



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 730 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOHN NJOROGE.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

Claimant's Case

In his Complaint dated 20th March 2003, the Claimant avers that he started working for the Respondent on 6th November 1987 and was given a formal agreement through a letter of appointment dated 6th November 1987 wherein the Claimant agreed to serve the Respondent as a clerk/cashier. In his witness statement, the Claimant avers that he was posted to Kenyatta Avenue Branch where he worked for 14 years and 6 months in Clearing, Savings, Current Accounts, Computer, Audit, Advances/Credit and Accounts/Administration Departments. He was transferred to Narok Branch and reported in June 2002 after clearing with the Kenyatta Avenue Branch.

On 2nd September 2002, the Claimant received a letter from the Human Resource Manager of the Respondent suspending him from duty on grounds of irregularities which had occurred in the Branch. He reported to the Chief Manager – Internal Audit from Monday – Friday as directed in the letter, but was never interrogated or even asked to write a statement by the investigating officers.

On 3rd October 2002, the Claimant was dismissed from employment and the Respondent confirmed that all the Plaintiff's terminal dues would be paid less any monies he owed the respondent. In his witness statement and during trial, the Claimant stated that the reasons for his termination were not stated as was required by Clause 5 (d) of the Collective Agreement, save for the fact that the Respondent had lost confidence in him.

The Claimant sought the following orders as against the Respondent:

- a. Payment in full for the loss and damage suffered together with interest thereon at commercial bank rates prevailing from time to time and in particular from 3rd October 2002 until payment in full;
- b. Service for period worked of 15 years;
- c. Damages for breach of the contract employment (sic) and wrongful dismissal;
- d. Damages on the footing of aggravated damages;
- e. Cost of the suit.
- f. Interest on (a), (b), (c), (d) and (e) above from the date of filing suit until payment in full.
- g. Any other relief this Honourable Court may deem fit to grant.

During trial, the Claimant testified that he was never issued with a second warning letter. The Claimant also avers that he is yet to be paid his dues, since the dismissal to date. During cross examination, the Claimant confirmed that if he missed a digit in the processing of a cheque, it

would lead to a loss which would cause the customer to lose confidence in the Bank. However, he told the Court that his suspension letter stated that there were fraudulent transactions in the bank (which he detected) and did not state anything about negligence. He testified that upon termination, he was issued with a Certificate of Service.

In his written submissions dated 18th July 2018, the Claimant submits that the termination notice did not give the reasons for termination as is required by Clause A5 (a) and (b) of the Collective Agreement other than that the Respondent had lost confidence in him. The Claimant submits that when the Respondent was suspending him, it stated that the bank was carrying out investigations concerning irregular transactions, and upon completion of the investigations the Claimant would be advised on the decision. Therefore, as at 2nd September 2002 the Respondent did not have any problems with the Claimant regarding confidence. Further, the issue of loss of confidence was not the subject of the investigations. The Claimant argues that there were no investigations being carried out and this was an excuse by the Respondent geared towards terminating the Claimant's employment maliciously and unjustifiably. The Claimant submits that there was no justifiable ground for terminating his employment as there is no nexus between the suspension letter and the termination letter.

The Claimant submits that he is entitled to the following remedies:

1. Kshs.51,453.00 (being the Claimant's salary as at 3rd October 2002)

$51,453 \times 12 \times 19 = \text{Kshs.}11,731,984.00$

2. General damages for breach of employment contract at the equivalent of the employee's 12 months' salary

$\text{Kshs.}51,453.00 \times 12 = \text{KShs. } 617,436.00$

The Claimant relies on the case of **Industrial Court of Kenya Cause Number 715 of 2011** between **Major Wilfred Kyallo Kangullyu vs. Tetra Pak Limited [2014] eKLR** where the court held that substantive procedural justice and the rules of natural justice could be incorporated in the contract of employment, becoming binding on the parties upon termination of employment.

The Claimant also submits that the Respondent maliciously dismissed him and as such ought to pay aggravated damages. He relied on the case of **John vs. MG Limited [1996] 1 ALL E.R. 35** where the Court held that exemplary damages are meant to punish the Defendant and aggravated damages will be awarded where the Defendant acts out of improper motive.

Respondent's Case

The Defendant in his defence dated 9th June 2003 avers that by a letter dated 6th November 1987, the Claimant was employed as clerical staff. The Appointment letter specifically provided that upon confirmation a party may terminate employment by giving a one month's notice in writing. The Claimant was subsequently confirmed as a permanent staff of the Respondent vide a letter of confirmation dated 6th June 1988. The Respondent avers that in addition to the suspension issued to the Claimant, he had served earlier suspensions and received previous warnings.

SHIRLEY NCHARO in her witness statement dated 7th November 2011 avers that the Claimant was suspended from duty on 15th September 2000 and 2nd September 2002 following his involvement in irregular transactions at the Respondent's Kenyatta Avenue branch and at various branches of the Respondent's bank respectively, which caused the Respondent to suffer loss. Investigations carried out determined that the Claimant was negligent and careless in the performance of his duties. The witness further avers that on 3rd October 2002 the Claimant's employment was lawfully terminated in accordance with Clause A5(d) of the Collective Bargaining Agreement and that the termination was not malicious. Further, the Claimant was paid one month's salary in lieu of notice pursuant to paragraph 11 of the Claimant's letter of appointment. The witness further states that at the Claimant's termination, he had terminal benefits of Kshs.90,741.50 which was applied, by consent, to reduce his loan of Kshs.1,320,364.30 owed to the Respondent.

TABITHA MUTWA and **LINET ANYIKA** in their witness statements dated 1st February 2018 and 20th January 2017 respectively, state that the Claimant's termination was not malicious, arbitrary or high-handed and that it was a sober decision reached after consideration of the Claimant's record and having satisfied both contractual and statutory provisions.

During trial, Tabitha Mutwa testified that the employment contract provided that any party could terminate the contract. As regards the issue of loss of confidence, she stated that there does not have to be actual loss for the customer to lose faith in a bank. She further testified that the Claimant's employment was terminated because loyalty and trust was breached. During cross-examination, she testified that the Claimant had been issued with one warning letter whose last paragraph indicated that an employee would be dismissed after three warnings. She further testified that after 12 months the warning letter was expunged from the Claimant's record and that the irregularities stated in the Claimant's suspension letter were related to his performance. She admitted that she did not know the findings of the investigations team. She further testified that she knew of other people who had been suspended namely: Patrick and Robert Lagat. She further reiterated that the Claimant was not summarily dismissed and that the bank was not bound to issue a second warning.

The Respondent submits that the termination of the employment of the Claimant was lawful, regular and proper under the Employment Act, Cap 226 (Repealed). The Respondent further submits that the concept of unfair termination was only introduced by the Employment Act of 2007 and is not applicable to the present suit and relied on the case of **Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR** where the court held that the Employment Act, Cap 226 (Repealed) did not impose a mandatory obligation upon employers to observe the principles of natural justice in terminating employees as is with the case in the Employment Act 2007. The Court of Appeal in this case upheld the position but clarified that the employer was only duty bound to observe and accord the employee procedural fairness where the contract of employment provided so. As such it will be wrong to fault the decision of the Respondent on the basis of an Act that was not in existence at the time decisions were made. It further relied on the case of **Gitau vs. East African Power & Lighting Company Limited** where

the court held that wrongful termination cannot arise where the same is carried out in accordance with the terms of the contract.

The Respondent further submits that it cited loss of confidence as a reason for termination of employment which was well founded as the Claimant was entrusted with critical and sensitive duties in his role as clerk and had been suspended twice and issued with a warning letter after occasioning loss of customer's money. In addition, the Respondent submits that during trial its witness demonstrated extensively to court how small margins of error and carelessness can cause panic amongst customers as well as exposure to litigation by customers. The Respondent further submitted that the Employment Act, Cap 226 (Repealed) did not impose a legal obligation to the employer to justify the reasons for termination and if the court questions the validity of the reason cited by the Respondent in the absence of such power under the applicable laws then or specific provision in the contract of employment or CBA is tantamount to rewriting the contract of employment which powers the Court does not have. The Respondent relied on the case of **National Bank of Kenya vs. Pipelastik Samkolit (K) Limited & Another [2001] eKLR** where it was held that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

The Respondent submits that the position taken by the Claimant that his employment was terminated pursuant to Clauses A5 (a) and (b) of the CBA is wrong in fact and law because the Claimant's employment was terminated and not summarily dismissed pursuant to clause 5 (d) of the CBA as indicated in the Claimant's termination letter dated 3rd October 2002.

The Respondent submits that the termination of employment was lawful as the Claimant was paid salary in lieu of notice and reasons for termination were given. The Respondent further submits that there is no justification for aggravated damages as the Claimant has not proved that the termination was malicious. The Respondent further submits that there is no legal basis for pay of 19 years for the remainder of the term the Claimant would have served until retirement. The Respondent relied on the following cases: **Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR**, **Cyrus Nyaga Kabute vs. Kirinyaga County Council [1987] eKLR** and **Godfrey Mwangi Wanjohi vs. Mitchell Cotts Kenya Limited [2002] eKLR** where the court quoted the decision of the Court of Appeal in **Kenya Oilfield Services Limited vs. Peter Njoroge (Muli, Akiwumi, Tunoi JJA)** whereby the Court in discussing damages for unlawful dismissal stated:

“The law is well settled that when the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. Where there exists no termination clause the measure of compensation is for the reasonable period of notice depending on the nature of the employment.”

The Respondent further submits that there is no legal basis for the Claimant to be paid a severance pay as he was a member of the respondent's Staff Retirement Benefits scheme and cannot again claim service pay.

Determination

The following are the issues for determination in the matter herein:

1. Whether the Respondent's Action of Dismissing the Claimant was Fair and Justifiable and in tandem with the Collective Agreement and the Law.

The claimant's letter of termination states that the termination was in accordance with Clause 15(d) of the Collective Bargaining Agreement, which provides as follows -

Clause 5 (d) of the Collective Agreement:

The notice period shall be one month's notice on either side in writing or the payment of one month's salary in lieu thereof by either party, subject to the reasons for the termination being included in the letter in question.

From the facts of the case and the evidence adduced in court, it is clear that after the suspension of the claimant, the respondent decided to terminate his employment under Clause 5(3) which did not require the assignment of any reason to the termination. As was discussed by Rika J. in **Kenya Ports Authority –V- Festus Kipkorir Kiprotich {2014} eKLR** that-

*“... at the time the Respondent was summarily dismissed on the law on termination of employment was as propounded by the Court of Appeal of Kenya in the cases of **Murgani and Oganda** and a catena of other judicial opinions, cited by the Appellant. Employers were not obliged to give reason, or hear the Employee before termination. Employment was- at- will of the Employer. The Employer could terminate the contract of employment for good cause, bad cause or no cause at all. This was the law of wrongful or unlawful termination. The relationship was seen within the 4 corners of the employment contract.”*

I therefore find that the termination was not unlawful as it complied with both the law and the terms of contract of the claimant.

2. Whether there are any remedies available to the Claimant.

Both the Employment Act (repealed) and the CBA Clause A5 did not provide for any remedies for unfair termination. Under common law that was applicable before the enactment of the present Employment Act, the measure of damages was the length of notice provided for in the contract or reasonable notice (**MENGINYA SALIN MURGANI –V- KENYA REVENUE AUTHORITY, KENYA OILFIELD SERVICES LIMITED –V- PETER NJOROGE**). The claimant having been paid one month's salary in lieu of notice as provided for in the CBA, there are no further damages payable to him. Prayer (a) of his plaint must thus fail.

The claimant is further not entitled to service pay as neither his terms of employment nor the law as it then was provided for the same.

Prayer (b) of the plaint must thus also fail.

Prayers (c) being a prayer for damages for breach of contract and wrongful dismissal being a duplication of prayer (a), must fail for similar reasons.

On whether the Claimant is entitled to aggravated damages, the Claimant has not proved that the Respondent acted maliciously in terminating his employment. For a person to become entitled to aggravated damages, he must prove that the Respondent had improper motives in terminating his employment as was held in the case of *John vs. MG Limited [1996] 1 ALL E.R. 35* where the Court held that exemplary damages are meant to punish the Defendant and aggravated damages will be awarded where the Defendant acts out of improper motive.

Unfair and unjustifiable termination is a procedural matter on how the employer went about terminating an employee's services. When the Claimant alleged that the termination of his employment was actuated by malice and ill motives, he ought to have proved that the employer had ulterior motives in terminating his employment which went over and above the allegations made against him and reasons given for the termination of his employment, which reason was acknowledged by the Claimant to be plausible as it would lead to loss of customer confidence. Further, the fact that there were other employees whose services were terminated together with the claimant, and that the claimant did not adduce evidence of ulterior or ill motive in the termination of his employment would negate any entitlement to aggravated damages.

The result is that the entire claim fails and is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE