



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 605 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 22nd July, 2015)

VINCENT E. O. ODHIAMBOCLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 30/4/2013 through the firm of Nyabena Nyakundi and Company Advocates. He has alleged unfair termination of his services.
2. The Claimant's case is that on 4/8/1996, he was employed by the Respondent as a bank clerk at a salary of 12,688/= which increased from time to time as he was promoted and at the time of dismissal he was earning 112,687/= as per his Appendix 1 (b) – his February 2011 payslip having risen to the rank of Section Head. He avers that he was stationed at the Central Processing Centre in the department of EFT.
3. The Claimant avers that he served the Respondent with diligence and faithfulness until on or about 23rd February 2011 when the Respondent unfairly and unlawfully terminated his services on allegation that he had committed acts of gross misconduct and that the bank had also lost confidence in him which the Respondent never gave particulars. The Claimant was therefore terminated under Clause A5 (c) (i) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical and Subordinate Staff. The Claimant annexed the termination letter as Appendix 3 (a).
4. Before the termination the Claimant avers that he had been issued with an internal memo dated 4/10/2010 to explain why there was no call back on cheques issued by the Samburu Teachers Co-operative Sacco. He avers that he explained himself stating that he couldn't get the listed signatories but on 22/9/2010 managed to get through the Sacco's Chairman who confirmed that the cheques were genuine (Appendix 4 (a) and 4 (b)).
5. The Claimant was thereafter suspended from duty with effect from 26/10/2010 pending investigations. Letter of suspension is Appendix 4 (c). The Claimant avers that his termination was done unfairly and maliciously engineered by Claimant's fellow employees who were hell bent on harassing him to make it impossible to service the loan in respect of the property he had bought at Malindi being plot number 2699 Malindi.
6. The Claimant appealed against the termination and wrote a letter to the Director Human Resource stating that proper investigations were not carried out covering the matter (Appendix 5). He also

avers that the provisions of the Collective Bargaining Agreement on termination were not carried out concerning the termination and this caused him to be seriously prejudiced. The Claimant further avers that he had not been served with any warning letter by the Respondent and had served Respondent for 15 years and that his termination was unfair.

7. It is also the Claimant's case that between 27/10/2008 and 22/11/2008, he worked overtime but as per Appendix 6 was never compensated.
8. It is also the Claimant's case that he is entitled to reimbursement for fees paid to Moi University while he was an employee of Respondent as per the bank policy. Appendix 7 are documents to confirm such attendance and amount payable being 62,000/=.
9. The Claimant avers that there were no valid reasons for his termination and that he was not accorded any fair hearing. He states that at the time of his termination his salary was Kshs.112,687/=. He therefore seeks order as per his claim for damages for wrongful termination, refund of 50% of fees paid, overtime 176 hours etc.
10. The Respondents filed their Memorandum of Defence on 3/12/2013 through the Federation of Kenya Employers (FKE). It is the Respondents position that the averments of the Claimant are not true. They aver that the Claimant worked for them as Section Head from 22nd March 2009 and his salary was 81,268/= and a house allowance of 4,700/=.
11. Concerning the circumstances leading to Claimant's termination, it is their case that, the Claimant was indeed send an email by a representative of the Respondent and asked to explain why cheques drawn on account of Samburu Teachers Sacco were processed before the proper call back process was followed and why the manager in charge of the call back was never notified so that the funds could be frozen to avoid any withdrawal following the unsuccessful confirmation or validation of the cheques from the customer (Appendix 2).

That indeed the Claimant responded to this email on 3/10/2010 stating that he was not able to get in contact with the officials of the Samburu Teachers Sacco to confirm if the cheques were genuine or not (Appendix 3).

12. The Respondents further aver that on 26/10/2010, the Claimant was suspended from employment in accordance with the provisions of the Collective Bargaining Agreement (Appendix 4). Further that forensic investigations were conducted in this matter (Appendix 5) and the report found that the cheques in question were deposited on 20th September 2010 and received at the CPC on 21/9/2010. They were allocated to the Claimant for purposes of validation and he was expected to call the account signatories to confirm the cheques and make a decision to pay or unpay the said cheques on 21/9/2010 but he didn't do so.
13. It is the Respondents case that the Claimant failed to unpay the said cheques and his inaction rendered the cheques time barred and culminated in their payment without validation. It is the Respondents position that had the Claimant failed to reach the signatories, he was expected to unpay the said cheques which he didn't do until 23/9/2010 after the cheques had already been unpaid (Appendix 5).
14. The Respondents further aver that they held a disciplinary hearing on 16/2/2011 where the Claimant's conduct was discussed. The committee made a finding that the Claimant acted negligently and in the circumstances of this case, he should have had them unpaid to avert any loss according to the Respondents cheque clearing procedures.

The Respondents attached copies of the minutes of the disciplinary hearing as Appendix 6.

15. The Respondents further aver that the Claimant's services were terminated on 23/2/2011 (appendix 7). The Claimant appealed against this termination (Appendix 8). The appeals

committee was constituted on 17/3/2011 and after hearing the appeal, it was dismissed (appendix 9) and the decision was communicated to the Claimant on 11/4/2011 (Appendix 10).

16. Other than the issues concerning the cheques paid without call-back, it is the Respondents position that the Claimant had previously been cited in some unbecoming behavior in a forensic audit held in 2008 and was even issued with a notice to show cause letter on 19/5/2009.

The Respondents submission therefore is that the termination of the Claimant was justified in that he was negligent in his duty. They asked court to dismiss his case with costs accordingly.

17. Having considered the evidence of both parties and their respective submissions, the issues for consideration by this court are as follows:

1. ***Whether there were valid reasons to warrant termination of Claimant's services.***
2. ***Whether due process was followed before the Claimant was dismissed.***
3. ***Whether the Claimant is entitled to remedies he has sought.***

18. On the 1st issue, the reason(s) given by the Respondent in dismissing the Claimant is as follows:

"TERMINATION OF EMPLOYMENT

This has reference to correspondence exchanged with you and the discussions held with you on your acts of gross misconduct.

We advise that it has been established that you committed acts of gross misconduct, details of which are well within your knowledge.

As a consequence, the bank has lost confidence in you and your services with the bank is hereby accordingly terminated with effect from today's date in terms of Clause 5 (d) of the Collective Agreement covering Section Heads, Check Clerks, Clerical, Technical and Subordinate Staff.

All money due to you including one months' salary in lieu of notice will be paid to you in due course.

Please arrange to clear your indebtedness with the bank (if any) and surrender to the bank any bank property in your possession.

Your loans shall be converted to public terms with effect from 1/3/2011.

You are requested to contact the Head of Retail Credit within 15 days of the date of this letter with a proposal on how you intend to settle your loan liabilities.

In the event of non-submission of a repayment proposal within 15 days of the date of this letter, the debt recovery procedures shall be engaged in line with the original letter(s) of offer issued and accepted at the onset of the borrowings.

Kindly sign the attached copy to acknowledge receipt of this letter.

Yours faithfully,

Signed

ROSE WANJALA

HEAD OF CPC "

19. The reason(s) given herein of losing confidence in the Claimant are not explicit as to what acts of

gross misconduct may have led to the “loss of confidence”.

Section 43 of Employment Act is explicit that:

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.

20. The reasons for termination must be given. Of course in the letter terminating the services of the Claimant herein, the Respondents failed to give reasons as envisaged under Section 43 of Employment Act.

21. However when the Claimant was cross examined before this court he admitted to having been given a show cause letter Appendix 2 by his supervisor Priscilla Kwatumba where he was expected to respond to the issue not later than 5/10/2010.

He admitted he responded the same day on 5/10/2010 (Appendix 3). Show cause letter stipulated clearly that he was to respond to the issue of the cheques that were paid without going through the proper processing system. After this, was the letter that suspended the Claimant from duty. Whereas details of reasons of the suspension are not stated, the correspondence between the Claimant and Respondents is evidence that the Claimant was aware of the reasons as to why he was being suspended.

22. I therefore find that there were proper reasons to warrant action against the Claimant though the said reasons were not properly communicated to the Claimant as expected in law.

23. On due process, the Claimant has stated that he was not given any fair hearing and neither was he invited for a disciplinary hearing as envisaged by the law. The Respondents on their part contend that the Claimant was given a hearing and have annexed their Appendix 6 which are minutes of the disciplinary committee meeting held on Wednesday 6/2/2011 at the Jiinue conference Room at 9.30 am.

24. In the minutes the list of members present is indicated and of course the Claimant name is missing. The issue of the cheques cleared by the Claimant are discussed but there is no indication that the Claimant was present nor was he asked to explain himself and even defend himself against the accusations leveled against him.

25. The way the disciplinary committee conducted its proceedings offends the provisions of Section 41 of Employment Act 2007 which states as follows:

“(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.”

26. The Respondents flouted rules of natural justice and also the provisions of Article 50 (1) of Constitution of Kenya which states as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

27. The Respondents having terminated the Claimant without following due process and without explicitly giving him reasons for his termination, this court makes a finding that the termination was unfair within the meaning of Section 45 of Employment Act 2007 and I declare it so.

28. The last issue for determination is on remedies. The Claimant has sought various remedies as per his claim. The claim of education reimbursement at 50% of cost was claimed by the Claimant. The Claimant sought to rely on his Appendix 6 on his list of documents. This document does not however state that fees paid by an employee will be reimbursable at 50%. The Claimant has not also adduced evidence to show that the course he studied had received the necessary approval as per the Respondents education policy. That claim for fees reimbursement must therefore fail.

29. On the claim for overtime there is proof that the Claimant worked beyond the normal hours of work as per his Appendix 6 translating in overtime period between 27/10/2010 to 22/11/2008. The Respondents denied that the Claimant is entitled to overtime pay.

However the law is clear on how much period of work an employee usually works and this is usually 8 hours per day. Any work outside the 8 hours translates to overtime work which would call for overtime compensation.

The Respondents have not given any evidence that the Claimant was paid for the overtime worked. I find the Claimant is entitled to this claim and I award him accordingly for overtime at 176 hours being 131,742/= as claimed.

30. On the claim for compensation for wrongful termination, I do find the Claimant is entitled to 6 months pay for the same being

$$= 6 \times 112,687 = 676,122/=$$

TOTAL awarded = 807,864/=

31. Other parts of the claim are not proved and are therefore not awarded.

The Respondent will also issue the Claimant with a Certificate of Service.

The Respondent will also pay costs of the suit.

Read in open Court this 22nd day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Respondent

Nyabena for Claimant