



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1983 OF 2015

JOSEPH MAIRURA MONG'ONI.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LTD.....RESPONDENT

JUDGMENT

1. Joseph Mairura Mong'oni (Claimant) instituted legal proceedings against Kenya Commercial Bank Ltd (Respondent) on 6 November 2015 and he stated the Issue in Dispute as

Refusal to pay terminal dues to Joseph Mong'oni.

2. The Respondent did not file a *Response* within the prescribed time and on 23 February 2016, the Court (by consent) directed it to file/serve a *Response* within 14 days.

3. The Respondent did not file a *Response*, thereafter but the Court will treat the *Draft Memorandum of Response* exhibited to the application which sought leave as the *Response*.

4. When the Cause came up for hearing on 6 March 2019, the Court declined an application for adjournment by the Respondent (reasons are on record).

5. Both parties opted not to call any witnesses but relied on the record and brief oral submissions.

6. The issue for determination is a simple one, and it is whether the Claimant was entitled to the payment of 1 month pay in lieu of notice.

7. The Claimant was dismissed from employment through a letter dated 20 May 2013, and reference was made to clause A5 (b) of the Collective Bargaining Agreement between the Kenya Bankers Association and the Banking, Insurance, and Finance Union (Kenya).

8. The Claimant's contention was that dismissal under the said clause was after WARNING and therefore not summary dismissal, entitling him to the payment of terminal dues including pay in lieu of notice.

9. The Claimant further contended that he was entitled to pay in lieu of notice by dint of section 35(1)(c) & (5) as read with sections 36 and 44(2) of the Employment Act, 2007.

10. The Claimant cited the Court of Appeal decision, *Telkom Kenya Ltd v Paul Ngotwa* (2013) eKLR.

11. In opposing the claim, the Respondent took the position that payment of *pay in lieu of notice* was not envisaged under clause A5 (b) of the Collective Bargaining Agreement.

12. The Respondent asserted that the Claimant having been given warning prior to dismissal, this was not a case of summary dismissal.

13. Clause A5(b) of the Collective Bargaining Agreement provided

Dismissal after Warning

If after due investigation by the Management concerned the employee is considered guilty of any of the following acts, an employee may be dismissed after 2 warnings in writing, with dismissal being effected on the third offence being committed

- i) If after due investigation by the Management concerned an employee is considered guilty of using any abusive or insulting language or is guilty of insulting behaviour to any person placed in authority over him/her;
- ii) If, without leave or lawful cause an employee absents himself/herself from the place proper and appointed for the performance of his/her work;
- iii) If he/she neglects to perform any work which it was his/her duty to have performed or if he/she carelessly or improperly performs any work which from its nature it was his duty to have performed carefully and properly;
- iv) If he/she refuses to obey any proper order of any person placed in authority over him/her, which order it was his duty to obey.

Subject to dismissal being justified only if three (3) of the above offences have been committed within any period of twelve (12) months and warnings in writing have been given to the employee within such period of twelve (12) months immediately preceding the commission of the third offence in respect of two (2) such offences. A copy of each warning letter and a copy of the letter of dismissal issued to any employee in accordance with the provisions of this Section shall be sent by the employer to the Central Staff Committee of the Bank concerned for information.

14. Locating the answer to the question posed would require an understanding of the nature of a *summary dismissal* as understood within the context of the prevailing law of general application, the Employment Act, 2007.

15. In terms of section 35(1) of the Act, unless it is a case of *summary dismissal*, the employer is under an obligation to issue a *written notice of termination of employment*, the length of the notice depending on the interval for payment of wages.

16. In the instant case, the Claimant was paid by the month, and therefore the *written notice* required would be at least 28 days, unless the contract provided for a longer period.

17. As to what constitutes a *summary dismissal*, section 44(1) of the Employment Act, 2007 has prescribed that any termination of employment without notice, or with less notice than prescribed by section 35(1) of the Act, (or any other specific statute) which may be applicable would amount to *summary dismissal*.

18. The Court would add to the statutory provisions, any period of notice contractually agreed on.

19. In the instant case, the Court will assume that no *written notice of termination of employment* as contemplated by section 35(1) of the Employment Act, 2007, or clause A5 (d) of the Collective Bargaining Agreement was issued.

20. The Court makes the assumption because none of the parties suggested that such a notice was issued. What were issued were *warnings*.

21. The Claimant here had 2 previous warnings within 12 months and allegedly committed an offence during the *life* of the 2 warnings.

22. A warning, by its nature within the employment relationship, connotes a *sanction* or *penalty* reached after an employee has been taken through a disciplinary process.

23. In the view of the Court, such a *warning(s)* cannot substitute for a *notice of termination of employment*, but would go to establish a *pattern of misconduct* on the part of the employee, and puts the employee on notice that if there are further disciplinary allegations within the prescribed time, the employer would deal with such allegations as serious enough to warrant *summary dismissal*, without further notice.

24. The *warnings*, such as were contractually agreed here were to serve as further grounds upon which *summary dismissal* could be justified in terms of section 44(4) of the Employment Act, 2007.

25. According to the Court, what the parties had done in clause A5(b) of the Collective Bargaining Agreement was to expand the 7 grounds of conduct set out in section 44(4) of the Act by adding on to the *matters* or *conduct* which would attract *summary dismissal*.

26. However, all *summary dismissals* would implicate the requirement of *pay in lieu of notice* pursuant to section 36 of the Employment Act, 2007.

27. As it is, it is the view of this Court is that all *dismissals* without notice would attract the payment of pay in lieu of notice, and the Court finds and holds that the Claimant was entitled to the equivalent of a 1-month salary, in lieu of notice.

Conclusion and Orders

28. The Court finds and holds that the Claimant was summarily dismissed and is entitled to and is awarded

- (a) 1 month pay in lieu of notice **Kshs 144,076/-**

29. No order as to costs as the Claimant was represented by the Union.

Delivered, dated and signed in Nairobi on this 31st day of May 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Munoru, Chief Economist, Banking, Insurance, and Finance Union (Kenya)

For Respondent Ms. Akonga instructed by Macharia-Mwangi & Njeru Advocates

Court Assistant Lindsey