



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1271 OF 2015**

**ROSE SANG TARUS ..... CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant brought this suit on 23.7.2015 alleging that her employment contract was unfairly terminated by the respondent on 26.11.2013. She seeks the following reliefs:

- (a) A declaration that in terminating the claimants employment, the respondent acted unfairly and unlawfully;
- (b) Reinstatement of the claimant from the date of dismissal, without any loss of salary, benefits and privileges; or in the alternative general damages for loss of salary, allowance and career, from the date of termination until the claimants retirement age of 60;
- (c) Maximum compensation for unlawful and unfair dismissal of employment equivalent to 12 months pay in the sum Kenya Shillings Four Million, eight hundred thousand (Kshs.4,800,0000.00);
- (d) The expulsion of negative reports pertaining the claimant on the respondent's system;
- (e) The issuance of Certificate of Service;
- (f) Costs and interest; and
- (g) Any further and other relief this Honourable Court may deem fit to grant.

3. The respondent filed defence on 25.8.2015 admitting that she dismissed the claimant from service but denied that the dismissal was unfair as alleged. She averred that the dismissal was fair and lawful because it was grounded on valid reason of misconduct, and fair procedure was followed. Finally, she averred that because the dismissal was fair and lawful, the claimant is not entitled to the reliefs sought.

Both parties tendered evidence during the hearing whereby each side called one witness. After the hearing, both parties filed written submissions.

**Claimant's Case**

4. The claimant testified as CW1 and basically adopted her written statement filed on 13.7.2017. In brief she stated that she joined the respondent on 1.4.2013 as the Head Resourcing on permanent and pensionable basis starting with a gross pay of Kshs. 400,000 gross pay per month. On 13.11.2013, she was suspended from work before she was dismissed on 27.11.2013.

5. She further testified that before joining the respondent she had repatriated back to Kenya from Qatar due to pregnancy and it is while she was in Kenya that she received a call from Head Hunters who were recruiting for various organizations, The call come on 30.1.2013 from Eva Owiti Personal Assistant to the Director Human Resource Barclays inviting her for interview on 31.1.2013 for the position Human Resource Business Partner.

6. She further testified that she succeeded in the interview and was given the proposed terms of engagement which she accepted on 26.2.2013. On 5.3.2013 she completed the Employee Information Form (A). At the Professional Membership Section, she filled

Association of Certified Chartered Accountants (ACCA) only. She contended that she successfully completed her ACCA way back 2005, 8 years before joining the respondent.

7. She further testified that after taking office, she discovered malpractices in the recruitment of temporary staff whereby the agent was colluding with respondent's staff to recruit their relatives. After sharing the information with the CEO, a big audit was conducted and the HR Director left the Bank. Ms. Susan Mwaura took over the HR Director's position in acting capacity and a team came from South Africa and interviewed her and others on how to improve the Human Resource Department. According to her, the team was hostile to her by questioning how she was recruited to the bank and went on to accuse her of being a relative of the former Human Resource Director, and further that she was dismissed by Kenya Airways.

8. The claimant denied the said accusations and provided evidence to prove that she voluntarily resigned from Kenya Airways. On 14.11.2014, she was invited to a disciplinary hearing on 22.11.2013. The hearing was done from 9.00 a.m. to 4.30 p.m. without any break for her although the panelist took a lunch break. She contended that as a breastfeeding mother such marathon proceedings were not fair for her.

9. After the hearing, she was told to sign the proceedings and wait for any corrections. The proceedings were never provided to her and even after being served with the dismissal letter, she was not able to appeal due to lack of the edited proceedings. The termination letter was served on her by Ms. Mwaura on 27.11.2013. The reasons behind the termination was the information she gave in the Declaration of Facts Forum about her career gaps. She contended that her explanation of the career gaps was true and accurate.

10. She testified that she filled the information in the form as follows:-

(a) 18/9 /2010 – 9/1/2011 – resigned from KQ to join Qatar Airways and because the two airlines were competitors KQ offered to pay off her notice period.

(b) 26/6/2012 – 25/3/2013 – Maternity Break

11. She contended the allegation that the said information was not accurate is invalid and as such the reasons for her dismissal by the respondent was unfair and a breach of her contract of service she contended that as a result of the termination her career was ruined and she has not been able to get a job. She therefore prayed for the reliefs sought in the claim.

12. On cross-examination, she admitted that she was issued with appointment letter and consented to the terms signing acceptance. She further admitted that she signed a declaration of secrecy and self –declaration. She further admitted further that she filled employment information forms and signed a declaration of fact and consent which only formed part of the contract of service. She also admitted that failure to disclose information was misrepresentation that could lead to termination of the contract. Finally, she admitted that she consented to the respondent doing background check to the information provided within 8 weeks.

13. She explained that the career gap between 18.9.2010 to 19.1.2011 was because she resigned from KQ to join Qatar Airways. She further explained that before joining KQ she worked for James Finlays. She admitted that before her dismissal she was invited to a disciplinary hearing and given the right to be accompanied by another employee. She contended that during the hearing, she told the panel that she resigned from KQ in early September and the reason for leaving KQ was because she was joining Qatar Airways. She further stated that she told the panel during the hearing that she resigned from James Finlay due to pregnancy and post election violence in 2008.

14. She denied that she provided incorrect information to the employer to secure employment and contended that all the information and certificates she provided were correct. She further contended that the employer verified the information from all the institutions she had attended. She maintained that she had a certificate showing that she was a member of ACCA. She contended that the issue of her certificates never arose during investigations.

### **Defence case**

15. The respondent's Head of Employee Relations, Mr. Vaslas Odhimbo testified as RW1. He stated that when the respondent recruits a new employee, he/she fills a standard form to indicate career growth. The form is called the Employee Information Form (A). Page 11 of the form is a Declaration of facts and consent which the employee signs.

16. The employee declares that the information given is correct and if the same is found to be false, the employer is entitled to reject the application or terminate the employment contract. The employee also gives consent to the employer to carry out a back ground check.

17. RW1 testified that the claimant herein was recruited through a consultant, Deloitte and Touche who supplied the claimant's CV's to the respondent. The claimant indicated in the CV and Declaration that she left James Finlay due to pregnancy and the 2007/2008 post election violence. The respondent was not satisfied with the reasons cited because the claimant was a native of the area and the break was in July and August yet the violence was ended in February 2008.

18. He further stated that the claimant indicated in the CV and Declaration that she left Qatar Airways due to pregnancy and end of contract. However he contended that the airline disputed that reason and indicated that the claimant's services were terminated. He contended that the claimant admitted that the termination was due to loss of employment.

19. He further contended that the claimant had indicated that she left KQ because she was head hunted by Qatar Airways. However, according to him the claimant left KQ on mutual separation after she was threatened with disciplinary action for recruiting her relatives.

20. RW1 contended that due to the senior rank the claimant held a very high degree of integrity was required and that it is why a background check was done to verify the information she gave. He further contended that after the background check it was found that she had misled the bank in respect of the reasons she left her previous employers. He stated that the bank found the information given to be false and that was the reason for terminating the claimant's employment after taking her through disciplinary hearing.

21. On cross-examination, RW1 admitted that he joined the bank on 26.11.2016 from DHL. He contended that his evidence herein is based on the documents he interacted with during his cause of employment. He maintained that the claimant had misrepresented facts by indicating that she held a Higher Diploma in HR which was disputed by the institute of HR Management vide the letter dated 25.11.2013.

However, he admitted that the said letter from the institution was written after the disciplinary hearing and the claimant never saw it.

22. He admitted that the claimant had a certificate showing that she passed ACCA examination in June 2002 and that she had a certificate of completion of ACCA examinations dated February 2005. However, he contended that such papers did not mean that she was a qualified ACCA and added that the bank received a letter dated 26.11.2013 from the institute stating that the claimant did not meet the course requirements for ACCA. He admitted that the letter was also written after the disciplinary hearing and it was not shown to the claimant.

23. He contended that the investigators contacted the claimant's former employers to verify the information and admitted that a letter from Hannee Khan stated that the claimant left KQ on her own violation. He further admitted that another letter from KQ indicated that the claimant resigned to pursue interests elsewhere, but he contended that the said letters were just a cover up because the real reason for leaving KQ was not resignation.

