



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1994 OF 2012

ENOS OLUNGO MANG'ONG'O.....CLAIMANT

VS

KENYA COMMERCIAL BANK.....RESPONDENT

AWARD

Introduction

1. This action is brought by Enos Olungo Mang'ong'o who worked for the Respondent Bank for a period of fifteen years running from 3rd January 1995 until 26th October 2010 when his employment was terminated. The Respondent's defence is contained in its Replying Memorandum dated 20th February and filed in Court on 21st February 2013. At the trial, the Claimant testified on his own behalf and the Respondent called Priscilla Kwatamba, Senior Manager, Clearing Department; Tom Mecha, Senior Manager, Forensic Services and Robley Ngoje, Senior Employee Relations Manager.

The Claimant's Case

2. The Claimant was employed by the Bank as a clerical staff effective 3rd January 1995 at an initial salary of Kshs.11,048.00. He rose through the ranks and at the time of his termination, he held the position of Section Head at a monthly salary of Kshs.131,677.00.

3. By letter dated 21st October 2010, the Claimant was asked to explain his suspected involvement in fraudulent activities against the Bank, the processing of a cheque for USD 7,000 and disclosure of information to former Bank employees. In his response, the Claimant stated that the cheque had been validated by the Manager and his colleagues had confirmed to him that the payee was well known to them.

4. On 26th October 2010, the Claimant's employment was terminated and his appeal against the termination was declined.

5. The Claimant states that there was no valid reason for his termination and that in effecting the termination, the Respondent ignored the procedure set out in the Collective Bargaining Agreement (CBA). Further, he was not afforded an opportunity to be heard as required under Section 41 of the Employment Act, 2007.

6. The Claimant goes on to state that on 12th October 2010, he was confined in a secluded private office by the Respondent's forensic staff, Tom Mecha and Aloys Ombui where he was subjected to mental torture and anguish as he was denied food and water. He was also subjected to thorough search and his private documents and two mobile phones were confiscated.

7. The Claimant's claim is as follows:

- a. A declaration that the termination of his employment was unfair and unlawful
- b. Reinstatement without loss of benefits or in the alternative:

i) 12 months' salary in compensation for unfair termination

ii) Aggravated and exemplary damages for unlawful search, confiscation of private documents and mobile phones and for detention without food or water

c) Costs and interest

The Respondent's Case

8. In its Replying Memorandum filed on 21st February 2013, the Respondent admits having employed the Claimant in 1995 and states that the Claimant's employment was subject to terms and conditions set out in the contract of employment and the CBA entered into between the Kenya Bankers Association and Banking Insurance and Finance Union.

9. The Respondent states that because of the nature of its business as a banking institution, it was an express term of the Claimant's employment contract and the CBA that the Claimant was to observe the strictest secrecy regarding the Respondent's business and was not to disclose any information relating to the business transacted by the Respondent or any of its constituents.

10. Sometime in October 2010, the Respondent's Forensic Services Department received intelligence to the effect that the Claimant was actively involved in perpetuating fraud against the Respondent by:

- a. Unlawfully obtaining confidential customer account information and relaying it to fraudsters for use in fraudulent RTGS transfers and cheque transactions; and
- b. Associating with external fraudsters including ex employees of the Respondent terminated from employment for engaging in fraudulent activities contrary to HR circular dated 30th September 2010 prohibiting such associations.

11. Following these allegations, the Respondent's Forensic Services Department commenced investigations in the course of which the Claimant was interviewed alongside other members of staff. The investigators also reviewed documents handled by the Claimant.

12. The investigators concluded the following:

- a. That the Claimant engaged in the fraudulent practice of relaying confidential customer account information to unauthorised third parties without any formal request;
- b. That the Claimant admitted having associated with persons previously terminated from the Respondent's employment for having engaged in fraudulent activities contrary to HR circular dated 30th September 2010;
- c. That the Claimant irregularly held onto a cheque of USD 7,000 without any satisfactory explanation;
- d. That the Claimant irregularly kept several cheques in his drawer, which ought to have been archived, for an unnecessarily long period without any reasonable explanation;
- e. That the Claimant was not truthful in the course of being interviewed and contradicted himself many times.

13. The Respondent therefore by its letter dated 21st October 2010, sought the Claimant's explanation on the investigators' conclusions. In his response dated 25th October 2010, the Claimant did not provide any satisfactory explanation to justify his conduct. The Claimant's employment was therefore terminated by letter dated 26th October 2010 and he was paid one month's salary in lieu of notice.

14. It is the Respondent's case that in terminating the Claimant's employment, the procedure set out in the CBA was observed and that the Claimant was given an opportunity to be heard. Further, his appeal was found to be without merit and was therefore declined.

15. The Claimant's terminal dues were computed and the final position was a nil balance. The Respondent denies the Claimant's claims of torture and harassment.

Findings and Determination

16. The following are the issues for determination before the Court:

- a. Whether the Respondent had a valid reason for terminating the Claimant's employment;
- b. Whether in handling the Claimant's case, the Respondent followed due procedure;
- c. Whether the Claimant is entitled to the remedies sought.

Reason for the Termination

17. Section 43 of the Employment Act, 2007 provides as follows:

(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.

18. On 21st October 2010, the Claimant was issued with the following letter:

“RE: SUSPECTED INVOLVEMENT IN FRAUDULENT ACTIVITIES AGAINST THE BANK

Please let us have your explanation on the following:

On 12th October 2010, you categorically denied having been in any form of communication with Joshua Koskei, a former member of staff. During your interview with the forensic investigators you stated that;

‘I wish to reiterate that I have not talked to Joshua on phone nor exchanged any messages and information...’

You later admitted to be in communication with Joshua and indeed even received a call on your cell phone when you were being interviewed by the Forensic Investigators. You then admitted that;

‘...honestly the said person (one saved as Tt4) is Joshua Koskei. I wish to reveal that I was cautioned against associating with him as he was a fraudster. He gave me this number through which we communicated when his mother died. I have spoken to him in the course of this interview and I told him I was in a meeting....’

Further, upon investigation, you admitted to having a range of Joshua's numbers saved in abbreviations i.e. Tt1 0721449795, Tt2 0751711744 and TT3 0737236990. You further stated that the reason as to why

the numbers were saved in abbreviations was because of the drink Joshua takes. Contrary to your earlier statement of not having met with Joshua, you later admitted to meeting Joshua at Magomano Hotel in June 2010.

You have also been in communication with Christopher Koech, a former member of staff whose name was given to you by Forensic Investigators. You called him at 9.22am, on the day you met the Forensic Investigators, and he also called you back at 10.12am. You told Forensic that he was a shylock and a former staff at KCB Sudan. You later contradicted this and stated;

'He told me two years ago that he was working in KCB Sudan and therefore I would not know that he was working in Kipande House and that he was dismissed...we have been in communication but he is the one who keeps calling me...he called me sometime in mid-September and wanted us to meet.'

You were also found to be a close associate of Bramwel Arapta (now on suspension pending investigations over fraudulent activities against the Bank.) When asked about the same you stated;

'I have a total of his (Arapta's) eight private telephone numbers namely 0720248541, 0711012087, 0735371389, 0734646948, 072283422, 0725466506, 0727290904, and 0712323553. We were fairly close and therefore it is not unusual to have numerous numbers.....I have no reason to doubt that Bramwel implicated me in the frauds...on several occasions staff call requesting for cheque images, Arapta could call for images and I would provide them.'

It was also found that on 31.09.2010, you received a cheque for USD 7000 drawn in the name of Christopher Sakwa at KCB Village Market. You did not validate the cheque nor did you pay or unpay the cheque as required, instead you held the check until 07.10.2010 contrary to Bank procedures.

On 12.10.2010, you were found holding several cheques in your drawer which had long been paid and had not been archived since you had not surrendered them for archiving. The cheques dated back to 2007, 2008, January 2010, February 2010 and September 2010.

Please let us have your explanations on the above matters and show cause why disciplinary action should not be taken against you.

Your explanation should be received today by 2.00 p.m

Yours sincerely

PRISCILLA KWATEMBA

19. The Claimant sought extension of the time within which to respond and he made his written representations by his letter dated 25th October 2010. The following day on 26th October 2010, he received the following termination letter:

"Dear Sir

TERMINATION OF EMPLOYMENT

This has reference to the correspondence exchanged with you and the discussions held with you on 26.10.10 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 (sic) hereby accordingly terminated with effect from today's date in terms of Clause 5(d) of the Collective Agreement covering Section Heads, Check Clerks, Technical and Subordinate Staff. (Emphasis added)*

All money due to you including one month's 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.

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

Yours faithfully

ROSE WANJALA

HEAD OF CPC

20. Although the letter dated 21st October 2010 carried a litany of accusations against the Claimant, the termination letter which came a week later on 26th October 2010 simply stated loss of confidence as the reason for the termination of the Claimant's employment.

21. In *John Ngatia Ndung'u v Kenya Commercial Bank Limited [2014] eKLR* this Court held that an employee facing disciplinary action is entitled to a clear statement of the exact offence(s) for which the employer is considering disciplinary action. Use of general phrases such as '*loss of confidence*' without further elaboration give the impression that the employer is on a fishing expedition to find some fault against an employee and validate a *fait accompli*. With regard to the instant case, this view is reinforced by the fact that the Respondent does not appear to have given any consideration to the representations made by the Claimant in his letter dated 25th October 2010.

22. At the hearing of this case, the Respondent's witnesses strenuously tried to demonstrate that the Claimant was at fault. I must state however that the Employment and Labour Relations Court is not the proper forum for an employer to produce evidence to support its position on the culpability of an employee. Once the internal disciplinary process is marred at the work place, it cannot be salvaged in Court. The role of the Court is to review the internal disciplinary proceedings with a view to determining whether in all respects, the employer acted reasonably and within the law.

23. An employer who issues a show cause letter with a catalogue of accusations to which the employee responds and then goes ahead to issue a termination letter on the basis of some offence called '*loss of confidence*' which to my mind is unknown in human resource management practice, cannot be said to have acted reasonably and within the law.

24. The Court therefore finds that the Respondent failed to demonstrate a valid reason for the termination of the Claimant's employment as required under Section 43 of the Employment Act, 2007 as well as under Clause A5(d) of the Collective Bargaining Agreement.

Termination Procedure

25. The Claimant states that he was not given an opportunity to be heard and the Respondent maintains that because the Claimant was interviewed in the course of investigations and held a meeting with Priscilla Kwatamba on 26th October 2010, then he was heard. Additionally, the Claimant was given an opportunity to make written representations on the accusations leveled against him.

26. Section 41 of the Employment Act, 2007 establishes the following procedure for handling cases of misconduct, poor performance and physical incapacity:

a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

(c) That the employer has heard and considered any explanations by the employee or their representative;

27. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

28. The procedure in Section 41 kicks in once an employer decides to subject an employee to a disciplinary process which may lead to disciplinary action. This process is not to be confused with interviews in the course of investigations or a meeting at which an employee is handed a termination letter. From the evidence adduced before the Court there was no proof that the Claimant was subjected to the mandatory procedure set out under Section 41.

Remedies

29. Overall, the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair. The Claimant seeks reinstatement which is a remedy to be granted in very exceptional circumstances. I have looked at the time lapse since the Claimant's termination and find reinstatement inappropriate in this case. I however award him twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in handling the Claimant's case.

30. I agree with the holding of my sister **Onyango J** in *Daniel Githinji Waiganjo v Kenpipe Co-operative Savings and Credit [2014] eKLR* that exemplary damages are not available in contracts, including employment contracts. This claim must therefore fail.

31. Ultimately, I make an award in favour of the Claimant in the sum of Kshs.1,580,124.00 being twelve (12) months' salary in compensation for unfair termination of employment.

32. The Respondent shall pay the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

33. I further direct the Respondent to issue the Claimant with a certificate of service.

34. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF JULY 2015

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Mr. Nyaburi for the Respondent