



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 615 OF 2015

CAROLINE AKUMU NYADIERO.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought separate suit on 17.8.2016 alleging that she had been unfairly dismissed from her employment and seeking for unconditional reinstatement or in the alternative payment of terminal dues plus compensation for the unfair dismissal. The respondent has however denied the alleged unfair termination and averred that the claimant was terminated for misconduct and after following a fair procedure. It is the defence case that the claimant was suspected of having committed or participated in fraud and after being afforded a chance to defend herself both in writing and orally, she was terminated. Thereafter she appealed but the appeal was dismissed and the termination upheld.

2. The suit came up for pretrial conference on 5.12.2014 when the parties agreed that the employment relation between the parties herein, and the disciplinary procedure followed before the termination are not in dispute. However, the parties identified the disputed issues as the reason for the termination and the terminal dues payable to the claimant. The suit was heard on 29.3.2017, 3.5.2017 and 30.11.2017 when the claimant testified as Cw1 and the Respondent called M/s Perpetua Ndunda as Rw1 and with the consent of the claimant, adopted the written statement dated 13.6.2017 by the respondent's Legal Recoveries Officer, Mr. Samuel Njuguna. Thereafter both parties filed written submissions which I have carefully considered.

Claimant's case

3. Cw1 stated that she was employed by the respondent on 12.11.2007 as a Sales Representative earning Kshs.10,000 per month and rose through the ranks to become the Sale Manager earning Kshs.127,000 per month. During her service, she met and exceeded her targets and she was always eligible for bonuses.

4. On 9.8.2014 she was called at around midnight by a stranger who informed her that her brother Isaiah Owuor had been attacked and was at the Coast General Hospital. She rushed there but on arrival, she called the informer who told her that the patient was taken to the Mombasa Hospital instead. She then rushed to Mombasa hospital where she found a team of doctors surrounding the patient who was being taken to the theatre and as such, she was not able to see or talk to him.

5. Cw1 further testified that the patient stayed in the theatre for 4 hours and thereafter taken to the ICU. She was therefore not allowed to see him until 7 a.m. on 10.8.2014 but strangely he was wearing a name tag for her estranged husband Mathew Owino with who he was having a drink at Mikindani while watching football on 9.8.2014.

6. Cw1 raised the issue of name tag immediately with the nurse who referred her to the reception where she was told that the patient was admitted bearing those names. She however demanded that the card be withdrawn immediately because it belonged to another person and not her brother. The reception staff resisted and only released the card after she promised to pay the bill in cash. She contended that the card was never run as the bill was paid in cash.

7. Two days thereafter Cw1 was called by the Insurance Agent in charge of the medical scheme and she explained what happened. On 13.8.2014, the respondent wrote to her enquiring about the same incident and she responded explaining what had happened. She was however suspended on 14.8.2014, and thereafter taken through disciplinary proceedings on 9.9.2014 and terminated on 2.10.2014 for misuse of medical insurance card. She then appealed on 3.10.2014 but the same was disallowed on 24.10.2014.

8. Cw1 denied the validity of the reason for her termination contending that the medical card was taken to the hospital by her estranged husband who took the patient to the hospital after the attack. She denied ever misusing the card and contended that it was in the possession of her estranged husband. She therefore prayed for reinstatement to her employment.

9. On cross examination Cw1 admitted that the respondent gave her medical cards for her and members of her nuclear family. She explained that she separated with her husband on 20.8.2013 by signing an affidavit which she gave the respondent. She further explained that the medical card was never used until that night when her brother was injured. She stated that she arrived at Mombasa Hospital at about 1 am but the nurses refused to give her the medical card even after offering to pay the bill in cash.

10. On further cross examination, Cw1 denied that the signature on her brother's Admission form was hers. She however admitted that time for the admission stated in the form was 1.30 a.m. but denied that she had arrived at the hospital at that time. As regards payment of her terminal dues, Cw1 admitted that the termination letter listed down her benefits including unpaid salary and salary in lieu of notice but she was paid nothing because she had outstanding loans with the employer. She however accused the employer of failing to declare to her the proceeds received from the sale of her house that was auctioned to recover the loan balance of Kshs.943,302.75 (staff), Kshs.1,283,713.95 (House) and Kshs.151,893 (credit card).

Defence case

11. Rw1 is a Care Manager employed by AON Kenya Insurance Broker. On 11.8.2014, she called Mombasa Hospital as a routine to check out whether any of her members was admitted and she was told that there was one Mr. Mathew Okong'o. She then went there and found NHIF and for Cw1 and National ID Card for Mathew Okong'o while going to see the patient she received a call from Jubilee Insurance Care Manager who told her that she saw "Mathew Okong'o" at the ICU but doubted that he was the insured member. After seeing the patient and wishing him well, she went to see the nurses who confirmed that the people who visited the patient were calling him Isaiah.

12. Rw1 decided to call Mikindani Medical Centre where the patient was seen first and given first aid and she confirmed from the clinician that the patient name was Isaiah and not Mathew Okong'o, she then called Cw1 who told her that her husband had been caught with another wife and was injured with a knife. She however told Cw1 that she was suspecting that the patient was not her husband. Later at 4 pm., Cw1 called her to say that she wanted to transfer the patient to Pandya Hospital for security reasons. Cw1 also confessed to her that the patient was brought to the hospital by her husband who admitted the patient using the said medical card but she took it and destroyed.

13. Rw1 confirmed that the admission form dated 9.8.2014 was for Mathew Okong'o Owino and his next of kin was Caroline Akumu (Cw1). She stated that the form is normally signed before a patient is taken to theatre and in this case, she maintained that it is the claimant who signed when "husband" was taken to the theatre.

14. On cross examination Rw1 explained that admission is done by the Admitting clerks of the hospital using the patient's smart card.

When she visited the hospital, she was told that the smart card had been returned to the patient but it had not been used. She however reported the matter to her seniors and later she learned that the claimant was dismissed from her employment by the respondent. She however confirmed that the smart card could not be used without the finger print of the holder.

15. Mr. Samuel Njuguna stated that claimant procured loans amounting to Kshs.3,220,000 made up of Kshs.860,000 (car), Kshs.1,000,000 (mortgage) and Kshs.1,360,000 (personal). He further contended that the claimant made some repayments but as at the time of her discharge, she had a loan balance of Kshs.2,938,575.70 still outstanding. He further confirmed that the respondent has since repossessed and sold by public auction motor vehicle Registration KBU 283M and house in Maniland North/section 11/2879 realizing Kshs.500,000 and Kshs.900,000 respectively.

16. As regards the terminal dues, Mr. Njuguna explained that the claimant was entitled to Kshs.146,287 as her terminal dues made up of one month salary in lieu of notice (Kshs.137,261), and salary for the days worked upto 2.10.2014 (Kshs.9,026). He prayed for the suit to be dismissed with costs.

Analysis and Determination

17. There is no dispute that the claimant was employed by the respondent as a sales manager until 2.10.2014 when she was terminated and paid one month salary in lieu of notice. There is further no dispute that the reason for her termination was fraudulent admission and misuse of medical scheme on 9.8.2014, and that she was accorded a hearing to defend herself of the said charges before the termination. There is also no dispute that due to outstanding loans, her terminal dues were not paid to her. The issues for determination are;

(a) Whether the reason for the termination was valid and fair.

(b) Whether the reliefs sought should be granted.

Reason for termination

18. The termination letter dated 2.10.2014 captured the reason as follows:

"Following investigations and the disciplinary hearing conducted on September 2014 regarding fraudulent admission and misuse of medical scheme on 9th August 2014, I am satisfied that you failed to follow the Bank's laid down regulations contrary to clause 11(c) and 12 of the terms and conditions of your employment."

19. The claimant has denied committing the said misconduct and maintained that the card was misused by her estranged husband who was drinking with the patient when he was injured. I have carefully read the said Admission forms dated 9.8.2014. It indicates the patient's name as Okong'o Owino Mathews and the next of kin as Caroline Akumu related to him as wife. The said information was false because according to both Cw1 and Rw1, the patient was claimant's brother Mr. Isaiah Owuor. The form further indicated that the company responsible for payment of medical bill as Jubilee W/NO. BBK/12748/01.

20. The form was signed by the claimant declaring that her employer was to pay the bill. The signing was witnessed by the Admitting Clerk, one Vicky on 9.8.2014 at 1.30 a.m. My comparison of the signatures by the claimant on the various documents filed herein including verifying Affidavits, letters and work related forms, I am satisfied that she is the one who signed the Admission form dated 9.8.2014 at 1.30 a.m.

21. The said form contained false information about the identity of the patient and his relationship with her. The said false information was meant to have her brother Isaiah Owuor admitted and treated at the expense of her employer's medical scheme. That was obviously fraud whichever way one looks at it and as such, the employer was justified to terminate her services.

22. Under section 45 2(b) of the Employment Act, a reason for terminating employment is fair if it is related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer. In this case the reason for termination related to the employee's conduct and it was therefore a fair reason for termination under section 44 (4) (g) of the Act. The said provision states that the employer is entitled to dismiss his employee if:

“(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the detriment of his employer or his employer's property.”

23. Having found herein above that the claimant fraudulently caused the admission of his brother to Mombasa Hospital using her employer's medical scheme, I now proceed to hold that the employer has proved and justified the reasons for terminating her services on 2.10.2014.

Relief

24. The respondent has admitted that the claimant is entitled to salary for the two days worked in October 2014 plus one month salary in lieu of notice. The sum was calculated as Kshs.146,287 and it was applied in off setting her loan balance. The claimant admitted that she had an outstanding loan. She is however not aware how much loan is still outstanding after the sale of her car and house. She did not however invite the court to determine that and as such I will not go that route.

Disposition

25. For the reason that the termination of the claimant's services was founded on a valid and fair reason and that her terminal dues were applied to offset her loan balance, I dismiss the suit with no order as to costs..

Signed and dated and at Nairobi this 6th day of April, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of April, 2018.

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JUDGE