24. He further testified that the claimant was paid one month salary in lieu of notice at the discretion of the management. He admitted that the reason cited for the termination in the termination letter was provision of inaccurate information in the Employee Information Form (A). He admitted that the letter dated 10.9.2010 indicated that the claimant was to serve through the notice period as her replacement was being sought, but KQ opted to pay her salary in lieu of notice. He maintained that the claimant gave false information to cover up for the unexplained gap between the time she left KQ and when she joined Qatar Airways.

#### **Issues for determination**

25. I have carefully considered the pleadings, evidence and submission by both parties. The issues for determination are:

- (a) Whether the termination was done in accordance with a fair procedure
- (b) Whether the termination was justified by a valid and fair reason
- (c) Whether the claimant is entitled to the reliefs sought.

#### **Procedure followed**

26. Under section 41 of the Employment Act, before an employer terminates an employee's contract of service, he must explain the reason to the employee in the presence of another employee or shop floor union official and thereafter accord the employee and his/her companion a chance to air their representations which must be considered before the termination is decided.

26. In this case the claimant admitted in evidence that she was invited to investigatory interviews by the appointed investigators and thereafter she was invited to a disciplinary hearing before a committee. The invitation letter is dated 13.11.2013 and it stated the charges as providing misleading and false information to the Bank on her application form and again during the investigation process. The letter warned her that if found guilty, she would be dismissed. The letter also advised her that she was free to be accompanied by a union official or a fellow employee from the bank.

28. Applying the facts of this case to mandatory provisions of section 41 of the Act I am satisfied that the procedure followed before dismissing the claimant was fair. Therefore, I return that the respondent has discharged her burden of proving procedural fairness as required under section 45 (2) (c) of the Act.

#### **The reason for the termination**

29. Section 43 of the Employment Act provides that in every legal proceedings challenging termination of an employee's contract of service, the burden of proving the reason for the termination lies with the employer. Again section 45(2) (a) and (b) provide that termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reasons(s) related to the employees conduct, capacity or compatibility or based on the employer's operational requirements.

30. In this case the reason cited for the termination of the claimant's contract of service was misconduct with respect to the information she gave the employer about her career growth. The information according to RW1 was given in the Employee Information Form (A) which formed part of the claimant's contract of service. RW1 stated as follows in his evidence in chief:

***“The claimant was to hold very senior position which required very high degree of integrity. The bank did background check and found that the claimant misled the bank in respect of the reasons she had left previous employers. The bank found that she had given false information and that was reasonable basis for termination of the claimant's service after being taken through disciplinary hearing.”***

31. The question that arises is whether indeed the claimant misrepresented facts by giving false information about how she left previous employers. I have carefully considered the Employee Information Form (A) including the Declaration of Fact and Consent signed by the claimant on 5.3.2013 and the Declaration of Fact signed on 25.3.2013. First, the Form did not require the claimant to indicate the reasons why she left her previous employers. All what was required was that the claimant should give the reason for career gaps in her career growth. Page 7 of the Form (A) required that the claimant explains the reason for any employment gaps longer than 2 months.

32. The period in issue was July 2008 – June 2009, and July 2012 to 5.3.2013 when she filled the forms(A). On the first gap, she explained the reason as maternity break following post election violence. On the second gap, she explained the reason as end of contract due to maternity leave.

33. In Declaration of Fact signed on 25.3.2013, the claimant explained that the gap between 18.9.2010 and 19.1.2011 was caused by her resignation from KQ to join Qatar Airways whereby KQ decided to pay off the notice period. She reiterated the explanation for the gap between 16.6.2012 and 25.3.2013 as maternity break to raise her family full time. In view of the fact that Form (A) and the Declaration of Fact did required the claimant to indicate the reason for leaving her former employer, I find that RW1 did not adduce any evidence to rebut the explanations given by the claimant for her employment gaps from July 2008 – June 2009, September 2010-January 2011 and June 2012 – March 2013 at the Form (A) and the Declaration of Fact.

34. It follows that by the respondent dismissing the claimant for misrepresenting facts about the reason why she left her former employment was an invalid reason for terminating her services. It was in fact a breach of the contract of service because the alleged misleading information or concealed information was not a term of the contract as contained in the Form (A) and the Declaration of Fact or anywhere else.

35. Just to pick on the claimant's departure from KQ, the respondent admitted that she had received the claimant's CV which indicated that the claimant left in September 2010. The claimant explained in the Declaration Form that the employment gap that followed was because KQ waived the notice and opted to pay off salary in lieu of notice to her.

36. Instead of the respondent putting effort to verify the truth about the explanation given, she spent all her effort investigating whether the claimant resigned or she was dismissed. Surprisingly, RW1 contended that the letter issued by KQ stating that the claimant resigned was only a cover up!

37. As regards the alleged misrepresentation on professional qualification in Form (A) the court agrees with the claimant that the issue was not canvassed during the disciplinary hearing as evidenced by the proceedings produced. The letters relied upon during the hearing herein were not part of the documents referred to during the disciplinary hearing. The findings of the panel after the hearing also did not mention the said letters or that the claimant misrepresented her professional qualifications. The panel recommended that, due to the material inaccuracies in the Declaration of Facts there was lack of integrity on the employee which amounted to false representation. The dismissal was therefore based only on the Declaration of Fact and nothing else.

38. Section 43(2) of the Employment Act defines the reason for termination as those matters which the employer genuinely believed to exist at the time when the employee's contract was terminated. According to RW1, the termination herein was because the claimant gave false information about the reason for her exiting previous employment. As already held herein above, that was not a valid ground for dismissing the claimant, considering what information was required by Form A and Declaration of Fact. Consequently I return that the respondent has failed to discharge her burden of proving valid and fair reason justifying the termination of the claimant's contract of service.

39. In **Judicial Service Commission v. Gladys Boss Shollei & Another**[ 2014]eKLR the Court of Appeal cited with approval **Michael Dowling v. Workplace Safety and Insurance Board**[2004] CAN LII 43692 **Page 74**. where it was held that:

***“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employees obligation to his or her employer.”***

41. In view of the observation herein above that the alleged dishonesty was invalid and taken out of context by the respondent; I must return that the alleged misrepresentation of facts and concealment of information was misconceived and uncalled for. It smacks of bad faith on the part of the respondent and a resolve to terminate the services of the claimant through witch hunt. The proceedings of the hearing on 22.11.2013 is a clear manifestation of the said witch hunt and violation of the claimant's legitimate expectation that the employer would act fairly within the goal points of the form (A) and the Declaration of Facts and the consent by the claimant to the employer to do back ground check.

42. In view of the foregoing, the court is inclined to distinguish the facts of this case from the facts in the cited precedents where the employee was found to have acted dishonestly and thereby eroded their employer's trust which is the glue that holds employment relationship together. In this case the claimant did not act dishonestly but it is the employer who misinterpreted the claimant's obligations under the Form (A) and the Declaration of Fact.

### **Reliefs**

43. Having made a finding that the respondent has failed to prove a valid and fair reason for dismissing the claimant, I make declaration that the termination of the claimant's employment by the respondent herein was unfair and unlawful as prayed.

44. Under section 49 of the Employment Act, an employee who is unfairly discharged is entitled to reinstatement, or reengagement or payment of compensatory damages. The claimant herein was dismissed on 26.11.2013, about 7 years ago and under section 12 of the ELRC Act, the court has no jurisdiction to order reinstatement of an employee after the lapse of 3 years from the date of the separation. Consequently, the prayer for reinstatement without loss of benefits is declined due to the said statutory limitation.

45. Considering the fact that the claimant served for less than a year but also the fact that she has not been able to secure another job since termination, I award her six month's salary as compensation for the unfair termination.

46. The prayer for expulsion of all negative reports pertaining to the claimant on the respondent's system is declined because there are no particulars of the alleged negative reports. A party who comes to court for an order must be specific on the kind and the extent of the order sought.

47. The claim for Certificate of Service is granted because it is a right under section 51 of the Employment Act.

#### **Conclusion and Disposition**

48. I have found that there was no valid and fair reason justifying the dismissal of the claimant herein and as such the dismissal was unfair and unlawful. I have further found that the claimant is entitled to compensatory damages and certificate of service. Consequently I enter judgment for her as follows:

**a. The termination of the claimant's employment is hereby declared unfair and unlawful.**

**b. The claimant is awarded Certificate of Service.**

**c. The claimant is awarded Kshs. 2,400,000 as compensation for unfair termination subject to statutory deduction.**

**d. The claimant will have costs plus interest at court rates from the date hereof.**

**Dated, signed and delivered at Nairobi this 26th day of June, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**