



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1201 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

BANKING, INSURANCE AND FINANCE UNION (K).....CLAIMANT

VERSUS

BANK OF INDIA.....RESPONDENT

JUDGMENT

The Claimant is a trade union and filed this Memorandum of Claim on behalf of Samuel Mwangi Kanubi and Moses Nandwa Sharon, the grievants are its members and who were both employed by the Respondent as clerks on 11th May 1993 and 4th November 1991 respectively. Moses Nandwa Sharon had initially been employed by the Respondent's subsidiary, the Bank of India Finance Ltd. The Claimant alleged that the Respondent had wrongfully dismissed the grievants Samuel Mwangi Kanubi and Moses Nandwa Sharon on allegations that the grievants had been suspected of having committed fraud. Both grievants testified at the hearing.

The Respondent filed a Statement of Response dated 3rd September 2012 denying the allegations in the Memorandum of Claim. The Respondent called one witness and relied on the witness statement of Matayo Odhiambo Bwire, its second witness dated 28th July 2014.

Claimant's Case

CW1 Samuel Mwangi Kanubi testified that he is a driver. He started working at Bank of India from 11th May 1993. On 8th April 2005 while at work at in the Clearing Department of the bank, he got a call from his in-charge Mr. Ongeru who asked him to report to the Bank Manager. At the Manager's office he found two gentlemen who were police officers. The officers enquired about the Electronic Fund Transfers (EFTs). After 20 minutes he was taken to his house but the officers did not say what they were looking for. He was later taken to Kileleshwa Police Station together with the second Claimant, Moses Nandwa and spent the night at the station until the next morning on 11th April 2005. On the 13th of April 2018 his lawyer visited the police station and demanded that he be charged.

The Claimant testified that he was released on a cash bail of Kshs.10,000 and was required to report back at the Banking Fraud Investigations Department. He was charged with forgery but since he could not raise the bond and surety of Kshs. 3 Million he had to be remanded at Industrial Area Remand.

CW1 further testified that after he was released he reported to work on 27th April 2005 and was issued with a letter dated 27th April 2005 summarily dismissing him from employment. The allegation by the Respondent in the letter was that he had been accused of theft of Kshs.37.99 Million, having been involved in the fraud leading to the loss of that amount. There had been no disciplinary hearing before the summary dismissal.

In cross-examination, he stated that his duties included posting EFTs which emanated from credit notes. The Credit notes came from the Bank's Industrial Area Branch and Mombasa Branch. Some of the EFTs turned out to be fraudulent. He further stated that at the date of his dismissal he earned a monthly gross salary of Kshs.63,767. In re-examination CW1 stated that the Court did not link him to the fraud. Consequently, he was acquitted.

CW2 Moses Nandwa Sharon stated that he worked in the clearing department of the Bank of India Nairobi Branch from 4th November 1991. He was later transferred to the reconciliation Department on 8th December 2004 but he only worked there for 8 days since he did not know conciliation work. Thereafter he was transferred to the clearing department where his duties involved posting inward and outward cheques. He stated that he neither dealt with credit notes nor did he know how an EFT looks like.

He testified that on 8th of April 2005 he reported to work around mid-day and was called by one Mr. Jachan to his office. He was introduced to two Inspectors whom he accompanied to Marshalls House and was later taken to his house in the company of CW1. He was locked up at the cells in Marshalls and on 19th April 2005 he was charged and released on a Kshs. 3 Million Bond. He could not raise the bond until 27th of April 2005 when he managed to raise the bond. Upon his lease he reported to the Respondent but was denied entry. He was then issued with the letter dated 27th April 2005 summarily dismissing him on accusations of theft. He stated that he had been acquitted for lack of evidence.

In cross-examination he testified that he had never handled EFTs and Credit Notes and had no knowledge of the processes. In re-examination CW2 stated that he earned a monthly gross salary of Kshs.65,295.

The Claimant in its written submissions filed on 26th July 2018 submitted that the Respondent ignored all the procedural requirements provided in the statutes prior to the summary dismissal of the Claimants. The Claimant submitted that the Respondent neither issued show cause letters nor invited the Claimants for disciplinary hearings. This being contrary to the provisions of Section 41 of the Employment Act.

In respect of the allegations of fraud the Claimant submitted that the forged credit notes and remittances had come from the Respondent's Industrial Area and Mombasa branches in a mail bag and that the Claimants had not been linked to the fraud. Further, that the Respondent never carried out any investigations since the investigations carried out by the Banking Fraud Investigations Unit was never completed. The Claimant relied on the case of *Mary Chemweno Kiptui V Kenya Pipeline Limited* and the decision by the Court of Appeal in **Civil Appeal No. 62 of 2015 Bamburi Cement Ltd V William Kilonzi**.

The Claimant in its submissions further included prayers which it sought that this court should grant. It prayed that the Court grants the following prayers;-

1. The Honourable Court finds and declares that the summary dismissal of the two Claimants was unfair, unlawful and hence invalid.
2. The Honourable Court to order compensation for the two Claimants for having suffered unfair/unlawful loss of employment as follows:

Moses Nandwa Sharon

Notice Pay Kshs. 65,295

Compensation Kshs. 783,540

Samuel Mwangi Kanubi

Notice Pay Kshs. 63,767

Compensation Kshs, 765,204

3. The Claimants pray for the payment of all salaries and allowances which they had lost as a result if the unprocedural and unlawful dismissal from employment (actual pecuniary loss) as follows:

Moses Nandwa Sharon – Kshs. 10,381,905

Samuel Mwangi Kanubi- Kshs. 10,138,953

4. The Claimants finally pray for any other order that the Honourable Court may find justifiable to grant.

5. Costs of the suit.

Respondent's Case

RWI Zacharia Mairura Ongeri testified that he is a Bank Manager of the Respondent. He testified that he was working in the Bank as an Assistant Manager between the year 2004 and 2005. That in late 2004 and January 2005 the respondent discovered that a fraud had taken place through various transactions which were effected through clearance. At the time, he was in charge of clearing work while Samuel Kanubi was the main clerk and Moses Nandwa had joined as a trainee in the department. He stated that the Banking Fraud and Investigations Unit interrogated the bank employees including himself and the Investigations Report linked Samuel Kanubi and Moses Nandwa to the fraud.

RW1 stated in cross-examination that he did not know if the investigations were completed. In addition, he did not have any evidence that the two grievants are the ones who had inserted a credit note into the system. He further testified that the Claimants were arrested and charged but were acquitted for lack of evidence. He was a witness in the criminal proceedings. In re-examination RW1 stated he did not know how the credit notes found their way into the system.

The Respondent submitted that the Claimant ought not rely on the Employment Act, 2007 as the Claimants were terminated on 27th April 2005 when the cause of action arose. Hence, the repealed Employment Act, Cap 226 and the Trade Disputes Act Cap 234 apply, relying on

the case of *Unilever Tea Kenya Limited v John Kememia Gitau [2017] eKLR*. The Respondent further submitted that the contracts of the grievants and the repealed Employment Act did not impose a duty on the employer to observe principles of natural justice prior to dismissal of the employees. In respect of the additional prayers in the Claimant's submissions, the Respondent submitted that the Courts have judicially pronounced themselves on the issue of parties being bound by their pleadings and that parties cannot submit or lead evidence on an issue not pleaded in their pleadings. It relied on the Court of Appeal's decision in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR*. It therefore submitted that the court does dismiss the suit with costs.

RW2 Matayo Odhiambo Bwire in his witness statement which was adopted by consent of parties stated that he noticed that the fraudulent credit notes did not originate from any of the Respondent's branches. He reported the matter to the Banking Fraud and Investigations Department who elected to charge the Claimants with several counts of stealing and forgery.

Determination

Issues for determination are the following—

1. Whether the Claimants were wrongfully dismissed from employment.
2. Whether the Claimants are entitled to the reliefs sought.

1. Whether the Claimants were wrongfully dismissed from employment

The claimant's were terminated from employment on 27th April 2005. In agreeing with the Respondent, the cause of action arose on the 27th of April 2005 when the Claimants received their letters of dismissal. The Employment Act Cap 226 and the Trade Disputes Act Cap 234 are the relevant law that applied to this dispute. The Employment Act 2007 cannot be applied retrospectively. In addition, Paragraph 2 (4) of the Fifth Schedule of the Labour Relations Act provides that any trade dispute referred to the Industrial court before the commencement of the Act, revision or interpretation of an Award would be determined in accordance with the Trade Disputes Act.

