



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 21 OF 2016

(Before Hon. Justice Mathews N. Nduma)

BENSON OTIENO AYAGO.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 5th February 2016 by the Claimant seeking the following reliefs: -

- a. Payment of the sum of Kshs. 3,509,895.
- b. Costs of the suit.
- c. Interest.

2. The claimant testified as CW1 and adopted a written statement dated 25th January 2016 as part of his evidence in chief.

3. CW1 stated that he was employed by the respondent bank as a clerk in the year 1994 in which position he served as cashier and customer adviser for a period of 13 years.

4. In the year 2007, CW1 was appointed a Branch manager and his consolidated salary improved to Kshs. 233,991. The claimant testified that on 30/9/2015, his employment was unlawfully and unfairly terminated on account of alleged poor work performance. CW1 testified that he was called to a performance interview prior to the termination and he explained that shortage of essential staff, including a personal banker was the reason for under performance of the Branch.

5. There was also shortage of sales staff. That he was forced to juggle responsibilities to fill in the gaps hence the problem. That the respondent acknowledged the issue of staff shortage and promised to send additional staff.

6. Strategies for improvement were agreed upon between the period September 2015 to December 2015. CW1 testified that the respondent did not honour this commitment, on timelines and terminated the employment of the claimant prematurely in September 2015 without giving him required staff and sufficient time to make amends in the branch performance.

7. The claimant was paid terminal benefits including notice pay and all the sum paid was applied to offset a personnel loan he had with the bank.

8. The claimant prays that the court compensates him for the unlawful and unfair termination of employment.

Response.

9. RW1 Vaslas Odhiambo Agola, testified that he was Head of Employee Relations of the respondent from November 2016. That he did not know the claimant personally. That he relied on a written statement dated 24/1/2019 as his evidence in chief. That the claimant was dismissed for failing to meet targets as a branch manager. That the respondent has agreed monthly half yearly and yearly performance targets.

10. That the claimant was visited for performance review on 4/9/2015 before the year ended. Termination took place on 30/9/2015. That as at June 2015, the branch performance was 51%. As at August 2015, the performance had improved to 66%. The performance was however below the 100% target hence the termination.

11. RW1 stated that despite the staff shortage, the branch had capacity to meet the target. RW1 admitted that the panelist at the interview recommended a personal banker to be employed immediately to support the staff at the Branch.

12. RW1 also admitted under cross-examination that a teller had been sacked and another had resigned on medical grounds but they had not been replaced.

13. RW1 said he was aware that the said staff had left but was not sure if they had been replaced in the year 2015. RW1 stated that the claimant gave lack of enough personnel to do key functions as the reason of the low scores for the branch.

14. RW1 stated that the respondent fairly terminated the employment of the claimant for poor work performance. RW1 admitted that the termination was done before the expiry of the agreed improvement period between September 2015 to December 2015.

15. RW1 stated that performance of the branch had improved to 76% in September 2015 but stated that the performance was still below expectation. That the claimant had received one warning for low performance in the year 2014.

16. RW1 stated that there was no legal or policy requirements for three warnings to be given before termination.

17. RW1 prayed the suit be dismissed with costs.

Determination

18. The issues for determination are: -

a. Whether the termination was for a valid reason and if a fair procedure was followed in the termination.

b. Whether the claimant is entitled to the reliefs sought.

19. The claimant was a Branch manager in Bomet form the year 2012 until the 30th September 2015 when his employment was terminated. At the time of termination, the claimant earned a consolidated salary of Kshs. 233,991.

20. The claimant owed the bank Kshs. 3,946,972.50 at the time of termination.
21. The claimant whilst admitting that the performance of the branch was below expected standard in the year 2014 -2015, explained that the fall of the performance was due to loss of key staff during the period who were not replaced.
22. It is common cause that the branch had lost two clerks during the period and the two had not been replaced. It was also common cause that the respondent had recommended that a personal banker be posted to the branch but it did not happen.
23. It is also not in dispute that the claimant had been interviewed on 14th September 2015 and had been given improvement timelines by the end of the year 2015.
24. It has also been established that the branch performance had continued to improve from 51% in August, 2015 to 76% in September 2015. RW1 acknowledged this fact, but stated that the branch was expected to achieve 100% performance target.
25. The claimant stated that he was forced to juggle responsibilities due to lack of staff in his branch and the promises by the respondent to bring key staff did not happen.
26. It is the court's considered finding that RW1 was unable to rebutt sufficiently, the candid testimony of the claimant that between June 2013 to September 2015, the branch performance had risen from 51% to 76% despite acknowledged shortage of key staff in the branch.
27. The respondent admitted that there was the staff shortage but chose to shift the blame concerning a whole branch to one individual despite the cogent and reasonable explanation he had given to the respondent during the performance review to his seniors and in court.
28. The respondent has failed to prove on a balance of probabilities that it had a valid reason to terminate the employment of the claimant as required under section 43(1) and (2) read with 47(5) of the employment Act, 2007.
29. On the contrary the claimant has demonstrated sufficiently that the termination was wrongful and the respondent had failed to meet its end of the bargain to enable him meet the expected branch performance target. That the branch target was premised on a communal staff performance and not one person. That the missing staff made it impossible for the desired target to be achieved.
30. The Court therefore, finds that the termination of the employment of the claimant was unlawful and unfair and it violated sections 41,43, and 45 of the Employment Act, 2007.
31. The claimant is entitled to compensation in terms of section 49(1) (c) and (4) of the Act. The respondent failed to meet the criteria set in the case of **Jane Jamba Mukula –VS- Tukai Lodge Ltd Industrial Court cause no. 823 of 2010.**
32. In this regard the claimant had served the respondent from 1994 to 2015 a period of 21 years. The claimant has risen through the ranks during the period and had a glowing career in the bank. The claimant expected to serve the bank to his retirement upon repayment of his staff loans.
33. The claimant was unable to discharge these obligations upon the unlawful and unfair termination. The claimant suffered loss and damage as a result thereof.
34. The claimant was paid terminal benefits which unfortunately he could not enjoy since it was applied to pre-maturely offset his benefit as staff loan. The claimant in the courts view had a cogent explanation for the performance of his branch which in any event was improving every month despite the respondent not providing key staff. The claimant did not contribute to his termination therefore.

35. The claimant was not compensated for the sudden job loss and he is entitled to compensation for the damage and loss suffered.

36. The court further relies on the case of **Aume Wino Misumbi Gumbi – S- Youth Enterprise Development Fund Board (2018) eKLR** to award the claimant who had served the respondent diligently for a period of 21 years, the equivalent of 10 months' salary in compensation for the unlawful and unfair termination in the sum of **Kshs. 2,339,910**.

37. In the final analysis Judgment is entered in favour of the claimant against the respondent in the sum of **Kshs. 2,339,910**. Interest at court rates from date of Judgment till payment in full.

38. Costs of the suit to follow the event.

Dated, Signed and Delivered at Nairobi this 17th Day of September 2020

Mathews N. Nduma

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 March 2020, this ruling has been delivered to the parties online with their consent. 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 18 of the Civil 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.

Mathews N. Nduma

Judge

Appearance

Mr. Olel for claimant

Mr. Ouma for Respondent

Chrispo: Court Clerk.