



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 467 of 2000

JESSE KAMAU GACHANJA.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

JUDGMENT.

This is a claim for damages for unlawful termination of employment. The plaintiff claims that in June 1985, the defendant employed him as a clerk. Over the years, he rose through the ranks and by the time of termination of his services he was serving as the Operations Manger at the defendant's Nyahururu branch.

Before being posted to Nyahururu, he was working at Nakuru. He had five loans the repayment of which was being recovered from his salary at source by chek-off system. It is not clear how it happened but it is common ground that after transfer, in the months of February and March 1999, both Nyahururu and Nakuru branches recovered the loans resulting in double repayments. The plaintiff brought that anomaly to the attention of the salaries clerk at Nyahururu branch, one Everlyne Awuor. To correct it she raised the Change of Payment/Deductions Form with an intention of re-inputting the information once the overpayment was recovered. She signed the form and as a requirement, the plaintiff as the Operations Manager at the branch, counter-signed it after which it was forwarded to head office and accordingly effected. That had the effect of deleting the loan repayment from the system as though the plaintiff had fully repaid his loans and for the months of April, May and June 1999 the loans were not recovered. When the plaintiff noticed that he instructed Awuor to re-input the information and the repayments resumed in July. What all this means is that there was one repayment skipped.

When the defendant learned of the skipped repayment, it launched investigations and concluded that the plaintiff had deliberately rescheduled his loan repayment to ease the financial pressure he was under and terminated his services thus provoking this suit.

At the time of terminating the plaintiff's services, the defendant was admittedly undergoing a major restructuring process to reduce staff and a number of positions including that of the plaintiff of Operations Manager were earmarked for abolition. The plaintiff claims that the skipped repayment was an excuse rather than a reason for the termination of his employment to deny him the retrenchment package. He therefore seeks a declaration that the termination of his employment was illegal and that he is entitled to the retrenchment package of Kshs.3,302,361.25, general damages costs and interest.

The defendant cannot hear of that. In its defence, it avers that the Early Retirement Scheme that it had in force at that time was purely voluntary but at its option. The plaintiff had not applied for early retirement and the defendant had not offered it to him. In the circumstances, it further averred, the question of retrenching the plaintiff without paying him the Early Retirement package does not arise. The rescheduling of his loan repayment entitled the defendant to summarily dismiss him but it opted to terminate his services in accordance with the terms of the contract of employment.

To establish his case, the plaintiff testified and called one witness. On its part the defendant called two witnesses and at the end of the hearing counsel for the parties filed written submissions. I will, in the course of this judgment, refer to both that evidence and counsel's submissions.

From the pleadings and the evidence adduced in this case, five issues arise for my determination. They are:-

1. Whether or not the plaintiff rescheduled his loan repayment.
2. If so whether or not the defendant was entitled to terminate his services.
3. Whether or not the termination was lawful.
4. If not whether or not the plaintiff is entitled to the Early Retirement package
5. Who pays the costs of this suit.

On the first issue, the defendant readily admits that upon his transfer to Nyahururu, there was double recovery of his loans repayment for the months of February and March 1999. The plaintiff testified that when he noticed double deductions, he notified Ms Everlyne Awuor, the salaries clerk at the Nyahururu branch whose duties included correction of such anomalies. She raised the Change of Payment/Deductions Form to temporarily stop the repayment. As the officer in charge of the branch, he was the one required to counter-sign that form and he did so.

The plaintiff admits that the effect of in-putting that information into the system was to delete the repayment as though he had fully repaid his loans but adds the Awuor's intention was to reinstate the repayment once the double payments had been recovered. That was done. The only problem was that Awuor re-input the information into the system late and the repayment resumed in July instead of June 1999. He strongly denied rescheduling his loan repayment and according to him, even if he erred in authorizing that change, which he still denied, that did not warrant the termination of his services. The most he should have suffered was a reprimand as recommended by the Area Manager.

The plaintiff further testified that, knowing as he did that his position of Operations Manager was one of those earmarked for abolition in the defendant's restructuring process, he verbally expressed to the Area Manager his desire to take early retirement. The Area Manager dissuaded him and informed him that he was going to be promoted to Business Manager and transferred to Molo branch. He produced as **Ex.19** the Area Manager's e-mail of 17th December 1999 which confirms that. On the basis of that information he did not take the early retirement that the defendant had offered to all its employees.

The defendant's version of the story is different. Its Area Operations Manager, Wilson Ngare, DW1, testified that in 1999 when about to complete his audit of Nyahururu branch, he received an anonymous call that the plaintiff was not repaying his loans. After confirming from the pay roll that the plaintiff did not repay his loans in the months of April, May and June 1999, he got instructions from his boss to return to that branch the following week with a colleague and investigate the matter. His investigations revealed that the plaintiff had authorized the stoppage of his loan repayments by the Change of Payment/Deductions Form which he called "a falsified report." In cross-examination, he admitted he did not ask the plaintiff why he did that and said that was the work of his colleague.

The colleague DW1 referred to was the defendant's Country Security Manager, Jason Turanta Some, DW2. He testified that on instructions of the Internal Auditor he went with DW1 to Nyahururu branch on 19th October 1999 to investigate irregular loan repayments. Awuor informed him that on instructions of Carol Ndegwa, a supervisor in the Salaries Section of the Human Resources Department, she had raised the Change of Payment/Deductions Form to correct the double loan repayments. The Error Exceptions documents for April, May and June which were supposed to raise a red flag on loans in arrears were missing from the branch. Awuor gave him a statement that she was

authorized by Ndegwa to raise the Change of Payment/Deductions Form but Ndegwa denied that and with that he concluded that it was the plaintiff who had instructed Awuor to raise that form to delay his loan repayments for purposes of easing the financial pressure he was in. In his report he concluded that the plaintiff had abused the trust the defendant had in him and was therefore not worthy of holding the position of Operations Manager. He recommended disciplinary action against him.

I have considered this evidence and carefully read the exhibits produced. As I have pointed out, it is common ground that there were double recoveries of the plaintiff's loans for the months of February and March 1999, an anomaly the defendant also concedes had to be corrected. According to the defendant the way the plaintiff went about correcting it by instructing Awuor to raise the Change of Payment/Deductions Form was wrong and that is what cost him his job.

I cannot accept this contention. This is because DW1 said that to effect loan deductions from a staff member's salary, standing order forms have to be completed. He, however, did not say what form was supposed to be raised to reverse the double deductions. DW2 said the plaintiff "was supposed to inform HR to reverse on repayment" instead of giving the deletion command. He, however, did not know how HR was to be informed or what form was to be completed. From this evidence, it is clear to me that the defendant did not have a format for reversing double loan recoveries. I believe that is why Awuor had to consult her boss Carol Ndegwa.

Neither Awuor nor Ndegwa testified but we have, in the defendant's bundle of documents, their written statements which they gave to DW2 immediately they were asked to explain the deletion of the plaintiff's loan repayment. Awuor who raised the form that effected the deletion did not say it is the plaintiff who gave her those instructions. To the contrary, she was categorical that it was Ndegwa who instructed her to do that. Instead of dragging Ndegwa, who was her boss, into the mud, she would not have had any difficulty saying it was the plaintiff who gave her those instructions, if indeed he had. I find no justification whatsoever in DW2 believing Ndegwa's word and concluding without any evidence that it was the plaintiff who instructed Awuor to raise the Change of Payment/Deductions Form. I am satisfied it is Ndegwa who gave those instructions. Realizing those were wrong instructions, she would not be expected to admit to giving them.

It is this evidence that has led me to believe the plaintiff's contention that the defendant, intent on reducing staff in its restructuring process, seized this saga to terminate his services without paying him the retrenchment package. To start with, it must be remembered that it was due to the defendant's own poor system that there was double deductions of the plaintiff's salary. It was also due to the defendant's lack of a format to reverse such deductions that led Awuor to seek Ndegwa's instructions as to what to do. Ndegwa then gave wrong instructions which Awuor acted upon and all the blame is heaped, not on the defendant itself or these two of its officers, but on the plaintiff. The defence witnesses were not candid when they claimed they did not know if any action was taken against the two. There is no way they would not have failed to know if any such action was taken.

True it is the plaintiff who authorized the issue of the Change of Payment/Deductions Form. He did that not because it concerned his account but because he was the officer who was required to do it. I am sure a different Operations Manager, with information that Ndegwa had instructed that mode of correction in the absence of a clear format, would have authorized it. In the circumstances, I find that the termination of the plaintiff's services was totally unjustified.

Counsel for the defendant argued that even if the defendant was wrong in terminating the plaintiff's service, having followed the terms of its contract of employment with the plaintiff, it committed no error. I cannot accept that argument either. Why did it not follow that route in reducing staff in its restructuring process instead of paying millions of shillings. Retrenchment was not an issue in case of **Central Bank of Kenya Vs Nkabu, [2002] 1 EA 34** and the other cases that they cited. In the circumstances, I still maintain that the termination of the plaintiff's services was wrongful.

That brings me to the issue as to whether or not the plaintiff was entitled to the retrenchment package.

There is no doubt that it was at the discretion of the defendant to decide who was to be retrenched so that even if one applied to retire under its Early Retirement scheme, the defendant was entitled to reject one's offer if the defendant still required his or her services. That is the

import of the defendant's Staff Circular No. 15 of 28th February 1997 cited in paragraphs 3 and 4 of the defence.

The plaintiff's position as Operations Manager was abolished. Molo branch to which, according to the Area Manager, he was supposed to be transferred after promotion was closed. In these circumstances, I have no doubt in my mind that the plaintiff would have applied for early retirement and the defendant would have readily granted it. Instead of doing that it used the excuse caused by its own errors and those of its staff to terminate the plaintiff's services and deny him the Early Retirement Scheme package that was made available to all other staff like PW2. I agree with counsel for the plaintiff that was discriminatory. In the circumstances I find and hold that the plaintiff is entitled to the Early Retirement package.

The plaintiff testified that under the defendant's Early Retirement Scheme, its employees were entitled to three months' salary for every completed year of service plus three month's salary in lieu of notice. The defendant did not dispute that. DW1 only pointed out in cross-examination of the plaintiff that he had only worked for 14 complete years.

The plaintiff himself conceded he had worked for about fourteen and half years. That is not fifteen complete years of service. He is therefore entitled to payment for 14 years. Out of the sum of Kshs.3,302,361.25 which was also not disputed if the plaintiff had worked for 15 complete years, I have to deduct three month's salary of Kshs.226,449/= leaving a balance of Kshs.3,075,912.25.

General damages are not awarded in disputes based on contract. I cannot therefore grant the plaintiff any.

In the upshot I find that the termination of the plaintiff's services was wrongful and he is entitled to the Early Retirement Scheme package which works to Kshs.3,075,912.25. Consequently I enter judgment for the plaintiff in the said sum of Kshs.3,075,912.25 plus interest thereon from the date of the filing of this suit and costs of this case as well as interest thereon from the date of taxation.

DATED and DELIVERED at Nakuru this 13th May, 2010.

D. K. MARAGA
JUDGE.