



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 168 OF 2014

MICHAEL MURIITHI MAINA

CLAIMANT

v

BARCLAYS BANK LIMITED

RESPONDENT

JUDGMENT

1. Michael Muriithi Maina (Claimant) was employed on permanent and pensionable terms by Barclays Bank Ltd (Respondent) and the same was confirmed through a letter dated 18 January 2005. The position was a Customer Advisor B1 (Claimant had previously served on contract).
2. In the course of the employment, the Claimant had good performance ratings as evidenced by documents produced and through a letter dated 31 January 2008, the Respondent appointed him as Local Business Advisor.
3. On 3 November 2008, the Respondent offered the Claimant continuity of service but under new terms and conditions of employment.
4. The Respondent on 20 March 2012 notified the Claimant of his suspension pending investigations into allegations of fraudulent loan application of Kshs 500,000/- at its Gilgil branch.
5. On 22 May 2012, the Respondent informed the Claimant that his suspension had been extended for 30 days, and through a letter dated 8 June 2012, the Claimant was invited to a disciplinary hearing on 15 June 2012.
6. The hearing proceeded as scheduled and on 12 July 2012 after which the Respondent wrote to the Claimant informing him that his services were being terminated.
7. The Claimant felt aggrieved and through a letter dated 15 July 2012 he lodged an appeal to the Respondent's Human Resources Director. The appeal was heard on 7 August 2012 but it was not successful.
8. This prompted the Claimant to commence legal proceedings against the Respondent on 23 May 2014 and the issue in dispute was stated as unfair dismissal.
9. The Respondent filed a Response on 9 July 2014, and the Cause was heard on 17 March 2015, 15 April 2015 and 8 July 2015.

10. The Claimant filed his written submissions on 15 October 2015 while the Respondent filed its submissions earlier on 2 September 2015 (both were filed long after the agreed timelines).

11. The Court has considered the pleadings, evidence and submissions and identified two main issues for determination. These are, *whether the termination of the Claimant's employment was unfair and if so, appropriate remedies/orders.*

Whether termination of employment was unfair

Procedural fairness

12. The Claimant was suspended through a letter dated 20 March 2012. The suspension was to enable investigations to be carried out. The suspension letter informed the Claimant that the allegations being investigated related to a fraud involving a loan application of Kshs 500,000/- at its Gilgil branch. The letter also informed the Claimant that his personal cheque had been retrieved from a fraudster who had been arrested.

13. The suspension letter was categorical that the suspension did not constitute disciplinary action and that at the conclusion of the investigations the Claimant would be informed if a disciplinary hearing was necessary. The suspension was extended through a letter dated 22 May 2012.

14. In the course of investigations, the Claimant recorded a statement with the investigators and after the conclusion of the investigations, the Respondent invited the Claimant to a disciplinary hearing through a letter dated 8 June 2012.

15. The invitation letter to a hearing informed the Claimant that the subject of the hearing was a fraudulent loan application of Kshs 500,000/- at the Gilgil branch and the retrieval of Claimant's personal cheque with a fraudster who had been arrested.

16. The Claimant was further advised that he could be accompanied with a colleague or union representative.

17. A hearing was duly held on 15 June 2012 and the Respondent produced the minutes in Court.

18. After the hearing, a decision to terminate the services of the Claimant was taken and he was informed of a right of appeal. The Claimant appealed and an appeal hearing was conducted but it was not successful.

19. The Court needs to juxtapose the process taken by the Respondent against the statutory and contractual requirements to a hearing (if any) to establish whether the same was procedurally fair.

20. The statutory requirement to a hearing is provided for in section 41 of the Employment Act, 2007.

21. I alluded to what I thought were the essentials of procedural fairness in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* (2013) and I observed as follows

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other

sanction.

22. In the instant case, the Claimant knew of the allegations to confront in advance. He was afforded an opportunity to make representations and to be accompanied during the disciplinary hearing. He was also afforded an opportunity to appeal, which he did.

