



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 242 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 20th April, 2015)

DAVID K. CHERUIYOTCLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 21/2/2011 through the firm of Kandie Mutai Mudeizi & Company Advocates. The Respondent is a banking institution registered in the Republic of Kenya under the Banking Act Cap 488 Laws of Kenya.

Claimant's case

2. It is the Claimant's case that in 1994 he was employed by the Respondent as a Clerical Officer at the Kitale branch earning a basic salary of Kshs.60,382/= per month with house allowance of Kshs.2,894/= per month as per his pay slip annexure A (page 21 of documents).

In year 2001 he was promoted to Section Head with grade B signing powers. His promotion letter is Annexure B (page 13 of documents). His performance seems to have been good and over time he won a Bronze Eagle Award and was also promoted to other higher levels as per the documents exhibited.

3. However, around 2005, he was suspended from duty by the Respondent citing some irregularities. The suspension letter annexed at page 20 of his documents stated that he had contravened Clause A5 (c) (1) of the Collective Bargaining Agreement covering section heads and the suspension was to be for a period of 30 days. The Claimant was entitled to payment of his salary at ½ his basic pay.

However the Claimant avers that the Respondent failed to summon him to explain the allegations and/or accusations and that he was never given a chance to explain the allegations or accusations. As per clause 5 (c) (iii) of the Collective Bargaining Agreement, in case of investigations finding him innocent he was supposed to be reinstated into employment and be paid his full salary for the period of suspension.

4. The Claimant however avers that the Respondent failed to give him an opportunity to be heard in response to the allegations of holding cash in the drawer meant to be in a classified account. The Respondent went ahead and executed the suspension and also used the security guards to deny him access to the staff working area where he was expected to sign a weekly attendance register. It is the

Claimant's position that on 24/8/2005, the Respondent wrote a letter to the Retail Manager Kitale Branch explaining circumstances under which the monies remained unposted to the classified account and also raising concern on why the Claimant had not been recalled after the expiry of the 30 days as spelt out in the suspension letter.

5. It is the Claimant's case that in the transaction, there was no loss of any monies at all to the Respondent and the Respondent suspended his services without notice or payment of any dues which was unjustified. The Claimant further avers that the Respondent failed to communicate on the subject matter and the Claimant does not know the fate of the matter considering that he was not recalled nor served with a termination letter.

6. The Claimant prays for a declaration that his suspension from employment to date is illegal and wants an order directing the Respondent to unconditionally reinstate him. In the alternative, the Claimant prays for an order directing the Respondent to pay him his terminal benefits as provided for in the Collective Bargaining Agreement and commensurate with the Barclays Bank of Kenya current exit packages. He also prays for other orders as tabulated in his claim all totaling 2,817,752/=.

The Respondent's Case

7. The Respondents on the other hand filed their Memorandum of Defence on 28/4/2011 through the Federation of Kenya Employers. It is the Respondents case that on 20/7/2005, it came to their knowledge that the Claimant had taken cash from a client Mr. Alfayo Anyoba on 13/6/2005 and as at 20/7/2005 on checking his till, he had not credited the clients account. Further that he was holding 6,000/= in fake currency notes in his till. The Claimant was asked to give an explanation regarding the irregularity as per a letter Appendix 3.

8. The Respondent avers that in his reply the Claimant admitted having had the 6000 fake notes but could not explain how he came to be in possession of those notes as per his Appendix 4.

On 21/7/2005, the Claimant was suspended from duty on half pay for 30 days as per Appendix 5. The Respondent contend that on receipt of this suspension letter, the Claimant resigned from the banks employment immediately stating that he was not ready to undergo the rigorous disciplinary procedure. The said resignation letter is annexed as Annex 6.

9. The Respondent avers that the Claimant was advised that his resignation had not been accepted since the bank was still conducting its investigations. He was also informed that he was required to report to the branch once every week on Monday to sign the attendance register. He was also warned to comply with suspension conditions by reporting to the branch within 5 days less he be treated as a deserter. The letter was send by registered post on 5/8/2005 to his last known address, P.O. Box 144 Bomet. Copies of the said letter and receipt are annexed as Appendix 7(a) and 7(b).

10. On 11/8/2005 the Respondent, having given the Claimant an opportunity to present himself and face disciplinary action, wrote to the Claimant informing him that he had been dismissed from employment on grounds of desertion and that any money due to him would be applied to offset the loan he had with the bank. A copy of the said letter is annexed as Appendix 8.

It is the Respondents submission that the Claimant's suspension and subsequent dismissal on account of desertion was lawful as he had acted contrary to Section 17 of Employment Act (repealed).

The Respondents deny that the Claimant was suspended without notice sine he was informed vide letter dated 20/7/2005 that he was to be investigated for committing specified irregularities. It is the Respondents averment that the Claimant is not entitled to compensation for loss of employment since his dismissal was lawful. They ask the court to dismiss this claim with costs.

Issues of determination

11. Upon considering the evidence of the parties placed before me plus the submissions herein the issues for determination are as follows:

(a) Whether the Claimant resigned or was terminated from employment by the Respondent.

(b) If he was terminated, if the termination was due for valid reasons and if due process was followed.

(c) If the Claimant is entitled to orders sought.

12. Starting with the 1st issue, the Claimant was indeed suspended from duty on ½ pay by the Respondents on 21/7/2005 for 30 days. This position is agreed upon by both the Claimant and the Respondent. The Claimant then chose to resign on 22/7/2005 as per his letter Appendix 6 dated the same day. This letter was stamped received by the Respondent head office on 4/8/2005 and by the Kitale branch on 22/7/2005. Of course this contention is not denied by the Claimant that he resigned on 21/7/2005. However, the Respondent decided to reject the resignation and continued communicating with the Claimant as their employee including summoning him to disciplinary meetings and also subsequently dismissing him with effect from 1/8/2005.

13. The question then is whether an employer once it has received a resignation letter can reject it. The employment contract just like any other contract has its own terms and conditions. Under the contract between the Claimant and Respondent, either party could terminate the contract by giving ample notice, in this case the period provided in the Collective Bargaining Agreement was 1 month. The Claimant exercised this option and it did not matter that there were on going investigations against him. An employee cannot be forced to remain in the employment of the employer if he does not wish to otherwise this would be tantamount to breaching his freedom under Article 36 of the Constitution.

Having found that the Claimant resigned, any action taken against him including a purported dismissal is null and void.

14. Is the Claimant entitled to prayers sought?. My answer is No. Having chosen to resign, the Claimant cannot claim any dues for wrongful termination. The issue of this case being time barred was not pleaded by the Respondent. However, I also hold that this case is time barred, the course of action having occurred in 2005 and this case being filed in 2011 without leave of court to file suit out of time.

I therefore find the claim by the Claimant has no merit and I dismiss it accordingly with costs to Respondent.

Dated and delivered in open Court this 20th April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ouma holding brief for Molenye for Respondent

Kandie Mutai Mudeizi for Claimant