REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 621 OF 2010

BANKING INSURANCE & FINANCE UNION (KENYA) …… CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LTD …….…….. RESPONDENT

JUDGEMENT

1. On 4th June 2010, the claimant union filed the memorandum of claim herein dated 25th April 2010 for and on behalf of the grievant (Nathan Launi Mugambi) for wrongful termination by the respondent. on 21st September 2010 the respondent filed the defence, the matter was heard by Chemmuttut, J (now retired) and the award was to be delivered on notice. However upon the court being seized of the matter fresh directions were issued and parties directed to set down the matter for hearing afresh. The claimant called the grievant in evidence while the respondent called Juliet Sewe as their witness. Both parties agreed to file whiten submissions.

Claimant's case

2. The grievant was employed by the respondent as a Barman on 1st September 2004 and posted to KCB Management Centre on a basic salary of kshs.25, 577.00 and a house allowance of kshs.1, 632.00. On 10th March 2005 the grievant was issued with a notice to show cause letter (NTSC) to explain the cause of an overage of 18 sodas. He gave an account on 14th March 2005. When the claimant union did a fact finding mission, they discovered that transfer of sodas was a normal practice. In handling the complaint against the grievant, the respondent failed to inform the claimant or follow the terms of the CBA between them. The dispute was referred to the minister but the claimant was aggrieved by the decision thereon hence this case.

3. The facts subject of this claim is that the grievant on 6th March 2005 was at work when his supervisor requested him for a crate of soda from the bar he was manning. The request was made due to the fact the keys to the restaurant beverage fridge could not be traced as the waiter responsible had left with it. On 7th March 2005 when the grievant was preparing his sales returns there was a shortage of one crate. The accounts officer asked the grievant to pay for the shortage to help balance the accounts. His supervisor then returned the crate taken the previous day while the he had already paid for it with accounts. He therefore took the extra crate to the bar he operated from for his own consumption as he had already paid for it. On 9th March 2005 management made a surprise check and found the grievant with an overage of 18 sodas as he had only consumed 6 sodas.

4. The grievant was dismissed as a result of the overage. The transfer of sodas was a common practice in the respondent bars and restaurant. The respondent suffered no loss and the grievant should not have been

terminated. The claimant is seeking that the grievant be reinstated without loss of benefits.

5. In evidence, the grievant gave his sworn evidence and stated that on 6th March 2005 his supervisor Mr Langat asked him to transfer a crate of soda from the bar to the restaurant as the access key was missing. The next day when the grievant was doing accounts returns he realised there was a shortage which he paid for in cash. This was to avoid him failing to render his account by 11.30 am as required by the respondent. The grievant later recalled that he had no shortage; rather he had transferred a crate to the restaurant the previous day. The grievant took the crate for his own consumption and placed it in the bar he was manning. Later there was a spot check by management who discovered the claimant holding an overage of 18 sodas. The respondent commenced investigations and the grievant was dismissed on 10th June 2005. He lodged an appeal and on 30th August 2005 there was response confirming the termination, there was no hearing or warning and therefore seek reinstatement.

6. In cross-examination the grievant stated that when he paid for the missing crate of soda, he was not issued with a receipt but the supervisor Mr Langat was aware of what had transpired. That he was not given the investigation report done by Mrs Kibiego and though unionised, he was never heard or his union involved.

Respondent's case

7. The respondent stated that the grievant was employed as a Barman on 27th September 2004 and placed on probation for 6 months during which time he could be terminated upon 1 month notice. The CBA between the respondent and the claimant provided for termination upon notice of 1 month. On 3rd December 2004 the grievant was evaluated for confirmation but was found untrustworthy and was given time to improve. On 9th March 2005 an ad hoc inspection was done by the respondent where the grievant was found with an overage of 18 sodas whereas he was required to keep a proper record before handing over which had not been done. Thus on 10th June 2005 the grievant was terminated in terms of section 26 of the Employment Act, Cap 226 (Now repealed). That the termination was lawful due to the grievant inability to be trusted, he was not diligent and thus termination was justified. The claim should therefore be dismissed.

8. In Evidence, Juliet Akinyi Sewe stated that she worked with the grievant in 2005 at the respondent where she was a Waitress. The respondent KCB Management centre had a Bar and restaurant and on weekends the pool bar was opened where the grievant was placed. When the grievant shift required him to hand over to the witness, the stock had to be verified but the grievant did not like this method as he did a general handover without confirming the actual stock. The witness on two occasions upon taking over from the grievant discovered shortages which she had to pay for. Several bottles would be empty from the stock. On the next time she took over from him she insisted on an actual counting of all the bottles to confirm all was well.

9. On 6th March 2005 the witness was asked by her supervisor Mr Langat to hand over a crate of soda to the bar. It was not allowed for one to have a crate of soda for own consumption. This was not allowed while at the work place. One was supposed to go through the records by having proper recordings which were to be reviewed before taking accounts for the day. If there were group clients and one forgot, these records were relied upon to trace an overage or shortage and the client would be asked to pay or get a refund as the case was applicable. Accounts were done daily and when the grievant discovered the overage, he was supposed to report immediately and not after 2 days. Accounts did surprise checks as a requirement. This kept all staff on alert as any loss had a sanction. Overages were normal especially when the staff were busy and one would have a loss of 1 to 2 bottles with some clients leaving without paying but to have a whole crate as overage was on the higher side and unusual.

10. On cross-examination, the witness confirmed that in cases where one had to pay for a loss, a receipt was issued. There was no performance appraisal as she was employed the same time as the grievant and this was never done for them.

Submissions

11. In submissions, the claimant states that the grievant was terminated under clause A5 of the CBA on the reason that the respondent had lost confidence in him. There was an appeal against the termination which was also dismissed. The grievant reiterated that he was under instructions from his supervisor who was at all times aware of what transpired in this case and that Mrs Kibiego confirmed that the respondent had a practice of transfer of drinks from the bar to the restaurant. That the union was not involved in the dispute resolution. The dispute was reported to the Minister and the claimant was aggrieved by the outcome recommendations.

12. The claimant further submitted that the grievant is innocent and his abrupt termination without warning was unwarranted. There was provision for 3 warnings which the respondent failed to apply before termination. That overages and shortages are a normal occurrence in the respondent business which does not always result in termination. This was unfair termination that should result in a reinstatement. The claimant relied on the case of ***BIFU versus Standard Chartered Bank Cause No. 31 of 1998*** where the court held that in a reinstatement the court must consider the special circumstances. That in this case the respondent did not lose anything from what the grievant did and the termination was not justified as there lacked a substantive reasons for it.

13. The respondent on the other hand submitted that the grievant failed in his duties when he failed to give a proper account of his sales and stock in his care, he created a situation where there was a conflict of interest and purported that his actions could be explained by stating that he forgot to render a proper account. That there is evidence that the grievant was asked by his supervisor to transfer a crate of soda and this was returned and while making returns the grievant failed to note this and instead paid while he kept the crate of soda at his work station purporting the same to be for his own consumption. This was not reported to anyone and procedure in declaring overage was not followed raising suspicion as to the motive of the grievant in keeping the crate of soda with him. There were 3 days when the grievant had time to declare the overage which he never did until the surprise check that made the discovery.

14. The respondent relied on the case of ***Moses Chavangi Kanyungira versus Barclays Bank ltd cause No. 649 of 2010*** where the court held that financial dealings require a high standard of approach. That in this case section 17(c) of the Employment Act, Cap 226 [now repealed] is applicable as the grievant neglected to do his work well. He was given a fair hearing and was paid his terminal dues and the orders sought cannot be granted as there is no longer trust between the parties so as to allow reinstatement. It is over 9 years since the termination and the respondent has since filled up the position and the claim should be dismissed.

Analysis of the issues

15. The claim herein is based on the provisions of the Employment Act, Cap 226 [now repealed] the same being grounded on termination of employment of the grievant that arose on 10th June 2005, was reported to the Minister and there are recommendations that the claimant was dissatisfied with. At the time of filing this claim on 4th June 2010, the grievant was out of employment for a period of over 5 years.

16. The grievant was terminated on the reasons that were outlined in his letter of termination dated 10th June 2005 noting;

> *After due investigations, I am satisfied that in March 2005, you committed serious irregularities in your work, details of which are well within your knowledge.*
>
> *The bank is accordingly of the view that you are in serious breach of your obligations for conducting yourself in a manner calculated to damage the relationship of mutual trust and confidence which is an implied term in every contract of employment.*
>
> *As a consequence the bank has lost confidence in you because the contract to employment has been*

frustrated and is hereby accordingly terminated with effect from today's date in terms of Clause 5(d) of the Collective Bargaining Agreement covering section heads, Check Clerks, clerical, Technical and Subordinate Staff.

