



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 695 OF 2017

ANITA VERA MAKAYOTO.....CLAIMANT

-VERSUS-

BARCLAYS BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim founded on alleged unfair termination of employment contract. It was brought on 11.4.2017 and it seeks the following reliefs

- a. Kshs.1,400,833.00
- b. Cost of the suit
- c. Interest on (a) and (b) above at commercial rates of 20%
- d. Any other and/or further reliefs that this court may deem fit and just to grant in the circumstances.

2. The respondent filed defence on 16.10.2018 denying the alleged unfair termination of the claimant's services. On the contrary, she averred that the termination was fairly done for a valid reason, namely, under performance, and the claimant was accorded capability hearing before the termination. She further averred that after the termination, she paid the claimant all her lawful dues. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 25.3.2019 when the claimant testified alone and the respondent called her former Head of Employee Relations Mr. Vaslas Odhiambo as her only witness. After the hearing, both parties filed written submissions.

Claimant's case

4. The claimant testified that he was employed by the respondent for a 2 year contract running from January 2014 to December 2015. That due to her good performance she was offered another 2 years contract from 1.2.2016 to 31.1.2018 in the position of Customer Service Advisor at a salary of Kshs.717,240 p.a.

5. She further testified that she worked well without receiving any complaints about her performance because she was always meeting her targets. However, on 21.1.2017 she was served with show cause letter and on 8.2.2017, she and her colleagues, who had received numerous warning for under performance, were summoned for capability hearing after which she was dismissed from service. She contended that the termination was discriminatory because she was treated unequally. She further contended that the capability hearing was not provided in her contract of service.

6. She further testified that her Job Description was Teller paying money to clients and receiving deposits both under the first contract and the second contract. That the key performance indicators was the volume of transactions handled but in 2016, a new parameters which were not part of her contract and service were introduced whereby, sales were given a bigger score. She was henceforth required to refer to the sales Personnel 4 loans, 2 credit cards, 2 bank Assurance and 2 new accounts per month.

7. She further contended that the capability was not done fairly because the names of the panelist indicated in the invitation letter was changed without prior notice and as such she become nervous and here presentation was affected. That her colleague Mr. Samuel Mburu's panel was not changed. She further contended that other colleagues, who were described as underperforming like Samuel Mburu, were not

terminated with and as such, felt discriminated against.

8. She further testified that her contract was terminated one year before its expiry date and prayed for reliefs set out in her claim because the termination was unfair and wrongful.

9. In cross examination, the claimant admitted that after the expiry of her first contract she was paid all her dues and she had no issues regarding that contract. She further admitted that she was given capability hearing before her second contract was terminated for under Performance. She however described the hearing as unfair. She also admitted that before the said hearing she had been served with a show cause letter and responded thereto stating that she met some of her parameters. She also admitted that the targets were agreed between her and her supervisor.

10. She further admitted that she underwent performance appraisal before a panel from the HR in relation to her work, her personal relations with other employees and attitude. She however maintained that she was not made aware that the performance appraisal was to lead to disciplinary action. She admitted that she scored 2 out of possible 5 overall which was below expectation and the rating was under performance.

11. She admitted that she had no evidence about Mr. Samuel Mburu's rating. She further admitted that she never mention him in her pleadings or written statement. She further admitted that she never protested against the change of the panel that handled her capability hearing. She however contended that she would have performed better before the panel which she had been notified via the invitation letter. She confirmed that she was accompanied by a union official to the hearing who also never protested against the change of the panel. She further confirmed that she never appealed against the decision of the panel that rated her as underperforming.

12. She admitted that the contract of service provided for a premature termination by a notice and that after the termination he was paid one month salary in lieu of notice.

13. In re-examinations, she maintained that apart from being invited to the capability hearing she was not told the consequences of the said hearing. She further contended that she saw the name of Samuel Mburu in the Dashboard, which was periodically posted by email to all staff countrywide in which Mr. Mburu was below her in the performance rating. She maintained that her termination was unfair and prayed for compensation.

Defence Case

14. Mr. Vaslas Odhiambo works for the respondent as the Head of Employee Relations since November 2016. He testified as Rw1 and basically relied on his written statement and the documentary evidence filed by the respondent. He confirmed that the claimant was employed by the respondent as a cashier for a 2 years contract running from 23.1.2014 to 24.12.2015 based at the Queensways Branch Nairobi. That after the expiry of the contract the claimant was given another contract for 2 years to serve as Customer Service Advisor from 1.2.2016.

15. Rw1 further testified that in line with the bank's policy, the claimant was expected to undergo performance appraisal based on performance targets agreed between her and her line Manager. That in the year 2016, the claimant performed below expectation and she was rated as underperforming. As a result, she was served with a show cause letter dated 21.1.2017 to which she responded by letter dated 24.1.2017 stating that she did not clearly understand her performance targets in 2016 in the CLM digital channel but after discussing the matter with her Line Manager, she was able to understand and as such promised to improve in the year 2017.

16. Rw1 further testified that the respondent was not satisfied with the said response and invited her for capability hearing in company of her union representative on 21.2.2017. That the claimant attended the hearing with Mr. Boniface Lugadiri, a union representative and after the hearing the panel observed that the claimant had no understanding of her performance objectives and could not articulate what was expected of her; she had no clear strategy on how to change her position; she did not seem enthusiastic towards her work, which contrasted her strong performance in 2014-2015 contract; and finally, there was gap in her attitude and she lacked understanding of the How (execution)side of performance.

17. As a result, the panel recommended for the termination of her services and the same was effected through the letter dated 8.3.2017 on ground of poor performance. That she never appealed against the termination within the 10 days period granted by the termination letter. The letter also set out the benefits payable to her including one month salary in lieu of notice, salary for the days worked, outstanding leave and pension which were duly paid to her in addition to issuance with a Certificate of Service.

18. Rw denied that the claimant was discriminated against and maintained that she was treated fairly in accordance with the respondent's Disciplinary and Grievance Tool Kit and the provisions of the Employment Act. He concluded that the respondent had a valid ground for terminating claimant's employment and fair procedure under section 41 of the Act was followed and as such the termination was fair and the suit should be dismissed.

19. Rw1 contended that although the claimant had the right to object to change of the panel constituted to hear her case, she and her union official never did so, and after the hearing, they read through the minutes and signed voluntarily.

20. In cross examination Rw1 admitted that he was not in the panel that heard the claimant but contended that he interacted with the documents that come from the case. He confirmed that the first contract for the claimant was for a cashier but the second contract was for Customer Service Advisor. That the second contract was distinct from the first one and the claimant understood its terms and signed it. That in the second contract the claimant was doing sales and advising clients to see Sales Personnel for loans.

21. He further stated that the mid year appraisal was meant to alert employees on their performance rating and assist them to improve. He confirmed that during the first 2 years contract the claimant performed well and she was given the second contract in which she performed below expectation. He contended that the panel to hear the claimant was changed 100% due to eventualities. He contended by stating that the claimant was aware of her low performance rating through the Dash Board.

Analysis and Determination

22. There is no dispute that the claimant was employed on a 2 years contract from 1.2.2016 but her services were prematurely terminated on 8.3.2017. The issues for determination are:-

- (a) Whether the termination of the contract was unfair
- (b) Whether the claimant is entitled to the reliefs sought.

Whether termination was unfair

23. Termination of employment is unfair if it is not grounded on a valid and fair reason and the procedure followed is not fair. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employers operational requirements. On the other hand, fair procedure involves but not limited to granting the employee fair hearing before the termination decided.

Reason for termination herein

24. The reason cited for the termination of the employment contract herein was poor performance by failing to meet the agreed targets. The claimant denied the said reason as invalid and contended that she was discriminated against by being treated differently from colleagues who were rated below her including Mr. Samuel Mburu who was not dismissed like her. She further contended that the targets she was accused of not meeting were not part of her job description as a teller.

25. The respondent contended that the claimant performed well as a cashier during her 2 years contract between January 2014 and December 2015 but upon signing a new contract as a Customer Service Advisor in February 2016, she performed dismally despite the mid-year performance appraisal which is done to assist the employees to improve on their performance. As a result she was served with show cause letter dated 21.1.2017 to which she responded by letter dated 24.1.2017 stating that she did not understand the performance targets but promised to improve in 2017 because the targets had now been explained to her by her Line Manager.

26. I have carefully considered the evidence and the submissions and found that the respondent has proved on a balance of probability that the claimant had failed to perform her duties as Customer Service Advisor as expected. She produced the contract letter dated 24.12.2015 indicating her job title as Customer Service Advisor. She signed acceptance to the said letter confirming that she had read and understood the terms therein and accepted the same.

27. The respondent further produced as exhibits copies of performance Appraisal forms dated 6.7.2016 and December 2016 in which the claimant was rated as underperforming. She further produced the claimant's response to the show cause letter where she stated as follows:-

“First I had a discussion with my Line Manager on my end of the year performance and key point that was noted was that I did not clearly understand my performance targets in the year 2016 on CLM and Digital Channels.

After the discussion, I was able to understand the measurables on my score card and I have placed myself in the right track to achieve and exceed year 2017 targets...

Having understood what is expected of me I plan to change my performance for better this year of 2017.”

28. The respondent further produced as exhibits, the minutes of the capability hearing which shows that the claimant admitted again that she did not understand are performance targets. All the said exhibits, support the view that the claimant did not understand her performance targets and consequently she never achieved them. That was the verdict reached by the panel that heard her case and recommended for her dismissal. Consequently, I return that the respondent has proved on a preponderance of evidence that she had a valid and fair reason under section 44(4) (c) of the Employment Act for terminating the claimants services.

29. The said provisions entitles the employer to dismiss his employee summarily if the employee carelessly or negligently performs her work, which was her duty under the contract of service to have performed the same properly. Although the claimant contended that she was measured on roles which were outside her employment as a teller, the letter of appointment dated 24.12.2015 clearly stated her job title as Customer Service Advisor. The said contract was distinct from the expired contract in which she was appointed a Cashier (Teller).

Procedure followed

30. The claimant contended that she was denied a fair hearing because the panel which was to hear her case was substituted by another one and as such she became nervous. The respondent has however contended that the claimant never protested the changes on the panel nor did her union representative protest. She also signed the minutes after the hearing without any objection and thereafter never challenged the proceedings on appeal.

31. After careful consideration of the evidence and submissions, I find that the respondent has proved that the procedure she followed before dismissing the claimant was in accordance with equity and justice. The claimant was taken through mid-year performance appraisal where she was rated as underperforming and given room to improve. That at the end of the year, she was taken through another performance appraisal but she was found to have again performed poorly. Thereafter she was served with a show cause letter to defend herself in writing and thereafter invited to an oral hearing in the company of her union representative. Finally, she attended the oral hearing with her union representative where she defended herself.

32. Under section 41 of the Employment Act, the employer is required, before dismissing his employee for poor performance, to first explain the reason to the employee in a language he understands, and in the presence of a fellow employee or shop floor union official of his choice and thereafter invite the employee and his companion to air their representations which must be considered before the termination is decided. In this courts view, the employer complied with that statutory provision and as such, I return that the employer has proved that she follows a fair procedure before dismissing the claimant.

33. Having found that the employer has proved on a preponderance of evidence that she had a valid reason for dismissing the claimant and that she followed a fair procedure, the court finds and holds that the premature termination of the claimant's 2 year contract was fair and lawful within the meaning of section 45 of the Employment Act.

Reliefs

34. In view of the foregoing finding, the claim for compensation for unfair termination under section 49(1) of the Employment Act is dismissed. Likewise, the claim for salary for the remainder of the contract period of 11 months is dismissed because the termination was fair and secondly because the contract of service permitted termination by notice or cause before the expiry dated.

35. The claim for Benefits for 11 months and continuity are also dismissed for lack of particulars and evidence. In any case, the claimant never disputed the allegation by the respondent that she was paid her terminal due plus pension. Finally, the claim for salary for 8 days worked in March is dismissed because the uncontested evidence by the respondent is that the same was paid.

36. In conclusion, the court finds that the suit lacks merits and it is dismissed. Each party to bear her own costs.

Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019

ONESMUS N. MAKAU

JUDGE