



REPUBLIC OF KENYA
IN THE HIGH COURT OF AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 1250 OF 2003
EVANS ENDUSA ONZERE.....PLAINTIFF
VERSUS
BARLCAYS BANK OF KENYA LTD.....DEFENDANT
JUDGMENT OF THE COURT

The Pleadings:

1. The plaint in this case is dated 17/11/2003 and filed in court on 02/12/2003. The plaintiff says that at all material times pertinent to this suit, the plaintiff was the Team Leader, Head Office Support (HOS) Grade B4 with the Defendant Bank, having been employed sometime in 1978. He also says that in the course of his employment, he was promoted through the ranks upon diligent discharge of his duties and that he won several awards for the quality services availed.
2. The plaintiff also avers at paragraph 5 of the plaint that sometime in 1999, the Defendant introduced what was known as **Internal Job Advertisement (IJA)** Regulations which required that unless job elements of a role had substantially changed with new responsibilities exceeding 3% of the current role added, the holder of that role would be matched into the new role; that in the year 2002, the Defendant replaced the previous layer of management headed by the plaintiff and introduced a new position. The plaintiff also says that prior to the creation of the new Grade B4, the defendant carried out a valuation by the Defendants Bank officials in the UK who confirmed that the new grade B4 was equivalent to the position hitherto occupied by the plaintiff and that if the Defendant had acted in good faith, the plaintiff would simply have been matched into the new role; but that instead of doing so, and in total disregard of the IJA regulations and Job Valuation Report, the Defendant advertised the new position.
3. The plaintiff further explains that consequent upon the advertisement, he sought an explanation from the then Manager Service Delivery (Domestic), one **Mr. John Thimba** who while admitting the irregularity, falsely raised the plaintiff's hopes by advising the plaintiff to put in his application with the assurance that the plaintiff would be given back the job. That promise by Mr. Thimba, according to the plaintiff was false because somebody else was recruited into the new grade B4. The plaintiff was then offered an Early Retirement Package which he declined and subsequently the Plaintiff's employment with the Defendant was terminated, with the resultant loss of future earnings since the plaintiff says he had another 18 years before retirement age.
4. The plaintiff claims that the termination of his employment with the Defendant was actuated by malice and constitutes unfair dismissal. He accuses the Defendant of:-

- (i) failing to give priority to the Plaintiff as required by IJA Regulations;*
- (ii) Disregarding the Job Valuation Report which had indicated that the new role was same grade B4 as the role held by the Plaintiff;*
- (iii) Failing to secure an alternative employment within the bank for the Plaintiff as required;*
- (iv) Failing to give the Plaintiff sufficient time (at least 3 months) before offering him an early retirement.*
- (v) Terminating the Plaintiffs employment before his normal retirement age;*
- (vi) Failing to pay the Plaintiff' his redundancy pay.*

5. As a result of the Defendant's alleged unfair dismissal the Plaintiff claims the following reliefs from the Defendant

- (a) Compensation for loss of office*
- (b) Redundancy pay*
- (c) Damages for unfair dismissal;*
- (d) Terminal Dues*
- (e) Costs of this suit and interest thereon*

6. The Defendant filed its Statement of Defence on 23/01/2004 and denied that the plaintiff was a diligent worker to the satisfaction of the bank. The Defendant admitted that it introduced comprehensive Internal Job Advertisement Regulations and also admitted other internal changes in consultation with its UK office but denied that the re-organization put the position previously occupied by the plaintiff at grade B4. The defendant also denied that it acted maliciously in terminating the plaintiff refused the Defendant's offer for early retirement.

The Plaintiff's Evidence

7. The plaintiff was the only witness. He stated that he joined the employ of the Defendant on or about 22/05/1978, initially as a clerk and rose through the ranks because of his good performance that earned him salary increments and letters of commendation. The plaintiff produced one letter dated 24/03/2002 by which he was given a Silver Medal Award. By this letter, produced as PExhibit 1, the Defendant congratulated the plaintiff and advised him of his nomination for an Eagle Award in the **Business Performance** category. The plaintiff's nomination for the Eagle Award was confirmed and the confirmation was conveyed to the plaintiff by a letter dated 17/07/2002 (PExhibit 2) by which he received the **SILVER** Award. The letter noted that the plaintiff had made an excellent achievement. The plaintiff received a winners pack as well as a cash award.

8. The plaintiff stated further that in or about May 1999, the Defendant issued a circular which changed the system of promotions. That the system required role profiling including qualifications so that any in-serving staff could apply and automatically qualify for interview in accordance with the IJA. He stated that pursuant to the new circular, the position of Team Leader – Head Office – Support – was advertised. That he applied for the job, got short listed, was interviewed and matched into the position of Team Leader Head Office Support. The plaintiff said that at the time of the said interview, he was holding the position of Project Manager in Programmes Office. He also stated that the new position brought with it higher salary to about Kshs.123,000/= p.m. The plaintiff was not able to produce the letter matching him into this new position and explained that the letter was with the Defendant. He however produced as PExhibit 3 a pay slip for the month of August 2002 showing gross pay of Kshs.152,384/=. The plaintiff

stated further that in or about July 2002, the Defendant abolished the plaintiff's position and created another role, and that upon abolition of the plaintiff's position, he was informed that he was now redundant. That the information concerning the abolition of office and communication that he was now redundant was given to the plaintiff via e-mail. The plaintiff testified that he took up the issue with the Defendant who referred the matter to the Human Resource people in the UK. The plaintiff also stated that after the UK office advised the Defendant concerning the new grade B4 vis-à-vis the plaintiff's former position it was found that the plaintiff should be matched into the new grade B4 or even a higher grade.

9. The plaintiff said that before the issue could be sorted out he took leave to sit for an examination and that when he came back from leave he was informed that he could no longer be retained by the Defendant in its employ. Again he says the communication was sent to him via e-mail dated 3/07/2002. He produced the two e-mails as PExhibits 4 and 5. 10. The plaintiff stated that he eventually left the defendant's employ on 2/09/2002. That he was not given an opportunity to apply for early retirement as was the practice but that the defendant offered the plaintiff early retirement. That he did not accept the Defendant's offer for early retirement. In his estimation, the plaintiff prays for the sum of Kshs.6104050/= made up as follows:-

3 months salary in lieu of notice = Kshs. 456,852.00

Salary for 2 days worked in the month

of September 2002 = Kshs. 12,690.00

Service pay at the rate of 1½ months pay

for every completed year of service of the

24 years and 4 months = Kshs. 5,482,224.00

Outstanding annual leave for the year

2002 = Kshs. 1,52,284.00

11. The plaintiff testified that he was entitled to the above benefits for the reason that the Defendant terminated his services on grounds of redundancy as per PExhibit 6. The Plaintiff confirmed that there was no other suit pending between him and the defendant..

12. Mr. Chacha Odera for the firm of Oraro & Company Advocates, cross-examined the plaintiff at length during which the plaintiff confirmed that he was hired by the defendant by a letter dated 17/05/1978. The plaintiff stated that he signed the Letter of Appointment in acceptance of the terms of service set out therein and that according to the letter, he was entitled to one month's notice or payment of one month's salary in lieu of notice. The plaintiff also said that by a subsequent letter of appointment to the last position he held before his services with the defendant were terminated, he was entitled to 3 months' notice or 3 months' pay in lieu of notice.

13. The plaintiff also stated that after he left the defendant's employment, the defendant worked out dues due to him and credited his account with the same. He confirmed from page 8 of the defendant's bundle of documents that the amount credited to his account by the defendant was the sum of Kshs.6 120 000.00 and that the offer was made to the plaintiff as far back as 2/09/2002. In answer to further questions put to him the plaintiff confirmed the following facts:-

- **that he was entitled to 3 months' salary in lieu of notice**
- **that the defendant also offered him 1½ months service pay for every completed year of service as claimed by himself**
- **that the defendant did not offer to pay for accrued leave for the year 2002 nor did it offer to pay**

for the 2 days worked in September 2002.

14. In answer to another question the plaintiff stated that he is claiming redundancy pay at the same rate of 1½ months salary for every completed year of service. He also agreed -

- *that the defendant offered him the sum of Kshs.554,2968.00 for service pay as opposed to his own computation of Kshs.548,2224.00*
- *that the defendant was ready and willing in September 2002 to give to the plaintiff a 25% discount on all the moneys owed by the plaintiff to the defendant in the sum of Kshs.444,491.00 (being 25% of Kshs.1,777,963/15)*
- *that the net amount offered by the defendant to the plaintiff was Kshs.2808999.15*
- *that the only issues not addressed by the defendant are the leave days for 2002 and the two days worked in September 2002.*

15. In re-examination, the plaintiff stated he did not sign the offer made to him by the defendant because first he expected to work until age 60 and second because the defendant did not give him 3 months to look for alternative employment.

The Defendants Evidence

16. The defendant did not call any oral evidence.

The Issues

17. The Statement of Agreed issues was duly executed by both parties' advocates and filed in court on 03/03/2004. However by the end of the hearing, the only issues that remained to be determined by the court are (a) whether the plaintiff was entitled to leave pay for accrued leave for the year 2002 and (b) whether the plaintiff was entitled to salary for the 2 days worked in September, 2002.

Submissions

18. At the close of the hearing both counsel agreed to put in written submissions, but eventually only the plaintiff's counsel did so. The Defendant counsel, Mr. Odera through Mr. Mogikuyu, informed the court on 16/06/2008 that he did not wish to put in any written submissions.

Findings:

19. Since the defendant did not adduce any oral evidence in answer to the plaintiff's testimony, I do find that the plaintiff's testimony as to the facts leading to his departure from the defendant's employment on 2/09/2002 remain uncontroverted. I also find that apart from the remaining issue of leave pay for accrued leave for the year 2002 and pay for the 2 days worked in September 2002, the defendant is not opposed to the plaintiff's other claims, whether we christen some of them under redundancy or service pay for the number of years worked.

20. However, before making a formal decision on whether or not the plaintiff has made out a case on a balance of probability, I will deal with the issue of redundancy. Counsel for the plaintiff cited one persuasive authority found in the case of **Sammy C.L. Akifuma –vs- Shell Development Ent (K) Limited** (Nrb. HCC No. 501 of 1997). The relevant law on this issue is section 2 of the Trade Disputes Act, Cap 234 Laws of Kenya. The learned Judge in the **Akifuma** case referred to this section which defines redundancy in the following terms:-

“The loss of employment, occupation job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business”

21. The plaintiff herein claims that he is entitled to redundancy pay but section 16A of the Employment Act (Cap 226) which was in force at the time of the alleged termination herein, termination of employment on grounds of redundancy is not permitted unless it is provided for in the Contract. In the instant case, the plaintiff did not produce in evidence the contract of employment showing that he was entitled to redundancy pay. The law requires that he who alleges must prove. The plaintiff has failed to prove his allegation that he is entitled to redundancy pay.

22. The plaintiff has further claimed that his termination of employment was not normal; that he was retrenched from employment and that as a result, he ought to be compensated for the same. Counsel for the plaintiff has contended on behalf of the plaintiff that the initial offer made by the Defendant to the plaintiff in early September 2002 was made on the mistaken assumption by the Defendant that the plaintiff was going out under normal retirement which would then have entitled him to terminal dues. Counsel contended further that having been retrenched the plaintiff was entitled to retrenchment benefits over and above the normal dues offered by the Defendant Bank. As per the amended plaint filed in court on 22/06/2005, the plaintiff seeks payments as follows:-

(i) Three Months' salary in lieu of notice = Kshs. 456,852.00

(ii) Payment for the two (2) days worked

in September 2002 = Kshs. 12,690.00

(iii) Service Pay = Kshs. 5,482,224.00

(iv) Outstanding leave = Kshs. 152,284.00

Total = Kshs. 6,104,050.00

23. As stated earlier, the defendant has not disputed these figures either in the pleadings or by way of oral evidence.

Conclusion

24. In light of the findings above, I hereby enter judgment for the plaintiffs as against the defendant in the sum of Kshs. **6,104,050.00** made up as follows:

(a) 3 months' salary in lieu of notice = Kshs. 456,852.00

(b) Payment for the two (2) days

worked in September 2002 = Kshs. 12,690.00

(c) Service pay at the rate of 1½

Months salary for every completed

Year of service (i.e. for 24 years) = Kshs. 5,482,224.00

(d) Outstanding leave pay = Kshs. 152,284.00

TOTAL = Kshs.6,104,050.00

As the defendant had offered (and has not withdrawn the offer) to reduce the plaintiff's liabilities by 25%, I order that the plaintiff is still entitled to the same.

25. The defendant shall also pay costs to the plaintiff and the same shall bear interest at court rates with

effect from the date of filing suit.

26. It is so ordered.

Dated and delivered at Nairobi this 26th day of September, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Wasonga for Kisaka for the Plaintiff

Mr. Makori for Chacha Odera for the Defendant