



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 1859 OF 2013

(Before D. K. N. Marete)

CYRUS MASENGE NYABICHACLAIMANT

VERSUS

BARCLAYS BANK OF KENYARESPONDENT

JUDGMENT

The matter was originated by way of a Statement of Claim dated 17th October, 2013. It does not disclose an issue in dispute on its face.

The Respondent in a Memorandum of Response dated 6th January, 2014 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that by a job offer dated 3rd November, 2008, he was employed by the Respondent as a Customer Advisor at a salary of Kshs.461,820.00 per annum and a house allowance of Kshs.44,400.00 all subject to an annual review. He was dutiful and served with zeal during his stay of employment with no case of discipline.

It is the Claimant's further case that the Respondents' policy on medication provides that an employee seeks medication and he presents the receipt to AON Minet Insurance for verification and eventual reimbursement. Pursuant to this, he had on several occasions sought medication at Marie Stoppes, Kitale and presented receipts to the insurance company and had refunds made accordingly.

His other case is that on 19th October, 2012, he received a letter from the Respondent suspending him from duty pending disciplinary investigations on allegations that he had presented fraudulent medical claims. He thereafter attended a Disciplinary Committee and general hearing being held at Sirikwa hotel. On 6th November, 2013 he was served with a termination letter from the Respondent.

The Claimant's other case is that he was unfairly terminated on grounds of fraud which was a fabrication by the Respondent with ill intentions. These allegations of fraud were an afterthought as by the time this was brought against him, the receipts had been verified and paid to him by the Insurance.

His further case is that he was not furnished with the forged documents prior to the hearing and this remains the case to date. Again, the signatories to the forged documents were never called to testify during the disciplinary proceedings. His efforts to seek audience or explanation from the Respondent have been futile.

He prays as follows:

- i. Damages for unfair termination.*
- ii. Reinstatement to work.*
- iii. Cost of this Claim.*
- iv. Any other relief as the Court may deem fit.*

The Respondent's case is that at the time of offer of employment, the Claimant was explained on the terms of employment which included the Terms and Conditions of Employment.

It is the Respondent's further case that on or about the month of August, 2012, she was informed of fraudulent claims emanating from Kitale and Eldoret branches and on investigation, the Claimant was incriminated.

The Respondent's other case is that on 19th October, 2012, the Claimant was served with a suspension letter for 30 days pending investigation. On 20th October, 2012, he was served with a notification for disciplinary hearing to be held on 27th October, 2012. On the hearing, the Claimant was found culpable and terminated from service.

The Respondent was served with an appeal on 23rd January, 2013 and invited the Claimant to a hearing of the same on 30.01.2013. He did not attend and the decision to terminate was upheld.

This matter was heard on 5th April, 2017 with the parties reiterating their respective cases.

The issues for determination therefore are:

1. Whether the termination of the employment of the Claimant was wrongful, unfair and unlawful.
2. Whether the Claimant is entitled to the relief sought.
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the Claimant was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this.

During the hearing, they restated their cases as pleaded. The Respondent denies a case of unlawful termination of employment and submits that the termination of the employment of the Claimant was undertaken after due disciplinary process that involved him. This is as follows:

18.

a) The Claimant was suspended from duty with half pay and full entitlements to his contractual benefits to pave way for full investigations pursuant to the provisions of Clause A 5 c) i) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical Staff etc, for a period of thirty days.

b) At the conclusion of the investigations, the claimant was invited to make a written statement regarding the submission of fraudulent claims, which he did.

c) Subsequent to the above, the Claimant was invited to a Disciplinary Hearing where;

- i) He was informed about the subject of the said hearing.*

ii) *The date and venue of the hearing.*

iii) *The Claimant's right to be accompanied by a colleague or a Union representative.*

iv) *The persons who would constitute the Disciplinary panel.*

d) *The Respondent was not satisfied with the Claimant's representations and consequently issued him with a Termination letter which clearly stated the reasons for the said termination, the Claimant's entitlements, his liabilities as well as the option to appeal against the said termination if he so wished.*

e) *The Claimant all the while was given an opportunity to explain his side of the story and the same duly noted and considered.*

f) *Again the background of the foregoing and taking into account that the Claimant was working in a Bank which required a high degree of honesty and integrity, it was recommended that his services be terminated.*

Further,

22-----*the Claimant was properly and legally terminated under the employment Act 2007. Under Section 45 (2) (b) and (c) of the Employment Act, the conduct of the employee was wanting and incompatible. From the investigations;*

a) *It was manifestly clear that the Claimant had demonstrated that he was a dishonest employee.*

b) *Even when he was found culpable, he showed no remorse and insisted that he was not to blame.*

c) *The Claimant's acts leading to his terminated amounted to gross misconduct and he contributed greatly to the action by the Respondent to terminate him. He therefore cannot turn around and accuse the Respondent for illegal termination.*

d) *The procedure for terminating his services was fair and valid as the process was followed and he was afforded an opportunity to be heard and be represented by Union officials during the explanation for the reasons why the Respondent was intending to terminate his services. He failed to justify his unbecoming conduct.*

The Claimant's case is a mere denial. He does not in any way adduce evidence in support of a case of unfair and unlawful termination of an employment. He does not rebut or controvert the Respondent's case of due process in the termination of his employment. I find the Respondent's case overwhelming and convincing. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, he is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim. And this answers all the issues for determination.

Delivered, dated and signed this 7th day of April 2017.

D. K. Njagi Marete

Judge

Appearances

1. Miss Chege holding brief for Mr. Achach instructed by Achach & Company Advocates for the

Claimant

2. Miss Kanyiri instructed by the Federation of Kenya Employers for the Respondent