



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1045 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS KIRIMI MUNGANIA.....CLAIMANT

VERSUS

BARCLAYS BANK (K) LIMITED.....RESPONDENT

JUDGMENT

The Claimant is a former employee of the Respondent. He was promoted to the position of Retail Support at job group B2 at JKIA’s Barclays Bank Branch. At the time of his termination, the Claimant was earning a monthly salary of Kshs.117,729.00 with a house allowance of Kshs.7,500.00.

The Claimant avers that following a theft that occurred on the night of 19th – 20th July 2009, the Respondent unfairly caused the Claimant to be arrested and charged in ***Makadara Criminal Case No. 2977 of 2009*** allegedly for stealing by servant. On 20th July 2009, the Claimant was suspended on half salary. Further, on 23rd November 2009 the Respondent terminated the Claimant’s services unlawfully and unfairly before the determination by court of the Claimant’s alleged involvement, and denied him the applicable terminal benefits as provided by the CBA and the law. The Claimant avers that he was not given the opportunity to defend himself.

The Claimant avers that on 25th November 2009, he wrote a letter to the Respondent requesting for a review of the decision to terminate his services but all was in vain. Further, on 7th December 2009, he wrote to the Defendant requesting to be paid for the extra hours worked while at JKIA Branch but the Respondent failed to respond to the Claimant in writing and verbally asked him to clear himself in court before seeking reinstatement.

On 14th June 2012, the Claimant was acquitted of all charges that had been preferred against him which was communicated to the Respondent on 26th June 2012 by the Claimant’s advocates. The advocates demanded that the Respondent computes and pay all Claimant’s terminal dues in full or unconditionally re-employ him without any loss of salary or benefits but the Respondent failed to respond.

The Claimant avers that he had worked for 28 years without any malpractice or misconduct and without being served with any warning letter. He avers that he was not in charge of the night security, strong room or the Bank and as such the Respondent’s allegations that he was involved in the theft are farfetched and untrue. The Claimant avers that he was not on duty and that the Respondent’s CCTV cameras had picked the action. However, the Respondent’s manager alleged that the same were not working. The Claimant sought the following prayers:

- a..... Notice of 1-month salary..... Kshs.125,229.00
- b.... Annual leave due 2009 (sic)..... Kshs.125,229.00
- c..... Leave allowance..... Kshs.4,701.00
- d.... Compensation for unfair termination
 (Termination 125,229 x 12)..... Kshs.1,502,748.00
- e..... Overtime for February 2008 and July 2009..... Kshs.1,800,000.00

f..... Gratuity/ Severance pay for (28 x 125,229)..... Kshs.3,506,412.00

g..... Forgone years of service (24 x 125,229)..... Kshs.3,005,496.00

Total Kshs.10,069,815.00

h. Costs and interest at the rate of 14% with effect from 1st July 2012.

In its defence the Respondent avers that on 20th July 2009, it received a report of missing cash of Kshs.33,482,521.00 at its JKIA branch which cash was built up of treasury money from 17th to 19th July 2009 thereby necessitating investigations by the Respondent. The Claimant and other employees working at the JKIA Branch were suspended to pave way for investigations. The Respondent avers that the Claimant was a member of the Banking and Insurance Finance Union, whose CBA accorded the Claimant an entitlement of half salary during suspension. The Claimant was adversely implicated in the Investigation Report which revealed that the Claimant was the shift leader in charge of the JKIA branch on the 19th July 2009 when the loss occurred and it was his responsibility to arm the alarm. That whereas the Claimant alleges that he armed the alarm at 11:20 pm, security records indicate that the alarm was armed at about 12:43 am. Further, the findings of the investigation revealed that there was no evidence of forced entry.

Vide a letter dated 18th September 2009, the Claimant was invited for a Disciplinary hearing scheduled for 29th September 2009 at the Respondent's Moi Avenue offices. The Respondent was informed of his right to invite a fellow colleague or shop steward. At the disciplinary hearing, the Claimant confirmed that he shared the keys with B1 and B2, which was contrary to the Respondent's policy. The Respondent avers that it was clear that the Claimant was dishonest hence the termination on 23rd November 2009 and not 29th June 2012 as alleged by the Claimant. The termination letter informed the Claimant of the reasons for termination and the Claimant's right of appeal to be lodged within 5 working days from the date of termination. The claimant did not appeal the decision as provided for under Respondent's Disciplinary Capability and Grievance Toolkit but instead requested for compensation for extra hours and further made his pension claim.

The Respondent avers the Claimant did not have a clean record. The Claimant had previous disciplinary cases and immediately before the loss of the Kshs.33 million, he had received a warning in respect of an offence and loss of Kshs.150,000.00. The Respondent avers that the termination was done in accordance with the **clause A5 (a) (iv) CBA** and **section 44 (4) (f) & (g) of the Employment Act** and the Claimant was paid one month's salary in lieu of notice. That as such the Claimant is not entitled to the prayers sought and the suit should be dismissed with costs to the Respondent.

On 21st August 2013, the Respondent filed a Notice of Preliminary Objection of even date, on the ground that this Honourable Court does not have jurisdiction to hear and determine this suit as the claimant brought his claim beyond the statutory limitation period of 3 years and hence the suit is fatally defective as the same is time barred and offends the mandatory provisions of **section 90 of the Employment Act 2007**. On 4th June 2014, the Nduma J. delivered a ruling dismissing the preliminary objection because the issue raised was not a pure point of law capable of determination without recourse to disputed facts.

The Evidence

CW1, FRANCIS KIRIMI MUNGANIA, testified that he was in charge of the branch on 19th July 2009. He stated that at around p.m. he closed business for the day and went home at around 11:15 pm. When they opened the door to the branch the next morning, they realized that all the money had been stolen as the branch vault was empty. He was taken as a suspect and was charged in Makadara Law Courts. He was later suspended by the Respondent and was informed that the reason was because of the incident. The Claimant's case was heard up to 12th June 2012 when he was found not guilty. Thereafter, the Claimant wrote a letter to the Respondent on 26th June 2012 but never received a response. The Claimant stated that normal working days were 8 hours per day but he sometimes worked for 14 hours. The Claimant testified that he did not receive any money when his employment was terminated and has not been paid anything to date.

During cross-examination, the Claimant admitted to having a set of keys that opened the vault and that one Frida had the other set. However, he asserted that the vault could not be opened by one person. He stated that the alarm was armed before they left. The employees at the Respondent worked in two shifts: the first shift from 2 pm to 11 pm which the Claimant was in charge of. Further, that he was not working for 14 hours but worked in a shift. He stated that at the time the money disappeared, he informed the manager who informed his seniors who in turn reported to the branch.

RW1, VASLAS ODHIAMBO AGOLA, testified that it was the duty of the Claimant to ensure that the alarm was properly set up and the money was secured. When the money went missing, the Claimant together with others were suspended pending investigations and to facilitate further investigations. He stated that one of the findings of the investigation report, was that the alarm was not armed when the Claimant left the Bank. It was armed an hour later. The cash and custody of the key was also found wanting. He testified that it was the responsibility of the Claimant to ensure that all the controls were adhered to. He testified that the Claimant was invited to a disciplinary hearing and informed of his rights. The Claimant was involved in the investigations. At the disciplinary hearing the Claimant was unable to explain why there was no false entry and how the money was stolen. RW1 stated that in the Claimant's letter dated 7th December 2009 the overtime he was demanding was not explained. He further testified that it was the Respondent's policy that overtime is payable according to the extra hours worked and is calculated and paid within a month. The Notice pay was paid and the Claimant had exhausted his leave days at the time of termination.

During cross-examination, RW1 could only account for 1 report and conceded that he had not prepared the report and had not interrogated the persons who prepared the report. However, on the issue of arming and disarming the alarm, RW1 stated that he relied on the Investigations report.

Claimant's Submissions

The Claimant in his written submissions dated 11th July 2018 and filed on 18th July 2018, submits that the Respondent has failed to prove how the Claimant's actions amounted to gross misconduct and/or negligence. He relies on the case of Amos Ohuru Wasonga vs. Kingsway Tyres Company Limited [2014] eKLR where the court held:

"The action of terminating the Claimant without giving reasons contravenes the provision of Section 43(1) of the Employment Act 2007 which states that..."

The Claimant submits that he was not given a fair hearing as demanded by Section 41 (1) and (2) of the Employment Act. The Claimant relies on the case of Nicholas Otinyu Muruka vs. Equity Bank Limited [2013] eKLR where the court held:

"The employer must demonstrate reasonable and sufficient grounds that link an employee to acts of criminal nature that amount to gross misconduct to (sic) gross to justify a summary dismissal. Mere suspicion is not enough there must be reasonable and sufficient grounds. Otherwise if employers are allowed to hold mere suspicions, they would use these simple reasons to harass, intimidate and/or harass their employees for just cause... employers cannot take discretion to terminate contracts of service on gross misconduct in disregard of due process of notification and hearing under section 41 of the Act. To do so such an employer must face the wrath and price of unfair termination"

The Claimant also relies on the case Daniel Warindo vs. Kenya Bureau of Standards [2016] eKLR where the court stated:

"Section 43 of the Employment Act states as follows...The law therefore not only requires that the reasons must be stated but must be proved. There is no reason the Respondent have set out and proved that led to the termination of the Claimant."

The Claimant submits that his dues were unreasonably withheld for no just reason since he was never given his terminal dues and no account was ever given to him or to the court as to how the said money was used. He prays to be awarded the prayers sought in the claim.

Respondent's Submissions

The Respondent in its written submissions dated 17th September 2018 and filed on 19th September 2018, submits that this Honourable Court does not have jurisdiction to hear and determine this suit as the Claimant brought his claim beyond the statutory limitation period of 3 years. The Respondent relies on Section 90 of the Employment Act which states that:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act Cap. 22, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The Respondent further submits that whenever a cause of action is statute barred, a court lacks the jurisdiction to handle the matter. The Respondent relies on CA Civil Application Nai. 100 of 2015 (Ur 81/2014) between Mr. & Mrs Justice E. Torgbor vs. Ladislaus Odongo Ojuok (Coram: GBM Kariuki, J. Mohammed & Otieno-Odek JJ. A.) where the Court of Appeal stated that:

*"...on our part, we reaffirm the dicta that jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the court to pause and determine the issue before proceeding with the case. The Supreme Court of Kenya in the cases of **Re The Matter of the Interim Independent Electoral Commission S. C, Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia SC Another v. Kenya Commercial Bank Limited 8Z 2 Others S.C. Application No. 2 of 2012; [2012] eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It stated: -*

A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is dear and there is no ambiguity."

The Respondent also relies on the case of Fred Mudave Gogo vs G4S Security Services (K) Ltd [2014] eKLR where the court observed as follows:

"...The Claimant's employment was terminated on 8th August 2008, a period over 3 years from the date of filing this claim ... on the 5th June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time."

The Respondent submits that the Court has no jurisdiction to extend the time of the Respondent and relies on the case of Maria Machocho vs. Total (K) Industrial Cause No. 2 of 2012 Justice Radido stated as follows:

"Before the coming into operation of section 90 of the Employment Act, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided ... in Section 4(1) of the Limitation of Actions Act, and it was 6 years. Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act. "

On the issue of whether the Claimant's employment was terminated unfairly, the Respondent submits that there were legitimate grounds to

terminate the employment of the Claimant in accordance with section 44 (3), 44 (4) (c) and section 45 (2) of the Employment Act 2007 since the Claimant breached the terms of his Employment Agreement. The Respondent relies on the case of ***Industrial Alliance Life Insurance Company vs. Gilbert Cabiakman (indexed as: Cabiakman vs. Industrial Alliance Life Insurance Co. 2004 SCC 55)*** where the court was of the opinion that parties to an employment contract have reciprocal obligations under the contract. The employer has the duty to remunerate, provide a conducive environment and to allow the employee to perform the work agreed upon. The employee on the other hand has the duty to work with prudence, diligence, honesty and to act faithfully. The Respondent further submits that it has proved that the grounds for termination were fair as provided for by section 45 (2) of the Employment Act 2007 and that it had a valid reason to terminate the Claimant's employment.

On the issue of whether the Claimant is entitled to the reliefs sought, the Respondent submits that the Claimant is not entitled to any of the prayers sought because:

- a. The Claimant was paid 1 month's salary in lieu of notice.
- b. The Claimant had already exhausted his leave at the time of termination.
- c. The Claimant's employment was fairly terminated.
- d. The Claimant did not prove overtime.
- e. The Claimant is not entitled to a gratuity or service pay as he was a beneficiary of a pension scheme.
- f. The Claim for forgone years of service is not provided for as one of the remedies in section 49 of the Employment Act.

Determination

The Respondent has submitted on the issue of this Honourable Court's jurisdiction. However, the same was raised by way of preliminary objection and was dispensed with when Nderi Nduma J. delivered a ruling dismissing the Respondent's Preliminary Objection on grounds that the issue raised was not a pure point of law capable of determination without recourse to disputed facts. The respondent did not appeal against the ruling. The only time a party may revisit any issue of limitation is when leave is granted ex parte. In this case parties ventilated the issue and a determination was made. It is therefore *res judicata*.

As such, the following are the issues that this Honourable Court ought to determine:

1. Whether the Claimant's employment was unlawfully and unfairly terminated.
2. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's employment was unlawfully and unfairly terminated

It is the Respondent's case that due process was followed. RW1 testified that the Claimant was involved in the investigations and was accorded a hearing and informed of his rights through a letter, before the proceedings commenced. The Respondent has submitted that there were legitimate grounds to terminate the employment of the Claimant in accordance with section 44 (3), 44 (4) (c) and section 45 (2) of the Employment Act 2007 since the Claimant breached the terms of his Employment Agreement. On the other hand, it is the Claimant's case that he was not given a fair hearing as demanded by section 41 (1) and (2) of the Employment Act.

The RW1 testified that the reason for the Claimant's termination was because he failed to follow procedure and not because he was accused of stealing.

RW1 testified that the Claimant had been involved in the investigation process, a disciplinary hearing notice was issued to him and he was informed that he had the right to appear with an employee and a member of the union, he was heard, a decision arrived at and he was given the option of appealing the decision. He never appeared with a fellow colleague or a member of the union and never appealed the decision rendered. Instead, he wrote a letter requesting that the termination be halted pending the hearing and determination of ***Makadara Criminal Case No. 2977 of 2009***. These were issues that he would have raised at the disciplinary hearing. The Claimant never disputed the content of the meetings relating to the proceedings.

From the minutes of the disciplinary hearing it is clear that the issue being interrogated was that of procedure. This is also clear from the letter of termination. At no point was the Claimant interrogated about his criminal case and as such the Claimant's averments that the reason used was a scapegoat to terminate his employment cannot hold. I find that the Respondent proved its reason for termination during the disciplinary hearing as was held ***Daniel Warindo vs. Kenya Bureau of Standards [2016] eKLR*** where the court stated:

"Section 43 of the Employment Act states as follows...The law therefore not only requires that the reasons must be stated but must be proved."

The Respondent had sufficient grounds to terminate the Claimant's employment being the failure by the Claimant to adhere to the set procedure. This occasioned loss to the Respondent. Further, the reason for termination is as provided for under the CBA and the Employment Act. The right termination procedure was followed as required by law and as such the termination was lawful and fair.

Whether the Claimant is entitled to the reliefs sought

The Claimant is not entitled to 12 months compensation for unfair termination as he has not proved that his employment was unfairly terminated.

The Claimant is not entitled to one month's salary in lieu of notice. RW1 stated that the Claimant's letter indicated that he had been paid one month in lieu of notice. However, during his re-examination the Claimant stated that his letter of termination had not stated what was due to him but stated how much was owed to the Bank. Further, the claimant stated in his testimony that he owed the bank Kshs.1,900,000.00 and that it was part of his agreement that his benefits would offset his loan. This was reinforced in his termination letter. It is not sufficient for the Claimant to allege that he does not know how his dues were computed. He should have sought clarification if he was aggrieved by the computation, something which he did not do. It therefore means that at the time, he was content with his dues being applied to offset his outstanding debt.

The Claimant is not entitled to overtime as he did not prove that he worked overtime. During trial, the Claimant admitted that he had not been working for more than 8 hours as alleged but worked in shifts of 8 hours.

The Claimant is not entitled to gratuity or severance pay as he had already been paid his pension benefits. During cross-examination, the Claimant conceded that he had received his pension benefits.

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 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE