



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1299 of 1999

ALICE NJERI WAMUIGAPLAINTIFF

VERSUS

CENTRAL BANK OF KENYADEFENDANT

JUDGEMENT

In this case the Plaintiff sought an extension of time to file an amended Plaintiff since two and half years after an order was made allowing the amendments.

In my ruling of the 30.9.2005 I ordered that the question of liability be tried first as the case was an old one.

The Plaintiff alleges in her amended Plaintiff she was an employee of the Defendant, and that her services were wrongfully terminated on the 8.9.1988.

The Plaintiff gave evidence that she was appointed as a copy typist on contract terms on the 2nd May, 1988 pursuant to a letter of appointment dated the 28.4.1988. That from 1.2.1992 she became a Permanent and Pensionable employee pursuant to a letter of the 28.2.1992. Her revised terms of service were contained in letter of the 15.2.1996.

Terms of service were governed by and included CBK Staff Rules and Regulations (the Rules).

On the 21.8.1998 she reported on duty at about 8.15 a.m. and was transferred to the School of Monetary Studies where she was informed that she had visitors who turned out to be from the Intelligent Services. They asked her to see the Director of Intelligence on the 24.8.1998. On the previous day she had been summoned to the CID headquarters in connection with some information she had in the Nairobi bombings of the 7.8.1998.

As a result of these events the Plaintiff and her husband decided to go into hiding and they disappeared until in early September 1998. She saw Mr. Michinke of CID who had no objection to her returning to work. It was after this that she saw the letter of the 7.9.1998 from the Defendant which stated:-

SUMMARY DISMISSAL

It has come to the attention of the Bank that on Friday, August 21, 1998 at about 9.30 a.m. you obtained a Staff Pass to go to Nyayo House. It is noted that you have not reported on duty since.

The Bank being concerned as to your whereabouts, set about looking for you without success.

Several attempts to locate you through your family have also failed. Due to the circumstances of your disappearance, the Bank was left with no alternative but to construe that you were absenting yourself from duty deliberately without reasonable excuse.

It was particularly noteworthy that your husband upon being questioned by the Head of Security in the Bank did not appear anxious about your absence creating the impression that he knew your whereabouts. Moreover on being requested whether he had reported your disappearance to the police he replied that he had not done so.

Accordingly, the Bank wrote to you on August 25, 1998, requesting you to show cause why disciplinary action should not be taken against you for absenting yourself from duty without authority or reasonable excuse, contrary to rule 3.12 of the Staff Rules & Regulations. The letter was served on your husband, Mr. Wilson Ireri Wamuiga, at your residence.

In the letter under reference, you were informed that your written defence which was required under the provisions of rule 6.43 of the Staff Rules & Regulations should have reached the Senior Manager, Human Resources Division by 4.30 p.m. on Wednesday August 26, 1998, failure to which the Bank would proceed to impose on you, at its absolute discretion, any of the penalties provided for under rule 6.42 of the same rules.

In view of the fact that as at September 1, 1998 when the APD Committee met to consider your matter you had not responded to the said letter from the Bank having regard to the seriousness of the matter, it has therefore been decided that you be summarily dismissed from the service of the Bank with effect from the date of this letter on grounds of gross misconduct in accordance with rules 3.13(a) and 6.23 of the Staff Rules & Regulations. In accordance with rules 3.12 and 6.23 of the said rules you are not entitled to any salary or any other benefits whatsoever from Monday August 24th 1998, being the next working day from the date when you vacated your office without authority or reasonable excuse, up to which date your dues/indebtedness to the Bank will be calculated and advised to you under separate cover.

Please complete Part A of the attached Clearance Certificate and hand it over to Head, Security Division for our further action. Also hand over to the Head, Security Division any property of the Bank, including your staff identity cards, which may be in your possession by virtue of your having been an employee of Central Bank of Kenya.

The letter of the 25th August 1998 was served on the Plaintiff's husband on the 27.8.98 and stated as follows:-

VACATION OF OFFICE

It has come to the attention of the Bank that you have absented your self from duty without authority or reasonable excuse contrary to rule 3.12 of the Staff Rules and Regulations since 9.30 a.m. on Friday, August 21, 1998.

As you are aware, such vacation of office amounts to a misconduct which would entitle the Bank to consider your dismissal as provided for in rule 3.13 of the said Staff Rules and Regulations.

Given the foregoing situation, and in accordance with rule 6.43 of the Staff Rules and Regulations, you are hereby required to show cause why the Bank should not take appropriate disciplinary action against you.

Your written explanation, if any, must reach the undersigned by 4.30 p.m. on Wednesday, August, 26, 1998, failure to which the Bank will proceed to impose on you, at its absolute discretion, any of the penalties provided for under rule 6.42 of the Staff Rules and Regulations.