23. Considering the sequence of events as narrated and evidenced by the documentation produced, the Court is satisfied that the process taken by the Respondent met the statutory test for procedural fairness.

Substantive fairness

24. But satisfying the statutory test for procedural fairness is not the end of the matter. The statute has placed an onerous burden upon employers in complaints of unfair termination of employment.

25. Pursuant to section 43 of the Employment Act, 2007, the employer should prove the reasons for the termination of employment, but that is not all. Section 45 of the Act requires the employer to also prove that the reasons are valid and fair.

26. The reasons given for the termination of the Claimant's employment were a fraudulent loan application of Kshs 500,000/- at the Gilgil branch and retrieval of the Claimant's personal cheque with a fraudster.

27. According to the Respondent, the Claimant was in contravention of its Code of Conduct by issuing the cheque.

28. These are the reasons the Respondent had to prove and also prove as valid and fair.

29. The Respondent called 3 witnesses

The Kshs 500,000/- fraudulent loan

30. The first witness was the Respondent's Gilgil Branch Manager. At the material time he was the Manager at Nakuru West branch. He worked with the Claimant at Nakuru from January 2011 to June 2012.

31. He stated that the Claimant processed the opening of 2 accounts in the names of Caroline Wambui and Shani Engineering Works. These 2 applicants did not produce all the required documentation and that the requisite processes were not followed by the processing officers.

32. In cross examination, this witness stated that the opening of the accounts relating to *Caroline Wambui* and Shani Engineering Works were not the reasons set out in the Claimant's termination of employment letter.

33. More poignantly, he stated that the loan was processed by the Respondent's Business Development Advisor in Gilgil and that the Claimant was based in Nakuru and not Gilgil and that the Respondent's Head office approved the opening of the accounts.

34. Pressed further in cross examination, the first witness stated that he had no documents to connect the Claimant with the processing of the Kshs 500,000/- loan as he did not participate in the investigations.

35. The witness testified at length on the process of applying for loans and approval for the opening of new accounts.

36. The Respondent's second witness was a Forensic Investigator. He investigated the allegations and produced a copy of his report.

37. He stated that the documentation used to open an account in the name of Shani Engineering Works were incomplete and that this transaction was carried out at Nakuru West branch.

38. He also testified in regard to the account opened for one *Caroline Wambui*. It was a loan application for Kshs 1,000,000/- made in March 2012. The documents used were counterfeit.

39. He stated that his investigations established that it was the Claimant who processed the documents and that some Kshs 18,000/- was transferred from the account of Shani Engineering Works to an employee authorised by the Claimant). The audit report to support the opening of the account was also forged.

40. Regarding the loan application at Gilgil for Kshs 500,000/-, the Forensic Investigator stated that it was in the name of one *Catherine Gathoni Mburu* and that the documents were processed by other staff but the Claimant opened the account. The said *Catherine* was working in cahoots with Respondent's employees and that she was arrested, and Claimant's personal cheque was recovered from her.

41. In cross examination, and when pressed, this witness admitted that the Claimant was not dismissed over allegations to do with the accounts of *Shani Engineering Works* or *Caroline Wambui Muriuki*.

42. This witness also testified at length on issues which in the view of the Court are not material to the determination of this Cause.

43. What emerges from the testimony of these 2 witnesses called by the Respondent is clear.

44. The Claimant was not dismissed because of allegations concerning the processing and opening of accounts in respect of *Shani Engineering Works* and *Caroline Wambui (Muriuki)*.

45. The reason advanced for the termination related to a loan involving one *Catherine Gathoni Mburu*. The loan was processed in Gilgil.

46. The Claimant was not based in Gilgil. There was a Business Advisor in Gilgil. The documents purportedly processed or approved by the Claimant in relation to this *Catherine Gathoni* were not produced in Court.

