



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2603 OF 1994

JOSEPH MWAURA NJAU PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD DEFENDANT

J U D G E M E N T

The plaintiff was employed by the defendant as a clerk on 28th April, 1969. His starting salary was Kshs.720/= per month – (see plaintiff’s exhibit 1).

He satisfactorily completed the probationary period prescribed in that letter and was confirmed in his appointment.

The plaintiff moved up the ladder in the bank’s establishment and by March 1993 he had attained the grade of Supervisor grade A earning Kshs.25015/= per month, more than 34 times the salary he started with.

Then on 6th March, 1993, after working for the defendant for about 24 years, the plaintiff received a suspension letter from the former in order to pave way for investigations into suspected fraudulent deals (see exhibit 2).

While on such suspension, he was entitled to receive ½ of his monthly salary which he appears not to have received. He said so in his evidence.

On 12th March, 1993 a letter addressed to the plaintiff by the defendant dismissed him from employment for gross misconduct or serious neglect. He acknowledged receipt of the letter on 17th March, 1993.

His explanatory letter dated 24th April, 1993 to the defendant – in an attempt for the latter to reconsider his case was rejected and the matter closed (see exhibit 7 and 8).

The plaintiff learned investigations into the alleged fraudulent deals were carried out by a security officer called Okuro who never bothered to invite him for an interview into the allegations.

He considered his dismissal malicious and unlawful and hence sought advice from a firm of lawyers, Rumba Kinuthia and company advocates, who filed this case in court on 21st July, 1994 to claim damages as per the prayers in the plaint.

A defence was filed on behalf of the defendant by a firm of lawyers, Messrs Kaplan and Stratron, advocates who also raised a set off and counter claim for various money’s the plaintiff owed the defendant (see paragraph 7 of Defence set off and counter claim).

However, these set off and counterclaim appears to have been settled by the plaintiff by 18th March, 1993 – (see exhibits 5 and 6) – hence there was no point in raising them in the defence filed in court on 26th September, 1994. The case was fixed for hearing on 3rd October, 2000 and 28th March, 2001 when only the plaintiff testified but the defendant did not call any evidence.

In submissions on 15th May, 2001 counsel for the defendant stated at the outset that since evidence of the plaintiff had not been controverted his dismissal was unlawful and that he was entitled to prayers (a) to (d) of the plaint but that he was not entitled to general damages for unlawful dismissal or terminal benefits for 24 years per staff circular No.18 dated 3rd March, 1992. That since the latter were in the nature of special damages the plaintiff had to plead them specifically and prove the same strictly.

It is true that trite law requires special damages be pleaded with as much particularity as their circumstances plaint and strictly proved – see Coast Bus Services Limited vs Sisco E. Murunga Ndayi & 2 others – Civil Appeal No.192 of 1992 (unreported) and Charles C. Sande vs. Kenya Cooperative Creameries Limited, Civil Appeal No.154 of 1992 (unreported).

In this case the plaintiff did not plead the retirement benefits or pension scheme funds he claimed in prayer (e) and (d) or give any particulars of these in the body of the plaint to be entitled thereto through this court. These claims came from the blue to be included in the prayers and the court has no basis of granting the same save for what will be said herein after.

In simple contracts of employment courts have tended to award employees what is due to them under the terms of such contracts when termination thereof have been declared unlawful. These payments include notice period, leave pay days worked or such other remuneration, otherwise general damages are not normally awardable – see Rift Valley Textiles Ltd vs Edward Onyango Oganda (Civil Appeal No. 27 of 1992) (unreported) and Alfred J. Githinji vs Mumias Sugar Company Limited (Civil Appeal Number 194 of 1991 (unreported)).

These are but a few of the authorities laying down the principal that damages will be limited to the period of notice and that an employer need not assign any reason when terminating the services of his employee. Quite a number of cases are being filed in this court where employers are using such authorities to fire long serving officers with otherwise very clean records and using notice period in their service agreement to avoid liability.

My own views have been that where an employer fires his employee in circumstances which indicates he was motivated by malice, bad faith or even ulterior motive then he/they should not hide behind the period of notice to avoid compensating the employee for such ill motivated sack.

Equally, where, as in this case the employer raises a serious complaint against an employee which he/they is/are unable to, establish in evidence surely he they cannot wave the Rift Valley Textiles case and tell the court

“here, see this authority which excludes us from paying any damages to the plaintiff on account of his dismissal from employment”

. I say this because each case must be decided in accordance with its peculiar circumstances.

Take for instance this case where under clause 13 of the conditions of services of the defendant whereof:-

“after you have served your probationary period, your appointment is confirmed it will be that of a monthly servant, provided that should you at any time either during your probationary period or afterwards, commit any breach of conditions herein contained or be guilty of unsatisfactory conduct inside or outside the bank, the bank reserves the right to dismiss you without notice”.

The defendant serves a suspension letter upon the plaintiff dated 6th March, 1993 which states:-

“This is to advise you that pending the outcome of investigations in the alleged suspected fraudulent deals when making purchases for the bank. You are with immediate effect suspended from duty.

During this period of suspension you will be entitled to pay at the rate of half your basic salary.

Please acknowledge receipt of this letter by signing the attached copy and returning it to this office”.

The letter was talking of alleged suspected fraudulent deals into which investigations were being conducted.

Then by 12th March, 1993 these investigations had already been completed and there was this letter dated that date stating amongst other

“After due investigations I am satisfied that you solicited for favours from suppliers and in some cases you actually received bribes. You further colluded to inflate quotations against the interest of the bank..... In view of this, you are instantly dismissed from the bank’s services from today’s date”.

The letter gave a breakdown of some amount of money the plaintiff owed the defendant and asked him to make proposals as to how to settle it.

Though the plaintiff made arrangements and settled these amounts, his letter dated 24th April, 1993 in an attempt to appeal against the dismissal elicited no favourable response. This is why the plaintiff lodged this suit in court.

Meanwhile, throughout his entire working life with the defendant, the plaintiff had a clear record and had started as a clerk earning Kshs.720/= and ended up as a supervisor earning Kshs.25,015/=.

In fact he produced correspondence between him and the defendant to show that he made useful suggestions to enhance the defendant’s efficiency, one of which earned him an award (see exhibit 9 and 10).

It is this very officer who is given a letter of suspension to give way to investigations to be carried out in “alleged suspected fraudulent deals in making purchases for the bank”.

The letter is dated 6th March, 1993 and within 6 days, such investigations are complete and the plaintiff given a dismissed letter dated 12th March, 1993.

There is no evidence any such investigations were carried out. The plaintiff testified he was never interviewed in connection with the alleged suspected fraudulent deals.

And with the defence having not called any evidence to confirm such investigations, there is no way the court can say there none any such investigations carried out.

Anyway what investigations can be carried out in such serious allegations and came up with a comprehensive or meaningful report within 6 days? Certainly, this is not possible.

The plaintiff testified that the person investigating him, in the name of the security officer was himself under investigations because, as the plaintiff put it, the said security officer was himself suspended a day before the plaintiff was dismissed from service.

Though the defendant in its last letter to the plaintiff dated 20th May, 1993 (see exhibit 8) the former denied this, I am inclined to believe the plaintiff's version and reject that of the defendant on this issue.

If that be so, what credence do I place on the so called investigations whose report was not even produced in this court? None at all.

This means there was absolutely no evidence can implicate the plaintiff with alleged suspected fraudulent, deals, or collusion with suppliers to like prices of supplies, to warrant to dismissal of the plaintiff from his employment.

If my investigations were carried out against the plaintiff there was no reason why he was not interviewed to explain his side of the story.

I have no quarrel with the correctness of the decisions quoted by counsel for the defendant their favour but what I must stress here is that each case must be determined on its on merit considering its peculiar circumstances.

In the plaintiff's letter of appointment dated 16th April, 1969 termination of service was upon giving, 14 days notice during probation.

Apparently there was no notice period after probation and in my view the termination clause during probation did not apply after confirmation hence for the purpose of this case that clause was useless and that I must approach the present case as if the service contract contained no provision at all regarding termination.

If that be so, and the reason for terminating the plaintiff's services with the defendant no having been established, is the former not entitled to damages, particularly when the dismissal was prompted by malice and interior motives? I feel he is – see CPC Industrial Products (Kenya) Ltd vs Omweri Angima (C.A No.197 of 1992 (unreported)).

This is not a case for the defendant to wave the Rift Valley Textiles Limited case in my face and to say that only prayers (a), (b) (c) and (d) of the suit suffice. In this case I award the plaintiff 12 months salary gross rate.

I therefore enter judgement for the plaintiff against the defendant in the sum of Kshs.370,527/= with costs of the suit and interest to accrue from the date of filing suit.

As regards the counter claim, I find no merit in it given exhibits 5 and 6 which clearly show these amounts were cleared. Costs of such counter claim to the plaintiff.

Delivered this 19th day of June, 2001.

D.K.S AGANYANYA

JUDGE