manual stated the Managing Director, “ *may impose the dismissal penalty.*” Waburi testified on direction that the Respondent required the job applicant to have the following qualifications: certified public accountant; business degree or working towards completion of such degree; and work experience. He had CPA, was working for completion of his degree, and had three years’ work experience.

9. Leah Gathoni Githiomi told the Court she was confirmed as the Human Resource Manager in 2012, having joined the Respondent in 2005. She maintained employee records. The Claimant joined the Respondent as an Audit Assistant on 11th June 2007, on 1 year fixed contract. He gave his CV on interviewing for the job. He stated he expected to graduate with a B.Com degree from the University of Nairobi. He filled a confidential application for employment form with his bio-data, stating he expected to graduate in December 2007 with a 2nd Class Honours B.Com degree. In August 2011, the Respondent put out a circular to all Members of the Staff, requiring them to update their records. It was realized that the Claimant’s records were still incomplete. The only document in the Claimant’s file to show he was at the University of Nairobi was a letter of confirmation dated 27th September 2006, indicating the Claimant expected to graduate in December 2006. Githiomi wrote to the Claimant asking him to update his file. She expected transcripts and – a copy of the degree. Instead, she received from the Claimant transcripts for the first three years of University, with incomplete units for the fourth year. There was no copy of a degree certificate. Githiomi brought this to the attention of the Management.

10. There were discrepancies in the Claimant’s Student Registration Number, in the documents availed by him from the University. Registration Number D33/1167/2002 was in his transcripts. The Respondent

called for clarification from the University. The University disowned this registration number, while conceding there was a person answering to the Claimant's name, registered in 1998 under number D33/1167/1998. Under this registration, it was confirmed the Claimant was a bona-fide student of the University, who joined in 1998, and who had not passed all the requisite papers.

11. Against this background, the Respondent called the Claimant to a meeting on 18th January 2012. He appeared in person accompanied by a representative of his choice. He produced the original confirmation letter from the University, which showed he would graduate in December 2006. He had given the letter on interview indicating he would graduate in December 2007. The Respondent's Disciplinary Panel recommended the Claimant's services be terminated. The Claimant filed an Appeal. The Appellate panel asked the Respondent Management to write on the subject to the University. The University responded on 26th January 2012 stating,

“ your letter of 24th January 2012 refers. I wish to confirm that neither Waburi Stephen Mbuthia, Reg. No. D33/1167/2002, nor the other Reg. No. D 33/1167/1988 graduated during the 2006/2007 academic year as purported. However, if both insist that they did, kindly request them to produce their original documents for verification and certification by the School.”

The Appeal Committee affirmed the termination decision. The termination letter followed on 1st March 2012. The Claimant was paid his terminal dues which included days worked up to 29th February 2012; leave days; one month salary in lieu of notice, less any money owed the Respondent. He cleared and signed the discharge form. Termination was on valid grounds, and was fairly carried out.

12. Cross-examined, the witness told the Court updating of records is not done daily. There was a review in 2010 and the Respondent went through staff records. She was aware the Claimant was confirmed as an Internal Auditor. She was not able to say exactly what transpired at the time of the Claimant's recruitment. She joined the Human Resource Department in 2008. The Bio-data Form was filled immediately an employee was recruited. The Claimant availed his CPA certificate, certificates for workshops he had attended, as well as the confirmation letter from the University of Nairobi. At no time did he say he had graduated. He had said he would graduate in 2007. The Respondent expected him to supply a copy of the degree certificate by the end of 2007. By the time the Respondent confirmed the Claimant, it expected he would have graduated. He became Senior Internal Auditor in 2011 after the Respondent restructured. The witness could not assume he became Senior Internal Auditor because he had the qualifications. The letter of termination stated the reason for termination to be dishonesty on the part of the Claimant. It also stated he altered documents. He forwarded the original letter from the University stating he would graduate in December 2006. The first termination was on 19th January 2012. The charges against the Claimant were not given in writing. Githiomi testified that the Claimant was in employment from 2007. The circular for updating of records was given in 2011.

13. In the Closing Submissions, the Claimant's Advocate emphasized that the Claimant was employed in June 2007. He produced all the requisite original documents at the job interview. He was recruited. He had revealed he expected to graduate in December 2007. He did not at any time inform the Respondent that he had graduated. He was confirmed in his position, promoted, and by the time he left he was the Senior Internal Auditor. The issue of the alteration on the confirmation letter never arose on the date of the interview. He was appraised on the job and the issue was never raised during this process. Termination was not grounded on valid reason. The procedure was unfair. No charges were framed and forwarded to the Claimant. He performed well and was promoted on merit. He deserves reinstatement. Terminal benefits paid to him have no relation to the prayer for compensation. The Respondent's Advocate answered that the Claimant was given a chance to defend himself. There were minutes produced by the Respondent of meetings which the Claimant attended, and was heard in the company of his colleague Hellen Njenga. The Respondent confirmed in these meetings that the Claimant was not qualified. His contract of employment was properly terminated. He was paid all his terminal dues. He signed acknowledgement and discharge. He could not be reinstated as he was fairly discharged, and in any event does not hold the qualifications for the job he seeks to be returned to. He has not graduated to-date.

The Court Finds and Awards:-

14. There is uncontroverted evidence that the claimant was employed by the Respondent Bank as an Audit Assistant on 1 year fixed term contract, on 11th June 2007. His salary was Kshs. 30,000 per month. On 2nd June 2008, he was re-employed as Internal Auditor, in an open-ended contract. His new monthly salary was Kshs. 62,500. On 1st December 2008, he was confirmed as Internal Auditor. He was re-designated Senior Internal Auditor in a letter dated 6th June 2011. It is the common evidence of the Parties that on 1st March 2012, the Respondent issued the Claimant a termination of employment letter.

15. Section 43 and 45 of the Employment Act 2007 require the Employer to give valid reason or reasons for termination of employment. Section 41 and 45 require the Employer to follow a fair procedure, in arriving at the termination decision. Section 49 creates the remedies of compensation, reinstatement or re-engagement. Was the Claimant's termination of employment based on valid ground or grounds, and was it carried out fairly? Is he entitled to reinstatement or compensation? These are the questions raised by this dispute.

16. There is sufficient evidence in the record of the Court that would be read as substantive justification of the termination decision. The Respondent's main issue with the Claimant was that he had not graduated by December 2007 as stated in his Employment Application Form. The collateral reason was that the Claimant altered the confirmation letter issued by the University of Nairobi on 27th September 2006, to read he would graduate in December 2007, rather than December 2006.

17. The Claimant was first employed in June 2007. He indicated he expected to graduate in December 2007. It is not possible that he would produce a letter stating he expected to graduate in December 2006, while employment was in 2007. The original letter on confirmation of the Claimant's status was that he expected to graduate in December 2006. The altered letter marked as exhibit 1 [a] in the Response, tallied with the information given by the Claimant that he expected to graduate in December 2007. It was not unreasonable of the Respondent to suspect the Claimant altered the date confirmed by the University, to suit his purpose at the employment place. It is hard to see who else at the employment place, would have reason to alter such a personal document as the confirmation letter. The University did not issue any letter pointing to a graduation date in 2007.

18. There were other red flags suggesting the Claimant was less than candid with his employer. In his CV, he stated on his Academic Qualifications- April 05 –October 2007, Bachelor of Commerce [Finance Major] expecting Second Class Honours. He repeated this information in his Employment Application Form, as well as the Bio-data Form. The altered letter fitted in this scheme of the Claimant's academic expectations. On 26th January 2012, he wrote to the University applying to re-sit the papers he had failed. This was years after he had expected to graduate, 14 years after he joined the University of Nairobi, and at the height of the queries at the employment place concerning his academic background. In the application to re-sit, the Claimant states in clear terms, "*I was unable to graduate in December 2006, because I had failed the above units. Although I re-registered in 2008, I was not able to get the results...*" This letter does not indicate that the Claimant expected to graduate in 2007. It reaffirms that he expected, as shown in the genuine confirmation letter from the University, to graduate in December 2006. What was the basis of the Claimant's information to the Interview Panel, and in the information he included in the Employment Application Forms and the Bio-data Form, that he expected to graduate December 2007? He says he re-registered for the units in 2008. He does not unequivocally say if he sat the papers. He says he was unable to get the results. He does not say if he failed or passed the papers. In the disciplinary meeting of 6th February 2012, the Claimant explained he re-sat the papers in 2007 and 2008. There were issues raised about his registration number. There were two numbers, one for 1998 and 2002. The Claimant was not able to explain these, stating they arose from genuine errors. There were too many shifting positions on the part of the Claimant which dented his honesty as a servant of the Bank.

19. The Court does not think the dishonesty was shown by the Claimant's failure to graduate; it was in how he went about the challenge. First he misled the Respondent he expected to graduate in December 2007, while the University records show he was expected to graduate in December 2006. Altered

confirmation letter cropped up, buttressing the veracity of the information given by the Claimant on recruitment that he expected to graduate in December 2007. The Bank employed him, confirmed him and even promoted him notwithstanding he had not graduated. It relied on the Claimant's information that he expected to graduate in not too distant a future from the date of employment. The Bank was flexible, and gave the Claimant adequate opportunity to develop his career, showering him with trust and confidence, but he did not reciprocate. There were too many discrepancies in the Claimant's Bio-data. He went about manipulating personal data to dupe the Bank into granting him security of employment. His good performance and promotions would not wipe away the gravity of his dishonesty. The Claimant had sufficient time between 1998 and 2012, a period of 14 years, to obtain his degree, or come up with convincing reasons for failure to graduate. He did not graduate and opted to mislead the Bank on his records. The Banking Industry requires high standards of probity. The Bank, in the view of the Court had valid reason to justify termination.

20. The procedure adopted by the Respondent was not in significant departure from the minimum statutory termination of employment procedure contemplated by the Employment Act. The Claimant was alerted by the Respondent about the possibility of termination of his contract, on 19th January 2012. There was no termination on 19th January 2012 as claimed by him. The Claimant concedes in paragraph 27 of his Statement of Claim that he was informed by the Respondent of the charges facing him. He was called to the first disciplinary hearing on 6th February 2012, which he attended in the company of his colleague Hellen Njenga. The Respondent carried further investigations after the first hearing. The Claimant was granted further hearing on 29th February 2012. It was determined that the Claimant's contract of employment should be terminated. The termination letter issued on 1st March 2012, and the Claimant was subsequently paid his terminal dues. There was no significant departure from the procedure given in the Respondent's Disciplinary and Grievance Procedures, or the Employment Act 2007, that would lead the Court to conclude termination was unfair on account of procedure. The Court is satisfied that the Claimant was advised of the charges facing him; was given a first hearing accompanied by a colleague of his choice; was heard in person on appeal; and was properly handed down the sentence in accordance with the law. ***The upshot is that the Court finds termination to have been substantively justifiable and procedurally fair. The Claim is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 18th day of December 2013

James Rika

Judge