



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 6 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JEREMIAH MUENDO KALEBU.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

On 7th January 2013, the Claimant filed his claim vide his Memorandum of Claim dated 24th December 2012. He has sued the Respondent for unfair, illegal and unjust termination of employment. He seeks the following reliefs:

- a. A declaration that the termination of his employment was unfair, illegal, unjust and in contravention of the Employment Act.
- b. The Claimant claims to be paid his final dues and compensation as follows:
 - i. Compensation for loss of employment.
 - ii. Half salary unpaid for the months of August, September and October at the rate of Kshs.30,348.00 per month being total of Kshs.91,044.00.
 - iii. Damages for wrongful termination of employment amounting to Kshs.728,352.00
- c. In the alternative, the Claimant prays that he be reinstated to his employment without loss of benefits.
- d. Cost of this case.

On 22nd April 2013, the Respondent filed its response vide the Memorandum of Defence and Counterclaim dated 19th April 2013 and is denying the allegations made by the Claimant. The Respondent seeks the following prayers:

- a. The Claimant's suit be dismissed and the decision to terminate the Claimant's employment be upheld.
- b. That the Claimant owes the Respondent Kshs.959,820.17.
- c. Cost of the suit.

Claimant's Case

The Claimant was initially employed as a clerk on 17th July 2007 and subsequently as a cashier on 3rd November 2008 which position was confirmed on 21st February 2008 and in which capacity he served until the termination of his employment on 27th October 2011. At the time of termination, he was earning gross emoluments of Kshs.60,696.00.

On 20th July 2011, the Respondent's Embu Branch Manager served the Claimant with a suspension letter pending disciplinary action on the ground that the Claimant had made an unwarranted interrogation of account number [xxxx]. He was issued with three further letters extending his suspension. On 1st September 2011, the Claimant received a letter inviting him for an interview at the Respondent's Nyeri

branch, to determine the case. After the interview and vide the letter dated 27th October 2011, the Respondent communicated to the Claimant that his services had been terminated.

The Claimant avers that the termination of his employment was actuated by malice and ill motive. Further that as a result of the Respondent's actions he was exposed to ridicule and insolvency.

Respondent's Case

The Respondent contends that at the time of termination the Claimant was earning an annual salary of Kshs.461,820.00.

On 17th May 2010, the Claimant incurred a cash shortage of Kshs.10,000. He was asked to give an explanation and he admitted that he had failed to follow the right procedure. Consequently, on 10th June 2010 he was issued with a letter of reprimand because the explanation was found to be unsatisfactory.

According to reports no. 72/09 and 07/11 the Claimant was believed to have processed a counterfeit cheque relating to the fraudulent payment of a cheque on 20th June 2011 from account number [xxxx]. When the counterfeit cheques were presented to the Claimant for payment, he recorded the customer's details on the reverse of the said cheques before passing the cheques to his colleague for payment under the pretext that he could not raise enough money from the till to pay them. Extracts from the Claimant's journal showed that he was holding KShs. 1,000,000.00 in his till at the time the cheque for Kshs.400,000.00 was presented to him for payment. On 13th and 14th June 2011, the Claimant made enquiries on account number [xxxxxx] checking on account ledger, statements and the signatures yet he was not serving the customer.

After the second fraudulent withdrawal from account number [xxxx], the Claimant deposited Kshs.30,000.00 in his staff account and his Branch Manager noticed an abrupt change in his lifestyle leading to a requisition for investigation of the Claimant by his supervisor.

After the conclusion of the investigations, the Claimant was served with a notice of suspension pending further investigation. The Claimant wrote a letter on 22nd July 2011 admitting to interrogating the account in question. The Claimant's suspension was extended vide the letter dated 26th August 2011 and on 1st September 2011, the Claimant was invited to a disciplinary hearing on 8th September 2011. The Claimant was advised to collect the letter on 2nd September but he collected it on 5th September.

The Claimant was heard on 8th September 2011 where he recanted the statement made in his written statement but confirmed that the statement had not been written under duress. After the hearing, the panelists made their deliberations.

The Claimant's suspension was extended vide the letters dated 20th September 2011 and 19th October 2011. Further, the Claimant's services were terminated on 27th October 2011.

The Claimant appealed the decision on the ground that his employment was wrongful. The Claimant was invited to attend the hearing of his appeal and which was conducted on 24th November 2011 as earlier communicated to the Claimant. The Claimant acknowledged that procedures were breached. The panelist made their recommendation to the Respondent who upheld the Claimant's termination.

Immediately after the Claimant's termination, the Respondent's customer and holder of account number [xxxx] wrote and disputed two withdrawals of KShs. 505,004.00 made over the counter from his account. The Claimant was not interrogated as his services had already been terminated.

Evidence

The Claimant restated his employment history and terms of contract as averred in his Memorandum of Claim. The Claimant testified that the reason for termination was that the bank lost confidence in him because of loss of cheques. He stated that he was taken through the disciplinary process but he did not know that he was entitled to representation. The Claimant stated that his suspension was extended thrice because the account in question was under investigation.

He averred that Samson Juma was the cashier who paid out the Kshs.470,000.00 and 400,000.00. However, he elaborated that the reason for that was because he did not have money in his till. Although his trail showed that he had the money, the Claimant clarified that he had already handed over the money to the custodian at that time and was waiting for authorization in the system. According to him, it was procedural to have inter-cashier transactions. It was the Claimant's testimony that a paying cashier was supposed to confirm procedure before making payment. The Claimant testified that he had a cash limit of Kshs.500,000. He stated that if the cash exceeded his limit he was expected to pay the excess cash to the custodian.

The Claimant stated that he lodged an appeal on the ground that he had not been fully represented. During appeal, there was a union representative.

There were other investigations on the same account but the incident was not reported to the police.

He stated that during suspension he was paid half salary. He reiterated that his salary at the time of termination was Kshs.60,500.00.

During cross examination, he stated that he informed his union of the incident and was advised to appeal because he had informed them after the first hearing had taken place. He stated that he did not have evidence that he gave soft leads to personnel. He admitted that his

termination letter stated the reasons for termination as encashment of the two cheques, unwarranted interrogation of accounts and failure to follow procedure. He also conceded that his invitation letter stated that he was entitled to be accompanied by a colleague or union representative. He admitted that he had ample time before the hearing as he was notified of the hearing date on 1st and the hearing was to take place on 8th September 2011. The Claimant could not satisfactorily explain why he involved himself, if he knew he did not have money and why his till was holding Kshs.1,000,000.00.

He stated that he interrogated the accounts so that he could issue the account holder soft leads but admitted that at the hearing he had stated that he could not remember the reason for the interrogation since he served many clients a day. He asserted that he did not have enough money in his till as he had surrendered money to the custodian. However, he admitted that at the hearing, he did not give evidence to show that the money had been with the custodian and not with him. It was his testimony that he was afforded a full hearing and the decision from the 1st hearing upheld. He also testified that he had told the appeal panel that the reason he never had representation was because he did not know who to call as he only knew the manager. He admitted that he owed the bank Kshs.960,000.00 which is still owing to the bank.

Upon re-examination, the Claimant reiterated that he had a staff loan of Kshs.960,000.00 which he had been unable to pay as he had no other means to pay. It was also his testimony that there was no indication that he was holding a million shillings at any time.

RW1, **Vaslas Odhiambo Agola**, the Respondent's Head of Employee Relations, restated the events as averred in the Memorandum of Defence. Further, RW1 testified that a customer, Dr. Jacob, had realized that his account balance was less after an already cashed cheque was re-cashed in Embu. On the second incidence, the cheque was still in the custody of customer which cheque had been crossed. The issue was investigated by one of the bank's officers at the forensic investigation team. The findings of the investigation were that the cheque had been indeed cashed in Embu and the first point of contact with the fraudulent cheques had been the Claimant and that he conducted a detailed interrogation of that account immediately after coming from leave. It was the witness's testimony that this manner of interrogation was not necessary for soft leads. He stated that the report showed that Samson did not make any interrogation prior to the withdrawal.

