



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 58 OF 2014

CHARLES NGOCHI MUNYI.....CLAIMANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st July, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 14.05.2014 through Karweru & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that his termination was wrongful, unprocedural and illegal.
- b) Damages for unlawful termination calculated at 1 year salary.
- c) Accrued dividends for year 2013.
- d) Mileage at Kshs. 17, 100.00.
- e) General damages for defamation.
- f) Any other relief that the honourable court may grant.
- g) Costs plus interest on (a) to (e) above.

The respondent filed the response to the claim on 02.07.2014 through Wahome Gikonyo & Company Advocates. The respondent prayed that the claim be dismissed with costs.

The claimant failed to file the final submissions within the time as directed by the court but belatedly filed the same on 29.07.2015. The respondent filed the final submissions on 22.07.2015.

The claimant was employed by the respondent effective 1.08.2001 as an assistant manager and deployed at respondent's Kerugoya Branch. By the letter dated 14.06.2013 the claimant was transferred to the respondent's Mumias Branch in the position of Business Growth & Development Manager.

The respondent as part of its community service ran a programme known as the Wings to Fly Program where it offered high school graduates with high academic potential an opportunity to be attached to serve in the respondent bank and later provided scholarship opportunity to such young scholars.

The case leading to the claimant's termination related to the manner the claimant had handled the case of one such scholar while the claimant was serving at the Mumias Branch.

The claimant testified that on 30.12.2013 he was summoned to the respondent's head office by the General Manager known as Francis Adello. The claimant went to the head office by 8.30am on 31.12.2013 and he used his private car to make that journey. The claimant was taken to a meeting and the respondent's human resource manager addressed the claimant about the unfortunate meeting and questions were asked about the young lady who was a candidate in the Wings to Fly Program. The allegations were that the claimant had sexually harassed or assaulted the said young lady whose name and statement to the respondent during the respondent's investigations was provided in the proceedings and was duly filed in court.

It was the claimant's evidence that the bright young lady had gone to Mumias branch as required by the respondent in preparation for an induction programme. It was the claimant's duty as the branch manager to facilitate the young scholar by paying to her the relevant transport stipend to attend the induction programme. At the meeting of 31.12.2013 the claimant was shown and given the statement by the scholar filed in court as respondent's exhibit E/165/1D which was received by the respondent on 12.12.2013. In that statement the scholar made serious allegations of sexual harassment against the claimant which the court sums up as follows:

- a) The scholar was summoned to the respondent's Mumias branch on 30.12.2013.
- b) The scholar met the claimant at claimant's office and claimant told her that he had chosen her for the job because the claimant noticed that she was a bright girl and he had been asked by one Kilonzo to visit the scholar's home because the claimant had to ascertain that she had been selected on the basis of poverty.
- c) The scholar and the claimant went to the scholar's home and then the claimant requested to go away with the scholar to photocopy the scholar's certificates and to take her passport size photograph.
- d) The business was done by 2.00pm and the claimant requested to take the scholar for lunch. While waiting for lunch at the hotel, the claimant gave a story of his life to the scholar allegedly to the effect that the claimant's wife did not bear babies, the scholar was to keep the information in confidence and that the claimant wanted to have a relationship with the scholar because the scholar being fresh from school it was unlikely that the scholar had engaged in immorality or was unlikely barren.
- e) The letter stated that the claimant then started pulling the scholar from her chair, forcefully hugging her and touching her on her waist and breasts as well as unbuttoning her blouse. The statement states that the scholar struggled out of the claimant's grip and ran outside the hotel and left for home. The claimant chased by his car, caught up and told the scholar that she was childish and unreasonable and as her supervisor he could make any report about the scholar. To be on the safe side, the statement states that the claimant told the scholar to remain silent, not to report the occurrence and to be his girlfriend.
- f) The following day the statement says the claimant called the scholar but she declined to tell him her decision and subsequently the claimant received the claimant's calls on strange numbers until when she declined to pick the calls from strange callers.
- g) The statement concluded thus, **"Having gone through the experience, I do not wish to work in my home branch anymore and I would like to be posted to another branch away from him. Thank you."**

In the reply to the statement, being exhibit E/165/II dated 31.12.2013 the claimant says he came to know about the scholar on 29.11.2013 and not 30.11.2013 as stated in the scholar's statement. The claimant

proceeded to reply that he had observed some misbehaviour on the part of the scholar because he had seen her with some young man in a suggestive and compromising position prompting him to warn her and he considered reporting the same to her parents. He admitted in the reply having driven with the scholar in his private car to the scholar's home but denied going with the scholar to the hotel as alleged in the scholar's statement. In his later statement exhibit E/165/IV signed 13.01.2014 given to respondent's internal investigator the claimant stated that he drove in his car with the scholar to the scholar's home and at some point the scholar sat on the co-driver's seat. He stated that they stayed at the home for about 45 minutes. He denied going to a hotel with the scholar.

In a later statement given to the respondent's internal investigator dated 9.01.2014 exhibit E/165/III the scholar narrates an account of the alleged sexual harassment substantially similar to the account as set out above in her initial written report only that the date of the occurrence changes to 27.11.2013. The statement explains how the case got to the respondent's attention thus,

“...When I went to Nairobi, during the induction course, I talked to Teresa and requested her to post me to another branch due to what had happened between me and the branch manager and I did not want to work under him. She agreed.

On the 14th December 2013, Lina from the HR came to talk to the girls about sexual harassment at work. I told her what I had gone through while in the hands of the branch manager (Mr. Munyi) and asked her whether this was sexual harassment. She told me it was, and advised me to write a complaint letter against the branch manager (Mr. Munyi). I then proceeded to write the complaint letter and took it to her.

She promised me that they will deal with the matter in a professional way and I had no reason to fear....”

By the letter dated 31.12.2013 the respondent suspended the claimant from work on account of the case of allegations of sexual harassment by the scholar involving the claimant and whose details, the letter stated, the claimant was well aware of. Proceedings of the meeting of 31.12.2013 are filed in court.

The respondent had instituted the Child Protection Policy to guide its staff in matters of the Wings to Fly Program. The policy was filed and of the unacceptable behaviour on the part of staff, the policy provided, among other things, that the staff must not:

- Develop physical or sexual relationships with children with whom they interact, engage or work.
- Behave physically in a manner which is inappropriate or sexually provocative.
- Spend excessive time alone with a child, away from others, behind closed doors or in secluded areas.
- Take a child to their home or visit a child at their home where they may be alone with that child.
- Do things of a personal nature for a child that they could do for themselves.
- Take a child alone in a vehicle unless it's absolutely necessary (e.g. in an emergency or their protection) or parental and managerial consents have been obtained.

The respondent subsequently terminated the claimant's employment by the letter dated 31.01.2014 on account of being found guilty of gross misconduct in regard to a scholar from the respondent's Wings to Fly Program and whose details the claimant was well aware of. In lieu of notice, the letter stated that the claimant would be paid full remuneration for January 2014, a month he had not worked at all.

The **1st issue** for determination is whether the claimant was unfairly terminated from employment. The court has considered the proceedings of 31.12.2013. At that meeting the claimant was informed in detail the case and allegations that were levelled against him and he was given a hearing. The court finds that the respondent complied with the requirement of notice and hearing as envisaged in section 41 of the Employment Act, 2007. On 31.12.2013 there were preliminary investigations, the claimant was informed the allegations, shown the written complaint, and was handed the formal notice by way of the suspension letter. The claimant was later heard at the meeting of 31.01.2014. The court finds that the respondent

substantially complied with section 41 of the Employment Act, 2007 on notice and hearing before termination and the failure that the claimant was not accompanied with a person of his choice has not been shown to have occasioned injustice especially that the claimant was a top manager and he put his case effectively throughout the hearing- the absence of the representative in the opinion of the court was therefore excusable as no manifest injustice resulted from the procedural omission.

