



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2165 OF 2014**

**GODRICK OTIENO KAJWANG?.....1<sup>ST</sup> CLAIMANT**

**ANDREW OTIENO OWINO.....2<sup>ND</sup> CLAIMANT**

**- VERSUS -**

**DIAMOND TRUST BANK KENYA LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> May, 2019)

**JUDGMENT**

The claimants filed the statement of claim on 05.12. 2014 through their trade union - the Banking Insurance and Finance Union. Mr. Isaiah Munoru appeared in that regard. The claimants alleged unfair termination of employment. They prayed for judgment against the respondent for:

- 1) The termination of claimants' service was procedurally and substantively wrongful and unfair.
- 2) The claimants are reinstated to their former positions or equivalent without loss of any benefits and break in years of service as the claimants are young, energetic and the employer has several branches to post them.
- 3) The claimants are paid for all salaries lost for all the months they have been out of employment to the date of judgment (actual pecuniary damage).
- 4) The claimants are paid 12 months gross salary compensation for suffering unfair termination.
- 5) The claimants be paid all the underpayments under the CBA for 1<sup>st</sup> claimant amounting to Kshs. 3, 809, 085.00 and the 2<sup>nd</sup> claimant Kshs. 1, 902, 013.00.
- 6) The respondent to adjust the terms and conditions of service to be as provided for in the collective bargaining agreement.
- 7) Interest on the above until full payment.
- 8) The costs of the claim.
- 9) Any other relief the Court deems fit to grant.

The respondent filed the memorandum of reply on 18.01.2018 through Oraro & Company Advocates. Mr. Chacha Odera Advocate and Ms. Anne Kadima Advocate appeared in that behalf. The respondent prayed that the claimants' suit be dismissed with costs.

There is no dispute that the respondent employed the claimants. The 1<sup>st</sup> claimant was employed on 17.09.2008 and the 2<sup>nd</sup> claimant on 10.06.2009. At the material time the claimants were deployed to serve at the respondent's mail registry.

The claimants' case is that on 28.02.2014 the 2<sup>nd</sup> claimant received the letter about the check-off forms signed by respondent's employees that had been recruited by the trade union. The letter was addressed to the respondent's Human Resource Manager (HRM). The 2<sup>nd</sup> claimant acknowledged receipt of the letter and gave it to the 1<sup>st</sup> claimant who recorded it in the register of received mails.

On 10.03.2014 each claimant received a show-cause notice. It was alleged that they had opened a mail addressed to the HRM under private

and confidential cover. The letter stated that the same amounted to breach of the respondent's confidentiality policy and procedures putting the claimants' integrity and honesty to question. The claimants were to reply by close of 10.03.2014. The claimants replied by their respective letters dated 10.03.2014. They explained that the letter had been addressed to the HRM, it was not under private and confidential cover, the person delivering it demanded acknowledgment of receipt of the letter. As per practice, the letter being not addressed as private and confidential the claimants opened it and acknowledged as was demanded by the person who delivered it. Further, they explained that had it been that it had been addressed private and confidential, then they would not have opened it at all. Further the letter had been received from the client unsealed. Each claimant received a letter of summary termination on the same day 10.03.2014 on account of the allegations in the show-cause notice. The claimants claim their termination was unfair and unlawful. They appealed on 12.03.2014 and the appeals were considered and disallowed on 13.03.2014.

The Court has considered the pleadings, the evidence and submissions on record.

To answer the **1<sup>st</sup> issue** for determination, the Court returns that the termination was unfair in substance and procedure. Whereas the claimants were given the notice as per section 41 of the Employment Act, 2007, they were not accorded a hearing as prescribed in the section. The Court considers that the hearing would have helped to verify the written replies to the show-cause letters and which remained unchallenged. Further, the respondent failed to establish that the letter had been sealed and addressed to the HRM under private and confidential cover. The Court finds that there is no reason to doubt the claimants' evidence that the letter was not sealed, and even if it was sealed, it was not addressed under private and confidential cover. They received it and conveyed it to the HRM as required. Further, the respondent failed to successfully challenge the claimants' assertion that if a letter was not addressed under private and confidential cover, then by practice the claimants were entitled to open it. Thus the Court returns that the reason for termination was not fair because it was not established that it related to a breach of the respondent's operational requirements. The reason for termination was not genuine or fair as envisaged in section 43 and 45 of the Act. While making that finding the Court finds that whereas the claimants urged that the dismissal was on account of joining the union, the same was not raised in replies to the show-cause notices or appeals and as submitted for the respondent, the same was unfounded as an afterthought.

The **2<sup>nd</sup> issue** for determination is whether the claimants are entitled to the remedies as prayed for. The Court finds as follows:

a) The claimants were unfairly dismissed. The Court has considered their previous clean record of service. They desired to continue in employment. They expected to continue in employment for several years to come. The Court has considered the respondent's evidence and submissions and there is no established or specific mitigating factor in favour of the respondent. However, the Court has closely analysed the evidence and finds that whereas indeed there was no evidence that the letter was not addressed under private and confidential cover, the claimants were contradictory in saying it was not sealed and then again saying that they opened it as it was not so addressed and in view of the client's demands that they acknowledge the receipt thereof. The Court considers that such contradiction was contributory as an impetus towards the dismissal. Accordingly, under section 49 of the Act, each is awarded 10 and not 12 months' pay in compensation for the unfair termination. The **1<sup>st</sup>** claimant is awarded Kshs. 64, 154.00 x 10 making **Kshs. 641, 540.00** and the **2<sup>nd</sup>** claimant Kshs.59, 089.00 x12 making **Kshs.590, 890.00**.

b) The claimants made no submissions on the prayer for reinstatement and the same is deemed abandoned. Further, as submitted for the respondent, under section 12 of the Employment and Labour Relations Court Act, the 3 years as bar to reinstatement have accrued and the reinstatement is no longer available. Further, as submitted for the respondent, an award of compensation as already granted should sufficiently meet ends of justice in the present case.

c) As submitted for the respondent the claimants are not entitled to pay for days they have been out of work. In particular the claimants have not made justification for such pay and the Court considers that in the present case nothing has been established and attributable to the respondent that may have hindered the claimants from engaging in gainful employment or activities. The respondent's submission that the award if made will amount to unjustified and potential exploitation of the employer in the circumstances of the case is hereby upheld. The prayer will fail.

d) As submitted for the respondent, the claimants were not members of the trade union and they had just been recruited in 2014 and the check-off letter delivered to the claimants and subject of the show-cause notices is the same letter by which the claimants had joined the union. The Court considers that section 59(3) of the Labour Relations Act, 2007 provides that the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement and, it is the Court's opinion that an employee is so covered effective the date of joining the union. Accordingly, the prayers based on the collective bargaining agreement will fail. As submitted for the respondent, the claimants were bound by the terms and conditions of service in the contracts they had executed individually.

In conclusion judgment is hereby entered for the claimants against the respondent for:

- 1) The declaration that respondent's termination of claimants' contracts of employment was procedurally and substantively wrongful and unfair.
- 2) The respondent to pay **1<sup>st</sup>** claimant **Kshs. 641, 540.00** and the **2<sup>nd</sup>** claimant **Kshs.590, 890.00** by 01.07.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimants' costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 17<sup>th</sup> May, 2019.**

**BYRAM ONGAYA**

JUDGE