



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 71 OF 2013

GODFREY M. MAE

CLAIMANT

v

EQUITY BANK LIMITED

RESPONDENT

JUDGMENT

1. Godfrey Mae (Claimant) was appointed by Equity Bank Limited (Respondent) as a bank clerk with effect from 3 May 2005 through a letter dated 25 April 2005. The appointment letter indicated the Claimant was entitled to a monthly basic salary of Kshs 25,000/- , house allowance of Kshs 2,500/- , 21 days annual leave and leave allowance of Kshs 3,000/- per annum. The salary was reviewed to Kshs 83,600/- with effect from 1 January 2011. By this time, the Claimant was a Relationship Manager, Operations, Changamwe Branch.
2. On 22 July 2011, the Respondent wrote to the Claimant informing him that he had been summarily dismissed due to negligence which had led to loss of Kshs 1,232,000/- from its Changamwe branch.
3. The Claimant was dissatisfied with the dismissal and after his appeal to the Respondent failed, he filed a Statement of Claim on 27 March 2013 seeking certificate of service, service pay, unpaid salary for July 2011, one month accrued leave, leave allowance, three months pay in lieu of notice and twelve months gross wages as compensation for unfair termination all totalling Kshs 1,675,000/-
4. According to the Statement of Claim, the dismissal of the Claimant was without lawful cause or justification as the *offences* had been committed by other members of staff who had been charged in court. It was also pleaded that due process was not followed.
5. The Respondent filed a Reply to the Claim on 25 April 2013 and asserted that the Claimant was dismissed because of gross negligence/misconduct in the performance of his duties and therefore the dismissal was lawful. Particulars of the gross misconduct were set out.

Claimant's case

6. In his testimony, the Claimant stated that on 25 May 2011 at around 3.00 pm the Respondent's branch Accountant informed him that he had noted abnormal high differentials of Kshs 800,000/- while doing reconciliation for an ATM. The Claimant carried out a reconciliation which confirmed the difference.
7. Another reconciliation done on 26 May 2011 with the Branch Manager could not account for the Kshs 800,000/-, as a result of which the Respondent's head office was informed and it sent a security officer who interviewed and recorded a statement from the Claimant.
8. Regarding the process of handling cash, handing over of the keys to the strong room and

- circumstances surrounding the loss, the Claimant testified that on 25 May 2011, the cash officer a Mr. Joseph Kimani did not report to work and had handed over his responsibilities to the Accounts Opening Supervisor, Harriet Mtekele without involving him as required. The said Kimani had left the keys to the strong room in the desk of Ms Mtekele on 24 May 2011. This was without authorization and against the Operations Procedures Manual.
9. A week prior, the Claimant stated that Kimani had applied for leave which he granted and that according to the procedures, Mr. Kimani was expected to formally hand over his responsibilities, combinations to the ATMs and keys on 24 May 2011 to enable the Claimant to designate another officer to take over the duties.
 10. This would have involved confirmation of accountable documents and contents of the strong room. The keys were kept by Kimani and the Branch Accountant Mr. Salat.
 11. The Claimant also stated that on handover a certificate should have been signed
 12. On 25 May 2011 the Branch Accountant and Ms Mtekele informed the Claimant that Kimani had not handed over and so he called him on the phone and got the password from him.
 13. On 28 May 2011, the Claimant stated that he was appointed as the custodian of the strong room and together with the Credit Administrator they established a further shortage of Kshs 99,000/- which he reported to the Branch Manager. This prompted a cash count which revealed shortage of Kshs 300,000/- in the safe.
 14. The Claimant informed the Branch Manager and investigations were carried out.
 15. On why the reasons given for the dismissal were not fair and valid, the Claimant testified that the cash officer Mr. Kimani never handed over through him officially and it is Kimani who failed to follow procedures, he was not a key holder (keys were held by Kimani and Salat), who were eventually arrested by the police and charged.
 16. On the process followed before his dismissal, the Claimant testified that the Respondent's Head of Operations Muringu Nganga called him to Nairobi where he was served with the summary dismissal letter by the Human Resources Manager. He was not issued with a show cause letter nor was he given an opportunity/forum to explain his case.
 17. After the dismissal, the Claimant wrote two letters of appeal but did not get any response.

Respondent's case

18. The Respondent pleaded that the Claimant failed to supervise the strong room and ATMs handing over, permitted money to be lost through dereliction of his duties and therefore the summary dismissal was lawful. It was further pleaded that the Claimant was not entitled to notice because it was a case of summary dismissal.
19. The Respondent called one witness Joachim Thumbi, an investigator in its security department.
20. The witness testified that a report was made on 26 May 2011 of loss of money at the Respondent's Changamwe branch and he conducted investigations and made a report (Respondent's exhibit 2).
21. The investigations found that no hand over of keys was recorded in the relevant register and that Mr. Kimani was supposed to hand over to Ms. Mtekele but could not because Ms Mtekele had left the premises earlier on the material day forcing him to place the keys on Ms. Mtekele's desk. The Claimant had not given him any instructions despite Kimani informing him of his impending leave.
22. In the view of the witness, the failure of the Claimant to take action when informed that Ms. Mtekele had left was negligent and that the Claimant should have signed Kimani off and reported to the Respondent's Head of Operations to send independent people to check the strong room.
23. The witness stated that in his report he recommended that the Claimant be dismissed for failure to perform his duties. The witness also stated that the investigations he carried out is the inquiry contemplated by the Respondent's Human Resource Manual.
24. He further stated that Kimani had faced previous disciplinary inquiries in his previous station Garissa.
25. During cross examination, the witness stated that Ms Mtekele reported to work on 25 May 2011 and proceeded on with Mr. Kimani's work without informing the Claimant what had transpired. He further stated that informing the Claimant about the charges against him was a Human Resource function.

Issues for determination

26. From the pleadings, documents, testimony and submissions the issues which arise for determination are broadly three, the applicable law, whether the summary dismissal of the Claimant was fair and if not, appropriate remedies.

Applicable law

27. The first port of call in a claim for unfair termination or wrongful dismissal is section 47(5) of the Employment Act. It is material that the Court sets out the section

*For any complaint of unfair termination or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while **the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***

28. The section sets out the incidence of burden placed upon each party. This provision contrasts generally with the requirement under the Evidence Act and framework of the civil procedure rules that he who asserts, must prove.

29. The second port of call then turns to section 41 of the Employment Act. The section provides for notification and hearing of an employee before the decision to terminate is taken. In employment law, this is what is called procedural fairness, which is similar to natural justice in administrative/public law. The obligation to demonstrate that procedural fairness has been complied with is put on the employer.

30. On the substantive reasons for termination, the relevant sections are sections 43 and 45 of the Employment Act.

31. Under section 43 of the Act, an employer is given the duty to prove the reason(s) for termination while section 45 of the Act obligates an employer to prove that the reason(s) are valid and fair reasons. Overall, under section 45(4) of the Act, an employer must show that it acted in accord with justice and equity in terminating an employee.

32. The Court is required to examine the conduct of the Respondent herein in light of the above cited statutory provisions which set out the irreducible minimums and any other contractual documents it had in place to regulate its relationship with the Claimant.

Whether the summary dismissal of the Claimant was fair

Procedural fairness

33. In his testimony, the Claimant stated that he was not given a show cause letter as required by the Respondent's Human Resource Policy Manual. He also stated that he did not attend any forum to explain his case and that his appeals were not responded to.

34. The Respondent's Head of Operations simply summoned him to Nairobi where the Human Resources Manager handed him a summary dismissal letter.

35. For the Respondent, Mr. Thumbi stated that he carried out investigations in the course of which he interviewed the Claimant and recorded his statement and that his inquiries was the one contemplated under the Human Resources Manual, and that the Claimant gave his side of the story.