47. The Respondent's first witness also admitted in cross examination that the termination of the Claimant's employment was not on account of the accounts opened in favour of Shani Engineering Works and Caroline Wambui.

48. The Court after considering the evidence is of the view that the Respondent has failed to prove that the Claimant was involved in the processing or approval of the loan sought by Catherine Gathoni of Kshs 500,000/- at Gilgil.

Retrieval of personal cheque

49. The second reason given for the termination of the Claimant's employment was that his personal cheque was retrieved from a fraudster who had been arrested.

50. The Claimant's explanation for the personal cheque was that he was purchasing building materials and that the Respondent had in fact advanced him a loan towards the construction.

51. In cross examination, the Claimant admitted that it was against the Respondent's policies for an employee to issue the type of cheque he issued.

52. But the Respondent's first witness (who signed the termination letter) stated that the Code of Conduct which prohibited the Respondent's employees from issuing post dated cheques had not been filed/produced in Court.

53. The Forensic Investigator also did not produce a copy of the Code prohibiting issuance of post dated cheques.

54. It is not the duty or within the Courts powers/jurisdiction to rewrite the terms of employment contracts mutually entered into by parties. But such contracts must be within the parameters envisaged by the Constitution and the law.

55. The prohibition of the Respondent's bank staff from issuing post dated cheques has bothered me a bit. Unfortunately, a copy of the policy/code was not produced in Court.

56. But I can say no more except to observe that pursuant to section 45 (2) and (4)(b) of the Employment Act, 2007 an employer's action in terminating the services of an employee should be evaluated against the requirements of validity, fairness and justice and equity respectively.

57. While it is easy measure validity, which connotes legal sufficiency, it is not that simple measuring fairness, as it reflects a moral value judgment or disinterest and equitableness.

58. But *validity, fairness, justice and equity* are the yardsticks which the Constitution and the statute have brought onto the employment equation when dealing with termination of employment, as these are values which have not been part of the common law or employment contractual relationship.

59. With the realities of life in this country, I am unable to find that the termination of the Claimant's employment in the circumstances of this case (on account of issuing a post dated cheque) was in accord with fairness, justice and equity. Such penalty was too severe and did not match the transgression.

Appropriate remedies

Declaration

60. The Claimant has made out a case for a finding that the termination his of employment was unfair in that it was not in accord with fairness, justice and equity.

Damages for unfair labour practices

61. The Claimant did not lay any proper evidential or legal basis for a finding that the Respondent was involved in unfair labour practices meriting the sort of damages pleaded as opposed to the statutory compensation.

Damages for unfair termination of employment

62. The Court has reached a conclusion that the Respondent has failed to prove the involvement of the Claimant in the Kshs 500,000/- fraudulent loan application or that it was a valid and fair reason and the Claimant is be entitled to compensation.

63. The termination of employment was also not in accord with justice and equity.

64. Section 49 of the Employment Act, 2007 has provided the primary remedies where there is a finding of unfairness.

65. Compensation under section 49(1)(c) of the Employment Act, 2007 is discretionary. The statute (section 49(4) has outlined the factors the Court ought to consider.

66. The Claimant served the Respondent for some odd 8 years. He secured alternative employment albeit at a lower wage.

67. Considering the length of service, and that the Claimant secured alternative employment, the Court

would award him the equivalent of 8 months gross wages as compensation (the pay slip for March 2012 indicate a gross pay of Kshs 132,584/-).

68. Before concluding, the Court wishes to observe that it is impressed with the type of procedural fairness safeguards put in place by the Respondent.

Conclusion and Orders

69. The Court finds and holds that although the Respondent complied with procedural fairness requirements it has failed to prove that the reason for the termination of the Claimant's employment was valid and fair and the Court awards and orders the Respondent to pay him

(a) 8 months gross wages compensation Kshs 1,060,672/-

70. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 11th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mongeri instructed by Mongeri & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon