



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 895 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th May, 2019)

JOSEPH ODUOR OTIENO.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent through the firm of Muumbi and Company Advocates seeking damages for wrongful and unfair termination and payment of accrued leave days.
2. He avers that he was employed by the Respondent on 1st April, 2008 to serve in various branches of the Respondent and he was also issued with a letter of appointment. That by virtue of his appointment he was entitled to loan facilities which included personal loans, mortgages, car loans and other facilities at preferential interest rate which he opted for.
3. Sometimes in the year 2014, the Respondent came up with a voluntary early retirement plan whereby it invited its employees to take up a voluntary early retirement package which the Claimant did not take up and continued to serve the Respondent with due diligence and to the satisfaction of the Respondent.
4. That on 24th August 2015, the Respondent purported to suspend the Claimant from duty stating that it was conducting investigations on an alleged fraudulent activity in the Respondent's office. During this period his salary was reduced by half.
5. He contends that he worked diligently and on 13th November, 2015, the Respondent without any notice and without according the Claimant any hearing purported to terminate the Claimant from his employment on grounds of loss of confidence attributed to fraudulent activities. That he was not afforded a hearing before the termination in violation of the rights to fair administrative action, fair labour practices and freedom from their discrimination as enshrined under article 47, 41 and 27 of the Constitution.
6. He avers that at no time during his employment did the Respondent bring to his attention the alleged fraudulent activities save for the letter of suspension from duty.
7. The Claimant avers that he was aggrieved by the said decision and wrote to the Respondent appealing the decision to terminate his employment and seeking reinstatement to which appeal was unsuccessful.
8. He avers that his performance was commendable and to this extent he was given a promotion on 1st June, 2014, which was confirmed on 26th November, 2014.
9. That as a result of his termination he will be unable to continue servicing the loans as the interest rates chargeable on the loans facilities which will revert to market rates which are much higher. He urges the Court to allow his claim and enter judgment against the Respondent for:-

1. A declaration that the Respondent's actions of terminating the Claimant's from employment vide the Respondent's letter dated 13th November, 2015, was unprocedural unfair and unlawful.

2. A declaration that the Respondent violated the Claimant's right to fair administrative action under Article 47, right to fair labour practices under Article 41 and freedom from discrimination under Article 27 of the Constitution of Kenya, 2010 as well as

rules of natural justice.

3. 12 months compensation for wrongful and unfair termination.

4. General damages for violation of fundamental rights and freedoms.

5. Three months' salary in lieu of notice.

6. Payment in lieu of accrued leave days.

7. An order directing the Respondent to issue the Claimants with favourable recommendation letter.

8. Any such other appropriate relief as the Court may deem fit.

9. Costs of this claim plus interest thereon.

10. The Respondent filed a Defence wherein they admit the employment relationship and aver that his suspension was in accordance with the law and as per the Respondent's rules and policies to pave way for investigations.

11. They aver that the Claimant was terminated for reasons that he failed to adhere to professional conduct as far as Bank Guidelines are concerned as well as acting in breach of employment contract and for colluding with other colleagues to defraud the Respondent institution which led to loss of Kshs.2,819,994/=.

12. It is the Respondent's position that the Claimant did go through the disciplinary process where he appealed the decision to terminate him. The Respondent found the review unsatisfactory and went ahead to terminate the Claimant on 30th December, 2015. They urge the Court to dismiss the suit with costs.

Evidence

13. In evidence the Claimant stated that he was appointed by the Respondent on 1st April 2008 vide a letter dated 12th March, 2008 attached to the Memorandum of Claim as Appendix 1. That at the time of termination he was servicing car, mortgage, personal and service loans.

14. That his problems with the bank started when he rejected a voluntary early retirement package. On 24th August, 2015, he was called by his supervisor who asked him whether he was aware about what had happened in the bank to which he responded in the negative. That the supervisor proceeded to hand him the suspension letter.

15. He further stated that he was never called to work again for questioning after he was handed the suspension letter even after investigations were complete. That he was not taken through any process and neither was he reported to the police or charged for any offence.

16. In November 2015, he appealed against the decision to terminate him but the same was not successful even though he was not called to make his representation. The Respondent subsequently terminated him which decision he stated that he appealed against but the appeal was rejected. That he was never presented with any evidence of any fraudulent activities. He urged the Court to allow his claim.