17. The parties herein had a CBA governing their relations and under part A5 termination of employment and the procedure applicable was particularised. Upon commission of acts that were found actionable by the respondent, an employee was to be subjected to a warning after investigations and within which time such an employee may be suspended and termination arise after notification within one month. These provisions looked at against the applicable law, the Employment Act Cap 226 [now repealed] go to the core of section 17.

18. From the evidence, the grievant was on 9th March 2005 found to have an overage of stock with no receipts to support the same, he was asked to explain, which he did but the same was found to be unsatisfactory and on 14th March 2005. Mrs Kibiego conducted investigations and found the claimant culpable and on 10th June 2005, the grievant was terminated.

Was there wrongful termination of the grievants' employment terms?

Should the grievants be reinstated?

19. It is important for parties to appreciate the foundational basis of a claim for wrongful termination, the same find ground on the Employment Act, 2007, which Act came into force upon a process of labour laws review that included the repeal of the Employment Act Cap 226. To therefore make a claim under Cap 226 without this conceptual application is an error that any party should avoid. The cause of action herein arose in 2005; the dispute was reported to the Minister and then filed in Court in 2010 where the claimant Union sets out the facts and the orders sought that of a reinstatement of the grievant without any seeking any other orders.

20. It is now trite that parties are bound by their pleadings and not just sufficient to rely on Article 159 of the Constitution or section 20 of the Industrial Court Act to avoid a procedure that is stipulated by law. The purpose of pleadings remains as that of setting out facts which constitute a cause of action as held in ***Petition No. 373 of 2012, Stephen Waweru Wanjohi et al versus the Ag et al*** . Those pleadings should clearly and specifically set out facts in order to enable the court to grasp what the cause of action is and what orders to consider.

21. Therefore, in this case a claim for wrongful termination in the absence of a clear outline of the breach or breaches of the applicable law, the Employment Act Cap 226 [now repealed] with regard to the grievants' employment contract by the respondent goes beyond the purview of the law the claimant is seeking to apply. To now seek application for a law that relate to what is now wrongful termination anf unfair termination is to avoid the essence of the protections that were under the repealed law and their limitations which cannot now be cured in this case. The terms of engagement for the CBA between the claimant and the respondent based on this repealed law as well as the termination of the grievant. This cannot be now transplanted into the new regime of labour relations as under the Employment Act, 2007. To do so would be to defeat the very purpose of the context and the intentions of the parties when the CBA was negotiated and when the cause of action arose as of 2005. This was the subsequent basis of the claim being filed after the report to the Minister and eventually to this court after 5 years as the claimant and grievant still enjoyed the terms as under the repealed legislation, the Employment Act, Cap 226.

22. The misconduct of the grievant was clearly outlined to him that of failure to declare an overage or cause the same to be receipted in a manner that was accountable an expectation that went with his job and required a higher standard of diligence and trust. Even in a case of innocent overage, the same ought to have been declared immediately it was discovered otherwise the affected employee would not be acting in good faith to state that the keeping of the overage was for own consumption. This is not an acceptable work place practice. To simply seat back and say that the grievant paid for the crate of soda and that he was going to keep drinking these sodas until they were finished is not a plausible explanation noting the strict and stringent accounting and handover processes that were required for his role and or position. The

grievant was not the only one in his place of work, other staff were bound to be at this same bar and hence required a proper handover and to come upon this extra crate of soda that was not part of the stock and or declared was bound to create conflict, confusion and or loss of trust, which eventually caused the termination of the grievant. This was not a healthy work practice to fail and or neglect to declare the stock and the presence of a crate unaccounted for posed problems to the grievant as well as other respondent employees working in this department. The responsibility rested upon the grievant to do the right thing to declare the overage and not on the supervisor who had asked for the transfer of a crate of soda from the bar to the restaurant. Once this was dealt with, the supervisor caused the return of the transferred crate but the grievant chose and or neglected to declare this overage until it was discovered by management during the spot check and surprise visit. The grievant cannot say he was not aware that this practice was unknown to him and due to this spot check he was found in possession of undeclared overage and thus the source of his termination process. These are matters consisted and contrary to the provisions of section 17 of the Employment Act, Cap 226 [now repealed]. The grievant received notice and His terminal dues were paid upon termination.

I therefore find good justification for the eventual termination of the grievant and therefore the orders sought for reinstatement are not warranted. This will not be granted. Costs were not claimed and will not be considered. The respondent did not also address the issue of their costs. I take it then that each party will accommodate their own costs.

Delivered and dated at Nairobi this 9th day of April 2014.

M. Mbaru

JUDGE

In the presence of:

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