



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 995 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JACOB OCHIENG OCHORO.....CLAIMANT

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

JUDGMENT

By statement of claim dated 13th June 2014 the claimant avers that his employment was wrongfully terminated by the respondent. He prays for the following remedies –

- (i) A declaration that the termination was wrongful/unfair.
- (ii) Payment of back wages from the date of termination to the date of judgment and/or until full payment.
- (iii) Twelve (12) months compensation for wrongful termination amounting to Kshs.556,080/=.
- (iv) Payment/refund of medical costs incurred amounting to Kshs.100,800/=.
- (v) One month's notice amounting to Kshs.46,340/=.
- (vi) Interest on all the above from the date of termination.
- (vii) Cost of the claim.

The respondent filed a memorandum of reply and counterclaim dated 18th July 2014 denying the averments in the statement of claim. It counterclaimed against the claimant in the sum of Kshs.331,550 and prays that the claim be dismissed and judgment entered in terms of the counterclaim with costs against the claimant.

At the hearing of the claim, the claimant testified on his behalf while the respondent called ELIJAH KIBAGENDI NYARANGI, the Branch Manager, Narok and ROBLEY NGOJE, the Group Senior Employee Relations Manager.

The parties thereafter filed and exchanged written submissions.

Background Information

The claimant was employed by the respondent, a bank, as a messenger on 13th February 1993. After successfully serving the probation period of 3 months, he was admitted to permanent and pensionable terms on 25th July 1995. In 2002, he was promoted to Clerk.

He first worked at the respondent's headquarters in Nairobi, then Jogoo Road and thereafter Ongata Rongai. In June 2007, he was transferred to the respondent's Kajiado Branch where he was deployed as a Cashier after being trained on the job for 7 days. As Cashier he worked well for 2 days but on the 3rd day he had a cash shortage of Kshs.331,550/=. After investigations it was concluded that the loss was caused by the claimant's dishonesty or negligence. His immediate Manager recommended summary dismissal, the Regional Business Manager recommended termination while the Employee Relations Department recommended a warning letter.

Before any decision was made on the disciplinary action to be taken against the claimant, he failed to report for duty from 25th August 2007. He was dismissed from employment for desertion of duty by letter dated 31st August 2007. The dismissal was to be effective from 25th August 2007 when the claimant deserted duty.

The claimant appealed against the dismissal but the appeal was not successful. He filed a second appeal which was also not successful.

Claimant's Case.

The claimant avers that he was unwell and was given sick off by his Doctor E. R. J. Anam for 10 days on 25th August 2007, a further one week from 3rd September 2007, another one week from 10th September 2007 and again one week from 17th September 2007. The claimant produced a medical report from the said Dr. Anam dated 25th August 2007.

In his testimony the claimant avers that on 24th August 2007 he went to Kajiado Hospital and informed his Manager that he was sick. That on 25th August 2007 he collapsed in the house and was taken to hospital, that the Doctor put him on bed rest.

That on 28th August he called the Operations Manager of the Respondent to inform him that he was sick and had been given 10 days off. The claimant testified that he sent people to deliver his sick sheet to the Bank. He testified that a person by the name Joyce received the sick sheet dated 25th August 2007 and the 2nd one was delivered by his nephew to the bank.

The claimant denied that he absconded duty after he was asked to record a statement at the police station.

Respondent's Case

The respondent's case is that the claimant failed to report for work on 25th August 2007. The Kajiado Branch tried to contact him on his cell phone but it was off. They sent some staff to look for him in his house at Kajiado but did not find him. On 27th August 2007, a letter was written to the claimant to resume duty within 7 days and on 31st August 2007, he was dismissed after failing to resume duty.

The respondent has counterclaimed for the shs.331,550 shortage incurred by the claimant. The respondent's witnesses testified that no demand was made to the claimant to refund the money and no deduction was made from him.

Determination

I have considered the pleadings, evidences and written submissions filed on behalf of the claimant and the respondent. The issues for determination are whether the dismissal of the claimant was fair and whether he is entitled to the remedies sought.

Fair Dismissal

I have taken note that the claimant was dismissed from employed on 31st August 2007. The employment Act 2007 was not in force then. The repealed Employment Act did not have provision for an employee to be taken through a disciplinary process before termination or dismissal. What is currently known as unfair dismissal was not in the repealed Employment Act. Neither the claimant nor the respondent submitted the terms and conditions of employment applicable for the claimant that provided for the disciplinary procedure of the Respondent.

The authorities cited by both parties are not relevant to this case as they relate to termination of employment under the current Employment Act, 2007 which came into force on 2nd June 2008. The case of **Banking Insurance & Finance Union (Kenya) -vs- Barclays Bank of Kenya Ltd [2014] eKLR** cited by the respondent and **Joseph Njoroje Kiama -vs- Summar Ltd [2014] eKLR** are therefore not applicable.

The Employment Act (repealed) provided for desertion as one of the grounds for summary dismissal as follows –

... if without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work.

In the present case, the respondent states that it made attempts to find the claimant but were unable to trace him. The claimant avers that he sent copies of the medical chits giving him sick off to the respondent but there is no evidence that the respondent received any of them. The claimant was away for one month from 25th August to 24th September 2007 by which time he had been dismissed. He was given an opportunity to appeal twice but his appeals were unsuccessful.

In my opinion the respondent was justified in terminating the employment contract of the claimant after he failed to report for duty or inform the respondent about his whereabouts. However in view of the medical chits filed by the claimant which may indicate that he was unwell but only failed to report the same, I will reduce the summary dismissal of the claimant to normal termination.

Remedies

I will now address the remedies sought by the parties:

1. A declaration that the termination was wrongful/unfair.

As I have already determined above the termination was in the circumstances of this case reasonable. I have determined that the same be reduced to normal termination of employment.

2. Payment of back wages

Having upheld the termination of employment, the claimant is not entitled to payment of wages after the date of termination.

3. Compensation

The claimant is not entitled to compensation of 12 months salary or any compensation as the termination of his employment was not wrongful or unfair and the remedy of compensation was not available at the time of the termination of his employment.

4. Refund of medical expenses

The medical expenses incurred by the claimant were not submitted to the respondent before the termination of his employment. The same are therefore not refundable.

5. One month's salary in lieu of notice

Having reduced the summary dismissal to normal termination, I award the claimant one month's salary in lieu of notice in the sum of Kshs.46,340.

6. Interest

Interest shall be payable on the said amount of notice from date of judgment.

7. Respondent's Counterclaim

RW1 stated that no demand was made to the Claimant for refund of the amount alleged to have been lost by him. There is no evidence that a decision was ever made by the respondent to recover the said sum from the claimant. I find that the counterclaim was an afterthought and it has not been proved that the claimant is liable for the same with the result that the counterclaim is dismissed.

8. Costs

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE