



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSES NO. 388 OF 2014 CONSOLIDATED WITH CAUSE NOS. 379, 380.

381, 382, 383, 384, 385, 386, 387, 389, 390, 535, ALL OF 2014

SYMON MIGWI KARANJA.....1ST CLAIMANT
STANLEY MUTUA MBIRITHI.....2ND CLAIMANT
WILLIAM MUGO MAINA.....3RD CLAIMANT
BONFACE KABUCHO KAMAU.....4TH CLAIMANT
PAUL LIVINGSTONE NGABA.....5TH CLAIMANT
BENARD ROTICH KIPSANG.....6TH CLAIMANT
JOHN GITUKU MUCHIRI.....7TH CLAIMANT
SOLOMON KIMUTAI CHELANGA.....8TH CLAIMANT
RICHARD ORAMISI KICHWANGI.....9TH CLAIMANT
ALBERT SUNGU AMTALA.....10TH CLAIMANT
PAUL MACHARIA KIRUGUMI.....11TH CLAIMANT
KENNEDY KIVITI.....12TH CLAIMANT
PETER THUO MBURU.....13TH CLAIMANT

- VERSUS -

WELLS FARGO LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th July, 2018)

JUDGMENT

Some of the claimants were represented by Waiganjo Wachira & Company Advocates and others by Betty Rashid & Company Advocates. The respondent was represented by Walker Kontos advocates.

The suits were consolidated and one of them selected as the test suit being **Simon Migwi Karanja –versus- Wells Fargo Limited Cause No. 388 of 2014** .The claimant therein testified to support the claimants’ case. The claimants prayed for judgement against the respondent for:

- a. Payment for overtime worked.

- b. Payment of house allowance.
- c. Payment of unpaid holidays.
- d. Notice pay equivalent to one month's salary.
- e. 12 months compensation for unfair termination.
- f. Punitive and aggravated damages for breach of the claimants' Constitutional rights.

The respondent opposed each of the claimant's suits and prayed that the same be dismissed with costs.

There is no dispute that the respondent employed the claimants as ATM Cash Officers. The parties appear to have had a good relationship as the claimants worked and were promoted over time.

In the cause of the service the evidence is that the claimants had certain grievances against the respondent. Thus on 05.12.2013 the claimants arrived early at work and they arranged to iron out their grievances with the respondent's management. Their grievances ranged from those related to remuneration, working hours, medical cover, holiday allowances, safety at work and others. Thus, the claimants' evidence per the claimant's witness (CW) was that on the morning of 05.12.2013 the claimants wanted to have audience with the respondent's Director. The management did not facilitate the audience and the claimants imposed a stoppage of work. The parties failed to resolve the matter amicably. The respondent invoked the disciplinary measures and the claimants were terminated on 06.12.2013.

The **1st issue** for determination is whether the termination of the claimants' employment was unfair.

CW testified that on 04.12.2013 the claimants worked for many hours. Their main job was to load ATM with cash. They worked to late hours in the night. Thus they asked the Assistant ATM Manager to kindly organise for their transport home. CW testified that the job was risky and the claimants had suffered seriously on previous occasions. On 04.12.2013 it was about 9.30pm or 10.00pm but the Assistant ATM Manager decided to abandon the claimants without assistance as they had requested. They tried to telephone the Manager who was then on leave but the call was not answered. At that time the Assistant Manager had gone to the car and left. It was a rainy night and the claimants were forced to walk and catch public transport home but they felt aggrieved that the respondent's management had failed to address their concerns even after they had notified the Assistant ATM Manager in advance that they would need to be facilitated by way of transport to go home after working late hours. CW testified that the transport grievance had been a frequent and persistent one.

Thus on the morning of 05.12.2013, the claimants requested to meet the Director about their plight but the Assistant ATM Manager declined and stated that it was not a debate for that day. The Assistant ATM Manager stated that he had informed the Banking Support Manager (BSM) about the grievance and insisted that the claimants had to proceed to work in the field. Shortly thereafter, the BSM arrived he threatened the claimants to know whomever they were dealing with and told the claimants to proceed to work in the field. The Director's son arrived and told the claimants to proceed to work within 15 minutes or the claimants face the consequences. CW testified that the usual reporting time was 7.30am but that morning they had reported at 6.00am as arranged by the claimants with the view of addressing the grievance. When 10 minutes lapsed, the BSM told the claimants to go the Human Resource Manager. The claimants were told to give out their ATM combination for safety of the ATMs. The claimants replied that they had a grievance and not a strike. The claimants who served in reconciliation section like CW had no such combinations but those who went to the field had the combinations.

CW testified that there was a procedure of handing over such combinations physically at the ATMs to ensure safety of the ATMs and accounting for cash as at time of the handing over. Thus, the claimants insisted that the procedure had to be followed despite the police who were called to intimidate the claimants. Later, it was CW's evidence that the human resource manager wrote on a paper and signed that if the cash at ATMs failed to balance or got lost the respondent's management and not the claimants would be responsible. After that the claimants handed in the ATMs' combinations. The claimants were then locked up at the Industrial Area police station without food and a show-cause letter was delivered to each of the claimants. The claimants begged for food but the human resource manager stated that they would remain in custody until the combinations for all ATMs had been confirmed.

Each of the claimants was given a show-cause letter alleging that on 05.12.2013 from 6.30am at the respondent's premises they had involved themselves in an illegal work stoppage and despite several pleas by management, they had refused to commence work. Further it was alleged that the claimants had failed to convene a meeting with the management to discuss issues in line with the respondent's policy. They had also failed to handover the combinations for the ATMs after the work stoppage so as to facilitate alternative arrangements – with the consequence that ATM services were paralysed and the customers suffered allot. The same amounted to refusal to obey a lawful command in contravention of clause 13 in the contract of service. Each claimant was required to reply to the show-cause letter immediately after receiving it. CW testified that they each wrote to reply and a disciplinary hearing was hurriedly conducted for each of the claimants later that 05.12.2013 and told to report on 06.12.2013.

On 06.12.2013 each claimant was served with a letter of summary termination on account of involvement in illegal work stoppage; failure to follow laid down procedures in requesting for a meeting with the management to discuss grievances; refusal to obey the instructions to handover the ATM combinations and doing so after the management invoked police intervention; and the said actions amounted to sabotage of respondent's operations leading serious inconveniences to the claimant's customers. The termination letter stated that the due terminal pay was for days worked and the accumulated leave days payable after handover.

Respondent witness No. 1(RW1) was one Francis Kamande, the respondent's BSM. He confirmed that on 05.12.2013 the claimants arrived at work early and he released to them the sealed containers for delivery to the ATMs. He later noticed the vehicles were not moving and he inquired and learned that the claimants wanted to speak with the management. He asked the claimants to go to work and to meet management later in the day. He confirmed that he knew that the claimants had grievances with the management. He confirmed that the documented

procedure for handing over the combinations for an ATM by a cash officer like the claimants entailed visiting the ATM with a cashier taking over. The combination must be given physically at the site of the ATM with a new cashier taking over accordingly. In cross-examination RW1 confirmed that the claimants had loaded the relevant cash bags the previous night on 04.12.2018. The claimants removed them in the morning of 05.12.2018 and arranged them route-wise and thereafter raised the issue of meeting the management about the grievances.

RW2 was Gray Gullen, the respondent's Executive Director. His evidence was that on the morning of 05.12.2013 the claimants had a grievance about compensation. Further, it was his evidence that if claimants worked late hours to dark night, the respondent had a duty to provide them with transport home, but, if they left work in early evening then they were to use public transport.

The court has considered the evidence and makes findings as follows.

First it is clear that on the night of 04.12.2013 the claimants worked late and despite requesting the Assistant ATM Manager to facilitate them with transport home, he failed to do so but to abandon them in the dark on that rainy night. RW2 confirmed that it was the respondent's policy to provide the claimants transport home when they worked late such as it happened on the evening of 04.12.2013. The Court returns that on that night it is clear that the claimants suffered so that on the morning of 05.12.2013 they had a valid and very serious grievance whereby the Assistant ATM Manager had failed to act on a timely request for transport and offered no reasonable justification for such failure.

Second, Procedure No. 6 on Grievance & Complaints Handling Policy at clause 7.0 of the respondent's Human Resource Procedure Manual provides that a grievance is any work related complaint, any discontent or dissatisfaction expressed openly by an employee or otherwise a group of employees. The Court returns that the claimants had a grievance within that definition. The clause sets out the procedure thus:

- a. Any employee of Wells Fargo wishing to raise a complaint which he or she is directly concerned with shall first raise the issue with the immediate superior or supervisor.
- b. The employee will then raise the issue with the section head and try to arrive at a solution or settlement in the event that the supervisor or immediate superior has not offered a solution.
- c. Where a settlement is not reached, the employee will then raise the issue with the HRM giving details of earlier proceedings.
- d. The HRM will then take up the matter, with a view of finding an amicable solution to the issue by discussing the matter with both parties to the dispute.
- e. In event of a failure to reach a settlement on the matter, it shall be reported to the labour officer for either conciliation or investigation or any appropriate action
- f. If a resolution is not reached at this level, then either party can refer the matter as a formal dispute to the Ministry of Labour in accordance with the provisions of the trade dispute Act Cap.234 of the Laws of Kenya.
- g. Any grievance can also be raised through the suggestion boxes within the company premises. Any employee using this option is not obliged to reveal his or her identity but all suggestions shall be treated with utmost confidence.

The Court has considered that procedure. The Court finds that the evidence is that the claimants had raised the same grievances before. On the morning of 05.12.2013 they again raised the grievances with their immediate superiors or supervisors. It is also clear that following the events of the night of 04.12.2013 they had raised the grievance about transport home but their immediate superior the Assistant ATM manager had callously left them without assistance. The Court finds that on the morning of 05.12.2013 and any other previous time, the claimants complied with the prescribed grievance management procedure which was raising the grievance initially with the immediate supervisor or superior. The Court finds that they never breached the prescribed procedure but stood by the protocol of raising the grievance initially with the supervisor.

Third, RW2 confirmed that the prescribed procedure for handing over the combinations of the ATM entailed a physical visit to the ATM by the new cashier taking over together with the outgoing cashier to handover. The Court returns that on 05.12.2013 the claimants were entitled to refuse to handover the combinations for the ATMs except in accordance with the prescribed procedure. It is clear now that the claimants did not fail to obey a lawful command or instruction as alleged in the termination letter because the command was to handover the combinations for the ATMs contrary to the handing over procedure and the Court returns accordingly.

Fourth, it is apparent from RW1's evidence that on the morning of 05.12.2013 the claimants arrived ready to proceed to work and the bags were arranged route-wise as they were ready to proceed to work but for their superiors' failure to manage their grievance efficiently and effectively towards amicable resolution. The claimants had already suffered the previous night and they were justified to complain that their immediate supervisor had failed to address their previous night's transport grievance so that they needed to escalate the matter to the Director. The Court finds that the claimants did not engage in work stoppage but upon the respondent's managers failing to deal with the grievance as such, they perceived the grievance as misconduct instead of resolving it as a grievance. Once the managers were colour blinded to see the grievance as misconduct, they walked on the misconceived path of initiating disciplinary action and by their own action lead to serious disruption of service delivery to the respondent's customers but which clearly was not the claimants' intention. The Court finds that the claimants never engaged in work stoppage but only in initiating a well founded and responsible grievance.

Fifth, and in view of the foregoing findings, the Court returns that the respondent did not have a valid reason to terminate the claimants' employment on account of the grounds as alleged and as set out in the respective letters terminating the claimants' contracts of service. Thus, the Court returns that the termination was unfair for want of a valid reason as per section 43 as read with section 45 (2) (a) and (b) of the Employment Act, 2007. Thus, the Court returns that the respondent has failed to discharge the burden of justifying the grounds for

termination of the claimants' employment as per section 47(5) of the Act.

Sixth, the Court returns that taking the evidence in to account it is clear that the claimants had valid grievances ranging from denial of due transport home, their immediate supervisor failing to amicably address their concerns about the transport or to meet the management about the same, and being required to handover combinations to the ATMs contrary to the laid down policies. The Court considers that in such circumstances and looking at the purported grounds of termination stated in the termination letter, the termination amounted to a dismissal on account of an unfair reason namely raising a valid grievance. The Court finds that such was an unfair termination upon unfair reason per section 46 (h) of the Act which provides thus, **"46. The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty – (h)an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;"**.

The Court returns that the termination was unfair for want of valid reasons or for being founded upon an unfair reason, the claimants' raising of a valid, well founded and responsible grievance.

While making that finding, the Court has found that the claimants did not engage in work stoppage or strike but even if they would have done so, then summary dismissal would have been an excessive punishment as recovery of the wage during an unfair or unprotected strike and recovery of any proximate loss to the respondent would be the proportionate and the usually legitimate cause of action. The Court in that regard follows its opinion in **Kenya Plantation & Agricultural Workers' Union –Versus- Roseto Flowers [2013]eKLR**, thus, **"For avoidance of doubt, the drastic punishment of dismissal may be imposed in appropriate cases under due process but the view of the court is that the primary punishment is preferable so as to foster collective bargaining recognising that employees usually do not go on lawful or unprotected strikes with the evil design to injure the employer and end the relationship; it is bargaining chip invoked as a last option to strike amicable balance - the storm before the tranquillity. The purpose of the strike is seldom to trigger a separation and termination or dismissal should, in the opinion of the court, be invoked in extremely rare and obviously justified cases."**

The **2nd** issue for determination is whether the claimants are entitled to the remedies as prayed for. The Court makes findings as follows:

- a. The Court returns that the claimants are not entitled to payment for overtime worked. CW confirmed that under clause 9 the contract of service provided that the claimant was not entitled to overtime pay. Further, there had been meeting with the human resource manager to review the clause on overtime but no agreement had been arrived at. RW 1 testified that monthly payment took into account the overtime served. Thus ATM cash officers in Nairobi earned more than those in upcountry stations due to the overtime element. The prayer will fail
- b. The Court returns that the claimants are not entitled to payment of house allowance as prayed for because they expressly agreed upon the payment of a gross salary. The Court returns that the gross pay amounted to a consolidated pay in terms of section 31 (2) (a) of the Act with a reasonable element to meet the claimants' rent or get reasonable housing. The prayer will therefore be declined.
- c. The claimants prayed for payment of unpaid holidays but the same will fail as there was no clear evidence and justification on how the same arise and the Court follows the holding by the Court of Appeal in **H.Young & Company (EA) Limited –Versus- Javan Were Mbango [2016]eKLR**, (Nambuye, Sichale, & Kantai, JJ.A) that such a claim must be particularised and the claimant must provide evidence showing that he worked on every public holiday as claimed. That was not done and the prayer will be declined.
- d. The Court has found that the termination was unfair and each claimant is entitled to notice pay at one month's salary as prayed for.
- e. The claimants pray for 12 months compensation for unfair termination. The claimants were dedicated workers. They were desirous of continuing in employment. The court has considered the aggravating factors namely the grievances had persisted for a long time without the respondent resolving them amicably; the claimants were arrested and intimidated for refusing to surrender the combinations for the ATMs contrary to the prevailing hand over policies; the claimants were kept the whole day without lunch on 05.12.2013; the disciplinary process was hurriedly conducted by issuing a show-cause letter, requiring immediate reply, carrying out a very short hearing and terminating the following day – clearly not allowing the claimants a chance to properly defend their respective positions. Further the claimants appear to have worked for long and extra hours but which the respondent failed to pay for allegedly in compliance with the terms of the contract on overtime and pending agreement on policy on payment for overtime. In such circumstances, the Court returns that the claimants are each entitled to 12 months' gross pay at the monthly rate as at termination towards ends of justice and under section 49 of the Act. To each claimant the respondent will pay compensation as computed in the respective statement of claim.
- f. The claimants prayed for punitive and aggravated damages for breach of the claimants' Constitutional rights. There were no submissions made for the claimants on this heading and the same is deemed abandoned. In any event the Court considered that the award for compensation for the unfair termination sufficiently meets justice of the case
- g. The respondent to pay the claimant's costs of the suit.

In conclusion judgement is hereby entered for the claimants against the respondent for:

- a. The respondent to pay each claimant 12 months' gross salaries in compensation plus one month salary in lieu of termination notice and a decree to issue in the sum under the two headings as computed for each claimant in the respective memorandum of claim; and the respondent to pay the decretal sum by 01.10.2018 failing interest to be payable thereon at court rates from today till full payment.
- b. The respondent to pay each claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 20th July, 2018**.

BYRAM ONGAYA

JUDGE