



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1090 OF 2013**

**(Before D. K. N. Marete)**

**SIMON OTIENO OKOYO NALWAKHO.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way a Statement of claim dated 15th July, 2013. It does not display an issue in dispute on its face.

The respondent in a Memorandum of Defence dated 25th August, 2013 denies the claim and prays that it be dismissed with costs.

The claimant's case is that by a consent of employment dated 11th December, 2006, he was employed by the respondent as a Custom Advisor at a salary of Kshs.374,760.00 per annum and a house allowance of 33,420.00, all subject to annual relief. These employment terms were later reviewed vide a letter dated 3rd November, 2008 in which the claimant was employed as a Retail Support with a salary of 751,236.00 and an occupier allowance of 56,400 per annum.

The claimant's further case is that he performed his duties with lots of diligence and faithfulness, lots of zeal and without failure. It is also the claimant's case that he had not any cases of indiscipline throughout his stint of service.

The Claimant's other case is that the respondent's policy on medication is that employees would seek medication and thereafter present receipts to AON Minet Insurance for verification and refund. He had on several occasions sought medical consultation at Marie Stopes, Kitale and undertaken this process for refund.

The claimant's further case is that on 19th October, 2012 he received a letter from the respondent suspending him from duty pending a disciplinary investigation on allegations that he had presented fraudulent medical claims. He was called to attend disciplinary proceedings on 27th October, at Sirikwa Hotel. On 6th November, 2012, he was issued with a letter of termination.

The claimant avers that his termination was unfair and based on grounds manufactured by the respondent with ill motive and malice. These allegations were also an afterthought in that AON Minet had already verified the receipts and made reimbursement to him.

It is the claimant's further case that during the hearing, he was not presented with the documents alleged to have been forged or the signatories to those documents called to testify on the documents. Again, all his efforts at seeking audience and or an explanation from the respondent bore no fruits. This rendered the termination unfair and inhuman and entitles the claimant to damages for unfair termination and or reinstatement.

He prays as follows;

- i. Damages for unfair termination
- ii. Reinstatement to work
- iii. Cost of this Claim
- iv. Any other relief as the court may deem fit

The respondent case is as follows;

3. The Respondent denies the allegations and averments contained in paragraphs 1 to 20, and the Prayers thereof in the memorandum of claim and states that:-

4. On the 4<sup>th</sup> of December 2008, a circular from the Human Resources Director indicated that the Respondent had noted an unusual upsurge in volumes and value of claims within the last two months emanating from outpatient claims for reimbursement. The circular went further to state that;

- i. It is expected that any claims that are launched are valid and duly signed off by the line manager;
- ii. All claims that are found to be irregular will be passed on directly to BASIS for investigation without any reference to the staff/member in question;
- iii. *Any member proved to have made a fictitious claim will be subjected to the D & G process for action.*

It is the respondent's case that the termination of employment of the claimant was occasioned by his misconduct: a presentation of a fraudulent medical claim from Marie Stopes, Kitale which matter was investigated and the claimant found culpable. The issue of unlawful termination of employment therefore does not arise.

The respondent avers that the termination of the employment of the claimant complied with section 44 (4) (e) and (g) of the Employment Act, 2007 which provides as follows;

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- e. an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
- f. ...
- g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

This matter came to court variously until the 20th April, 2018 when it was heard *inter partes*. Here the claimant testified in reiteration of his case after which the parties agreed on a determination by way of written submissions.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 22nd May, 2018 submits a case of unfair termination of employment and cite a contravention of section 45 (1), (2), (3), (4) and (5) of the Employment Act, 2007 as follows;

*45(1) No employee shall terminate the employment of an employee unfairly.*

(2) A termination of employment by an employer is unfair if the employer fails to prove-

- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason-
  - i. related to the employees conduct, capacity or compatibility; or
  - ii. based on the operational requirements of the employer; and
- c. that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately

before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

- a. the termination is for one of the reasons specified in section 46; or
- b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-

- a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- b. the conduct and capability of the employee up to the date of termination;
- c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
- d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- e. the existence of any previous warning letters issued to the employee.

The claimant also submits a case of violation of section 43 of the Employment Act, 2007 in that no valid reason for the termination of his employment was offered. He further seeks to rely on the celebrated authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** which burdens the employer to prove that the reason or reasons for the termination the absence of which the termination shall be deemed to have been unfair.

He further sought to rely on section 47 (5) of the Employment Act, 2007 which apportions the burden of proof as follows;

47(5)“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”

The respondent in her written submissions dated 15th May, 2018 reiterates a case of lawful termination of the employment of the claimant. She further reiterates a case of dismissal for gross misconduct on the part of the claimant for involvement in a presentation of fraudulent medical receipts for reimbursement of costs. This was a total violation of section 44 (4) (g) of the Employment Act, 2007. She therefore disparages the claimant’s case and submits a case of lawful termination of employment.

I agree with the respondent’s case. It is doubtless that the claimant involved in misconduct by way of presentation of fraudulent receipts in his medical claim. This was investigated and he was found culpable. He was taken through appropriate disciplinary proceedings in accordance with requirements of section 41 of the Employment Act, 2007. He was therefore dismissed. This is a case of lawful termination of employment and the claimant cannot be heard to complain. He is the author of his own misfortune. I therefore find a case of unlawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Dated and signed this 19th day of July, 2018.

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 25th day of July, 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Miss Mukami holding brief for Achach instructed by Achach & Company Advocates for the claimant

2. Miss Kanyiri Instructed by the Federation of Kenya Employers for the respondent