17. In cross-examination, he admitted appearing before a team, which explained why he was on suspension but in his view that did not constitute a disciplinary hearing. Further that he was on suspension for a long time and then he was terminated. That he was not paid any money as any money due went into servicing the loans. That he was not paid any money in lieu of notice.

18. The Respondent on the other hand put up one witness one Stephen Opiyo Obongo the Head of Employee Relations since 1st March, 2018. That an issue arose in the Bank where they had a fraudulent transaction by Amos. In the cause of investigation the said Amos adversely mentioned the Claimant who was then suspended to pave way for investigations. That thereafter the Claimant was invited for a disciplinary hearing and then he was terminated.

19. That the Claimant was issued with a certificate of service and is still servicing the bank loans. In cross-examination, he admitted that there was no letter on record inviting the Claimant for a disciplinary hearing but that the minutes on record prove that there was a hearing in which the Claimant attended.

20. He also admitted that the Report which revealed that Amos mentioned the Claimant adversely was not in Court and that the Respondent never reported the matter to the police. The witness did also not have evidence of paying the Claimant notice pay and leave pay in Court.

Claimant's submissions

21. It is submitted that the Claimant was unfairly and unprocedurally terminated as he was not subjected to a hearing contrary to Section 41 of the Employment Act. That the reasons cited for dismissal is fraudulent activities that the Claimant was allegedly involved in. That committing a criminal offence to the detriment of the employer is one of the grounds for termination of employment set out under Section 44 of the Employment Act, 2007. However that this ground must be proved at the shop floor.

22. The Claimant submits that during the course of his employment the Respondent never brought to his attention any of the fraudulent activity save for the letter of suspension of duty. That this is contrary to the provisions of Section 41 of the Employment Act. They also cite the case of Mary Mutanu Mwendwa Vs Ayuda (2013) eKLR where it was held:-

“The Employment Act, in a radical departure from the position which obtains under the common law and in Kenya prior to 2nd June, 2008 has made it mandatory by virtue of section 41 of an employer to notify and hear any representations an employee may wish to make whenever his/her termination is under contemplation by the employer if the ground for the termination relates to the employee’s misconduct, poor performance or physical incapacity. The employee is by law even entitled to have a representative present.”

23. On whether the Claimant is entitled to reinstatement it is submitted that under Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011, empowers the Court to order for reinstatement. That the Claimant was dismissed on 13th November, 2015, which in their view is within the threshold of time from when he was terminated. That as a result of the termination the Claimant has been unable to secure meaningful employment to date and he is the sole bread winner for his family.

24. On terminal dues, the Claimant cites the Labour Appeal Court of South Africa case of Le Monde Luggage cc t/a Pakwells Petze Vs Commissioner G. Dun and Others, Appeal Case No. JA 65/205 when applying the Labour Relations Act of South Africa held that:-

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a Court is to determine the extent of that loss taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer.”

25. The Claimant prays for three months’ salary in lieu of notice, payment in lieu of accrued leave days, 12 months’ salary as compensation for the wrongful termination and general damages for violation of fundamental rights to the tune of Kshs.3,000,000/=.

Respondent’s submissions

26. The Respondent submits that there was a valid reason to terminate the Claimant. That according to Section 43 as read together with Section 45 of the Employment Act, 2007, it gives an employer an obligation to ensure there is a valid reason that would move a reasonable employer to terminate the employment of an employee therefore rendering the termination fair.

27. That the Claimant’s job was Clearing and Settlement of Operations Analysts, which entailed among other functions assisting the Respondent in its operations involving bank accounts from another bank to another. Having been adversely mentioned during Amos Akonya’s investigations, this in itself raised a negative impact on the Claimant, which was not taken rightly by the Bank as he compromised the position of trust bestowed upon him. They cite the case of Agnes Murugi Mwangi Vs Barclays Bank of Kenya Limited (2013) eKLR where the Court rendered itself thus:-

“...Banks are in the business of handling other people’s money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face.”

28. It is further submitted that the Claimant was aware of the disciplinary proceedings against him. The Respondent relies on the assertion that on 24th August, 2015, the Claimant was suspended from duty which fact is not disputed. That the details of the charges against the Claimant were somehow within the Claimant’s knowledge. That in lieu of this, the Respondent submits that it followed due process as required by law.