Turning back to the reason for termination the court has noted the discrepancies on the dates. In the initial account the scholar reported it was on 30.11.2013 and in a later statement to the investigator stated it was on 27.11.2013. The claimant in the initial statement stated it was on 29.11.2013 and in later statement to the investigator stated it was on 28.11.2013. A copy of the motor vehicle check-in register relied upon by the investigator and filed in court showed that the claimant's car checked into the alleged hotel on 28.11.2013. At the meeting of 31.01.2014 the claimant said the date was either 28th or 29th. At the same disciplinary hearing it was concluded that the allegations were **"...likely to be true based on the incidences and contradictions of the claims"**

The scholar was not cross examined by the claimant at the disciplinary hearing and was not called to give evidence before the court. The court considers that both the scholar and the claimant gave contradictory dates about the alleged date of the event. That contradiction in the dates would, in the opinion of the court, not in itself help decide the issue whether the termination was unfair on account of sexual harassment as the reason for termination. It is the opinion of the court that all circumstances and material before the court have to be carefully examined.

On a balance of probability and the scholar having not testified and in light of the cited discrepancies, the court finds the respondent has failed to establish that the claimant sexually assaulted the scholar as it was alleged and the court further finds that the dismissal was therefore unfair for want of genuine reasons as envisaged in section 43 of the Employment Act, 2007. While making that finding the court has noted the reservations by the respondent at the meeting of 31.01.2014 that it was only likely that the claimant had engaged in the misconduct of sexual harassment. The basis of the likelihood was in the opinion of the court unjustified as the likelihood was founded upon facts that at best remained mere allegations. It is not clear to the court why the respondent failed to undertake further investigations and also subject the scholar and the claimant to examination in an oral hearing to deal with the hanging issues. While making the finding the court has further considered the gravity and grave consequences of the alleged reason to the claimant's professional life, family life and general wellbeing as well as the need to protect the positive respondent's initiatives under the Wings to Fly Program. It is the opinion of the court that owing to such considerations, it was necessary that the extensive and complete investigations were undertaken before dismissal upon the alleged reason of sexual harassment so as to protect the compelling and legitimate interests of both parties in view of the grave allegations that confronted the claimant and the commendable Wings to Fly Program that was run by the respondent and around which the case had emerged.

The court has reconsidered the reason for termination and the surrounding circumstances. The claimant admitted before the respondent and before the court that at some point he was alone with the scholar in his private car when he drove to the scholar's home and in circumstances which were not absolutely necessary. The evidence showed that the claimant involved himself in doing things that the scholar could have done by herself. Evidence for the respondent showed that the respondent undertook extensive investigations and statements were filed with the respondent that showed that the claimant had been culpable of breaching the relevant policy provisions.

It was established that the claimant breached the policy and as admitted by the claimant in his testimony before the court and at the disciplinary hearing. The court finds that the reason for termination was not valid as envisaged in section 43 of the Act but the claimant wholly and in a big way contributed to his dismissal in the manner and activities as cited in this judgment that led to his dismissal. Accordingly the court finds that the termination was unfair, the claimant vigorously contributed to his termination and the court finds that he is not entitled to any compensation for the unfair termination under section 49 (1) (c) of the Act. The declaration will be granted for unfair termination but damages as prayed for will therefore fail.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The claimant did not provide evidence to support the prayers as made and there were no submissions to support or justify the prayers. The prayers will therefore fail.

In view of the outcomes in this case, the respondent shall pay 25% of the costs of the suit.

In conclusion, judgment is entered for the claimant for:

- 1) The declaration that the termination of the claimant's employment by the respondent was unfair for want of a valid reason as envisaged under section 43 of the Employment Act, 2007.
- 2) The respondent to pay 25 % of the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 31st July, 2015**.

BYRAM ONGAYA

JUDGE