



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

ELRC. CAUSE NO. 2491 OF 2016

TOBIAS GUMBA.....CLAIMANT

-VERSUS-

FIDELITY COMMERCIAL BANK.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Cash Officer on 12.11.2007 and his monthly consolidated salary was Kshs.45, 000 but it was later increased to Kshs. 80,866.78. On 17.12.2015, he was dismissed from employment for gross misconduct. Thereafter, his Trade union lodged a dispute with the Minister for Labour and conciliation was done before a conciliator and the dismissal was upheld. He was dissatisfied and brought this suit on 2.12.2016 seeking the following reliefs:

- a. Declaration that the dismissal of claimant was unfair and unlawful;
- b. 12 months salary being compensation for the unfair termination;
- c. Anticipated Salary from the date of termination to age of 60 years plus interest at 10% to cover inflation;
- d. Reinstatement;
- e. Exemplary damages of Kshs.3,000,000;
- f. Costs of the suit;

2. The Respondent filed defence through the law firm of James Oyuke & Co. Advocates on 15.3.2017 admitting the employment relationship as pleaded by the claimant. However, it denied the alleged unfair termination and averred that the termination was in accordance with the law. It contended that the Claimant was lawfully dismissed for gross misconduct, namely insubordination, after being accorded an opportunity to be heard but declined. It further averred that the Claimant was also accorded an opportunity to appeal against his dismissal but he failed to do so. Therefore the respondent prayed for the suit to be dismissed with costs.

3. The suit went to full hearing, both parties gave evidence and thereafter filed written submissions.

Claimant's Evidence

4. The Claimant testified as CW1 and basically adopted his written statement dated 29.8.2016. He reiterated how he joined the respondent and worked until his dismissal on 17.12.2015.

5. He testified how in 2015 he was served with three warning letters for alleged insubordination of his seniors. Regarding the first warning letter, he explained that he was instructed to open a CIT cash box from another branch without any cash schedule and also to open on behalf of the Operations manager and he refused because it was against the procedures. The procedure required opening by two people with different keys and the Operations Manager was giving her key to him to open on her before and he refused.

6. As regards the second warning, the issue was customer's failure to write date, name and amount in words on a cheque but was speaking English fluently. He explained that he took the customer to the Operations Manager's Office for assistance but the customer came back to him insisting that he should be the one to write for. He helped her after the Operations manager asked him to write for her. When the customer came back to the bank another day with similar problem, he took her to the Operation Manager's office where the customer wrote the cheque and the matter ended there.

7. The third warning was received on 10.12.2015 and it concerned an allegation that he told Sarah, not to leave office after being dismissed on 27.11.2015 directed to leave immediately. However, he contended that it is the operations manager who insisted that Sarah should stay on until the following day for handing over while he advised the operations manager that Sarah ought to hand over and leave immediately because she had been dismissed. He contended that Sarah sought his intervention as the Shop Steward.

8. He denied any wrong doing in the said incidences and contended that he was only being victimised for doing his duty procedurally and also for his role as a Union leader. He testified that after the last incidence, he received the third warning and also invited to disciplinary hearing scheduled for 17.12.2015 at Nairobi. However, he did not attend the hearing because he was not facilitated for his return trip from Mombasa to Nairobi.

9. He stated that he received one way ticket at 5pm to go for the hearing the following day. He never attended the hearing and a dismissal letter was issued to him on 17.12.2015. He reiterated that the alleged misconduct set out in the dismissal letter were not true. He contended that he never refused to carry out lawful instructions or lawful and reasonable orders. He maintained that the dismissal was unlawful and prayed for the reliefs sought to be granted.

10. On cross examination, he admitted that his contract of service was dated 5.11.2007 and it referred to the respondent's HR Policy, Staff Policy Manual and Instructions, and Circulars from Supervisors from time to time. He further admitted that he was issued with warning letters dated 18.6.2015, 15.9.2015 and 10.12.2015 citing the reason as insubordination. However he reiterated that the said allegations were untrue.

11. He admitted that as a cash officer, he had a duty to open cash box. He further admitted that on 10.12.2015, he was invited to attend disciplinary hearing on 17.12.2015 at 11 am at Nairobi and called the HR Manager Ms Salome Bodo and asked for facilitation towards his attendance. He further wrote to her a letter dated 14.12.2015 confirming that he would attend the hearing and asked for accommodation and travel expenses, security and food and Ms Salome confirmed vide email dated 15.12.2015 that the travel expense would be provided by the employer but not the other demands.