29. The Respondent submits that the Claimant is not entitled to damages for reasons that the claim for three months’ notice pay is against the employment contract, which provides for one month’s notice under Clause 12 thereof. That indeed notice was given and the Claimant was paid one month’s salary in lieu of notice which is evidenced by the payment of tax obligations to Kenya Revenue Authority which amount was factored in and necessary deductions were made by the employer regarding this payment.

30. The Respondent cites the case of Kenya Oilfield Services Ltd vs Peter Njoroge 1985 which was relied upon in the case of Geoffrey Mwangi Wanjohi versus Mitchell Cotts Kenya Limited (2002) eKLR where the Court in discussing damages stated:-

“The law is well settled that when the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. Where there exists no termination clause the measure of compensation is for the reasonable period of notice depending on the nature of employment.”

31. That the law on general damages is well settled and thus they are not recoverable. The Respondent urges the Court to dismiss the suit with costs.

32. I have examined all the evidence and submissions of the Parties. The issues for this Court’s determination are as follows:-

- 1. Whether the Respondent had valid reason to terminate the services of the Claimant.***
- 2. Whether due process was followed before the Claimant was terminated.***

3. Whether the Claimant is entitled to remedies sought.

33. On the 1st issue, reference is made to the Claimant's letter of termination dated 13.11.2015 which sets out the reason for the termination as being loss of confidence or being reasonably and sufficiently satisfied that he was involved in a fraud that resulted in the bank losing 2,819,994/=.

34. Prior to this termination, the Claimant was placed on suspension vide a letter dated 24/8/2015 on account of being mentioned adversely in fraudulent activities. The suspension letter did not mention which fraudulent activities the Claimant had been mentioned in or who had mentioned him. He was informed that once investigations were completed and a decision made on the matter, he would be suitably advised.

35. The Respondent have averred that the Claimant participated in fraudulent activities but they have not proved the fraudulent activities in question nor how the Claimant is linked to loss of Kshs.2,819,994 as alleged in the letter of termination.

36. Section 43 of the Employment Act states as follows:-

1. "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

37. The law envisages that the Respondent should prove the reasons for the termination are valid. The Respondent have however not shown that they had valid reasons to terminate the services of the Claimant.

38. On the issue of due process, the Claimant told the Court that he was not given a chance to be heard.

39. The Respondent on their part indicated that the Claimant was given a fair hearing. The Respondent annexed some minutes to indicate that they conducted a disciplinary hearing for the Claimant.

40. I have looked at the alleged minutes for the meeting held on 23/10/2015. There is nothing in the meeting to show that the Claimant attended the meeting as the names of the people who attended the meeting are indicated. It is indicated in the meeting that the staff concerned for discussion were Joseph Otieno and Christopher Odhiambo.

41. There is no evidence in the minutes that the Claimant attended and was able to defend himself. The minutes fall short of minutes of a disciplinary hearing, which should indicate the nature of the charges against the Claimant and his responses thereto.

42. There is also no indication that the Claimant had been invited for any disciplinary hearing. The disciplinary hearing envisaged is as provided under Section 41 of Employment Act 2007 which states as follows:-

"(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 a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision 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".

43. The minutes as shown do not indicate that Section 41 of Employment Act was followed. There is no indication that the Claimant was given notice of the hearing nor was asked to call his witnesses. It is therefore my finding that the Claimant was not accorded fair hearing.

44. Section 45 (2) of Employment Act 2007 states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

45. Given that there were no valid reasons to terminate the Claimant's services nor an indication that he was accorded due process, I find the termination of the Claimant unfair and unjustified.

46. In terms of remedies sought, I exercise my discretion and award the Claimant 8 months' salary as compensation for the unfair termination.

47. I also award the Claimant 1 months' salary in lieu of notice.

48. The total awarded to Claimant is $8 \times 103,454 = 827,632$ plus 103,454 notice = **931,086/=**.

49. I also direct that the Respondent issue the Claimant with a Certificate of Service.

50. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 28th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kiprotich for Claimant – Present

Wanjiku Nyaga for Respondent – Present