She stated that on the 21.8.98 she had told the Head of Department that she had been summoned to Nyayo

House and would be back to work. In cross examination she said that on 21.8.1998 she obtained a pass to visit Nyayo House but did not go there. The Defendant called no evidence.

It is the Plaintiff's case that the reason for her absence from work was reasonable. She claims that her employment was wrongfully terminated.

The Defendant denied that it had unlawfully terminated the Plaintiff's services and maintained that the dismissal of the Plaintiff was lawful. There is a counterclaim for monies due to the Defendant in respect of the salary paid to the Plaintiff for August 1998 which it is claimed was only due until the 24.8.1998.

Miss Wahome for the Plaintiff referred to Rules 3.12 which states an employee shall be regarded as having vacated his office if he absents himself from duty without reasonable excuse for more than 48 hours. She submitted the Plaintiff's absence was reasonable.

That the Plaintiff being on Permanent and Pensionable terms may only be dismissed from the service of the bank on grounds of misconduct or gross misconduct (Rule 6.20).

Clause 6.21 states as follows:-

"The Bank may, at any time, dismiss from its services any employee on permanent and pensionable terms who is found guilty of misconduct by giving him three month's notice in writing or paying the employee three month's salary in lieu of notice."

That under Rule 6.42 under the rubric "Penalties" is set out the penalties which may be imposed on an employee who is in breach of the Rules including under (l) dismissal.

That under Rule 6.43 under the rubric "Inquiries" no order imposing any penalty on an employee shall be made except after an inquiry.

It was her submission that as there had been no inquiry the summary dismissal of the Plaintiff was unlawful.

Mr. Ougo submitted that the prayer for reinstatement in the Amended Plaint was not an order that could be granted.

He referred to rules 3.12, 6.21 and 6.29 of the Rules.

I accept that the Plaintiff was employed by the Defendant on permanent and pensionable terms.

I also find that in her own evidence she absented herself from her employment from the 21.3.98 until a date sometime in early September and that apart from informing her senior that she was going to see the CID the Defendant had no knowledge of her whereabouts.

Rule 6.29 defines misconduct as follows:-

"Misconduct includes breach of the terms and conditions of these Rules and Regulations (marked * in the booklet) or any other act or omission specified therein as a misconduct."

Rule 3.12 is marked with an asterisk so that breach of that rule can constitute misconduct. Whether it does or not depends on whether the absence was with reasonable excuse, in the absence of authority to be absent.

Under Rule 3.13 the Defendant has the right to dismiss if an employee who has been absent from duty for more than 48 hours gives no reasonable excuse for his absence.

Under Rule 6.20 an employee who is on permanent and pensionable terms may only be dismissed from

the services of the Bank on grounds of misconduct or gross misconduct.

There is no suggestion in this case that the Plaintiff was dismissed for gross misconduct.

The provision of Rule 6.42 referred to above are discretionary.

A breach of staff rules may not, however, be misconduct as defined in Rule 6.29.

It appears that a breach of the Rules can be misconduct where an asterisk is marked against the rule but where there is no asterisk the breach of a rule can be the subject matter of a penalty under Rule 6.42. In the latter case the provisions of Rule 6.43 apply. I hold however, that whereas in this case there has been a breach of a Rule marked with an asterisk no inquiry is necessary for the breach of the rule giving rise to dismissal under Rule 6.29 as read with Rule 6.20.

Further in the case of a breach of rule 3.12 and Rule 3.13 the Defendant had a right to dismiss the Plaintiff. The only question therefore is, was the Plaintiff's absence for more than 48 hours with a reasonable excuse.

There is no doubt that the Plaintiff felt herself in jeopardy as a result of the investigations of her by the Intelligence Services and CID. In my view, however, she should have notified the Defendant of her problems if not personally, by letter. Whether they would have accepted her explanation would have been a matter for them. However, in the absence of any explanation and without any knowledge of her whereabouts as envisaged by Rule 5.27, I find that the Defendant had the right to dismiss the Plaintiff from their services and that the dismissal of the Plaintiff was not wrongful.

As the Plaintiff was dismissed for misconduct then the provision of Rule 6.21 apply which entitled the Plaintiff to three months notice in writing or three months salary in lieu of notice. This is in contrast to Rule 6.23 where instant dismissal only applies to gross misconduct.

Having so found, I will hear the Defendant as to what the Plaintiff is entitled to by way of compensation for lack of notice or payment of three months' salary in lieu of notice. I will also deal after those arguments with costs and the fate of the counterclaim.

Dated and delivered at Nairobi this 27th day of March 2006.

P. J. RANSLEY

JUDGE