



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

CAUSE NO 243 OF 2013

JOSEPH KIPROTICH BETT.....CLAIMANT

VS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Joseph Kiprotich Bett, the Claimant in this case, was an employee of Kenya Commercial Bank Limited. He brought his claim by way of Memorandum of Claim dated 22nd February 2013 and filed in court on even date. The Respondent filed a Memorandum of Response on 7th May 2013.

2. The matter proceeded to full hearing, with the Claimant testifying on his own behalf and Bramwel Simiyu Mbirira for the Respondent. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Clerical Staff on 2nd May 1986. He rose through the ranks to the position of Head of Computer Operations. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 209,147.

4. On 20th November 2010, the Claimant was sent on compulsory leave, to pave way for investigations into allegations that he was associating with undesirable persons, who were planning to defraud the Respondent. The Claimant's employment was subsequently terminated on 28th February 2011.

5. The Claimant claims that the termination of his employment was unlawful and unfair. Specifically, he states that there is no valid reason for the termination and that he was not given an opportunity to be heard. He claims the following:

a. Service/gratuity $(209,147 \times 25 \times 2/3)$Kshs. 3,485,783

b. Compensation for loss of future earnings $(209,147 \times 12)$2,509,764

The Respondent's Case

6. In its Memorandum of Response dated 30th April 2013 and filed in court on 7th May 2013, the Respondent admits having employed the Claimant by letter dated 28th April 1986. The Respondent

however denies sending the Claimant on compulsory leave and/or unlawfully terminating his employment.

7. The Respondent maintains that the provisions of Section 41 of the Employment Act did not apply to the termination of the Claimant's employment as it was not premised on the grounds of misconduct, poor performance or physical incapacity. The Claimant was therefore not entitled to reasons for termination.

8. In any event, the Respondent avers that the Claimant engaged in gross misconduct in the nature of fraud and theft to its detriment, whereupon the Respondent had a valid reason to terminate his employment. This reason was explained to the Claimant prior to the termination.

9. The Respondent adds that the issue of validity of reasons for termination of the Claimant's employment does not arise as a relevant issue for consideration by the Court in determining the legality of the termination. The Respondent states that prior to the termination, the Claimant was given an opportunity to be heard.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant's employment was terminated by letter dated 20th January 2011 stating as follows:

"Joseph Bett

C/O Head Office

Dear Sir,

TERMINATION OF EMPLOYMENT

This has reference to the correspondence exchanged and discussions held with you, details of which are well known to you.

As a consequence, the Bank has lost confidence in you and your services with the Bank are hereby accordingly terminated with effect from today's date.

All money due to you including one month's salary in lieu of notice will be paid to you in due course.

Your loans shall be retained at staff interest rates up to 28.2.11.

You are required to submit a loan repayment/loan takeover proposal to the Head of Retail Credit within 15 days of the date of this letter. The Head of Retail shall review and consider the proposal within 15 days of the submission.

You are required to ensure that monthly repayments to all your loans are paid by the last day of every month. Default of repayment(s) on any loan(s) shall result in immediate conversion to public rate.

The aforementioned conditions notwithstanding, the Bank reserves the right to vary the terms of the

loan(s) in accordance with the original letters of offer issued and accepted at the onset of the borrowings. It should be noted that all loans must continue being serviced by way of timely monthly repayments at all times.

Please arrange to clear your indebtedness with the Bank (if any) and surrender to the bank any bank property in your possession.

Kindly sign the attached copy to acknowledge receipt of this letter.

Yours faithfully,

(Signed)

LABAN SOGOMO

HEAD EMPLOYEE RELATIONS”

12. This letter does not disclose any specific reason for the termination. The Respondent’s Employee Relations Manager, Bramwel Simiyu Mbirira however told the Court that the reason for the termination of the Claimant’s employment had to do with his association with Reuben Too, a former employee of the Respondent involved in fraudulent activities.

13. The Claimant did not deny his association with Too. He however denied complicity in any fraudulent activities. Mbirira testified that some investigations had been undertaken but he was not aware of their outcome. No investigation report was produced before the Court and there was no evidence that the Claimant was given an opportunity to respond to the allegations made against him, prior to the termination.

14. In its Memorandum of Response dated 30th April 2013 and filed in court on 7th May 2013, the Respondent suggests that the Claimant was not entitled to be notified of the reason for termination because he was not terminated on the grounds of misconduct, poor performance or physical incapacity. The Respondent therefore holds that as long as the Claimant was given notice or paid in lieu thereof, then his termination was lawful.

15. With much respect, this is a misapprehension of the law. Section 43 of the Employment Act, 2007 requires an employer to establish a valid reason for terminating the employment of an employee. Under Section 41 of the Act, the employee is entitled to adequate opportunity to prepare and present their defence in response to all the charges made against them.

16. The Respondent’s witness, Bramwel Simiyu Mbirira conceded before the Court that the Claimant’s association with a former employee of the Bank, Reuben Too was not an offence by itself. The Respondent therefore needed to demonstrate the detriment it had suffered as a result of this association, which it failed to do. This, coupled with the failure to disclose any specific reason for termination in the termination letter leads to only one conclusion; that the Respondent had no reason for terminating the Claimant’s employment.

17. It is also evident that the Claimant was not afforded any opportunity to be heard, prior to the termination as required under Section 41 of the Employment Act. The attempt to hear him on appeal did not cure this failure on the part of the Respondent.

Remedies

18. Overall, the Court finds that the termination of the Claimant’s employment was substantively and procedurally unfair and awards him twelve (12) months’ salary in compensation. In making this award, I have taken into account the Claimant’s length of service and his employment record. I have also considered the Respondent’s conduct in the termination transaction.

19. Regarding the claim for service/gratuity, the only thing to say is that the Claimant was a member of a registered pension scheme in addition to the National Social Security Fund. He would therefore be excluded from service pay under Section 35(5) & (6) of the Employment Act. This claim therefore fails and is dismissed

20. Ultimately, I enter judgment in favour of the Claimant in the sum of Kshs. 2,509,764 being 12 months' salary in compensation for unlawful and unfair termination of employment.

21. This amount will attract interest at court rates from the date of judgment until payment in full.

22. The Claimant will have the costs of the case.

23. These are the orders of the Court.

DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF FEBRUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MARCH 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mrs. Gakoi for the Claimant

Mr. Kimani for the Respondent