



REPUBLIC OF KENYA
IN THE EMPLOYMENT OF LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 138 OF 2015

JULIUS KIEMA KENGA.....CLAIMANT

-VERSUS-

BARCLAYS BANKK OF KENYA LIMITED & ANOTHER.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the Respondent on 14.10.1988 as a cashier. His duties were mainly to deal with foreign exchange. On 14.2.1996, the claimant was arrested and later charged with the offence of fraudulent false accounting in Case Number CMCR No 812 of 1996 at Mombasa. Then on the said 14.2.1996, he was suspended from work until 23.5.1996 when his services were terminated. The reason for the termination was that on 9.2.1996 his residential house was searched and he was found having custody of foreign currency purchase and sale receipts. That the bank alleged that he had no authority from the management to remove the said receipts from the bank premises whether or not the related transactions were cancelled. That the said conduct was in contravention of clause A5 (a) (i) of the collective Bargaining Agreement (CBA) but he was terminated under clause A5 (d) of the CBA. Thereafter the claimant was acquitted of the criminal charges in CMCR No 812 of 1996 on 11.12.1998.

2. The claimant then brought the suit in the High Court on 10.12.1999 claiming general damages for false imprisonment and malicious prosecution and damages for breach of contract. In response, the 1st respondent denied liability for the said tort and breach of employment contract. The suit was heard on 15.11.2007, 12.10.2011, 15.3.2012 and 22.6.2015 when the claimant testified as PW 1 and the 1st respondent called Mr Araka James Oyamo as DW 1 and filed witness statement for Mr Jawahar Sarab Dinshaw. The second respondent never called any witness but at close of the hearing all the parties filed written submissions.

Analysis and Determination

3. There is no disputed that the claimant was employed by the 1st respondent as foreign exchange cashier between 1988 and May 1996 when his services were terminated by one month notice which was compensated by payment of salary in lieu. There is also no dispute that the claimant was charged with criminal offence of fraudulent false Accounting and was acquitted on 11.12.1998. The issues for determination are :

- a. Whether the termination of the claimant's services by the respondent constituted a breach of his employment contract.

b. Whether the claimant was falsely imprisoned and maliciously prosecuted by the respondents in CMCRC No 812 of 1996.

c. Whether the claimant is entitled to the reliefs sought.

Breach of Employment Contract

4. The termination letter dated 23.5.1996 stated as follows :

“TERMINATION OF EMPLOYMENT

Reference is made to the subject of foreign Currency purchase and sale receipts that Were found in your custody in your house on 9.2.1996 I am satisfied that you removed the said receipts from the bank's Premises without management authority. You had no right whatsoever to remove the said receipts from the bank premises whether or not the related transactions were cancelled. The above offence is in contravention of clause A5 (a) (i) of the Collective Agreement and the bank is justified to summarily dismiss you from its employment. However we are prepared to reduce this to termination ... in accordance with clause A5 (d) of the Collective Agreement... by payment of one month's salary in lieu notice...”

5. There is no doubt from the foregoing excerpt from the termination letter that the claimant was not summarily dismissed for the offence of removing the bank's property (receipts) from the bank. He was only terminated under clause A5 (d) of the CBA which permitted either party to the contract to terminate the employment contract by giving the other, notice of one month or paying him one month salary in lieu of notice. So what breach did the 1st respondent commit under the CBA? The answer is zero. She only exercised her right to freedom of contract which was provided for under clause A5 (d) of the CBA. She complied with the CBA by agreeing to pay one month salary in lieu of notice which money was applied towards offsetting the claimant's outstanding loan. The claimant has not denied that he had a loan with the bank and that the salary in lieu of notice was applied towards payment of the said loan. Consequently and on a balance of probability the Court finds that the 1st respondent never breached the claimant's employment contract through the termination letters dated 23.5.1996.

False Imprisonment and Malicious Prosecution

6. The Court has perused the proceedings in CMCRC No 812 of 1996 in order to understand the background of the claim of false imprisonment and malicious prosecution. The evidence of PW 7 one Joakim Lasi is very crucial because he was the investigating officer. On 14.2.1996 he was in his office at the Banking fraud investigations, when he received a call from DW 1 in this case Mr. Oyamo, who was the 1st respondent's security officer, reporting loss of customer's cash deposit. PW 7 proceeded to the respondent's bank and questioned two cashiers including the claimant herein and picked them for further investigations. That he went to search the claimant's residential house for the money but found no money. However he found several Bank vouchers for foreign currency exchange of which the claimant admitted that he took home. That he maintained that the vouchers were for no purpose. PW 7 then took the vouchers away for further investigations. That he discovered that the vouchers were for deleted transactions. That he questioned the senior officers in the bank and they confirmed that the deletion of the transactions by the claimant were authorized.

7. Another key testimony in the said criminal case proceedings was the evidence of PW 6 now DW 1 in this suit. He admitted that he reported to the police about the loss of Ksh 45000 customer's cash deposit. That he accompanied the police to search the claimant's residence and recovered vouchers for deleted transaction. That he did investigations on the transactions on the computer systems, documents and even contacted customers to confirm whether their transaction were indeed cancelled. That he established that the claimant was using the bank to transact his business. That as result the claimant denied the bank business in terms of commission from the transactions. PW 6 then handed the documents he recovered during his investigations to the police for use during the prosecution of the claimant in the criminal case. However the claimant was found innocent and acquitted after his senior admitted on oath that they had

authorized all the deletion of the transactions done by the claimant.

8. The question that begs answer is whether the claimant was unlawfully denied his freedom and maliciously prosecuted by the respondents jointly. As regards the first issue of liberty, the Court finds that the 1st respondent had no control over the police in relation to detaining the claimant while under investigation. The police had the sole mandate of deciding whether or not to release the claimant on bond or not. Likewise the police had the sole mandate of deciding when to finalise investigation and arraign the claimant in Court within 24 hours as required by the law. The Court will therefore on a balance of probability find that the first respondent was not liable for false imprisonment of the claimant.

9. As regards the 2nd respondent, the Court agrees with her submission that the claim is time barred. The cause of action in respect of the tort of false imprisonment arose on 20.2.1996 when the claimant ceased to be under the custody of the police. Consequently the claim ought to have been filed in Court within 12 months from that time. However, the present suit was filed in December 1999 after the cause of action for false imprisonment had long expired. Consequently that claim against the 2nd respondent must therefore fail.

10. As regards malicious prosecution, the Court finds that the two respondents are jointly liable because the claimant has proved all the ingredients of the tort of malicious prosecution established in **Zablon Mwaluma Kadori vs National Cereals & Produce Board [2005] e KLR** where it was held

“In a claim for damages for malicious prosecution like this, it is incumbent upon the plaintiff to prove on a balance of probability that the prosecution was instituted by the defendant; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and probable cause; and that in instituting the prosecution the defendant was actuated by malice.”

11. As correctly submitted by the claimant’s Counsel, the respondents knew before charging the claimant with CMCRC No 812 of 1996 that the vouchers recovered from his house were lawfully deleted. PW 6 and PW 7 who were leading the investigations for the bank and the police respectively admitted on oath during the criminal proceedings that they interviewed officers of the bank who admitted to deleting the transactions. The two witnesses however went on to press charges against the claimant and called the same officers who had admitted that the deletion was lawful as the witnesses.

12. The Court is satisfied from the material before it that the said two witnesses representing the two respondents were actively involved in the institution of the prosecution against the claimant through investigation and gathering of evidence which never brought any conviction.

13. The prosecution was also without reasonable and probable cause because as noted above PW 6 and PW 7 in the said proceeding had already interrogated the relevant officers of the bank and confirmed that they had authorized the deletion of the transactions which were alleged to constitute fraudulent false accounting. That all the transactions were fed in the computer system and the pass- words for officers who deleted the transactions were evident.

14. The Court is also satisfied that there was malice in the prosecution because the respondent knew that the claimant could not possibly delete any transaction in the system but proceeded to charge him instead of the officers who authorized the deletion of the transactions. According to the claimant, he was being punished and removed from the bank for implicating Mr. Kaiti with the failure to deposit Kshs 45000 left to him by a customer to deposit on her behalf. That the said Mr. Kaiti was the son of the Barclays Bank manager at the Port Branch. Whether the foregoing is true or not, no reasonable prosecutor who have charged the claimant alone for deleting the transactions from the computer system when in deed his supervisors have confessed to having deleted the transactions themselves using their own pass words.

15. Lastly and most important, the criminal proceedings were terminated in favour of the claimant in this suit as per the ruling dated 11.12.1998.

Reliefs

16. In view of the finding above that there was no breach of the employment contract by the 1st respondent, the claim for damages for such breach is dismissed. However the claimant is awarded Kshs 63201 being salary for February, March, April and May 1996 as the said claim was not contested by evidence by the defence using record of payment. The termination letter only dealt with salary in lieu of notice which was set off against an outstanding loan advanced to the claimant. Likewise the claim for Kshs 21261 has not been disproved in evidence and it is allowed. The claim for medical expenses is however dismissed because the medical expenses were incurred long after termination of employment. It is now trite law that once employment ends, all fringe benefits goes with it. The said Kshs 84,462 under the employment contract is payable by the 1st respondent only.

17. Lastly the claimant is awarded Kshs 1000,000 as General damages for malicious prosecution. In so doing the Court has considered the time when the tort was committed being 20 years ago. The claimant is also awarded Kshs 100,000 being special damages in respect of legal fees paid during the said malicious prosecution by the respondents. The said Kshs 1,100,000 awarded for the tort will be paid by the respondents jointly and severally.

Disposition

18. For the reasons stated above, judgment is entered for the claimant in the sum of **Kshs 1,184,462** subject to the apportionment of liability stated above, plus costs and interest from the date of filing suit.

Signed, dated and delivered at Mombasa this 4th day December 2015.

ONESMUS MAKAU

JUDGE