



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2194 OF 2014

CAROLINE WANJIKU KIMARU.....CLAIMANT

VERSUS

FAMILY BANK LIMITED.....RESPONDENT

JUDGMEN

1. Caroline Wanjiku Kimaru (Claimant) instituted legal proceedings against Family Bank Ltd (Respondent) alleging *constructive dismissal* and breach of contract.
2. In a *Statement of Response* filed on 17 February 2015, the Respondent contended that the Claimant was summarily dismissed for lawful cause and that there was no breach of contract on its part.
3. On 28 June 2017, the Claimant filed an *Amended Statement of Claim* to introduce a head of claim for special damages, and the Respondent filed an *Amended Memorandum of Response* on 17 July 2017.
4. The Claimant filed a Reply to the *Amended Memorandum of Response* and the Cause was heard on 29 May 2019 and on 15 July 2019. The Claimant and the Respondent's Head of Security testified. The witnesses produced exhibits and adopted their filed witness statements.
5. Although the Court directed the parties to file *Agreed Issues*, different sets of Issues were filed.
6. The Claimant's submissions were not on file by this morning while the Respondent filed its submissions on 27 August 2019.
7. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as examined hereunder.

Unfair termination of employment or constructive dismissal?

8. The Claimant was issued with a summary dismissal letter dated 15 January 2014, and therefore it is the view of the Court that this was not a case of *constructive dismissal*.

Procedural fairness

9. Section 35(1)(c) of the Employment Act, 2007 contemplates written notice of termination of employment unless it is a case of *summary dismissal* in terms of section 44(1) of the Act.
10. The written notice, therefore, did not apply in the instant case.
11. However, in terms of section 41(2) of the Employment Act, 2007, a hearing is mandatory in cases of summary dismissal.
12. Prior to the summary dismissal of the Claimant, the Respondent had discovered certain erroneous transactions and it called the Claimant for a meeting around 8 August 2013.
13. In the meeting, it was proposed that the Claimant reimburse the lost amount of Kshs 580,500/-, and in default to be charged with a criminal offence.
14. The Claimant was requested to give a commitment on how she would repay the Kshs 580,500/- and in a letter dated 7 December 2013,

she indicated that she could not repay the money within 3 days.

15. The summary dismissal letter was thereafter issued on 15 January 2014. The letter cited section 44(4)(g) of the Employment Act, 2007.

16. On why she was contending that the dismissal was unfair, the Claimant testified that upon request, she went to the Respondent's Head Office on 11 December 2013 and was instructed by the Security Office to record an incident report after which she was arrested and placed in custody, charged in Court, and that she was eventually acquitted. She stated that she was denied access to the workplace after release.

17. The Claimant testified that she was not issued with a show cause notice or subjected to a disciplinary hearing.

18. It is in the public domain that the Respondent operates a banking business.

19. Although there was no explicit evidence that it has a disciplinary policy as required by section 12 of the Employment Act, 2007, the Court would have expected at the very least that the Respondent would disclose the date, venue and particulars of the persons who may have afforded the Claimant an opportunity to be heard before the decision to dismiss was taken.

20. If the hearing took a formal context, no minutes of such a hearing was produced.

21. The Court, therefore, agrees with the Claimant that she was not afforded an opportunity to be heard as envisaged by section 41(2) of the Employment Act, 2007.

22. The Court in the circumstances finds that the summary dismissal of the Claimant was procedurally unfair.

Substantive fairness

23. With the conclusion on procedural fairness, it is not necessary for the Court to examine whether the Respondent discharged the burden placed on it by sections 43 and 45 of the Employment Act, 2007.

Compensation

24. Compensation is a discretionary remedy.

25. In the view of the Court, this is not a suitable case to award compensation considering the circumstances under which the Claimant was dismissed.

Salary in lieu of notice

26. Since the Court has concluded that the Respondent did not comply with the requirements of section 41(2) of the Employment Act 2007, it would award the Claimant the equivalent of 1 month salary in lieu of notice (salary was Kshs 48,000/-).

Breach of contract

Unpaid statutory dues

27. The Claimant did not particularise or prove the statutory dues she was not paid.

28. The Court finds that this head of claim was not proved.

Salary for October to December 2013

29. The Respondent produced records to show that the Claimant was paid salaries from October to December 2013.

30. Consequently, the Court finds there was no breach of contract with respect to payment of the salaries.

Unpaid leave days

31. The Claimant did not lay any evidential foundation to this head of claim and it is declined.

Special damages

32. The Claimant sought Kshs 300,000/- said to have been fees paid to a firm of advocates to defend her in the criminal case. Apart from producing a fee note, the Claimant did not produce any evidence that she paid the fees.

33. The Court, therefore, declines to award the special damages.

Conclusion and Orders

34. The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards her

(i) Pay in lieu of notice **Kshs 48,000/-**

35. The Court declines to award compensation or any of the other reliefs sought.

36. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 8th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms Sinana instructed by Denis Anyoka Moturi & Co. Advocates

For Respondent Mr Kibicho/Mr. Ngige instructed by J.K. Kibicho & Co. Advocates

Court Assistant Lindsey