



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 454 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

HELLEN WASEKA.....CLAIMANT

- VERSUS -

MIDDLE EAST BANK KENYA LIMITED.....RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated the 19th of March 2012, the Claimant filed suit seeking orders against the Respondent for:-

i) The award of Kshs. 13,467,097/=.

ii) Her certificate of service.

iii) Costs of the suit together with interest and any other relief this Honourable Court deemed just.

2. The Claimant avers that on 9th November, 2009, she was employed by the Respondent as Head of Operations and Information Technology at a gross monthly salary of Kshs. 420,000/= pursuant to a contract of employment dated 6th October, 2009, for a term of 4 years.

3. That throughout her period of service the Claimant did not receive even a single warning letter from the Respondent regarding her performance having endeavoured to serve the Respondent with loyalty and diligence.

4. She avers that in a meeting held on 24/2/2012 between her and the Managing Director of the Respondent, it was verbally communicated to her that her contract of service had been terminated. That the reason for the said termination was explained as an alleged delay on her part to disclose to the bank's external auditors the existence of a difference in the bank's cheque clearing process in 2011 resulting in an unplanned extension of the external auditors' stay at the bank in order to conduct additional work. That she was not allowed to make any representations at the said meeting or at any time thereafter despite several attempts to do so.

5. She contends that the said disclosures did not form part of her job description nor did the Respondent provide her with instructions requiring her to make any disclosures to external auditors. That the

termination was done in blatant contravention of fair procedure in terms of her contract of service and the Employment Act. She alleges that she was not accorded an opportunity to be heard and the meeting convened was not in adherence to Section 41 of the Employment Act. That the reason for termination was unfair and contrary to justice and equity. That the Respondent has also failed to pay the Claimant's terminal dues.

6. It is her contention that after the verbal summary termination on 24.2.2012, the Managing Director of the Respondent by a letter dated the 28th February, 2012, wrote to the Claimant purporting to terminate her contract of Service by giving her 3 months' notice.

7. That later on 9th March, 2012, the Respondent wrote to the Claimant purporting to summarily dismiss her from its employment for absconding duties. She further contends that in the same letter of 9.3.2012, she was wrongly accused that she had failed to hand over the Respondent's property in her possession which property she alleges that she had made arrangements to deliver to the Respondent which delivery was duly acknowledged by the Respondent.

8. The Claimant demands to be paid for the over 20 months of service remaining in her 4 year contract of service, unpaid leave days and compensation for wrongful termination.

9. The Respondent in their Memorandum of Defence admit the employment relationship and add that the termination in the contract of employment was subject to either side giving to the other three months' notice of termination.

10. They aver that during the period of employment the Respondent noticed the Claimant becoming more and more isolated from the operation team she was heading and supervising as well as from the Senior Management of the Respondent due to her attitude to her work and failure to communicate with her team on various matters. That she also disregarded meeting timelines on various assignments given to her.

11. The Respondent contend that the Claimant failed to advise management, internal audit department and external auditors in a timely manner on the clearing differences in the banking operations of the Respondent. This in their view, was gross misbehaviour leading to a meeting on the 23.2.2012 between the Respondent's Managing Director and the Claimant where the issue of poor performance was discussed. That at the meeting the gravity of her offence was explained to her and she was asked for an explanation which she did not give.

12. That the Respondent informed the Claimant that they would be considering terminating her employment in accordance with her contract. They aver that by a letter dated 28.2.2012 they notified the Claimant that the contract of employment would be terminated as from 28th May, 2012. They contend that from 5.3.2012, the Claimant absented herself from work and by a letter dated 7.3.2012, the Respondent drew the Claimant's attention to this alarming fact and once again asked the Claimant for an explanation.

13. It is also contended that on 3.3.2012, the Claimant gained entry into the Respondent's premises in breach of the Respondent's security regulations and shredded voluminous records and documents belonging to the Respondent.

14. That by 9.3.2012, the Claimant had still not returned to work and instead handed over sensitive door and alarm keys for entry to the Respondent's premises to a third party for delivery to the Respondent. That in light of such grave misconduct the Respondent terminated the Claimant's services summarily, which termination was in accordance with provisions of Section 44 of the Employment Act.

15. They contend that the Claimant's certificate of service was prepared long ago and is available for collection. Further, that no terminal dues are payable and that the Claimant was a member of Middle East Bank Staff Provident fund managed by Kenindia Asset Management Company Limited and the Claimant can make a claim from this fund in accordance with the terms thereof.

Evidence

16. The Claimant led evidence as set out in the Memorandum of Claim and in cross-examination she denied causing the Respondent any delays in the clearing processes and denied absconding duty as she was verbally terminated without a hearing or being issued with any notice.

17. The Respondent put up 3 witnesses. RW1 was Joseph Gitau Kinuthia who at the material time was the senior manager in Human Resource Department and Administration. He stated that the Claimant was the head of key departments in the bank and her main role was to ensure smooth running of the Bank including accuracy of all information including customer records. That during the Claimant's time at the Respondent he witnessed instances where she failed to offer any leadership and left important decisions to her juniors. That she knew the customer accounts were not balancing due to a clearing difference for a period of 3 months but she treated this as someone else's job.

18. That she also did not have interpersonal skills and he quoted an instance where one customer by the name of Mrs Muchiri reported of being harassed because she had parked her car in the Claimant's preferred space. He stated that the Claimant did not have team spirit as there were some disciplinary cases involving staff in her department, which she did not accord the Human Resource Department support causing unnecessary challenges.

19. It was also RW1's testimony that on 3.3.12 the Claimant went in the Bank premises at Milimani Road Branch in Nairobi alone and in contravention of the Bank Rules where she shredded a lot of records. This was noticed on 5.3.12 when they found a lot of shredded papers and upon enquiry it was confirmed that it was the Claimant who had done the shredding but they were yet to establish what documents had been shredded.

20. That the Respondent issued her with a 3 months' notice but instead of serving the notice period she absconded from her duties for which reason she was dismissed.

21. RW2 was one Solomon Okach Odiero, the Head of Internal Audit at the material time, who led evidence to the effect that the Claimant used to take an inordinately long time to provide him with answers to requests for information necessary to evaluate whether or not the risks the bank face in operations were effectively managed. That the Claimant also failed to cooperate with him by failing to allow him to discuss anomalies identified in operations of the bank. He provided a schedule of instances when the Claimant delayed in providing information to his department and the various dates when reminders were sent to the Claimant with delayed response or no response at all.

22. RW3 one Philip Ilako the Managing Director of the Respondent bank stated in evidence that the Claimant's duties required her to provide leadership and direction, manage operational risk to prevent loss or escalation of associated risks and to be a team player.

23. That she had shortcomings as set out in the Statement of Defence which caused him to notify her on 23.2.2012 of the Respondent's decision to terminate her services in line with her contract of employment for reasons of poor leadership, lack of team work, tardiness in resolving audit issues in areas under her responsibility and failure to communicate to management of clearing differences in a timely basis and to disclose the same to the external auditors.

24. In cross-examination he admitted at the meeting where the termination was communicated, it was only the Claimant and himself in the room at which meeting he notified her of the reason she was being dismissed. That no warning letter was issued prior to the said meeting.

Submissions

25. It is submitted on behalf of the Claimant that she was not accorded a fair hearing and that the Claimant stood no chance of getting a fair hearing from the Respondent given deliberate acts on the part of the Respondent to ensure that the Claimant was prejudiced in seeking to make any representations she

may have wished to make.

26. Further that the Respondent failed to prove the reasons for the termination as required in Section 43(1) of the Employment Act. That in the defence it expressly admitted that it did not conduct a review of the Claimant's work in 2011 and in their view the Respondent lacks basis for the determination that the Claimant failed to exhibit competence, initiative, leadership and professionalism in his work.

27. That in the present case the Claimant is yet to get alternative employment or any other form of income as a result of which no sum or advantage that can be quantified in monetary terms has been adduced in evidence that can be deducted from the maximum compensation to mitigate his actual pecuniary loss. As a result, they pray for the Claim to be allowed as drawn.

28. On the other hand, it is submitted on behalf of the Respondent that the Claimant was not terminated as alleged in her pleadings and evidence but rather she absconded duty forcing the Respondent's hand to terminate her services. Further that the claim for summary dismissal is an afterthought as the stand taken by the Claimant prior to filing suit was stated in the following terms:

“Note that your aforesaid verbal communication of 24th February, 2012, resulted in an immediate constructive dismissal of our client's contract of service. It is therefore disingenuous of you to purport to require our client to serve out a three-month notice period relating to a contract of service you have unilaterally and unfairly terminated. Indeed, the present working environment to which our client is exposed renders it untenable for her to productively offer her services because of the mental anguish occasioned to her by the unfair manner of your termination of her contract of service. It is also clear to her colleagues as work that she is unwanted by you; no reasonable employee would continue to serve in such circumstances. Accordingly, our client considers that her contract of service was constructively and unfairly terminated as from the 24th of February, 2012, making it unnecessary for her to serve for a further 3 months.”

29. That the evidence of the Respondent's witnesses was not controverted in cross-examination and it should be taken as an admission. They quote Sarkar's Law of Evidence (17th Edition) Vol. II at pages 2730 – 2731 where he commented thus:-

“Effect of omitting or not cross examining a witness on essential points... he should interrogate the witness on all material points that go against him. If he omits or ignores them they may be taken as an acceptance of the truth of the part of the witness's evidence.... If he asks no question, he will be taken to accept the witness's account.”

30. That the Claimant's Counsel did not cross-examine the witness on the emails contained in the Respondent's bundle of documents filed in Court on 11.12.2017 and therefore the contents of the email were unchallenged.

31. On the issue of bonus, it is submitted that the Claimant's performance had deteriorated as evidenced in the schedules annexed on the bundle of documents indicating that in year 2010 her performance was average and in 2011 her performance was below average.

32. That the claim for payment for 20 months is completely unjustified as the said contract of employment was terminable by a three months' notice by either party. They cite the Court of Appeal case of **CMC Aviation Vs Mohamed (2015) 2EA 92 at pages 103j to 104a:-**

“In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation.”

33. That the Claimant has not proved the case of summary dismissal and thus the suit should be dismissed with costs.

34. I have considered all evidence and submissions of parties. The issues for determination are as follows:-

- 1. Whether the Respondent had valid reasons to terminate the Claimant's services on 23.2.2012.**
- 2. Whether due process was followed in this termination.**
- 3. Whether the Respondent had valid reasons to dismiss the Claimant on 9.3.2012.**
- 4. Whether the Claimant is entitled to the remedies sought.**

35. On the 1st issue, the Claimant's case is that she was terminated for no valid reasons. The Respondent's Managing Director testified that the Claimant was terminated for poor leadership, lack of team work, tardiness in resolving audit issues and failure to communicate to management of clearing differences in a timely basis and to disclose the same to the external auditors.

36. From the Respondent's submissions, the Claimant was being accused of poor performance. Indeed in the Claimant's contract, it was indicated that:-

"Performance appraisal will be conducted each year against the agreed performance targets on your performance, a bonus payment will be considered. The bonus will be calculated at a percentage of your monthly salary".

37. The Claimant contends that she performed well and was indeed issued with a bonus payment in 2010 of Kshs.238,000/= and of Kshs.154,000/= in 2011. This is an indication that she performed fairly well.

38. If indeed the Respondent had felt that the Claimant's performance was not satisfactory, this bonus would not have been paid.

39. The Respondent have relied on the internal Audit report dated 19.1.2012 to indicate that the Claimant's performance was not good.

40. The Claimant on her part has submitted that she performed her work quite well and the Managing Director commended her work vide the **Managing Director letter dated 3.1.2012** on clearing process of cheques. She also avers that she always updated the Managing Director and Risk Management Committee of what was needed.

41. From the foregoing, it is apparent that though the Claimant may have had some short coming, there were no valid reasons to lead to termination of her employment.

42. Section 43 of Employment Act 2007 which states as follows:-

"(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

43. The reasons envisaged herein are to be valid tangible reasons which in this case I find are lacking.

44. On the 2nd issue, the Respondent also went ahead and dismissed the Claimant without any formal disciplinary process. Section 41 of Employment 2007 states as follows:-

"(1). Subject to section 42 (1), an employer shall, before terminating the employment of an

employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

45. In the case of the Claimant however, she was summoned by the Managing Director and informed of the Bank’s decision to terminate her services. No hearing was given to her. She was not allowed to call witnesses. It is my finding that the Claimant was therefore condemned unheard and in the circumstances her notice of termination dated 24.2.2012 was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:-

(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 employee’s 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”.

46. After the termination, the Respondent wrote to the Claimant giving her 3 months’ notice. It is strange that the Managing Director orally informed the Claimant of the Bank’s decision to terminate her services and as an afterthought issued her with a 3 months’ notice.

47. The letter dated 28/2/2018 reads as follows:-

“Refer to your meeting with the undersigned on Friday 24th February 2012, wherein I advised you of the Bank’s decision to terminate your services.....”.

48. The decision to terminate had already been made and communicated to the Claimant on 24.2.2012. The 3 months’ notice coming on 28/2/2012 was therefore an afterthought.

49. Following this “notice”, indeed the Claimant made a mistake by going back alone without a colleague. She also shredded some documents. The Respondent avers that this was gross misconduct and now decided to summarily dismiss her.

50. Section 44(4) of Employment Act 2007 gives instances when certain act or omission of an employee would be considered a gross misconduct. The issue of shredding unknown documents cannot be one of them. Issue of entering bank premises unaccompanied is also not one of them. The Respondent did not produce before this Court their own Human Resource Manual which view these acts as a gross misconduct.

51. It is my finding that the Claimant act may have been a misconduct but not a gross misconduct that warranted summary dismissal. The Respondent also avers that the Claimant had absconded duty. There is no indication that she was summoned to show cause why she should not be dismissed for absconding duty. The conduct of the Respondent was definitely harsh and uncalled for and shows a targeted attempt to get rid of the Claimant in an attempt to cover up the unfair termination on 24.2.2012.

52. It is my finding that therefore that the Claimant having been terminated as admitted by the RW3, any action after 24.2.2012 was of no value on effect against a staff who had already ceased to be an employee of Respondent.

53. In terms of remedies, I find that the Claimant was serving the Respondent a 4 year contract. The Respondent decided to terminate this contract prematurely on 24.2.2012. In the circumstances, I find for the Claimant and I award her full salary for the remainder of the contract period:-

1. 20 months x 420,000 = 8,400,000/=

2. I also award her 6 months' salary as compensation for unfair termination= 6 x 420,000 = 2,520,000/=

3. She is also entitled to 3 months' salary in lieu of notice = 3 x 420,000 = 1,260,000/=

TOTAL = 12,180,000/= Less statutory deductions

4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Karanja for Respondent – Present

Khasiani holding brief Odongo for Claimant