



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CLAIM NO. 43 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GILBERT MARIERA MAKORICLAIMANT

-Versus-

EQUITY BANK LIMITEDRESPONDENT

JUDGEMENT

The Claim herein is filed by Gilbert Mariera Makori alleging unfair termination of his employment by the Respondent. He seeks the following reliefs -

- a) Adequate and reasonable remedy of compensatory award under Sec. 49 of Employment Act.
- b) Unspent leave days (60 days).
- c) One month salary (March 2011 and one month salary in lieu of notice).
- d) 12 months' salary and leave dues.
- e) Costs for the suit and deem fit and just to grant.

The Respondent filed a Statement of Response which was amended by leave of the court in which it admits terminating the Claimant's employment but contends that the termination complied with the provisions of the Employment Act.

At the hearing of the case the Claimant who was unrepresented testified on his behalf while the Respondent acting through Mr. Onyango, learned counsel, instructed by Olel, Onyango, Ingutiah & Co. Advocates, did not call any witness. The parties thereafter filed and exchanged written submissions.

In his testimony the Claimant stated that he was employed by the Respondent on 17th May, 2006 as a bank clerk. He was promoted to Senior Relationship Officer in charge of opening accounts and worked in several stations. His starting salary was shs.25,000 gross consolidated while his last salary was 62,500.

He received a letter of termination on 21st March, 2014. Prior to the termination he was never given a chance to defend himself. The letter of termination did not state the reason for termination. The reason for termination was not disclosed even after the Claimant sent a demand letter through an advocate demanding the same.

Under cross examination the Claimant stated that he was advanced a loan of Shs.100,000 and a further

loan of Shs.200,000 by the Respondent which he cleared. He denied knowledge of fraudulent transactions through withdrawal of funds from dormant accounts. He denied knowledge that any employee other than himself were terminated. He also stated that he was not paid any salary in lieu of notice. He stated he did not clear with the bank as he was not satisfied with the reasons for termination.

The Claimant further stated that he took leave for previous years and the only leave outstanding was for 2010 and 2011.

In the written submissions the Claimant reiterated the contents of the statement of claim and his testimony.

The Respondent submitted in the written submissions that the Claimant was terminated under section 35 as read with section 36 of the Employment Act. The Respondent offered to pay salary in lieu of notice, salary for days worked and pending leave of three days. The Respondent submitted that the claimant's last salary was shs.50,000 per month and tabulated his dues as follows -

a) One months' salary in lieu of notice	Kshs.50,000.00
b) 21 days worked unpaid	Kshs.35,000.00
c) 3 pending leave days	<u>Kshs. 5,000.00</u>
Total	Kshs.90,000.00

The Respondent urged the court to enter judgement for the Claimant in the admitted sum. The Respondent submitted that the claimant did not prove that he was owed 60 days annual leave and that having been lawfully terminated the claimant did not deserve compensation.

Findings and Determination

From the evidence on record and written submissions the issues arising for determination are the following -

- 1) Whether the termination of the Claimant's employment was unfair.**
- 2) Whether the Claimant is entitled to the prayers sought.**

The Law

The law relating to fair termination of employment is contained in section 41, 43 and 45(2) of the Employment Act which provide as follows -

41. Notification and hearing before termination on grounds of misconduct

(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.

43. Proof of reason for termination

(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.

45. Unfair termination

(1)

(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.

The burden of proof is provided for under section 47(5) as follows -

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Section 12 provides that every employer with more than 50 employees must have a statement of disciplinary rules as follows -

12. Statement on disciplinary rules

(1) A statement under section 10 shall—

(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

(b) specify the person to whom the employee may apply—

(i) if dissatisfied with any disciplinary decision relating to the employee; and

(ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.

(2) Subsection (1) shall not apply to rules, disciplinary decisions, grievances, or procedures relating to health or safety at work.

(3) This section shall not apply where as at the date the employee starts work the employer has

employed less than fifty employees.

Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union.

After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decision whether or not to dismiss or terminate the services of the employee.

Section 43 further enjoins the employer to prove the validity of the reasons for termination or dismissal.

Section 45(2) provides that unless both fair procedure as provided under section 41 and valid reason as provided in section 43 are proved, the termination or dismissal will be unfair.

In the present case the claimant stated that he was never given a hearing as contemplated in section 41. He only received the letter of termination. The said letter did not state the grounds for termination. The letter is reproduced below -

*Our Ref: **EBL/HR/03/11/0741/PF.1556***

March 21, 2011

Mr. Gilbert Mariera Makori

P O Box 519

KEROKA

Dear Mr. Makori,

RE: TERMINATION OF SERVICE

This is in regard to the incident involving you as an Officer of the Bank and whose details you are well aware of. The incident has called to question your credibility and as a result of this, the Bank has lost confidence in you as a staff of the Bank. We therefore regret to advise you that your services with Equity bank Limited have been terminated with effect from 21st March, 2011.

The decision to terminate your services is in accordance with the Employment Act 2007, which allows either party to terminate the services of the other by paying the requisite notice.

Consequently, you will be paid up to and including March 21, 2011, which was your last date of service in addition, the company will pay you one month salary in lieu of notice in accordance with your letter of appointment.

Please organize to hand over any company property in your possession to the Business Growth and Development Manager -Keroka. In addition, ensure that you have cleared with all the departments and hand over the duly completed clearance form to the payroll Accountant, after which your final dues will be payable on the next payroll date.

Yours faithfully

EQUITY BANK LIMITED

John N. Wamwati

HUMAN RESOURCE MANAGER

It is evident from the letter that it does not state the reasons for termination and it does not make reference to a hearing having taken place or the claimant having been required to respond to some accusations prior to the termination. The claimant testified that he was not aware of the reasons alleged in the letter and those reasons were not given to him even after his demand through his lawyer's demand letter.

The Respondent did not adduce any evidence to controvert the Claimant's testimony. The testimony of the Claimant thus remain unchallenged. As provided in section 47(5) of the Employment Act, the claimant has met the burden of proof required of him by law.

For the foregoing reasons, I find and hold that the termination of the claimant's employment was unfair both procedurally and substantively under the provisions of section 45(2) of the Act.

Remedies

The Claimant prayed for terminal dues under section 49. Having found that the termination of his employment was unfair, he is entitled to salary for days worked and pay in lieu of notice. He is also entitled to leave earned but not taken and to compensation as prayed.

The Claimant testified that his last salary was shs.62,500. This is confirmed by Annex EBL-II-a Statement of Earnings - attached to the Respondent's Statement of Response filed on 14th April, 2014 reflected as "*pay in lieu of notice*". The Respondent's attempt to use the figure of Shs.50,000 as the last salary of the claimant, which was the claimant's salary as at January, 2009 is therefore in bad faith.

The Respondent denied that the claimant had outstanding leave of 60 days for 2010 and 2011. It did not produce any evidence to prove that the Claimant took leave for those years and that the only outstanding leave is the 3 days it has offered to pay through its written submissions. It is not for the claimant to prove his outstanding leave. This is a statutory responsibility of the Respondent as provided under section 74(i) (f) and 10(6) and 10(7) of the Employment Act which provide as follows -

74 (1) Records to be kept by employer

(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

(a)...

(b)...

(c)...

(d)...

(e)...

(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;

Section 10

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection(1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

I find that the Respondent having failed to controvert the claimant's allegations by producing evidence to the contrary, has not disproved that the claimant is entitled to 60 days annual leave which I hereby award the claimant.

Taking into account the manner in which the Claimant's employment was terminated and the length of service, and further taking into account the factors provided for under section 49(4) of the Employment Act and the fact that the Respondent failed to call evidence in this case, it is my opinion that 12 months compensation is reasonable. I therefore award the claimant compensation equivalent to 12 months salary.

Conclusion

In conclusion, I make the following orders;

1. I declare that the termination of employment of the Claimant was unfair both procedurally and substantively.

2. I award the claimant the following:-

- | | |
|---|--------------|
| i) Salary for 21 days worked one month | Kshs. 43,750 |
| ii) Pay in lieu of Notice | Kshs. 62,500 |
| iii) Leave earned but not taken (60 days) | Kshs.125,000 |
| iv) 12 months' salary compensation | Kshs.750,000 |

3. The Respondent is directed to issue a certificate of service to the claimant in accordance with section 51 of the Employment Act.

4. The Respondent is directed to clear the Claimants name with Credit Reference Bureau (CRB) having failed to prove that the claimant owes it money.

5. Compliance with 3 & 4 orders above to be within 30 days from date of Judgement.

6. The Respondent shall also pay the Claimant Shs.20,000 which the court assesses as reasonable expenses for filing, service and sundry expenses related to the case.

7. Decretal amount shall attract interest at court rates unless paid within 30 days from date of judgement.

8. All other prayers stand dismissed.

Dated, Signed and Delivered this 6th day of October, 2016

MAUREEN ONYANGO

JUDGE