



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 873 of 2000

SUSAN MIBEI PLAINTIFF

VERSUS

STANDARD CHARTERED BANK (K) LTD..... DEFENDANT

JUDGEMENT

The trial of this case was based on the Amended Plaintiff which was filed in court on 6th June 2003, as well as on the Statement of Amended Defence which was filed in court on 18th June 2003.

It was the plaintiff's case that her contract of employment was governed by the Agreement dated 21st April 1983, as well as by the "collective agreement between Kenya Bankers (employers) association and Kenya Union of Commercial, Food and Allied workers" ("KUCFAW").

It is common ground that the plaintiff's employment with the defendant was terminated by a letter dated 30th April 1998.

The plaintiff contends that the said termination was wrongful and illegal. If anything, it was stated that the alleged termination was actually carried out on account of redundancy, thus entitling the plaintiff to severance pay, together with her income for the period that she would have continued working until she attained 55 years of age.

In answer to the claim, the defence was that the termination of the plaintiff's employment was in accordance with the terms of the contract between the two parties. And the defendant said that the plaintiff had already been paid one month's salary in lieu of notice.

It was also the defendant's case that severance pay was not payable. So also the defendant insists that the plaintiff was not entitled to income that she would have earned until attaining the age of 55 years.

In support of the case, the only witness was the plaintiff. Whilst the defendant called two witnesses.

The plaintiff testified that her contract of employment was embodied in the letter dated 21st April 1983, together with the Collective Bargaining Agreement between Kenya Bankers (Employers) Association and KUCFAW.

After working with the defendant for about fifteen years, the plaintiff says that her services were terminated through a letter from the defendant, which was dated 30th April 1998.

It was her testimony that as at the date of her termination, her salary was Kshs.51,366/70. And to support her case, the plaintiff exhibited her payslip for April 1998.

Meanwhile, in October 1997, the plaintiff had been promoted to the position of Cash Officer. Thereafter, she believed that her future prospects were very bright, as at the age of 35 years, she still hoped to work for 20 more years.

According to the plaintiff, her termination was preceded with her authorising a payment, which later turned out to have been fraudulent. However, as far as the plaintiff was concerned, the defendant's investigators had cleared her of any fraud.

Following her termination, the plaintiff unsuccessfully lodged appeals for reinstatement. Thereafter, she says that she remained a housewife; when she failed to secure alternative employment elsewhere. She blames her failure to obtain alternative employment on the contradictions in the letter of termination, which suggested that she was the one who had terminated her own employment, whilst the truth was that her services had been terminated by her employer.

The plaintiff also testified that her contract of employment was governed by the Collective Bargaining Agreement (hereinafter cited as "the CBA"). In that regard, it was her evidence that she could only be laid off lawfully if she had been given three warning letters within a span of twelve months. Therefore, as she had not been given any three warning letters in the twelve months preceding her termination dated 30th April 1998, it was the plaintiff's case that her termination was unlawful.

Even after the plaintiff originated the transaction of 11th March 1998, which later turned out to have been a fraud on the account of a customer, she says that the investigators did not have any disciplinary action taken against her. Therefore, she believed that she was duly cleared of any wrong-doing, as not even a warning letter was given to her.

The plaintiff also made available to the court, her "performance assessment form" for the year 1997. The said form, which was filled-in by the manager, indicated that the plaintiff had a rating of "A2", which she described as the second highest rating at the bank. Indeed, the bank manager's comment was that the plaintiff had ran her department efficiently. As that was her last rating at the bank, the plaintiff could not understand how she could then be shown the door by the defendant.

Thereafter, when she was being cross-examined, the plaintiff conceded that according to her statement dated 2nd April 1998, it was her responsibility to check the signature of the customer before giving out the entries for processing. However, in the transaction of 11th March 1998, the plaintiff did not do so.

The plaintiff also conceded that pursuant to the terms of her letter of appointment, the bank was as much entitled as the plaintiff was, to terminate the contract of employment by giving one month's notice.

It was also noteworthy that the plaintiff explained that her termination was effected at a time when the bank was re-structuring, which resulted in some redundancies being declared. However, she was very clear in her mind about the fact that she was not declared redundant.

Another significant concession, which was made by the plaintiff during cross-examination, was that the contract did not require reasons for termination, to be given.

As regards, the claim for leave pay, the plaintiff said that she had had a total of 46 days leave. Out of those, she says that she had taken a total of 18 days only. Accordingly, she said that she was entitled to payment in lieu of the remaining 28 days.

She also said that the bank had failed to pay her one month's salary in lieu of notice, and her earnings until she attains the age of 55 years, which is the retirement age. However, the plaintiff did admit, during cross-examination, that she was not obliged to work for the bank until she attained 55 years, nor was the

bank obliged to keep her until that age.

DW1, Christopher Aori, is an employee of the defendant. He was the person who personally investigated the transaction which later led to the termination of the plaintiff. He began the investigations after a bank customer named C. E. Yang complained about an unauthorised debit to his account, amounting to Kshs.180,000/-.

As the transaction had been authorised by the plaintiff, DW1 interviewed her on two occasions.

In his understanding of bank operations, DW1 said that the plaintiff ought to have verified the customer's signature, before authorising the transaction. However, the plaintiff is said to have admitted having failed to verify the signature of the customer.

After investigations, DW1 recommended that disciplinary action be taken against the plaintiff, for negligence in the performance of her duties. In his view, the plaintiff had failed to adhere to the cardinal rule, which requires the bank staff to know the person who gives instructions for any transactions.

During cross-examination, DW1 explained that he had been the bank's Investigations Manager since 13th July 1992. Prior to joining the bank, DW1 had been an inspector of Police.

And in relation to this case, DW1 testified that after ascertaining that the transaction under investigations was a fraud, he reported the issue to the police.

According to the witness, the bank was wrong to have cited clause 5 (c) of the plaintiff's letter of employment, as the basis for the termination of her contract. He explained that by citing clause 5 (c), the bank was implying that the plaintiff had terminated her own employment; which was not the position herein.

DW1 also said that he never ascertained if the plaintiff was a beneficiary of the fraudulent transaction. That notwithstanding, the witness emphasized that it was the plaintiff's responsibility to ensure that she verified the person who gave the instructions.

DW12, Tom Ogaya Orata, was also an employee of the bank. He had worked with the bank for 22 years, as at the date when he testified, on 27th July 2006.

He recalled that the plaintiff had signed a cheque deposit slip without first authenticating the signatories. He explained that authentication would have been by checking the specimen signature, and presumably comparing it to the signature on the document in question.

It was his evidence that as a result of the plaintiff's failure to authenticate the signature, funds were withdrawn from an account at the bank's branch at Yaya Centre, and later credited to an account at Ruaraka. The sum in issue was Kshs.180,000/-, which he said was a loss to the bank, as the customer had to be refunded the said sum.

DW2 testified that, to his knowledge, the plaintiff was paid one month's salary in lieu of notice.

And as far as the plaintiff's leave was concerned, DW2 produced "leave and sickness records" for the period between 1996 and 1998. The records showed that as at the end 1997, the plaintiff had 40 leave days. As her leave for 1998 was 32 days, that means that the plaintiff had a total of 72 leave days, for the period upto December 1998.

However, between 1st January and 3rd February 1998, the plaintiff took up 26 days, leaving a balance of 46 days for the year 1998.

Thereafter, the plaintiff was again on leave between 8th April 1998 and 30th April 1998. According to

DW2, that period accounted for another 18 days of leave. In effect, by the date of termination, it would appear that the plaintiff still had a balance of 28 leave days.

However, DW2 insisted that the plaintiff had no more leave days to her credit, as at the date of her termination. I will revert to that issue later.

Meanwhile, in cross-examination, DW2 explained that the CBA was only applicable to unionisable staff. However, as the plaintiff was a manager at the material time, DW2 said that the CBA was not applicable to her.

For that reason, the witness explained that the plaintiff was not entitled to a leave allowance, separate and distinct from her salary. Such leave allowance was only payable to unionisable staff, he explained.

And as regards the contention that the plaintiff did not have any available leave days, as at the date of her termination, DW2 did explain that the 32 leave days are earned in a complete year. I understand that to mean that the number of leave days earned as at any particular date within a year, is calculable on pro rata basis, depending on the number of days already worked. For instance, by the end of June in any given year, an employee would have earned a total of 16 leave days; whilst by end of March, the leave days earned would be 8.

By my calculations, as at 30th April 1998, the plaintiff would have earned 11 leave days. Therefore, if she still had some 28 leave days upto 31st December 1998, when she ought to have had only 21 days (for the remaining 8 months of that year), my calculations show that the plaintiff had some 7 leave days which she had earned, but had not yet taken.

In my understanding DW2 got his calculations wrong because he failed to take into account the fact that the plaintiff had carried over some 40 leave days from 1997. Therefore, even though the plaintiff might have already taken some 16 leave days by 30th April 1998, some of those days must be debited against the days carried over.

Accordingly, I hold that the plaintiff is entitled to Kshs.11,978/50 in respect to the 7 leave days which she had earned, but had not taken, as at the time her contract was terminated. The said sum has been pegged to the plaintiff's monthly salary of Kshs.51,336/70.

As regards the plaintiff's claim for severance pay, I hold that she is not entitled to the same. I say so because severance pay is only payable to a person who had been declared redundant. Section 16 A (1) (f) of the Employment Act stipulates that:

"an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay."

In this case, the plaintiff readily admitted that she had not been declared redundant. Therefore, she would not be entitled to severance pay as claimed or at all.

The fact that her termination was effected at a time when the defendant was also restructuring, and thus laying off some employees, would not entitle the plaintiff to severance pay, unless she too had been declared redundant.

Then, as regards the claim for "loss of service upto 55 years", the plaintiff has not made out a case. In any event, I find that the said claim is not sustainable in law, as the two parties were not obliged to continue the employer/employee relationship until the plaintiff reached the age of 55 years.

It was an express term of the contract that either party thereto could terminate it at the expiration of one month's notice, or upon payment of one month's salary in lieu of notice. Therefore, neither party could insist that the other was obliged to continue the contract, if the said other wanted to opt out of the relationship. The only requirement, if either party wished to bring the relationship to a lawful conclusion,

was that he should give one month's notice, or alternatively pay one month's salary in lieu of notice.

In **JOSEPH OKUMU SIMIYU –VS- STANDARD CHARTERED BANK (K) LIMITED, HCCC NO. 899 OF 1994**, the Hon Lenaola J. expressed himself thus, on a claim of similar nature;

"There is this preposterous notion in the minds of many employees that permanent and pensionable means working until the cows come home.

The reason why we have a notice clause in contracts is that contracts may be terminated with such notice or payment in lieu thereof well before retirement. Neither an employer nor an employee are bound till retirement doth them part. Period!"

To my mind, that statement aptly summarises the legal position. Therefore, the plaintiff's claim for alleged loss of service upto 55 years is without merit, and is thus denied.

The defendant insisted that the plaintiff had been paid one month's salary in lieu of notice, but the plaintiff denied that assertion. It was therefore the obligation of the defendant to discharge the onus of proving that it had made the said payment. However, the defendant did not produce any material, at the trial, to prove that it had paid the plaintiff one month's salary in lieu of notice.

The reason why I have laid emphasis on the failure to produce evidence at the trial is that the defendant purported to produce some further evidence, in the form of bank statements, at the time of making submissions. The said endeavour was irregular, as counsel cannot adduce evidence which his client's witnesses had not made available.

Also, no evidence could be adduced long after any party had closed its case, unless there was a specific application to re-open the case. If such an application was granted by the court, the evidence would still need to be produced by an appropriate witness, as opposed to the advocate. Thereafter, the other party would also have an opportunity of cross-examining the witness.

As the statements of account were not produced by any witness at the trial of this suit, the same are hereby not regarded as evidence. Accordingly, the court declines to take them into consideration.

In the circumstances, I hold that the defendant has failed to prove that it did pay to the plaintiff one month's salary in lieu of notice. Therefore, the plaintiff is awarded Kshs.51,336/70, in lieu of notice.

Meanwhile, it is noted that in the letter dated 30th April 1998, the defendant stated that the termination of the plaintiff's employment was under clause 5 (c) of the contract.

It is common ground that that was erroneous, as the plaintiff never terminated her own employment.

The plaintiff has made a lot of capital about the said error. However, I do hold that that error would not enhance the compensation payable to the plaintiff.

In **ADDIS –VS- GRAMAPHONE COMPANY, LIMITED [1990] A. C. 488 at page 491**, Lord Loreburn L. C. said;

"I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. ...

If there be a dismissal without notice, the employer must pay an indemnity; but that indemnity cannot include compensation either for injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

In the same case, Lord Atkinson held as follows, at page 496;

"In many cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: Thorpe –vs- Thorpe (1830) 1 B & Ad 415. One of these consequences is, I think this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more."

In this case, the contract would have been kept if the plaintiff had been given one month's notice, or alternatively if she had been paid one month's salary in lieu of notice. That therefore, is the extent to which the law provides compensation to her; and no more.

In conclusion, I hold that the termination of the plaintiff's contract of employment was wrongful, for the reason that she was neither given one month's notice nor paid one month's salary in lieu of notice. However, the said termination did not constitute redundancy. I also find that the plaintiff had not been paid for the seven (7) leave days which she had earned, but not yet taken, as at 30th April 1998, when her contract was terminated. Therefore, I grant judgement in favour of the plaintiff for;

- (i) Kshs.11,978/50 in lieu of the seven (7) leave days
- (ii) Kshs.51,336/70,being one month's salary in lieu of notice.

Both sums shall attract interest at court rates from 30th April 1998 until payment in full.

The plaintiff is also awarded the costs of the suit, and it is directed that the quantum of the said costs be pegged to the sums awarded to the plaintiff. I have deemed it necessary to give this direction as I believe that it would be unjustifiable for the costs to be related to the sums which were claimed in the Plaint, most of which the defendant has defended successfully.

Dated and Delivered at Nairobi this 16th day of January 2007.

FRED A. OCHIENG

JUDGE