12. Thereafter he called Ms Salome over the said demands, and she said one way ticket would be send and threatened him that he had a choice to attend the hearing or not. He reiterated that he refused to attend the hearing because he was given one way ticket with no accommodation. He admitted that he was given the right of appeal but he never appealed and instead his union referred the dispute to the Ministry of Labour on 16.2.2016. He admitted that the Conciliator upheld the dismissal observing that the dismissal was justified.

13. However the claimant disagreed with the conciliator's recommendation and reiterated that he was dismissed for participating in union activities. He further reiterated that he followed all procedures in his dealings. He also reiterated that it was not procedural to open the Cash Box alone. He maintained that the procedure requires that there must be a schedule of the content in the cash box and it must be opened by two people including himself and the Operations Manager or Branch Manager.

14. He admitted that he received one month salary in lieu of notice plus pension in lumpsum.

Defence evidence

15. The Respondent's Employee Industrial Relations Manager Mr. Simon Muriithi Maina testified as RW1 and like the Claimant he also adopted his written statement dated 21.2.2021 as his evidence in chief. He confirmed that the Claimant was employed by the Respondent as Cash Officer on 5.11.2007 for a consolidated salary of Kshs.45,000 per month. He further confirmed that the claimant's employment was governed by the respondent's HR policies, Code of Ethics and Business Conduct, Policy manuals and Instructions Circulars periodically in force and all other lawful instructions given verbally by superior officers.

16. Rw1 stated that in June 2015, the claimant began exhibiting haughty, contemptuous and brutal behavioural language; lacking proper respect for rank or position and being presumptuously disrespectful towards equals and superiors contrary to the respondent's work policies. As a result, a warning letter dated 18.6.2015 was issued to him inviting him to improve his conduct of face disciplinary action.

17. On 15.9.2015, the claimant was issued with another warning letter for refusing to carry out instructions from the Operations Manager to confirm cash count from tellers at the end of the business day, yet it was his duty as cash officer.

18. On 10.12.2015, the claimant was issued with the third warning for refusing to a request to post debit and credit transactions. The letter warned him of disciplinary action if he failed to improve on his attitude, performance and interaction with his seniors. The letter referred to several incidences of insubordination between 27.11.2015 and 10.12.2015 and invited him to a disciplinary hearing on 17.12.2015 at 11 am in Nairobi in company of representative of his choice.

19. The claimant confirmed that he would attend by email dated 14.12.2015 but made unreasonable demands for transport, accommodation, food for himself and his representative Kinya Gitonga. The respondent replied him by email dated 15.12.2015 that he would be provided with his bus ticket to attend the hearing. As regards his representative he was advised to choose any person from a list of staff in Nairobi Office to accompany him to the hearing.

20. Rw1 further stated that the claimant indicated that he could not travel on 16.12.2015 overnight to attend the hearing on 17.12.2015 and the HR Manager responded that the decision whether or not to attend the hearing was upon him.

21. Rw1 testified that the claimant failed to attend the hearing and the disciplinary committee deliberated on his case in his absence and decided that the claimant should be dismissed summarily for insubordination but be paid one month salary in lieu of notice plus all other outstanding remuneration upto his last day of employment.

22. He contended that the claimant was dismissed lawfully in accordance with section 41 and 44 of the Employment Act. He further contended that the dispute went to the Ministry of Labour for conciliation and the Conciliator upheld the dismissal observing that it was justified because of the claimant's gross misconduct.

23. On cross examination, Rw1 stated that there was no requirement in the HR Policy and Procedures Manual for hearing the claimant before issuing him with the said three warning letters. However, he admitted that he did not bring the said HR Manual to court as evidence. He further admitted that he had not joined the respondent when the alleged misconduct occurred. He also admitted that the Operations manager and the Branch manager are still in the bank but they were not called to testify.

24. He contended that the claimant never wrote any email to say why he could not attend the hearing or asking for rescheduling of the hearing. However, Rw1 admitted to having no evidence to prove that the bust ticket was given to the claimant earlier than 16.12.2015 at 5 pm.

25. He confirmed that the procedure for opening CIT cash Box is that it must be opened by the Cash officer and the Operations Manager because it has two locks and each of the two officers has separate key. He further confirmed that no one can open the CIT box alone.

Issues for determination

26. There is no dispute that the Claimant was employed by the Respondent from 12.11.2007 to 17.12.2015 when he was summarily dismissed for gross misconduct. Section 45 of the Employment Act requires the employer to prove that the termination of employee's contract of service was grounded on valid and fair reason and that a fair procedure was followed and in default the termination is unfair. Consequently, the issues for determination are:

- a. Whether the reason for dismissing the Claimant was valid and fair.
- b. Whether a fair procedure was followed
- c. Whether the Claimant is entitled to the reliefs sought.

The reason(s) for dismissal

27. The reason for dismissing the Claimant cited in the dismissal letter dated 17.12.2015 was insubordination in the following aspects:

- a. Refusal to carry out a lawful and reasonable instruction that was consistent with his contract of employment;
- b. Wilful disobedience to lawful orders given by the employer, namely invitation to attend disciplinary hearing on 17.12.2015 despite being provided with bus ticket;
- c. Persistent refusal to obey lawful and reasonable command or request despite being served with previous warning letters for insubordination;
- d. Impudence in the course of his employment.

28. The Claimant denied the validity of the said reasons for dismissal and contended that he was just a stickler of work procedures which his superiors wanted to flout. He also contended that he was only being victimised for his union activities. Rw1 admitted that the warning letters were issued without according the claimant any hearing. I have read the said 3 warning letters and confirmed that they were written from the head office on the basis of complaints made by the Operations Manager.

29. A warning letter, is a disciplinary action taken against an employee by the employer after a disciplinary process. It is an administrative action with the potential of spoiling the employee's employment record at work place or even lead to more severe consequences like dismissal or demotion among others. It is therefore unfair and unlawful for an employer to purport to condemn an employee to written warning(s) before giving the employee a hearing or some other opportunity to defend himself.

30. Had the employer heard the claimant on the alleged complaints of insubordination, it would find that the alleged disobedience was in fact justified because the Operations Manager's commands or requests were unreasonable and unlawful like asking the claimant to open a CIT box alone to verify cash without any Schedule of the Content.

31. In this case the respondent has failed to call the said operations Manager as a witness to respond to the Claimant's allegations that she was giving him instructions contrary to work procedures. Consequently, I find and hold that the allegations of insubordination contained in the said three warning letters have not been proved since the evidence by the Rw1 is mere hearsay.

32. As regards the refusal to attend disciplinary hearing on 17.12.2015, I have carefully considered the evidence by both Rw1 and the claimant. The invitation to the said hearing and the claimant's willingness to attend is not in dispute because there are written correspondences to that effect. The only disputed matter is whether the claimant was properly facilitated to attend the hearing in Nairobi which was 500 kilometres from his work station.

33. Through email dated 14.12.2015 the claimant sought return ticket for himself and his colleague whom he had chosen to accompany him to the hearing, accommodation in a place of their choice and food. The email stated:

“Hi

I acknowledge receiving a letter from your office to attend a grilling in H/O NAIROBI. I am very much willing to attend the session with my representative Kinya Gitonga (staff) as required by the law and I am requesting if you can make the necessary arrangements that is transport accommodation and food for the time we will be there. The accommodation will be a place of our choice and we want to know for how long we are going to stay in Nairobi so that we can plan with our families.

Regards.

Tobias Gumba”

34. Rw1 responded by email dated 15.12.2015 in the following terms:

“Dear Tobias,

The management hereby acknowledges receipt of your mail on request made by you. However, I would like to advise as follows;

- 1. You are coming for a disciplinary hearing and therefore, the bank will only avail bus ticket for you to attend the hearing. You will therefore travel on Wednesday evening from Mombasa to Nairobi.**
- 2. The disciplinary process will take strictly one [sic] to enable you take the next bus back to Mombasa.**
- 3. You have the option of coming with any employee of your own choice at your own cost.**
- 4. ... if the cost is the issue then you are free to choose an employee within Nairobi Region and should you go for this option then we shall avail a list of all the employees in Nairobi so you can choose from said list.**
- 5. ...**

Please note that should you refuse or fail to appear at the inquiry, it may continue in your absence and sanction may be imposed in your absence. ...”

35. The claimant responded on the same day requesting Rw1 to organise the hearing with a human face because in his view it was not possible to travel to Nairobi on 16.12.2015 overnight, attend the hearing on 17.12.2015 and travel back to Mombasa overnight. Consequently, he requested for transport and subsistence while attending the hearing. However, Rw1 wrote back advising him that he had the option of attending the hearing but warned that the hearing will proceed even if he chose not to appear.

36. Having considered the evidence and the tone in the said correspondences, one cannot fail to notice who between the claimant and the management was omnipotent. Rw1 was not ready to treat the claimant with any human face as requested. She treated the claimant as if his goose had been cooked and therefore it did not matter whether he attended the hearing or not.

37. Rw1 was also very unreasonable in her instructions and not willing to consider that the claimant was to be on duty on 16.12.2015 upto 5 pm, then board a bus to Nairobi overnight, stay in some unspecified place until 11.00 am, attend hearing for unspecified duration and then board the next bus back to Mombasa! Where is human face in that command?

38. The command by the Rw1 was also unreasonable by directing the claimant to meet the cost of bringing his fellow employee from Mombasa to Nairobi or chose another employee from Nairobi region. That command was not only unlawful but also a curtailment of his constitutional right to fair hearing, fair administrative action and fair labour practices. It must be obvious that disciplinary hearing ought to be held at the place where the dispute arose and if the employer choses to hold the proceedings elsewhere, the employee must be adequately facilitated by the employer in terms of travel and subsistence expenses prior to the day of travelling.

39. It follows that an employee is not to incur his own expenses to attend disciplinary proceeding away from his work place. It is also not a valid and fair reason for dismissing an employee if the employee fails to attend the hearing due to the employer’s failure to facilitate the employee’s attendance in terms of transport and subsistence like in this case.

40. Under section 45(2) of the Employment Act, for a reason to be fair, it must relate to the employee’s conduct, capacity and compatibility, or employer’s operational requirement. In this case the failure by the claimant to attend the hearing despite the threats by RW1 was not to blame on himself but the employer’s failure to facilitate him on very basic human needs which the employer had the means to provide. It follows that the respondent has failed to prove on a balance of probability that the claimant failed or refused to obey a lawful and reasonable command from the employer or a person give authority by the employer. Consequently, I hold that the reason for dismissing the claimant was not valid and fair as required by section 45 of the Act.

Procedure followed

41. Section 41 of the Employment Act provides that:

“41(1) Subject to section 42(1), An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

42. There is no dispute that the claimant was invited to a disciplinary hearing on 17.12.2015 with a fellow employee of his choice. However, I have already found that he was not facilitated by the employer to attend the hearing. Although Rw1 described the demands by the claimant as unreasonable, I am of a contrary view. He only sought basic needs for any human being for attending employer’s inquiry 500 kilometres away from his work station. He requested for transport and subsistence for himself and his fellow employee who was accompanying him pursuant to section 41 above.

43. The failure to provide the said basic needs curtailed the ability of the claimant to attend the hearing and even if he could attend, the hearing could not be fair in the circumstances as the claimant was a human being. I agree with him it was not possible to work the whole day on 16.12.2015, travel at overnight, do a hearing on 17.12.2015 in the morning, and travel back immediately to Mombasa after the hearing.

44. Consequently, upon consideration of the circumstances of this case I find and hold that the respondent did not accord the claimant a fair hearing as contemplated under section 41 and 45(2) of the Act. It is not enough for the employer to serve the employee with summons to attend a disciplinary hearing, he must prove that the employee could attend with his companion or they were facilitated to attend in good time.

Reliefs

45. In view of the finding that the reason for dismissing the claimant was not valid and fair and that that a fair procedure was not followed before the dismissal of the claimant, I make a declaration that the dismissal was unfair and unlawful within the meaning of Section 45 of the Employment Act.

46. Having found that the dismissal was unfair and wrongful, the claimant is entitled to relief under section 49 (1) of the Act. He prayed for reinstatement and compensation by an award of twelve months’ salary for the unfair termination. However by dint of section 12(3) (vii) of the ELRC Act, the remedy of reinstatement is overtaken by events because under the said statutory provision it cannot be ordered if 3 years have lapsed after the separation.

47. Consequently, I allow the prayer for damages. The claimant admitted that he was paid one month salary in lieu of notice after the separation. Therefore I award him 6 months gross pay being Kshs.80,886.78 x 6 = Kshs.485,320.68 as damages for the unfair termination of his employment contract. In making the award I have considered his long service of over 8 years without any valid warning letter. He also did not cause his dismissal through misconduct.

48. The claim for anticipated salary upto age of retirement is dismissed for lack of any contractual or legal basis.

49. Likewise the claim for exemplary damages of Kshs.3,000,000 has not been established by the claimant and it is dismissed.

Conclusion and disposition

50. I have found that the dismissal of the Claimant was unfair, wrongful and unlawful within the meaning of section 45 of the Employment Act because it was not grounded on a valid reason and fair procedure was not followed. I have further found that the claimant is entitled to damages for the said unfair termination. Consequently, I enter judgment for the Claimant in the sum of Kshs. 485,320.68 less statutory deductions. The Claimant will have, costs plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED IN NAKURU THIS 15TH DAY OF OCTOBER, 2021

ONESMUS N. MAKAU

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE