



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 98 OF 2015

(Before Hon. Justice Mathews N. Nduma)

DMA..... CLAIMANT

VERSUS

CHASE BANK KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 25th March 2015, in which the claimant prays for a declaration that the claimant's termination of employment is illegal, unconstitutional, discriminative, null and void ab inito

- (i) Special damages
- (ii) General damages
- (iii) An order for reinstatement
- (iv) Costs of the suit.

2. The respondent filed a statement of defence on 21st May 2015 and the claimant joined issues with the respondent in a reply to the defence filed on 10th June 2015.

3. The claimant testified under oath as CW1 that she was presently a house wife. That she worked for the respondent from 15th January 2013. That she recorded a witness statement filed on 3rd March 2018 and adopted the same as her evidence in chief. CW1 stated that she was single when she was employed and filed a personal details form to that effect. The form was produced by the respondent. The claimant was confirmed on permanent and pensionable terms on 29th October 2013. CW1 testified that she worked for the respondent until 11th February 2015 when her employment was terminated. At the time the claimant was 24 years old and earned Kshs. 62,400. CW1 testified that the retirement age of respondent's employees was at 60 years old. That CW1 was yet to serve a further 36 years to date of retirement.

4. The claimant produced the letter of termination dated 11th February 2015.

5. The reason for termination stated in the letter is that the respondent had received a complaint in a letter dated 16th January 2015 by a director of a company banking with the respondent. The said director had complained that the claimant had an intimate relationship with the said director's husband.

6. The claimant was served with a show cause letter and she confirmed that the alleged person was married to her and they had a child together.

7. CW1 testified that the respondent accused her of providing false marital status to the respondent at the time of employment. CW1 stated in her testimony that her relationship with the alleged client was always professional and above board. CW1 admitted that she was legally married to the other Director of the said company Mr. Vincent Marube and they had a son.

8. CW1 denied that she had breached clause 2.2.2.1 of the Bank's Talent and OD Policy which provided that:

"Chase Bank discourages its employees from engaging in intimate relations with each other and or with a customer/s of the Bank",

and clause 2.2.4.1 which provides that Chase Bank employees should have honest and dignified relations with their customers and suppliers in their business relations.

9. CW1 testified that she worked at the customer service desk and did internal transfers and issued credit cards amongst other duties.

10. CW1 stated that she started living with Mr. Vincent Marube as man and wife from April 2013 and that at the time she filled the employment form on 14th January 2013 they were not married yet.

11. CW1 admitted that the said Vincent was also married to the complainant M/S Isabella. CW1 stated that she did not make an application to amend her marital status in the employment records. CW1 admitted that she was aware Mr. Vincent was a director of a company that had an account in the bank. CW1 stated that she was not aware of clause 2.2.2 and 2.2.4 on personal relations with employees and customers. CW1 said she was not aware if Isabella was still married to Vincent. CW1 stated that they had been given extracts of the policy document but not the whole document. That the extract given to her did not have clauses 2.2.2 and 2.2.4. CW1 stated that when she met Vincent, she did not know that he was married. CW1 added that she served the respondent diligently and did not have any adverse record prior to the events that led to the termination of her employment.

12. CW1 claims special and general damages for the unlawful termination of her employment.

13. RW1 Fredrick Odhiambo Opas testified for the respondent. RW1 stated that he was a regional manager Western Region. RW1 relied on a witness statement dated 21st February 2019 as his evidence in chief. RW1 produced the personal details form filed by the claimant upon her employment. The form is dated 15th January 2013. At clause 7 of the form, the claimant filled her marital status was 'single' and under clause 8 filled that she had no spouse. RW1 testified that CW1 did not later communicate her new marital status. RW1 had received a complaint from Isabella dated 16th January 2015 which triggered the show cause letter, response to show cause letter and the termination. RW1 stated that a disciplinary hearing was held and the bank decided to terminate the employment of the claimant for breach of code of conduct clause 2.2.2; 2.2.3 and 2.2.4. RW1 confirmed that there was no complaint against CW1 regarding her work performance. RW1 stated that there was no clause in the policy document which required employees to report their changed marital status. RW1 stated that the respondent had no form for changing marital status. RW1 stated that there was no proof that her marriage to Vincent had affected her work in any manner. RW1 admitted that his wife could open an account in the branch where he served. RW1 stated that they did not offer CW1 the option of moving to another branch of the bank.

Determination

14. The issues for determination in this matter are:

(i) Whether the respondent had a valid reason to terminate the employment of the claimant and whether the respondent followed a fair procedure in doing so.

(ii) Whether the claimant is entitled to the reliefs sought.

Issues (i) and (ii)

15. The court shall deal with the two issues simultaneously. The facts of the case are not in dispute. The simple facts of the case are that the claimant was employed by the bank on 15th January 2013. At the time of her employment the claimant was not married and therefore filled an employment details form on the said date indicating that she was single.

16. It is not in dispute that the marital status of the claimant subsequently changed in April 2013, when she started living with one Vincent, a director of a company that had an account with the respondent bank at the Kisii branch where the claimant worked.

17. It is also not in dispute that one Isabella, a co-director of the said company filed a complaint with the Bank on 16th January 2015, complaining that the claimant had an intimate relationship with her husband who was a co-director of the customer, company.

18. It is important to note that this complaint is made about two years from the date CW1 stated she started living with Vincent in April 2013.

19. RW1 did not contest the fact that CW1 was legally married to one Vincent RW1 and therefore the respondent was aggrieved by the fact that CW1 did not subsequently disclose her new marital status to the respondent. RW1 conceded under cross examination that the respondent had no written policy regarding employees to record their changed marital status with the bank. RW1 further admitted that the Bank had no standard form for change of marital status of employees after their employment. RW1 admitted that there was nothing wrong with his own wife opening an account with the Bank and at the same branch where he worked. RW1 admitted further that the claimant had not done anything wrong in her work except in his view the failure to disclose her marriage to a customer. There was no policy produced before court regarding marital relationship between an employee and a director of a company that had an account with the bank. RW1 did not adduce any evidence to show that the relationship between the claimant and Vincent had accorded any benefit over other customers in the bank. There is absolutely no evidence that anything adverse arose from the said relationship.

20. It is the court's finding that the respondent has not satisfied the requirements of *Section 43 of the Employment Act, 2007*, by proving that it had a valid reason to terminate the employment of the claimant. To the contrary the claimant has discharged the onus under *Section 47(5) of the Act*, by establishing that the termination of her employment was wrongful and was not for a valid reason. That the bank overstepped its mandate and delved in a marital dispute between two spouses of Mr. Vincent.

21. Accordingly, the termination of employment of the claimant was unlawful and unfair and in violation of *Sections 43 and 45 of the Employment Act, 2007*.

22. The claimant has however not proved any violation of constitutional provisions with regard to discrimination. No such evidence was adduced before court.

Remedies

23. Having found that the termination of the employment of the claimant was wrongful, unlawful, and unfair, the court finds that the claimant is entitled to remedies in terms of *Section 49(1), (2), (3) and (4) of the Act*.

24. In this regard, the claimant was only 24 years at the time of termination. The claimant's potential of a glowing career in the banking industry for the next 36 years up to date of retirement was unlawfully curtailed. The claimant did not contribute to the loss of her employment. The claimant had not committed any offence related to her work and therefore there is no reason for a sore relationship between the claimant and the bank. The claimant wishes to be reinstated to her job since she has not found any employment do date. The claimant did not however adduce evidence to demonstrate efforts she has made to get alternative employment. The claimant seeks general and special damages in the alternative. The claimant did not prove any special damages suffered by her as a result of the termination. It would appear that the bank paid all her terminal benefits upon termination since none is pleaded.

25. The claimant however claims damages equivalent to the lost income for the 36 years not worked till retirement age of 60. This claim cannot constitute special damages. It is erroneously pleaded and not proved.

26. With regard to the common law principal not to award an order of specific performance in a contract for service except in very exceptional circumstances, the court notes that the claimant lost her job purely for getting married to a man she loved and with whom she had a child. The respondent admitted that the claimant had done absolutely nothing wrong in relation to performance of her work. The respondent did not adduce any evidence at all to show why the claimant ought not to be reinstated or re-engaged to her work. The court notes how scarce jobs are in the banking industry especially once a person has a record of termination from one bank. That record has the potential of denying the claimant re-entry to the banking industry forever. There is no evidence that the respondent compensated the claimant for the loss of her job. There is no evidence that the claimant was granted any ex-gratia payment in respect of the termination.

27. The court is aware that at least four (4) years have elapsed since the termination took place. The court is aware of the requirement under *Section 12 of the Employment and Labour Relations Court Act, 2011* as amended not to reinstate an employee upon expiry of three years. The court notes that the delay in concluding this matter is not the making of the claimant nor the respondent but the backlog of cases pending in our courts. The court is aware of a Court of Appeal decision where the court granted reinstatement to an employee after expiry of three years period.

28. Considering all the circumstances of this case, the court considers this an appropriate case for the respondent to re-engage the claimant in work comparable to that in which the employee was employed prior to her dismissal or other reasonably suitable work, at the same wage in terms of *Section 49(3) (b) of the Employment Act 2007*.

29. In the final analysis, the respondent and/or its successor in business is directed to re-engage the claimant in work comparable to that in which she was employed prior to her dismissal or other reasonably suitable work, at the same wage and terms and conditions of service forthwith and in any event within 60 days of this judgment. The respondent to meet the costs of the suit.

Judgment Dated, Signed and delivered this 19th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Nyabega for claimant

Mr. Ogeto for Respondent.

Chrispo – Court Clerk