



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 116 OF 2017**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**PHILIP OLANG.....CLAIMANT**

**VERSUS**

**GUARANTY TRUST BANK.....RESPONDENT**

**JUDGMENT**

**PREAMBLE**

1. The Claimant filed his statement of claim dated 9<sup>th</sup> January, 2017.

The Respondent put its response dated 21<sup>st</sup> January, 2019.

**FACTS – CLAIMANT’S CASE**

2. The Claimant was employed by the Respondent on 12<sup>th</sup> March, 2008 and rose over the ranks over the years.

He says he worked diligently and in 2014 he was charged with the responsibility of overseeing the new core banking system and in 2015 he was promoted to Group board of Directors travelling logistics.

3. He says in 2015 he enrolled for Post Graduate Studies at Strathmore University.

The Respondent issued him a good recommendation letter.

4. He says he requested the Respondent to allow him work from 7.00a.m to 4.00p.m on selected days and take his study leave to do his examinations. He says he used this arrangement for 5 years before when taking other studies and it worked.

5. He says on 20<sup>th</sup> July, 2016, he put an application for study leave to the new head of operations and he attached a copy of his exam timetable. He says he also put in handover notes.

6. He says that the Respondent’s Head of Operations Mr. Mark Kariuki Mana who had been with the bank for only 2 months sent him a notice to show cause letter dated 25<sup>th</sup> July, 2016 why disciplinary action should not be taken against him for being away without leave. He says he did not have office email and only learnt of the notice on 1<sup>st</sup> August, 2016. He says he responded by 2<sup>nd</sup> August 2016. He says he had notified the head of operations of his intention to be away on leave on four different occasions.

7. He says on the same day even before his explanation could be interrogated he was transferred to Operations Department which was essentially a demotion.

He says on 3rd August, 2016 he was summoned for disciplinary meeting and was not accorded a fair hearing but was treated harshly.

On 4<sup>th</sup> August, 2016 he was summarily dismissed. He says he was not given an opportunity to be heard.

Thereafter his bank accounts were frozen and instructions were given to withhold his pension funds.

8. The Claimant says since he was dismissed in an unfair and unprocedural manner he has suffered a lot mentally, socially and prays to be compensated for loss suffered as per Claimant's tabulation;-

(1) One month salary in lieu of notice Kshs.207,600/=

(2) Pending leave days Kshs.166,080/=.

(3) 8 days worked before dismissal Kshs.55,360/=.

(4) 12 months salary for compensation Kshs.2,491,200/=

**TOTAL Kshs.2,920,240/=**

(5) He also prays for punitive and aggravated damages.

(6) He prays for costs and interest at court rates and any other relief the court may be pleased to award.

### **RESPONDENT'S CASE**

9. The Respondent says the Claimant performance and attitude during a project assigned to him with a team on or about 2014 was below par.

10. The Respondent says the Claimant attitude was taking the form of insubordination and disregard of lawful instructions.

On 22<sup>nd</sup> October, 2014 Claimant was given a notice to show cause why disciplinary action should not be taken and he responded on 27<sup>th</sup> October, 2014.

He was issued with another warning letter on 29<sup>th</sup> October, 2014 but despite all that his behavior continued to be unacceptable.

11. Claimant was Head of Administration Department and reported to Mark Kariuki since June, 2016.

The Respondent denies that the Claimant was studying for five years and was getting study leave.

He applied for study leave on 20<sup>th</sup> July, 2016 which was not approved.

He was not cleared but still proceeded on leave.

12. The study leave was applied five days to the requested date and this was unprocedurally. The right procedure was to apply for 4 weeks in advance.

13. The Respondent says the Claimant was given a notice to show cause for absconding from duty. The show cause letter was issued on 1<sup>st</sup> August, 2016 and Claimant replied on 2<sup>nd</sup> August, 2016.

14. The Claimant was then summoned to disciplinary meeting on 3<sup>rd</sup> August, 2016 and as a result of which he was dismissed on 4<sup>th</sup> August, 2016. The Respondent says Claimant was given enough time to respond as by his letter marked as "Appendix R.6".

15. The Respondent says the Claimant's dismissal was not unfair and unprocedural. He says his accounts were not frozen but he owed Respondent known debts and so even if accounts were frozen it was fair since he owed money to the bank.

16. Respondent admits Claimant's employment was terminated by way of summary dismissal for gross misconduct and so is not entitled to one month payment in lieu of notice.

17. The Respondent says Claimant was not entitled to leave days and he paid his dues before he left.

18. He further says since his termination was lawful he is not entitled to any compensation.

19. In the alternative the Respondent says the Claimant is indebted to the Respondent for a facility which stands at Kshs.1,023,969.47 as at 28<sup>th</sup> February, 2017.

The same attracts interest at the rate of 14% per annum and default interest of 10% per annum which is outstanding.

20. The Respondent prays the said amount be set off should this claim succeed together with interest at 14% and 10% default interest on arrears both applied from 28<sup>th</sup> February, 2017 due and owing.

21. Issues for determination;-

- (1) Was Claimant unlawfully terminated
- (2) Is Respondent entitled to his claim.
- (3) Is Claimant entitled to the reliefs prayed?

### **DECISION**

22. The mandatory requirements in terminating the employment of an employee is to give a valid reason to the employee and to follow the right procedure.

Section 41 of the Employment Act 2007 is couched in mandatory terms.

Section 41 provides that “an employer shall before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands the reason which the employee is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice during this explanation.”

23. In the case of **MARY CHEMWENO KIPTUI VS KENYA PIPELINE COMPANY LIMITED CAUSE NO.435 OF 2013** it was held that “where the employer failed to follow these mandatory provisions whatever the outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of a fellow employee or a union representative.

The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of fair hearing principles as well as natural justice tenets.

24. The reason given by the Respondent was that Claimant was absent from work without leave. Actually the reason given for the summary dismissal in his letter of 4<sup>th</sup> August, 2016 was that he absconded from duty without permission and deceived the management that he had obtained leave.

25. The use of the term absconding which is used interchangeably with desertion has its dynamics. To clarify this in the case of **RONALD DAUDI VS TORNADO CARRIERS CAUSE NO.236 OF 2016** it was held that desertion of duty is a grave administrative offence which if proved would render an employee liable for dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.

In the present case absconding or desertion cannot be claimed because the Respondent did not follow the above process.

26. I must observe that truly Claimant took things ab initio for granted going to sit his examinations without official leave. He did

mention to his line Manager Mr. Mark Maina Kariuki that he was to be on leave but Mr Kariuki asked him to clear with him. He then proceeded on leave even though his leave application of 25<sup>th</sup> July, 2016 to 30<sup>th</sup> July, 2016 was not approved.

He claims he had operated like that in the past but that was taking things too much for granted. He should have followed the due process and being an old staff he knew the requirements of leave approval very well. He has suffered a lot as he himself had admitted having lost his employment and hopefully he has learnt his lesson.

27. Having said so the Respondent’s handbook on staff matters provide that absence from work is an act of misconduct whose penalty is warning (paragraph 7).

The same handbook provides that summary dismissal is “an extreme form of disciplinary action available. It is suitable for the most serious cases of gross misconduct. Only the Managing Director can approve summary dismissal”.

28. The Respondent’s reason for summary dismissal is what he regards as absconding. But absconding applies where the employee leaves employment and does not show that he intends to go back to work. That is not the case here since the Claimant never indicated he never intended not to return to work.

29. Furthermore the Respondent never gave him notice that he was considering terminating his employment due to his deserting his employment. Again the law provides that it is not desertion if employee intends to return to his work.

Desertion is only where employee does not intend to return to work (**BONIFACE NKUBI VS PROTECTIVE CUSTODY LIMITED CAUSE NO.243 OF 2017**).

30. Further the Respondent did not send notice to the Claimant inviting him for a disciplinary meeting and informing him to invite a fellow employee or union representative as his witness. The Respondent sent a notice to show cause on 1<sup>st</sup> August, 2016 and then on 3<sup>rd</sup> August he was summoned to a Disciplinary meeting. He was not notified to call a witness or even to prepare his defence. On 4<sup>th</sup> August, 2016 he

received the termination summary dismissal letter signed by the Manager, Human Resources rather than the Managing Director as required in their Handbook.

It is not even clear why on 2<sup>nd</sup> August, 2016 the Head of Operations Mr. Mark Maina transferred the Claimant to KYC support office and then just to dismiss him summarily on 4<sup>th</sup> August, 2016.

31. I have carefully and painstakingly considered the evidence adduced by the parties and their submissions and I am convinced even if the Claimant took matters into his hand by going on leave without approval the process followed by the Respondent thereafter to dismiss him was all flawed.

32. I am supported by the finding of the often cited case of **WALTER OGAL ANURO VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011** where the court held that termination to pass a fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness.

Further Section 43 of Employment Act obligated an employer to prove the reason for termination of employment and where the employer failed to do so, the termination was deemed to have been unfair.

33. Having found that the Respondent did not pass the fairness test in that it failed to show substantive justification for the said termination as well as procedural fairness, I find the Claimant has therefore proved his case on balance of probability.

I proceed to enter judgment in his favour and find his employment was unfairly terminated.

### **REMEDIES**

34. I will now proceed to deal with reliefs sought by the Claimant.

(a) One month salary in lieu of notice Kshs.207,600/=

(b) Pending leave days as the Respondent did not prove the Claimant had taken the year's leave days Kshs.166,080/=.

(c) Days worked before dismissal were 4 not 8 Kshs.27,780/=

(d) The Claimant having worked for the Respondent from 2008 to 2016 and offered substantial services give or take I will award him 9 months as compensation totaling Kshs.1,868,408/=.

(e) The Claimant admits he had taken a loan facility from the Respondent. The Respondent says balance owed was Kshs.1,023,969/47/= but Claimant has not confirmed the amount.

Assuming that is what is owed by the Claimant (Both parties will have to confirm the figures) plus interest at 10% per annum as per the agreement and 10% interest on arrears. The Claimant is obliged to settle the same.

(f) The final effect of my award therefore to the Claimant is Kshs.2,269,760/=.

(g) Costs follow the event and so the costs are awarded to the Claimant.

(h) Interest is awarded at court rates from date of Judgment until final payment.

(i) The sum awarded will be paid less the loan owed to the Respondent by the Claimant with interest at 10% per annum and 10% interest on arrears from 27<sup>th</sup> February, 2017.

So ordered.

**Delivered, dated and signed in Nairobi this 11<sup>th</sup> day of February, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of**

**Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**