



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmutut, J.

A.K. Kerich & A.B. Ongaro, Members.)

CAUSE NO.74 OF 2000.

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....Claimants.

- v -

STANDARD CHARTERED BANK OF KENYA LTD.....Respondents.

Issue in Dispute:-

“Wrongful dismissal of Mrs. Jeniffer M. Buogha” (hereinafter called the grievant).

J.A. Guserwa, Advocate, of J.A. Guserwa & Co., Advocates, for the Claimants (hereinafter called the Union).

J.N. Namasake, Principal Executive Officer, F.K.E., for the Respondents (hereinafter called the Bank).

A W A R D.

The Notification of Dispute in Form ‘A’, dated 8th March, 2000, together with the statutory certificates from the Labour Commissioner and the Minister for Labour under Section 14, subsections (7) and (9) (e) and (f) of the Trade Disputes Act, Cap.234, Laws of Kenya, were received by the Court on 21st July, 2000, and the dispute was listed for mention on 9th August, 2000. On this occasion, Ms. J.A. Guserwa, Advocate, and R.M. Muthanga, Executive Officer, F.K.E., who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 29th August and 29th September, 2000, and the dispute was fixed for hearing on 25th October, 2000. The learned counsel for the Union, Ms. Guserwa, belatedly submitted her memorandum on 28th September, 2000; and in the circumstances, Mr. Namasake for the Bank was unable to file his reply statement as directed. On 25th October, 2000, the dispute was rescheduled for hearing on 21st and 22nd February, 2001; and meanwhile Mr. Namasake was allowed to file his reply statement on or before 24th November, 2000. He did not do so. On 15th February, 2001, the matter was brought up for another mention when it was fixed for hearing on 18th and 19th April, 2001, and Mr. Namasake was again granted an extension to file his reply statement on or before 23rd

February, 2001, which he ultimately did on 28th March, 2001. Consequently, several adjournments were taken by, and granted to, the parties for settlement of the dispute, but their attempts proved futile; and the matter was eventually heard on 5th March and 21st June, 2002, and final written submissions were received on 22nd August 2002.

In a nutshell and for purposes of the record, the grievant was employed by the Bank on 9th July 1976 as a clerk. She rose through the ranks and at the time of her dismissal on 29th June, 1998 for facilitating forgery and fraud, she was working as a Acting Section Head on a salary of 35,270/=, excluding allowances. It was the case of the Union that the matter was reported to the police and the grievant, with others who are not a party to this dispute, were arrested and charged in Criminal Case No.1159 of 1996 with the offence, *inter alia*, of making a false document, with intent to defraud the bank, contrary to Section 349(a) of the Penal Code, Cap. 63, Laws of Kenya. In the meantime, i.e. on 21st March, 1996, the grievant was suspended pending enquiry and was eventually dismissed as aforesaid while the criminal case was still in progress in the Criminal Court. On 7th July 1998, the learned Acting Principal Magistrate, Mr. W.M. Muiruri, acquitted the grievant under Section 210 of the Criminal Procedure Code, Cap. 75, Laws of Kenya. The learned counsel for the Union, however, urged that the principles of natural justice required that an employer should wait at least for the decision of the Criminal Court before taking a disciplinary action, and that inasmuch as the Bank did not do so in this case, the grievant suffered wrongful dismissal.

The main contention of the Bank was that the grievant improperly performed her duties which facilitated fraudulent transactions in which the Bank lost Kshs.1,126,213/=; that when she was asked to show cause why she should not be dismissed for misconduct, her explanation was found unsatisfactory, and, therefore, the Bank lost confidence in her, and she was dismissed. Mr. Namasake pointed out that the bank was not bound to wait for the result of the trial in the Criminal Court, and that they (Bank) could and did hold a fair enquiry against the grievant, resulting in her dismissal as aforesaid.

As regards the contention that the action taken by the Bank was vitiated in that they had not waited till the trial in the Criminal Court was over, and that the principles of natural justice required that they should have at least waited for the decision of the Criminal Court before taking disciplinary action against the grievant, it is my humble opinion that very often employers stay enquiries pending the decision of the Criminal Courts and that is fair; but I cannot say that the principles of natural justice require that an employer must wait for the decision at least of the Criminal Court before taking action against an employee. I may, however, add that if the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await for the decision of the Criminal Court so that the defence of the employee in the criminal case may not be prejudiced. Therefore, it was open to the bank to prosecute the grievant on a criminal charge and it was also open to them to take departmental disciplinary action against her, and there was no failure of the principles of natural justice in this case.

However, in their written final submissions, the parties agreed that the dismissal of the grievant, who had served the Bank for 22 years, be reduced to normal termination of service, and she be paid Kshs.1,243,646.50 which was computed as follows:-

(a) Half salary for the period
March 1996 to June 1998 Kshs.623,072.50

(b) Owner occupier house
allowance “ 87,500.00

(c) 1 month salary in lieu of
notice “ 48,459.00

(d) 10 months' pay for loss of
employment “ 484,590.00

Total Kshs.1,243,646.50

Therefore, the only disagreement in this case which requires consideration and determination by the Court concerns the computation of the pension benefits payable to the grievant under the Pension Scheme in force at the material time when her

services were terminated. The learned counsel, Ms. Guserwa, vehemently contended that the computation of the pension payable to the grievant should be from 9th July, 1976 when she joined the services of the Bank as a clerk, while Mr. Namasake argued that the grievant was only entitled to pension with effect from 7th February, 1980, when she was appointed to the Bank's Permanent Clerical Staff.

Ms. Guserwa submitted that the grievant joined the services of the Bank as aforesaid, i.e. on 9th July 1976, and worked continuously for 22 years until 29th June, 1998, when her services were terminated. Thus her 22 years of service should form the basis for computation of her pension benefits. In support of her demand, the learned counsel cited the cases of Mrs. Adoniah Gogo Awich and Mrs. Racheal Wangui Kinyua who similarly left the services of the Bank in 1996, and were paid their pensions for the entire periods of their employment, without any discrimination and/or deduction of their years of service. Ms. Guserwa, therefore, urged the Court to find that the Bank's purported reduction of the grievant's pensionable service as discriminatory and also in violation of Section 82 of the Constitution, and prayed that the pension benefits due to the grievant be calculated under Schedule II, Section I, para.I(b) of the Pension Rules. The learned counsel also prayed that the Bank be condemned to pay legal costs, amounting to Kshs.55,000/=, incurred by the grievant both in the criminal and instant proceedings.

On the other hand, Mr. Namasake submitted that the grievant is entitled to her pension benefits, amounting to Kshs.693,157.47, with effect from 7th February, 1980, when she was appointed to the Bank's Permanent Clerical Staff and the Bank started contributing to the Pension Scheme (see Apps.2 and 3). In the circumstances, he urged the Court to find that the grievant is entitled to her pension in accordance with the Bank's Kenya Pension Fund Rules and Regulations.

On careful scrutiny of the parties' submissions and the documentary evidence on the record, I am fully persuaded by the submission of the learned counsel for the Union, Ms. Guserwa. The two cases cited by her have not been challenged by Mr. Namasake for the Bank. Pension, whether contributory or non-contributory, is a payment of money for past service. Para.I(b) of Section I, under Schedule II of the Pension Rules, states as follows:-

“A female Member's Pensionable Service at any time shall be her period of full time continuous service with the Employer after the age of 19 with a maximum of 480 months”.

The grievant served the Bank continuously for a period of 22 years from 9th July 1976 until 29th June 1998, when she was accorded normal termination of service; and in the circumstances, her entire period of employment will be counted for purposes of her pension. Accordingly, I award that the grievant be paid forthwith her terminal dues as computed hereinabove and also her full pension in terms of para.I(b) of Section I, under Schedule II of the Bank's Pension Rules and Regulations with effect from 9th July, 1976 to 29th June, 1998.

On consultation, the two Members of the Court are in full agreement with this decision.

DATED and delivered at Nairobi this 29th day of October, 2002.

Charles P. Chemmutut,

JUDGE.