RW1 stated that the Claimant and all persons involved in the incident were taken through a disciplinary process. The Claimant was suspended. It was RW1's testimony that the Claimant was informed that he could come with a witness. He was also informed of his right to come with a colleague. He stated that the reason for the suspension extensions was because the Respondent wanted to finalize the investigations. He confirmed the Claimant's position during cross examination that a cashier was required to authenticate customer details before a cheque could be cashed. He conceded that a cashier with insufficient funds could refer the customer to another cashier but indicated that the Claimant did not do that. He gave his colleague a cheque for payment after approving it for payment. RW1 requested the court to enter judgment for the debt which had not been paid. He stated that the Claimant was not entitled to payment of half unpaid salary.

During cross examination, he stated that when one cashier was unable to pay a client, he referred client to the next cashier without verifying. The Claimant first verified before referring the client. RW1 stated that other employees were subjected to a disciplinary process but did not have the minutes for their disciplinary meeting. He stated that the Claimant interrogated the account at 7:50 am yet the Premium Branch opened at 8:00 am or 8:30 am. He conceded that the case before the court was an employment matter but countered that arguing that it was logical for an employer to counter-claim since the claim was against it.

He testified that there were other fraudulent transactions done by the Claimant, yet he did not have proof to buttress those allegations. RW1 was put to task to elaborate on the Respondent's averment that the amount of Kshs.505,004.00 was not pursued because the Claimant had since left employment when the same was discovered, yet it was discovered on 26th September 2011. He stated the report came after the Claimant's employment had been terminated.

Upon re-examination, he asserted that the Claimant interrogated the account twice which information was contained in the investigation report. Further, he stated the amount of 505,004.00 was discovered on 26th September 2011 yet the Claimant's hearing was conducted on 8th September 2011.

Claimant's Submissions

The Claimant submits that the reasons advanced by the Respondent for terminating the Claimant's employment are unfair and go against the provisions of section 45(2) of the Employment Act 2007. The suspension exceeded the 30 days period contained in the letter and there was no explanation as to why the period was extended. The disciplinary process took a lengthy period and there was no explanation on why the Respondent chose to terminate the Claimant's employment. The Claimant relied on section 43 (1) and (2) of the Employment Act which provides for proof of reasons for termination and section 45 (1) and (2) of the Act which prohibits unfair termination. The Claimant also relied on the case of **George Onyango Akuti vs. G4S Security Services Kenya Limited [2013] eKLR** which stated:

"... For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

The Claimant also submitted that the loan between the Claimant and the Respondent is purely contractual and cannot be subject of a labour relations dispute. There exist several modes of seeking remedies for breach of contract and this court is not one of them as such the Respondent's counterclaim should be dismissed.

The Claimant also submitted that he has proved his case on a balance of probabilities and prayed for a finding in favour of the Claimant.

Respondent's Submissions

The Respondent submitted that the Claimant was in blatant breach of the terms and conditions of employment and contract. The Claimant

had a fiduciary duty of care to the Respondent. The Respondent relied on the case of *Industrial Alliance Life Insurance Company v. Gilbert Cabiakman* (indexed as: *Cabiakman v. Industrial Alliance Life Insurance Co. 2004 SCC 55*) where the court stated that *an employee is bound to carry out his or his work with prudence and diligence and to act faithfully and honestly toward the employer and the employer has the power to suspend, and to establish the conditions on which it may do so. Further, if an employee is injured through willful misconduct or in the course of committing a criminal act, the employer cannot be held liable and should be free to raise the defence of illegality or contributory negligence.* The Respondent relied on the case of *Holman v Johnson (1775) 1 Cowp 341* where the court held that it cannot lend its aid to a man who founds his cause of action upon an immoral or illegal act.

The Respondent relied on the case of *CMC Aviation Limited vs. Captain Mohammed Noor [Civil Appeal No. 199 of 2013] (UR)* where the Appellate Court held that the trial Court erred in not considering the contribution the Respondent could have made to the events leading to his dismissal. The Respondent also relied on sections 44(3) and 44(4) of the Employment Act 2007 to justify the summary dismissal and the grounds for which the dismissal was based. The Respondent submitted that it has demonstrated that it had valid grounds to summarily dismiss the Claimant but instead terminated the Claimant for breach of terms of contract and for gross misconduct to give him a soft landing.

It is the Respondent's submission that it fully complied with the provisions of section 41 of the Employment Act and afforded the Claimant with an opportunity to be heard and the Claimant participated even in the Investigation process.

The Respondent submitted that Claimant was suspended in the months of August, September and October, 2011. He was entitled to half pay as per the terms of the negotiated CBA which formed the terms and conditions of service of the Claimant. The Claimant was therefore bound by the terms of the CBA. The Respondent relied on the case of *Attorney General of Belize vs. Belize Telecom Ltd [2009] UKPC 10* where the court held that *courts have no power to improve upon contract and cannot introduce terms to make it fairer or more reasonable.*

The Respondent submitted that the Claimant was fairly and lawfully terminated in accordance with sections 43 and 45 of the Employment Act hence is not deserving of any damages for wrongful and unlawful termination as.

The Respondent submitted that the Claimant has failed to prove his claim against the Respondent on a balance of probability and is therefore not entitled to costs of the suit.

Determination

From the evidence on record and the submissions the following are the issues for determination –

1. Whether the Claimant's termination was unfair and unlawful.
2. Whether the court has jurisdiction to make a finding regarding the Respondent's Counterclaim
3. Whether the Claimant is entitled to the prayers sought.

Whether the Claimant's termination was unfair and unlawful.

The Claimant submitted that the reasons for termination of the Claimant's employment are unfair and go against the provisions of **section 45 (2) of the Employment Act 2007**. The suspension exceeded the 30 days period contained in the letter and there was no explanation as to why the period was extended. The disciplinary process took a lengthy period and there was no explanation on why the Respondent chose to terminate the Claimant's employment. The Respondent on the other hand submitted that the Claimant was in blatant breach of the terms and conditions of employment and contract. It is the Respondent's submissions that it fully complied with the provisions of section 41 of the Employment Act and afforded the Claimant an opportunity to be heard and that the Claimant also participated in the investigation process.

Termination Procedure

The Claimant relied on the case of *George Onyango Akuti vs. G4S Security Services Kenya Limited [2013] eKLR* which stated:

“... For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

Section 41(1) of the Employment Act provides that 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 a shop floor union representative of his choice present during this explanation.

During trial, RW1 testified that the fraud incident was investigated, a report written and every employee found to be involved was taken through a disciplinary process. The Claimant was suspended. Thereafter, the Claimant was invited for a hearing and informed of his right to attend with a witness and a colleague. It was the Respondent's case that the Claimant was heard, and a decision to have his employment terminated arrived at. The Claimant appealed, his appeal was heard and the earlier decision upheld. During cross examination, it was the Claimant's concession that his termination letter had indicated the reasons for his termination, his invitation letter had stated that he was entitled to accompaniment by a colleague or union representative and that he had been given ample time to prepare for the hearing. As such, the Respondent met the standards set out in section 41 of the Act.

The Extension of the Suspension Period

Clause A5 (c)(i) of the CBA provides that:

“Where the employer requires to carry out investigations in acts of gross misconduct and/or serious neglect as detailed in paragraph A5 (a) above, an employee may be suspended for a period not exceeding 30 days during which period the employee shall be entitled to be paid at the rate of half his basic salary. The suspension may be extended at the discretion of the employer.”

From the evidence adduced by the parties, the Claimant was first issued with a suspension letter on 20th July 2011. The suspension was extended on 26th August 2011, 20th September 2011 and 19th October 2011. This was 55 days after the lapse of the first suspension period.

The Court in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** was of the opinion that suspension is a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer.

The suspension was extended for a period of 55 days to ensure the investigations were concluded as was stated by RW1. Due to the nature of the allegations made against the Claimant and the repercussions ensuing therefrom, it was necessary for the Respondent to conduct conclusive investigations so as to get to the root of the matter and to ensure that the decision taken was well thought out.

The Claimant was entitled to half a salary as was implied by the extension letters through the term: “terms and conditions remain the same.” Further, the Respondent had the discretion to extend the suspension as per Clause A5 (c) (i) of the CBA.

From the foregoing I find that the period within which the suspension was extended and the reasons for such extension were valid hence the Claimant is not entitled to half salary unpaid during the extension of suspension period.

Whether the court has jurisdiction to make a finding regarding Respondent’s Counterclaim

The Claimant submitted that the loan between the Claimant and the Respondent is purely contractual and cannot be subject of a labour relations dispute. There exist several modes of seeking remedies for breach of contract and this court is not one of them.

Section 12 (1) of the Employment Act, 2007 confers upon this Honourable Court the exclusive original jurisdiction to hear and determine disputes relating to or arising out of employment between an employer and an employee. The Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** quoted with favour the decision of Majanja J. in **United States International University (USIU) v Attorney General & 2 Others [2012] eKLR** that:

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.”

In the case of **Kenya Universities Staff Union –V- University Council of Masinde Muliro University of Science and Technology**, Odunga J. observed as following –

*“In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held in **Nairobi High Court Petition No. 613 of 2014 – Patrick Musimba vs. The National Land Commission and Others**: where it was held that:*

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

During cross examination, the Claimant admitted that he owed the Respondent KShs. 960,000.00 which is still owing to the bank. The same was reiterated during his re-examination but he stated that he had been unable to pay as he had no other means to pay. Further, RW1 testified that at the time of termination the Claimant owed the Bank an amount of KShs. 959,820.17 from personal staff loans which amount remains outstanding to date. In the case of **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR** where the court held that:

“I note the counter-claim was not challenged by the claimant in any material way. The grievant admitted that indeed the amounts claimed were due only that he could not pay as he was unemployed and he needed to be reinstated to be able to repay this amount. This part of the claim being admitted saves for the reasons of inability to pay will therefore be granted.”

During cross-examination, RW1 conceded that the case before the court was an employment matter but it was logical for an employer to counter-claim since the claim was against it.

As an employee of the Respondent, the Claimant was entitled to certain benefits such as personal staff loans which he would not have been entitled to had he not been an employee. Though the issue of the KShs. 959,820.17 owed to the Respondent by the Claimant is commercial in nature, this Honourable Court has jurisdiction to hear and determine the issue since the debt arises from the privileges accorded to the Claimant by virtue of the employer-employee relationship between him and the Respondent.

During cross-examination, the Claimant admitted that he has an outstanding debt of Kshs.960,000 owing to the Respondent a fact which was reiterated upon his re-examination which he conceded to being unable to pay as he had no other means to pay. As such, the Respondent counterclaim succeeds.

Remedies

The Claimant is not entitled to any of the prayers sought as the Respondent has proved on a balance of probabilities that the Claimant's employment was dismissed fairly and lawfully. The claimant's case is thus dismissed in its entirety.

The claimant having admitted owing the respondent the sum of Kshs.959,820.17, the counterclaim succeeds and judgment is hereby entered for the respondent against the claimant in the said sum of Kshs.959,820.17.

In view of the fact that the claimant lost his job and has a loan to pay, it is the opinion of the court that it fair that each party bears its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE