REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 470 OF 2015

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 20TH JULY 2016)

JAMES KABINGA KIBUGU ……..…….… 1ST CLAIMANT

PAUL NGARI NGUGI ……..….……... 2ND CLAIMANT

VERSUS

CENTRAL BANK OF KENYA ……..……. RESPONDENT

JUDGMENT

CLAIM

1. The Claimants filed their Claims as HCCC 1899 of 1997 consolidated with Civil Suit no. 1900 of 1994 through the firm of S. Musalia Mwenesi Advocates seeking damages for unfair termination.

2. The 1st Claimant states that he was employed by the Respondent on 2nd April, 1974, as a Clerk. That he diligently and faithfully served the Respondent and rose through the ranks and as at the time of dismissal he was a supervisor.

3. The Claimant further states that on 9th June 1994, the Respondent interdicted him purportedly under Rules 6.35 (c) and (d) of the Respondent's Staff Rules and Regulations but states that he was not aware of any circumstances satisfying Regulation 6.35(c) and that he was never charged with misconduct or gross misconduct under Regulation 6.35(d).

4. It is the contention of the Claimant that it was not until September 1994, that he was asked to show cause why disciplinary proceedings for gross misconduct should not be brought against him. He states that he replied to the said letter and pointed out that no charge could be made out under Regulations 6.31 and 6.34 because no ground of misconduct had been specified.

5. On 18th October 1994, the Respondent terminated the Claimant's services under Regulation 6.21 stating that they had lost trust and confidence in him. The Claimant avers that the Respondent's actions caused loss and damage and was deprived of the salary and other benefits he would have otherwise earned.

6. The Respondent filed a defence denying the existence of an employment relationship with the Claimant as any existing contract of employment was properly and lawfully terminated on 18.10.1994.

7. According to the Respondent the events leading to termination of the Claimant are that sometimes in the month of February 1994, the Plaintiff was arrested and questioned by the Police in connection with the theft of surrendered foreign exchange bearer certificates whereupon the Defendant lawfully interdicted him pursuant to the powers vested on it by the provisions of the contract of employment subsisting between the parties.

8. They further state that in the letter of interdiction they advised the Claimant of the circumstances satisfying Regulation 6.35 (c) of the Staff Rules and Regulations and that on 9th September 1994, the Plaintiff was charged with gross misconduct and expressly required him to show cause why disciplinary action should not be taken against him.

9. The Respondent contends that Regulation 6.34 of its Staff Rules and Regulations does not mandate an actual conviction of the offences set out therein before the Defendant can properly take action thereunder.

10. As a result of the said termination, the Respondent avers that the Claimant though employed on permanent and pensionable basis the Claimant is not entitled to any pension benefits. The Respondent denies that they breached the Central Bank of Kenya Act and its Staff Rules and Regulations. They pray for the suit to be dismissed with costs.

Evidence

11. The 1st Claimant in evidence states that in February 1994, he was working as a Supervisor in the Respondent Bank when they were informed by his section head that some certificates had disappeared. The matter was reported to the Department head who instructed him to report to the head of security. The matter was taken over by Banking Fraud Department immediately to whom he was supposed to give any information pertaining the loss but he states that he did not give any information because he did not have any.

12. The Claimant admitted to having been investigated and interdicted in 1994 and was informed that the bank was considering instituting disciplinary proceedings against him but was never given a chance to defend himself and on 18.10.1994 he was given a letter terminating his services on the basis that he was believed to have fraudulently dealt in recycled Forex C Certificates and the disappearance of bags of used Forex C Certificates. He later learnt from the local dailies that they were innocent victims of the Goldenberg Scandal.

13. The Claimant stated that he was investigated without his knowledge and was never informed of the findings of the said investigation. As at time of dismissal, the Claimant was earning a salary of Ksh 13,265/=, house allowance of Shs. 7,680/= and transport allowance of Shs. 5,190/=. Upon termination the 1st Claimant appealed to the Respondent's Governor to reconsider his termination and reinstate him which appeal was never considered. He prayed for compensation for unlawful termination.

14. The 2nd Claimant's claim is similar to the 1st Claimant and he led evidence to show that he was dismissed as a result of similar events as for the 1st Claimant. He prayed for damages for unfair and unlawful termination.

15. The Defendant put up one witness who relied on their witness statement filed in Court wherein they stated 1st Claimant was appointed to the Respondent Bank on 17th April 1974 as a Clerk on permanent and pensionable terms. Similarly, the 2nd Claimant was appointed on 16th May 1975, as Clerk on permanent and pensionable terms.

16. That sometime in February 1994, following reported loss of two bags full of Forex C's certificates, it was recommended by the Banking Fraud Unit that three officers including the Claimants be sent on

suspension until investigations were completed. The said officers were further instructed to report to the Banking Fraud Investigations (BFI) Division of the Kenya Police once a week.

17. He further led evidence to the effect that the 1st Claimant was interdicted on 9th June 1994, and he was to receive half salary plus allowances and report daily to the officer in charge BFI Division. On 9.9.1994 the Bank wrote a letter referring to the 1st Claimant's earlier arrest and interrogation by the police concerning disappearance of surrendered Forex C's from the Bank and required him to show cause in writing why disciplinary action could not be taken against him as provided for in Rules 6.20 and 6.21 of the Staff Rules and Regulations.

18. That the Claimant responded to the show cause letter stating that arrest for interrogation and release did not breach Rule 6.31 and 6.34 of the Staff Rules and Regulations. On 18.10.1994, the Bank informed him that they were terminating his services with immediate effect on account of losing trust and confidence in him. That the Claimant appealed to the Governor but the Bank did not reverse its decision.

Submissions

19. The Claimant submits that they were not found guilty of any misconduct and as such they were not in breach of Rules 6.31 and 6.34 of the Respondent's Staff Rules. The Respondent did not prove before the Claimants' dismissal that they were involved in theft, forgery, assault or convicted of any criminal offence.

20. They further submit that the Respondent's witness admitted at the hearing that an investigation report was never handed over to the Respondent Bank, therefore the Respondent acted without any evidence of wrongdoing.

21. The Claimants further submit that the Respondent was wrong in issuing notice to show cause accusing them of an offence committed without the benefit of relying on an investigation report blaming the Claimants. They were dismissed on a point of belief which they state was not sufficient to warrant dismissal.

22. They pray that the Claim be allowed as prayed and pray for damages for a period of twelve months as stipulated in the Employment Act 2007 despite the fact that the cause of action arose before the commencement of the Act.

23. The Respondent submits that the Claimants' interdiction and eventual termination by the Respondent was on account of loss of trust and integrity arising from the loss of Forex Certificates in their custody. They state that according to Clause 6.35 of the Staff Rules and Regulations the Respondent was entitled to interdict an employee:-

> ***a. Whenever an employee is charged in a court of law with an offence if proved would lead to his dismissal.***
>
> ***b. Where an employee has been detained in lawful custody by the police with a view to assisting the police with their investigations.***
>
> ***c. If and when Bank interest requires that an employee should forthwith cease to exercise the functions' and powers of his office and the question of his dismissal is being contemplated; or***
>
> ***d. Where an employee is charged with misconduct or gross misconduct and the question of his dismissal is being contemplated.***

24. The Respondent state that they were satisfied that the Claimants were guilty of gross misconduct under Clause 6.35 which called for a notice to show cause why disciplinary action should not issue as required under Clause 6.20 and 6.21 of the Staff Rules and Regulations.

25. They rely on the case of ***Fulgence Sunza Masai vs. Kenya Revenue Authority (2014) eKLR*** where gross misconduct was defined as:

> "***Conduct undermining the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employee. Misconduct includes theft or fraud, physical violence or bullying, deliberate and serious damage to property, serious misuse of organizations property or deliberately accessing the internet containing pornographic, offensive or obscene material, serious insubordination, unlawful discrimination or harassment bringing the organization to disservice, serious incapacity at work brought by alcohol or illegal drugs causing loss or damage or injury through serious negligence, a serious breach of health and safety and serious breach of confidence."***

26. The Respondent submits that they followed the law set out in the Employment Act in the procedure used to terminate the Claimants.

27. It is the Respondent's submission that the Claimants are not entitled to damages claimed. They state that at termination of Claimant's contracts they were paid on superior terms *interalia*, three months' salary in lieu of notice and salary for unspent leave as required under the Staff Rules and Regulations which fact was confirmed by the Claimants. The Claimants were also paid the half month salary which they had withheld during the period the Claimants were on interdiction.

28. The Respondent submits further that in the event the Court holds that the Claimants were unfairly dismissed, then it should hold that no further damages are payable. They state that the law as at the time of dismissal of the Claimants was that where dismissal or termination was wrongful, the damages payable to the employee is the salary which would have been paid in lieu of notice.

29. They rely on a recent case of **Kenya Revenue Authority Vs Menginya Salim Murgani (2010) eKLR** where it was stated:

> ***"Regarding the period of notice, it is common ground that since the period of notice was not specifically provided for, the contract would be terminated by issuing reasonable notice. From the evidence set out above, even the Respondent in his evidence admitted that a six months' notice would have constituted a reasonable notice for the contract of service. It follows therefore that the findings by the Superior Court that the Respondent was entitled to salary for seven years and six months from 9th March 2001 to date of judgment was not based on any evidence and was with respect, arbitrary. Similarly it was the contract of service which regulated the leave allowance payable and the pension payable."***

30. They also rely on the case of **Ombanya Vs Gailey Roberts Limited (1974) E.A. 522** where the Court stated:

> ***"…it is established that where a person is employed and one of his terms of employment included a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current. In the instant case, the Plaintiff would have been legally dismissed by one month's notice and the defendant could have dispensed with his services on that period of notice. In this respect, the Plaintiff would have no cause of action."***

31. The Respondent concludes their submissions by stating that they lawfully dismissed the Claimants and all their dues paid and as such the Claim should be dismissed.

32. The Claimants were terminated on 18/10/1994. During the operative period, the Employment Act Cap 226 (now repealed) was the law governing employment relations.

33. Under the said repealed law, Section 16 states as follows:

"Either of the parties to a contract of service to which paragraph (ii) and (iii) of subsection (5) or the provisions 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."

34. This provision read together with Respondents Staff Rules and Regulations states as follows:

"6.1 …the Bank may, at any time, dismiss from the services of the Bank any employee on permanent and pensionable terms who is found guilty of misconduct by giving him three months notice in writing or paying the employee three months salary in lieu of notice".

35. It is not clear whether the Claimants were indeed found guilty of misconduct as provided in the Clause above. The chronology of events leading to their termination is as follows:

- ***1.3.94 – Claimants are interrogated about the disappearance of the surrendered Forex C's from the Respondent, recorded statements and released on 4.3.94.***
- ***9.6.1994 – Claimants are interdicted from Respondents service.***
- ***9.9.1994 – Claimants are sent show cause letters.***
- ***14.9.1994 – Claimants replied to the show cause letters denying any involvement in the disappearance of the Forex C's.***
- ***18.10.1994 – the Claimants are terminated on grounds that the Respondents had lost trust in them and in accordance with Clause 6.21 of Staff Rules and Regulations.***

36. Clause 6.21 of the Respondents Staff Rules and Regulations deal with employees found guilty of misconduct. My understanding is that "being found guilty" connotes a finding from a criminal Court of guilt after due process.

37. In the case of the Claimants however, they were never charged in any Court and neither were they pronounced guilty. It was therefore wrong for the Respondents to terminate them citing Clause 6.21 which did not apply to them.

38. The Claimants appealed the decision of Respondents and stated as much but the appeal was rejected.

39. Having found as above, I also note that the 2 Claimants filed a Misc. Appl. No. 38/95 and 1455/94 where Hon. J Waki (as he then was) ruled that the remedy the Claimants have is in breach of contract.

40. The Claimants submitted before this Court document No. 42 in the list of documents being a report of the Standard Newspaper dated Friday October 15th of 2004 indicating that a Cleaner of Central Bank of Kenya Mr. Moses Mbuki Nguku revealed that former Department Manager Jacob Kilach asked him to carry two bags of Forex C's ….".

41. These Forex C's were the reasons the Claimants were terminated yet it emerged that they never were involved in their disappearance.

42. My findings are that the Respondents had no valid reason to terminate the services of the Claimants.

43. Despite the fact that the repealed Cap 226 did not have a provision for an employee giving reasons before termination, in case of the Claimants the Respondents giving reasons for termination for Claimants which reasons turn out not to be true. As found in the Misc Appl. 38/95 and 1455/94 (consolidated) the Claimants are entitled to a remedy for breach of contract.

44. I therefore find for each Claimant and make orders as follows:

1. The Claimants termination was unfair and unjustified.

2. The Claimants are entitled to their terminal dues as officers who retired in the service at the time of termination.

3. Each of Claimants is entitled to payment of damages for breach of contract being Kshs.2 million for each Claimant.

4. The Respondents to pay costs this this suit.

Read in open Court this 20th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

S. Mwenesi for Claimants – Present

Miss Barasa holding brief Amele for Respondent