



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. 2132 OF 2011

JOSEPH MAINA GICHUHI..... CLAIMANT

VERSUS

BARCLAYS BANK (K) LTD..... RESPONDENT

Mr Opiyo for the Claimant

Mr Echesa for the Respondent

JUDGEMENT

1. By consent of the parties, Cause No 2132 of 2011 was heard as a test suit for the claimants in Cause No 2472 of 2013 Angeline Wambui Muchiri Vs Barclays Bank (k) Ltd, Cause No 710 of 2009 Shadrack Adem Vs Barcklays Bank (k) Ltd and Cause No 1883 of 2013 Lucy Wangui Mwaniki Vs Barclays Bank (k) Ltd.

2. This suit was initially filed at the High Court on 15th June 2005 as HCC No 747 of 2005.

3. A statement of defence was filed on 28th May 2010.

4. The Claimant relies on list of documents filed on 17th May 2006 and further list of documents dated 7th February, 2004.

5. The Defendant relies on list of documents filed on 4th June, 2010.

Facts of the Claimants Case.

6. The Claimant was employed by the Respondent on 22nd September, 1986. He worked continuously until the 4th April, 2005 when his employment was terminated vide a letter of termination of the same date.

7. The claimant appealed the decision to terminate his employment by a letter dated 5th April, 2005 and the Appeal was dismissed by the Respondent on 6th June, 2005.

8. At the time of termination the Claimant earned a gross salary of Kshs 184, 644.

9. The claimant rose through the ranks from the position of a clerk to a Manager.

10. By a letter dated 16th June 2004 the Respondent gave the claimant authority to authorize documents for payment. There was a portion that read

“ In cases where the Head of Registrar services may be absent from office the Claimant may countersign limits above Kshs 500,000.00”.

11. The reason for the termination of employment according to the letter of termination dated 4th April, 2005 was that

“ the fraudulent transfer and sale of shares in the name of Nicholas Colin Oliver Watneyyou failed to follow the banks laid down procedure regarding verification and approval of sale documents without due regard for limits allocated and hence acted in gross derogation of duty”.

12. The claimant avers that he had the necessary authority to approve payment documents and did not exceed the authorized limit in the letter dated 16th June, 2004.

13. That no complaint was made against the claimant. That the claimant had served the respondent honestly and diligently and had no previous verbal or written warnings.

14. That he was not taken through a disciplinary process prior to the termination but was summoned as a witness at a hearing where no charges were preferred against him.

15. At the time of termination of the employment of the claimant and his colleagues in Cause No 2131 of 2011, 1833 of 2013 and 247 of 2013, the Respondent had an early voluntary retirement scheme offered to all employees vide the defendant's circular of 8th October 2003 and the Claimant had accepted the offer for early retirement vide a letter dated 5th April, 2005 in the event his appeal was not successful.

16. The claimant testified that by reason of the wrongful and unfair termination of employment he has lost salary and other benefits attached to the continued employment and has suffered loss and damage as he would have ordinarily worked upto the statutory retirement age of 60 years.

17. The claimant prays for judgment against the defendant as follows:-

(a) A declaration that the letter of termination dated 4th April, 2005 to the Claimant by the defendant under his ordinary terms and conditions of employment was unjustified and wrong in law.

(b) A declaration that the Claimants employment with the defendant should not have been terminated as did but the defendant should have retired the Claimant under the voluntary early leavers scheme package and its benefits offered by the defendant in circular dated 8th October, 2003.

(c) In the alternative and without prejudice to the foregoing in (a) and (b), damages for premature retirement to be calculated as if the Claimant was normally retired at the statutory retirement age of 60 years.

(d) An order that the claimant be paid early retirement benefits as per the defendant's offer stipulated in the voluntary early retirement scheme offered vide circular letter dated 8th October, 2003.