Nduma J. in this very matter and in his Ruling to the Respondent's Preliminary Objection filed on 15th March 2013 held:

"It cannot therefore be disputed that the cause of action arose on 27th April 2005. At the time, the law applicable to dismissal at the work place was the Employment Act Cap 226 of the Laws of Kenya and the Trade Disputes Act Cap 234 of the Laws of Kenya."

In addition the Court of Appeal in *David Ngugi Waweru v Attorney General & Another [2017] eKLR* held;

"Finally, this Court has had occasion to grapple with the issue of defining a cause of action and determining when it arises in a contract of employment in the case of Attorney General & Another vs Andrew Maina Githinji & Another [2016] eKLR. Waki, JA with whose decision Kiage, JA agreed, examined the same issue and stated in part, as follows:

"The critical question to ask, which I will endeavor to answer, is this: What is a cause of action and when does it arise in a claim for unfair /wrongful termination?

A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint." That definition was given by Pearson J. in the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs. Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:-

..Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court? Lord Diplock, for his part in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-

..A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person? I am sufficiently persuaded by those definitions and I adopt them.

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy from their employer through the court? On the one hand, the AG contends that it was on the date of the respondent's dismissal while the respondents insist it was after their criminal trial was exhausted. There does not seem to be a direct authority from this Court on the issue, but the Employment and Labour Relations Court has pronounced itself on the matter in several cases, sometimes in conflicting fashion. In many of them however, it has been held that the cause of action for wrongful/unfair termination arises once a claimant is terminated from employment. I will refer to a few of them by way of illustration.

In the Benjamin Wachira case (supra), for example, the court, (L. Ndolo J.) expressed itself as follows:-

On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his reinstatement to the public service.

This Court has however taken a different view on this matter in the case Hilarion Mwabolo vs Kenya Commercial Bank [2013] eKLR to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated

seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal. In the instant case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October 2000 as communicated by letter dated 29th September 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October, 2000 and that is the date when time began to run as against the Claimant's claim?."

We may ask the same question about the appellant in this case: when did he become entitled to complain or obtain a remedy in damages from his employer through the civil court? Was it at the time he received the letter of dismissal on 29th April, 2004 or at the time he received the letter converting the dismissal to termination in public interest on 13th July, 2006 or after the decision of the JR court on 17th June 2009? The answer, we think, is the 29th April 2004. For it bears no logic for a cause of action to accrue and then, instead of proceeding to court, the aggrieved party pursues an appellate disciplinary process that would take him outside clearly stated statutory limitation periods."

The Employment Act Cap 226 did not require that employees be subjected to disciplinary hearings. Section 16 of the Act provided;

Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.

The Respondent summarily dismissed the Claimant upon being released on bond. Section 17(g) of the Employment Act Cap 226 provided that the employer may summarily dismiss an employee should the employee have committed a criminal offence or on reasonable and sufficient grounds of having committed a criminal offence against or to the detriment of his employer. The letter dated 27th April 2005 summarily dismissed the Claimants on grounds that they had been suspected, on reasonable grounds of having been involved in a fraud. This was sufficient reason for the termination of the Claimants under the then Act taking into account that the Claimants had been charged with an offence. Their acquittal was after their dismissal and did not therefore affect the dismissals.

In *Ezekiel Nyangoya Okemwa V Kenya Marine & Fisheries Research Institute [2016] eKLR* Rika J. in citing the decision of the Court of Appeal in *Kenya Revenue Authority V. Menginya Salim Murgani [2010] eKLR* held:

*"The question would be whether the Claimant was entitled to substantive and procedural justice under the laws that governed his contract of employment at the time of suspension; whether he received such justice from the Respondent; and whether in the absence of such justice, the law as it were, afforded the Claimant the nature of remedies he seeks. The remedies under the Employment Act 2007 would clearly not be in play, at the time the Claimant was investigated, suspended and sent home. In the Court of Appeal of Kenya decision **Kenya Revenue Authority v. Menginya Salim Murgani [2010] eKLR**, the Court held that [prior to 2007] Employers had no obligation in observing principles of natural justice, in termination of contracts of employment. The Courts have explained that under the old employment law in Kenya, Employers could terminate contracts of employment at will, for good cause, bad cause or no cause. At the time, employment was at the will of the Employer. This thinking stretches far back as exemplified in the 1909 **English Case of Addis v. Gramophone Co. [1909] AC 488**, where the House of Lords ruled that an Employee who was dismissed in a manner which imported obloquy among the commercial community in India, resulting in permanent damage to his reputation, could not recover damages for loss of employability and injured feelings. It was suggested such a pursuit could only be considered in a separate claim for defamation. Decisions in our Courts save for those from the Industrial Court have long upheld this dogma.*

*In Employment and Labour Relations Court decisions involving **Major Wilfred Kyallo Kangulyu v. Tetrapak Limited [2014] eKLR** and **Kenya Ports Authority v. Festus Kipkorir Kiprotich [2015] eKLR**, it was explained that the concept of unfair termination, as opposed to the concept of unlawful termination, was not universally accepted and applied in Kenyan employment law. It was confined to the Industrial Court of Kenya, where by dint of Section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya, the Court could grant the remedies of compensation for unfair termination, or order Employers to reinstate or re-engage Employees found to have been unfairly dismissed. Employment at will was the dominant doctrine, with near-universal application in the Civil Courts. The Court of Appeal in **Menginya** clarified that where the contract of employment, even before the Act of 2007, imposed on the Employer the duty to observe principles of natural justice, then Court could, enforce such obligations and damages could be paid for non-observance of obligation."*

In the instant case the claimant did not submit any evidence that the respondent had a duty to observe principles of natural justice. The terms of employment of the grievants as reflected in their letters of appointment did not impose such duty on the respondent. No other terms of employment were produced by the claimant.

The arguments advanced by the claimant in support of the claim for unfair termination are Sections 12, 41 and 45 of the Employment Act 2007 which Act is not applicable to this case as already observed herein above. Stripped of these provisions there remains no justification to support a finding of unfair termination.

All the authorities cited by the claimant are decisions under the provisions of the Employment Act, 2007.

The letters of dismissal of the grievants clearly state at the last paragraphs thereof that –

"In terms of Clause A5 (vii) of the Collective Bargaining Agreement and Section 17(g) of the Employment Act (Cap 226 of the Laws of Kenya), we hereby summarily dismiss you from employment of the Bank with immediate effect."

Section 17(g) of the repealed Employment Act provides that an employee may be dismissed summarily on grounds that –

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.

The fact that the grievants were charged and put on their defence in Criminal Case No. 666 of 2005 is sufficient proof of reasonable and sufficient grounds of suspicion. The law did not require the respondent to wait until the grievants were acquitted of the charges before taking disciplinary action hence the wording of the Section bearing reasonable and sufficient grounds of suspicion.

I find that the claimant has not proved that the summary dismissal of the grievant was wrongful in terms of Section 15(1) of the Trade Disputes Act (repealed).

2. Whether the Claimants are entitled to reliefs sought.

The Claimant in its Memorandum of Claim prayed that the grievants be reinstated back to their original positions. Section 15 of the Trade Disputes Act provided;

(1) In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that employer to reinstate that employee in his former employment, and the Court may in addition to or instead of making an order for reinstatement, award compensation to the employee:

Provided that such compensation shall not exceed -

(i) in a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as the result of the wrongful dismissal;

(ii) in any other case, twelve months monetary wages.

(2) Without prejudice to any other remedy, any compensation awarded under this section may be recovered summarily as a civil debt.

The CW1 SAMUEL MWANGI KANUGI testified that at the time of his dismissal he was 36 years and was at the date of the hearing 48 years while the CW2 MOSES NADWA SHARON stated that he was 40 years old in 2005 and was at the date of the hearing 50 years old. It would be impractical to reinstate the claimants. In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** the Court of Appeal held;

“One of the factors to be considered in determining whether or not to order reinstatement is practicability...Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement, not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties.”

The Claimant in its submissions introduced new prayers besides those in the Memorandum of Claim. It is settled law and there are a myriad of authorities in which the Courts have held that a party is bound by its pleadings. Therefore, the new prayers ought not be considered at all and are accordingly dismissed.

Conclusion

Having found that the claimant did not prove wrongful termination of the grievants, they are not entitled to reinstatement or compensation. The claim must therefore fail. Accordingly dismiss the same with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE