



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 191 OF 2016

BETWEEN

ONESMUS IRUNGU KAMAU.....CLAIMANT

VERSUS

FAULU MICRO-FINANCE BANK LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Wandai Matheka & Company Advocates for the Claimant

Daly & Inamdar Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 15th March 2016. He avers he was employed by the Respondent Financial Institution, as a Branch Manager, on 1st October 2014. He was summarily dismissed by the Respondent on 6th August 2015. He was not given a reason for the decision and was not heard. He has asked the Respondent to allow him resign, rather than leave on involuntary termination. This was accepted. His last salary was Kshs. 258,057. Without prejudice to the assertion on resignation, the Claimant asks the Court to find his contract was terminated unfairly, and grant him Judgment against the Respondent, in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 258,057.
- b) Accrued leave of 9.8 days at Kshs. 84,384.
- c) Unpaid salary of 10 days at Kshs. 86,019.
- d) Compensation for unfair termination at Kshs. 3,096,084.

e) Overtime pay at the average of 3 hours per day at Kshs. 967,713.

f) Accrued pension at approximately Kshs. 270,000.

Total Kshs. 4,762,858

g) General damages for loss of income.

h) Certificate of Service.

i) Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Reply and Counter-claim on 20th June 2016. It admits to have employed the Claimant as its Branch Manager, with effect from 1st October 2014. He was to serve probation of 6 months, ending 1st April 2015. The Respondent would review Claimant's performance, and confirm him, or terminate his contract depending on performance. Between 1st January 2015 and 31st March 2015, his performance was found wanting and he was advised there would be no confirmation. Probation was extended by 3 months, beginning 1st April 2015. Review was carried out for the period 1st January 2015 to 30th June 2015. There was no improvement. The Claimant was issued termination letter dated 10th August 2015. He requested the Respondent to substitute termination with resignation. The Respondent accepted this. The Claimant tendered resignation letter dated 10th August 2015. He failed to account for and /or reimburse the Respondent: legal fees for charging staff property paid by the Respondent; advance for generator fuel at Kengeleni Branch; advance for taxi usage; and advance for Kengeleni PC Under-settlement, all totaled at Kshs. 159,459. The Respondent counter-claims this amount. The Respondent urges the Court to dismiss the Claim and allow the Counter-claim.

3. The Claimant, and the Respondent's Manager Coast Region, Patrick Charles Waiganjo Wachira, gave evidence on 21st March 2017 when hearing closed.

4. The Respondent conceded to, and partial Judgment was granted with regard to, the prayers for annual leave pay at Kshs. 84,384, unpaid salary of Kshs. 86,019, and Certificate of Service.

5. The remaining prayers are on notice pay, compensation, overtime, pension, general damages, costs, interest, any other suitable relief, and the Counter-claim.

6. The Claimant testified he was employed as Branch Manager Kengeleni. He was placed on probation of 6 months. His salary at the beginning was Kshs. 240,000. It had been reviewed favourably depending on good performance, to Kshs. 258,057 by the time he left employment. The letter of termination came to the Claimant as a shock. He had worked for 11 years as a Banker, and held a Bachelor's Degree in Business Management.

7. He never knew that the probation period was extended. He did not receive the letter of extension dated 21st April 2015. He did not sign the letter in acknowledgement of receipt. He had worked for Rafiki Bank before joining the Respondent. He did not make request from the Respondent, for the money which the Respondent counter-claims. He had nothing to do with the counter-claimed money. He was supposed to work from 8.00 a.m. He worked from as early as 6.00 a.m. The contract entitled the Claimant to pension on completion of probation.

8. Cross-examined, the Claimant told the Court his contract was terminated after 10 months of employment. He was to serve probation up to 31st March 2015. He signed appraisal forms. Reason for

termination was not stated to be poor performance. The Claimant asked to be allowed to resign. His request was allowed. Pension depended on successful completion of probation. He explained on redirection that he had already been sacked by the time he sought to resign. He was mitigating his circumstance, by offering to resign. Clause 13 of his contract required any variation is made in writing, and signed by all the Parties.

9. Patrick Charles Waiganjo Wachira confirmed the Claimant was employed by the Respondent on the date and in the position given in his evidence. He was to serve probation of 6 months under Wachira's supervision. He did not perform well. Wachira recommended to Head of Human Resources, Peter Ihia, that Claimant's probation is extended. Wachira personally gave the Claimant the letter of extension, in Wachira's office. Mid-year appraisal followed. There was no improvement on the part of the Claimant. He was issued a letter of termination. He requested he is allowed to resign, rather than have his contract terminated. The Respondent accepted his request.

10. Pension entitlement was to be initiated by the confirmation letter. Participation in the scheme was voluntary. There was no monthly deduction made from the Claimant's salary as contribution. There was no provision for overtime. Management Employees do not get overtime. Branch Managers are fully responsible for any costs charged on the Branch. He was to ensure all money was accounted for.

11. Wachira told the Court on cross-examination that the Claimant was responsible for his Branch's Account. The Claimant did not make request for generator fuel, taxi usage and under-settlement as counter-claimed. Wachira gave the Claimant the letter extending probation. The Claimant did not acknowledge receipt. Periodic performance appraisal did not mean end of probation. Termination was effective immediately. Resignation came after termination. Redirected, the Witness testified that the Claimant was to account for all money in the Branch Operations Account.

The Court Finds:-

12. Parties do not dispute that: the Claimant was employed by the Respondent as Branch Manager from 1st October 2014; his letter of appointment stipulates he would serve probation of 6 months, during which his performance would be assessed; his contract was terminated by the Respondent effective 10th August 2015, through a letter dated 6th August 2015, on the ground that the Claimant's performance had been persistently below expected standards; he served for 10 months; he requested the Respondent on the same date termination was to take effect, that he is allowed to resign, rather than exit through involuntary termination; and his salary was Kshs. 258,057 as at the time he left employment.

13. The Court is able to conclude from the trail of documents that the Respondent accepted Claimant's request for resignation in writing, in a letter dated 22nd August 2015.

14. There is absolutely no reason to doubt that resignation was voluntary and a negotiated way out for the Claimant. The Respondent had made a decision to terminate the Claimant's contract, but on the same date the decision was to take effect, the Claimant sought, and was granted a softer way out. Ultimately, separation was by agreement of the Parties. There was mutual understanding.

15. The events leading to resignation are not quite relevant, the Parties having in the end agreed that Claimant's contract is terminated through resignation. If they are relevant, the Court is satisfied the Claimant was still on probation at the time of termination/resignation. He had been placed on 6 months' probation at the start of his contract. His performance was assessed quarterly and half-yearly, and found wanting. There was extension of probation. There is no reason to doubt that the Claimant was issued the letter of extension of probation dated 21st April 2015. The contract was clear that if and when the

Claimant completed his probation successfully, he would be confirmed in writing. There is no letter of confirmation in the record. He was on probation at the time of termination/resignation.

16. In the end termination was not unfair, as there was a meeting of minds, based on the Claimant's request, how the employment relationship should come to an end. Even if termination was at the instance of the Employer, the contract in question, was a probationary contract, regulated under Section 42 of the Employment Act 2007. The prayers for notice pay and compensation for unfair termination have no merit and are rejected.

17. The Claimant was a Branch Manager. His contract stipulated that the nature of his work may require some variation and extension of the normal working hours. He was expected in plain language, to manage his time, to fit the nature of his work as Branch Manager. His contract did not provide for overtime pay. It is not proper for a Branch Manager to assume that overtime regulations applicable to a certain cadre of Employees under the Regulation of Wages Orders [Section 63 [2] of the Labour Institutions Act 2007], can apply with regard to Managers. The Wages Orders are meant to protect lower cadre Employees. Bank Managers have the bargaining strength to negotiate their terms and conditions of employment with their Employers. If overtime should be paid to a Manager, it should be captured in his negotiated contract. Managers do not have to adopt overtime regulations from the Wages Orders. The Claimant was paid a handsome salary of Kshs. 258,057, which must have taken into account that, it was always likely, the Claimant would occasionally be expected to arrive at Kengeleni Branch in the wee hours, and leave late. His prayer for overtime pay has no foundation.

18. Clause 7 of the contract on Employee Benefits, states on successful completion of probation, the Claimant would become eligible to participate in Staff Contributory Pension Scheme. The Claimant did not complete probation successfully, and was not confirmed. He did not participate in the Staff Pension Scheme. His pay slips do not show any pension contribution. The prayer for pension is rejected.

19. The prayer for general damages would not be allowable even had the Claimant shown his contract was unfairly terminated. He has asked for compensation for unfair termination, the equivalent of 12 months' salary which would redress loss of income. His claim for general damages for loss of income is misplaced and is declined.

20. The Counter-claim is that the Claimant as Branch Manager, failed to account for money availed to the Branch by its Head Office, for operations. These amounts were not shown to have been expended by the Claimant as an individual. He did not pocket any money from the Account. The Respondent did not establish individual responsibility of the Claimant, for the items detailed in the Counter-claim. It was not shown that indeed money was not accounted for by the Claimant. The Respondent did not mention these items in response to Claimant's letter of demand before filing of the Claim. The Counter-claim was made in afterthought, perhaps in the hope of disorienting the Claimant, in his pursuit of this unnecessary Claim. It has no merit and is rejected.

21. There is partial Judgment in favour of the Claimant on record. It was agreed the Respondent shall pay to the Claimant annual leave pay at Kshs. 84,384, and arrears of salary, at 89,019 – total Kshs. 173,403. It was further agreed the Respondent shall release Certificate of Service to the Claimant. Partial Judgment on record, is adopted as the full Judgment of this Court.

IT IS ORDERED:-

a) Judgment is entered for the Claimant against the Respondent in terms recorded in the partial Judgment.

b) The rest of the Prayers and the Counter-claim have no merit and are declined.

c) Parties to meet their costs of this unnecessary litigation.

Dated and delivered at Mombasa this 15th day of December 2017.

James Rika

Judge



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