36. Clause 14.1 of the Human Resource Manual guarantees all staff facing disciplinary process a fair hearing and further provides that proper disciplinary procedures be carried out.

37. Under clause 14.5.3 gross misconduct may lead to summary dismissal.

38. Clause 14.7.2.2 and 14.7.2.3 of the Manual provides that a formal disciplinary procedure should start with a Show Cause letter in writing setting out the nature of the complaint or allegation against the employee, whether it is a minor, major or gross misconduct. The employee is given two working days to respond.

39. Clause 14.9 of the Manual provide for the keeping of disciplinary records in each employee's file.

40. Clause 17.4 of the Manual provide for procedure in cases of disciplinary action and the salient

- points for the purposes of the present case is that the Respondent's Chief Executive Officer must be involved and that a detailed inquiry must be held first and the employee should be fully advised of the charges against him and given an opportunity to fully explain his side of the case.
41. The procedures set out in the Human Resource Policy Manual must be seen as in addition to and not in place of the basic minimum requirements provided for in section 41 of the Employment Act.
42. The Court has previously had occasion to explore what a proper construction of section 41 of the Employment Act. In Mombasa Cause No. 64 of 2012, *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* I observed thus
64. 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.
65. 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.
66. 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.
43. It cannot be disputed that the Claimant was not given any show cause letter setting out the allegations or complaints against him as required by the Respondent's Human Resource Manual. Section 41 of the Employment Act does not explicitly require that written notification be given and in this regard the Respondent's Human Resource Manual has raised the threshold by making it mandatory that allegations against an employee be put in writing in a show cause letter.
44. It has also not been demonstrated that the Respondent heard and considered any representations by the Claimant before taking the decision to dismiss him. The statement recorded by Mr. Thumbi cannot, by the stretch of any imagination be taken as part of the procedural safeguards given to employees. In its submissions, the Respondent suggested, relying on the decision of Emukule J. in *Erick Karanja Gakonyo & Another v Samson Gathimba* (2011) eKLR that no termination notice was required because the Claimant was summarily dismissed on account of gross negligence amounting to gross misconduct.
45. The *Gakonyo* decision is distinguishable from the present case. The decision was made in light of the Employment Act (cap 226) which has now been repealed.
46. Under the legal framework then, an employer could dismiss for no reason, a bad reason or a good reason, provided damages equivalent to the notice period or reasonable period was given. But this is no longer the obtaining legal position after the advent of the Employment Act, 2007.
47. Sections 41 and 45 are material in this respect. The 2007 Act has fundamentally changed the legal relationship.
48. What the Respondent did was simply to carry out an investigation or inquiry to establish the facts from which a disciplinary process could be initiated against the Claimant. It could not substitute the process contemplated in section 41 of the Act or the procedures set out in the Human Resource Manual.
49. While it is correct that a fair disciplinary hearing may be conducted through exchange of letters and need not be through oral presentations, this is not what a prudent employer would do. This is so because of the employee's right to have a union shop floor representative/fellow employee present during the disciplinary hearing process.
50. The decision of the Court of Appeal in *Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR therefore does not assist the Respondent. What the Respondent did was an investigation to gather facts but no iota of a disciplinary process as contemplated by section 41 of the Employment Act.
51. The Respondent should have drafted charges against the Claimant after the investigations report dated 15 June 2011 was sent to the Director Operations and notified the Claimant of the same through a show cause letter, give him an opportunity to state his case, consider his case before taking any disciplinary action.
52. In the view of the Court, the Respondent did not comply with the procedural fairness requirements

of section 41 of the Employment Act and its own procedures as set out in the Human Resources Manual and so the summary dismissal of the Claimant was procedurally unfair.

53. Because of the conclusion the Court has reached, it is not necessary to discuss whether the Respondent has proved the reasons for the dismissal and that the reasons were valid and fair reasons. This approach is fortified by the provisions of section 45(2)(c) of the Employment Act which provides that

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a)....

(b)....

(c) *that the employment was terminated in accordance with fair procedure.*

Appropriate relief

Service pay

54. The Claimant sought Kshs 250,800/- as service pay at half month pay for each year of service.

55. The letter of appointment however indicated that the Claimant was required to subscribe to the National Social Security Fund. Similar provision was made in clause 2.4 of the Human Resource Manual. This issue was not interrogated properly if at all in the course of the hearing.

56. Because the Court was not given sufficient material it declines to make any award under this head.

Unpaid salary for July 2011

57. The Claimant was terminated on 22 July 2011. Pursuant to section 49(1)(b) of the Employment Act, he is entitled to the earned wages for this period. The Claimant in the pleadings claimed Kshs 83,600/- and the Respondent did not address this relief in cross examination.

58. The Claimant did not work for the whole month and cannot be entitled to a full month's salary. Using the correct formula of taking the basic salary and housing allowance and dividing by twenty six to get the daily rate which is then multiplied by the number of days worked, the Claimant is entitled to Kshs 70,738/- for wages upto 22 July 2011.

One month pay in lieu of accrued leave

59. Under this head, the Claimant sought Kshs 83,600/-. One of the conditions in the Claimant's letter of appointment was entitlement to 21 days annual leave. Section 28 of the Employment Act provides for leave with full pay. Pursuant to sections 10(3) and (7) and 28 of the Employment Act, the Court finds that the Claimant is entitled to the relief.

Leave allowance

60. Clause 3 of the letter of appointment entitles the Claimant to Kshs 3,000/- as leave allowance. He is awarded this head of relief.

Three months pay in lieu of notice

61. Clause 7 of the letter of appointment provided for one month notice of termination of employment or one month pay in lieu of notice. The claim for three months pay in lieu of notice therefore has no contractual basis and the Court finds the Claimant is entitled only to one month pay in lieu of notice.

Twelve months pay compensation for unfair termination

62. This is one of the primary remedies for unfair termination. It is a discretionary remedy though, and the Court is obligated to put into consideration any, some or all of the thirteen factors listed in section 49(4) of the Employment Act.
63. The Claimant testified that at the time of trial he had secured alternative employment as an Administrative Assistant at Kenyatta University. He had served the Respondent for about 6 years and would have served the Respondent for a long time save for the summary dismissal.
64. Further, the Claimant has succeeded in his claim and he has invariably incurred expenses in pursuing the claim (for avoidance of doubt the expenses include reasonable legal costs).
65. Considering the above factors and conclusion that the summary dismissal of the Claimant was procedurally unfair, it is the view of the Court that an award equivalent to 6 months gross wages would just and reasonable.
66. The Claimant was earning a gross monthly wage of Kshs 83,600/- and this translates to Kshs 501,600/-.

Conclusion and Orders

67. From the above discussion, the Court finds and holds that the Respondent has failed to prove that it followed a fair procedure before taking the decision to summarily dismiss the Claimant and therefore the dismissal was unfair and the Claimant is awarded

a. Unpaid salary for July 2011	Kshs 70,738/-
b. One month accrued leave	Kshs 83,600/-
c. Leave allowance	Kshs 3,000/-
d. One month pay in lieu of notice	Kshs 83,600/-
e. Six months gross wages compensation	Kshs 501,600/-
TOTAL	Kshs 742,538/-

68. The Claim for service pay is declined.

69. The Respondent is further ordered to issue the Claimant with a Certificate of service.

Delivered, dated and signed in open court in Mombasa on this 4th day of April 2014.

Radido Stephen

Judge

Appearances

Mr. Jengo instructed by Jengo & Associates

for Claimant

Ms. Ngige instructed by Mwangi Njenga

& Co. Advocates

for Respondent