



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 186 OF 2015

(Before Hon. Justice Mathews N. Nduma)

KENNEDY MAINA MIRERACLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

J U D G M E N T

1. By a Memorandum of Claim dated 8th June, 2015 and filed on even date, the Claimant seeks compensation for unfair termination of employment and payment of gratuity in respect of 27 years' service in the sum of Kshs.11,101,698. The Claimant also seeks costs and interest.

2. The claim is opposed vide a Memorandum of Defence and counter claim dated 29th February, 2016 in which the entire claim is denied and counter claim in the sum of Kshs.3,495,582.37 is made comprising of:-

- (i) Staff housing loan Kshs.895,442.15.
- (ii) Staff personal loan Kshs.2,565,287.80 and
- (iii) Card balance Kshs.34,852.42.

Claimant's Case

3. The Claimant relies on the Memorandum of Claim and annexures thereto which include a witness statement made by the Claimant on 8th June, 2015. The Statement was adopted under oath as the Claimant's evidence in chief in addition to other oral testimony made under oath.

4. The Claimant was employed by the Respondent on 31st October, 1988 at a salary of Kshs.41,880 per annum. The claimant rose through the ranks overtime and at the time of termination on 6th March 2015, he earned a consolidated salary of Kshs.3 million per annum.

5. An investigation was conducted at the Kisumu Branch of the Respondent where the Claimant was a General Manager following a whistleblowing that there were lapses in the security and operational procedure at the Branch and that the Claimant was demanding sexual favours from staff members hence jeopardizing the staff employment relations in the branch.

6. Investigations were done in which the Claimant and the staff members recorded statements. The report

of the investigators was submitted to the Respondent on 31st October, 2014 and was produced in court.

7. In addition to allegations of sexual harassment, it was alleged that the Kisumu branch was not opening on time and that on 18th October, 2014 a member of management Immaculate Ayuko reported to work late and the keys to the doors were brought by her husband and the incidence was never reported timeously, contrary to bank policy that “key holder, must ensure that keys are not handed to any other person without the manager’s authority and never to a member of the public”. It was also alleged that management was taking leave without following laid down procedure.

8. Pursuant to the report, the Claimant received a letter of suspension dated 13th February, 15. The letter did not ask the Claimant to show cause however by a letter dated 13th February, 2015 he was invited to attend a disciplinary hearing on 20th February, 2015. The Claimant was asked to be accompanied by a colleague. The claimant was also asked to appear fully prepared to state his case because disciplinary action may be taken against him.

9. The minutes of the meeting dated 20th February, 2015 were produced in court.

10. The Claimant alleges that the Respondent disregarded the recommendations of the investigations.

11. That the disciplinary committee was biased and did not give the Claimant a fair hearing and the Claimant be compensated for unfair and unlawful termination of employment and that he be paid gratuity for the 27 years served, costs and interest of the suit.

Respondent’s Case

12. The Respondent opposed the claim as earlier stated by a statement of defence and counter claim filed on 3rd March, 2016. However the Respondent did not call any witness in support of its case.

Determination

13. The issues for determination are as follows:-

(i) Whether the Claimant has proved on a balance of probabilities that the termination was not for a valid reason and was not in accordance with a fair procedure.

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

Issue i

14. Section 43(1) reads –

“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”

(emphasis mine)

15. It is clear that contrary to the conventional rule of burden of proof under the Evidence Act, Cap 80 of the laws of Kenya, The Employment Act, shifts the evidential burden of proving the reason or reasons for the termination for the Employment to the employer whether or not the employer is the plaintiff or the respondent.

16. However, section 47(5) puts a spin on this as follows –

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of

proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

(emphasis mine)

17. The two sections may appear contradictory in terms, but this is not so taking into account the provisions of section 107 of the Evidence Act, which provides –

“Whoever desires any court to give judgment as to any Legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.”

18. It is the court’s considered view that sections 43(1) and 47(5) of the Employment Act, must be construed so as not to nullify the conventional and accepted law on the burden of proof.

19. Therefore, the Plaintiff must adduce *prima facie* evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents *prima facie* evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on a balance of probabilities.

20. In the present case, the Claimant adduced evidence under oath to demonstrate that there was no valid reason to terminate his employment and that the employer did not follow a fair procedure. However the records tendered by the Claimant himself, did not support that view because the impugned investigation report, contradicted the testimony by the claimant.

21. Even though, the Respondent did not call any witness in this case, and only relied on the pleadings and documentary evidence presented, the Claimant had not presented sufficient evidence to prove his case on a balance of probabilities.

22. The court finds that the Claimant failed to discharge the burden of proof placed on him under sections 107 and 108 of the Evidence Act.

Section 108 reads –

“the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

23. In this case, the claimant testified and the Respondent did not but from the evidence tendered by the Claimant, there were clearly valid reasons given for his suspension and eventual termination of employment.

24. Furthermore, a disciplinary process followed forensic investigations and evidently, without having to hear the side of the Respondent, there was justification to discipline and terminate the employment of the Claimant.

25. The Claimant was paid all his terminal benefits. The Claimant has not proved he was entitled to payment of gratuity as claimed or at all. Consequent on the finding of the court on liability, the claimant is also not entitled to any compensation since the termination was lawful and fair.

26. The Respondent did not pursue the counterclaim. The Claimant demonstrated that he had paid all the loans advanced to him by the company and the counter claim is dismissed.

27. In the final analysis the suit by the claimant and the counter claim by the Respondent have no merit and are both dismissed. Each party to bear their own cost of this suit.

Dated and Signed in Kisumu this 8th day of March, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Onsongo for Claimant

Ms. Oyombe for Respondent

Chrispo – Court Clerk