Defence

18. In the statement of defence filed with the leave of court on 28th May, 2010, the defendant admits it terminated the Claimants employment on 4th April, 2005 but for a lawful cause and proper justification. The defendant denies that the Claimants gross salary was Kshs. 184,644 as at the time of termination. However, the statement of final payment submitted by the Respondent confirms that the claimant as at April, 2005 earned a consolidated monthly salary of Kshs. 184,644 and the Claimant was upon termination paid a gross pay of Kshs. 312, 124.25 comprising of;

- (i) 1 month's salary of Kshs. 184,644
- (ii) Payment in lieu of one month's notice in the sum of Kshs 184,644
- (iii) Payment in lieu of leave days not taken in the sum of Kshs 109,268.80

19. Less lost amount in the sum of Kshs 166,432.55

20. The net amount of Kshs 105, 687.10 after all deductions were made was credited to the personal loan account.

21. The Claimant did not therefore receive a penny. The claimant was asked to make arrangements to repay the house loan of kshs. 189,646.30, 1st personal loan of kshs. 698,107.50 and 2nd personal loan of kshs. 360,976.45.

22. This left the Claimant highly indebted to the respondent. The balance of the loan was subjected to commercial interest rate at 16% until fully paid.

23. The defendant denies that the benefits offered to the Claimant on termination of his employment were discriminatory, selective or oppressive as set out in the plaint and stated that the same had no relation, bearing or connection with any benefits which the defendant may have offered to any other of its employees opting to voluntarily retire or who fell under the voluntary leaver's scheme under the circular of 8th October, 2003 which did not cover the Claimant and under which the Claimant's employment had not been terminated.

24. The defendant further states that each of its employees had a separate and distinct contract of employment and therefore the allegations of discrimination has no basis.

25. The Claim for loss of future earnings till retirement age of 60 years is vehemently contested since the Claimant's employment was terminated for a lawful reason and was therefore justified.

26. Issues for determination

- (i) Was the employment of the Claimant terminated for a valid reason and in terms of a fair procedure?
- (ii) Was the Claimant discriminated against by the Respondent by:
 - (a) Subjecting him to a more severe punishment than his co-accused in the theft of KBL shares that led to the termination of the claimant's employment and
 - (b) By not allowing him exit vide the more beneficial voluntary leaver's scheme
- (iii) What remedy if any is available to the Claimant

Determination

The court will determine these issues collectively as follows;

27. A careful analysis of the pleadings by the parties, the documentary and oral evidence adduced before court, the court has arrived at the following conclusions of fact;

- (a) The Claimant had honestly and diligently worked without any warning or reprimand for misconduct by the Respondent as a banker for a continuous period of 19 years.
- (b) The Claimant had rose through the ranks from position of a clerk to a manager.
- (c) That in his position as a manager he had been provided with authority to verify Transfer Documents in addition to his other responsibilities as set out in the letter granting that Authority dated 16th June, 2004.

The Claimant's role was to countersign documents with a value limit of:

- (i) Upto to 200,000 (to sign alone)
- (ii) Between 200,000 to 350,000 (two signatures one of whom must be level B3 or above)
- (iii) Between 350,000 to 500,000 (Two signatures one of whom must be level B4 or above.)
- (iv) Above 500,001 (Two signatures one of whom must be the Head of Registrar service or B4 or any other authorized official in his absence)
- (v) The Claimant to specifically counter sign documents upto maximum limit of Kshs 500,000. However, in cases where the Head of Registrar services may be absent from office "*you may counter sign limits above Kshs 500,000*")

(d) The claimant was summoned to a disciplinary hearing on 25th February 2005 regarding the role the claimant had played in the "*fraudulent transfer and sale of EABL shares in the name of Nicholas Colin Oliver Watney*".

Upon considering the presentation made by the Claimant at the hearing the bank was satisfied that the Claimant,

"failed to follow the Bank's laid down procedure regarding verification and approval of sale documents without due regard to limits allocated and hence acted in gross derogation of duty"

(e) The Claimant was not served with a notice to show cause outlining the specific charge(s) levelled against him before attending the disciplinary hearing and none was produced by the Respondent before court. No minutes of the disciplinary proceedings were presented to court by either party.

(f) Upon termination, the Claimant was allowed to appeal the decision and he presented to court a detailed version of the explanation he had made against the allegations made against him at the hearing. Indeed the claimant told the court that his impression was that he had been called to the hearing as a witness for the Respondent against the suspects considered to have played a significant role in the fraudulent transfer of KBL shares.

28. The Claimant produced a write up on the investigations carried out by the Branch Business Unit (BBU) on the fraud.

29. The suspects are listed as Michael Mundia Kamau, Lucy Wanjiku Njoroge and Ms Mary Awuor Oyallo and the role they played is detailed in the brief description of the incident as reported.

30. The findings by the investigators are also set out in the report and in particular, Ms Oyallo did not do proper identification of the person who was given details of the account against which the fraud was

committed; Mrs Lucy Wanjiku Njoroge did not adhere to the authorization limits; She also did not satisfy herself that the Attorney who signed the indemnity was included in the banks approved list; The signature of the indemnity had a slight variance that was not picked up by Mr Mundia; Mr Mundia was commended by the investigators for blowing up the whistle on what was to be an extensive fraud targeting KBL shares owned by deceased persons and there were no clear instructions on how to handle customer's instructions. The investigators recommended snap checks be introduced to ensure that authorisation is carried out at the right level. Currently this was not done.

31. The report did not have any allegations favourable or otherwise with respect to the Claimant.

32. RW 1 Odhiambo Ooko did not produce the minutes of the disciplinary proceedings following an objection by the counsel for the Claimant, that this witness intended to produce the same after the Claimant had closed its case and without seeking leave of the court. The same was shelved by consent of the parties.

33. However, the Claimant in the appeal letter admits to have countersigned the document which was above the 500,001 verification limit but relied on the letter of Authority dated the 16th June 2004, which authorized him to countersign documents above the limit of Kshs 500,000.

34. RW 1, the only witness for the Respondent told the court that he did not participate in the disciplinary hearing of the Claimant and had joined the respondent on 1st October, 2012 after the Claimant had long left the employment of the Respondent. RW1 did not adduce any direct evidence on the circumstances that led to the termination of the Claimant other than telling the court that from the records available, the Claimant did not apply to exit under the early leaver's scheme. That the scheme was not available to employees facing disciplinary action. He produced the circular which offered the early leaver's Scheme.

35. From the totality of evidence before court and especially the investigation report, there appears to be no adverse role played by the Claimant in the consummation and completion of the fraudulent transfer of KBL shares.

36. Instead exculpatory evidence by the Claimant has led to the inescapable conclusion by the court that the Respondent has failed to justify the termination of the employment of the Claimant after 19 years of excellent service to the bank.

37. In the peculiar circumstances of this case, the court finds in favour of the Claimant and declares that;

(i) The termination of the employment of the Claimant by a letter dated 4th April, 2005 was wrongful and unjustified in law in that it was not for a valid reason.

(ii) The court finds that the claimant was entitled to be considered for exit under the then available voluntary early leaver's scheme package offered to all employees by a circular dated 8th October, 2003 and ought to have been exited under the scheme, just like his co-employees who benefited accordingly.

38. Accordingly, the court commutes the adverse termination of the Claimant to a normal exit under the Circular of 8th October, 2003 which the court finds covered the Claimant in the circumstances of the case.

39. The court further directs the Respondent to compute the terminal benefits due and owing to the Claimant in terms of the circular of 8th October, 2003 and file the same with the court within 30 days from the date of this judgement.

40. This judgement is applicable to the Causes identified earlier on in the judgement provided the facts and circumstances of the termination of the specific Claimants are similar to the findings of fact made in this judgement.

41. The Respondent to pay the costs of this suit. The award is payable with interest at court rates from the date of the judgement till payment in full.

Dated and Delivered at Nairobi this 10th day of June, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE