



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1592 OF 2010

BETWEEN

LAWRENCE ONYANGO ODUORI CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Ojiambo Advocate instructed by Ojiambo & Company Advocates for the Claimant

Mr. Okeche Advocate instructed by the Federation of Kenya Employers [F.K.E.] for the Respondent.

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Lawrence Onyango Oduori filed this Claim against his former Employer Kenya Commercial Bank, on 21st December 2010. He claims he was employed by the Bank on 24th June 1996 as a Messenger/ Motor Cycle Rider, and worked up to 7th May 2008, when the Bank summarily dismissed him. He questions the validity of the reason given in justifying dismissal, and the fairness of the procedure. He seeks for orders against the Respondent for:-

- a. The Court do review the decision to dismiss the Claimant from employment of the Respondent and find that absence from work having been occasioned by a wrongful order or direction of the Respondent, the Respondent cannot rely on it to dismiss the Claimant, and therefore there was no justification for the dismissal.
- b. The Court orders the Respondent to reinstate the Claimant to its employment with immediate

effect with full benefits since May 2008.

- c. In the alternative the Court orders the Respondent to pay the Claimant General Damages for wrongful and or unlawful dismissal.
- d. The Court orders the Respondent to pay to the Claimant, General Damages for loss of salary, allowance and career by reason of wrongful dismissal.
- e. The Court orders the Respondent to pay to the Claimant Damages for the loss of his house being Flat Number 3 on L.R. Number 209/ 4361/11 at Shauri Moyo Estate Nairobi, by reason of wrongful dismissal.
- f. Terminal benefits due to the Claimant as follows: accrued overtime at Kshs. 38,614; unpaid salary at Kshs. 6,754; salary in lieu of notice at Kshs. 33,775; accrued annual leave at Kshs. 67,550; and bonus scheme at Kshs. 40,000.
- g. Costs; and interest on the monetary items till payment in full.

2. The Respondent filed a Statement of Response on 2nd November 2011. The Respondent's position is that the Claimant was employed by the Respondent Bank on 24th June 1996 as a Messenger. He was dismissed for having been arrested by the Police on a cognizable offence, and not being bailed within 14 days, as stipulated under Section 44 [4] [f] of the Employment Act 2007. Dismissal was on justifiable ground, and carried out fairly. The Claimant is not entitled to reinstatement; the prayer for damages for loss of the house is outside the jurisdiction of the Industrial Court; and terminal benefits claimed have already been paid to the Claimant.

3. Mr. Oduori testified, and closed his case on 19th July 2013. The Respondent testified through its Industrial Relations Officer Caroline Mutua on 18th December 2013 when the hearing closed. The dispute was mentioned on 19th February 2014 when Parties confirmed the filing of their Submissions and were advised Award would be delivered on notice.

4. The Claimant told the Court he was appointed by the Respondent as Messenger / Motor Cycle Rider through a letter of appointment dated 13th June 1996. He was confirmed to the position after completion of probation, in a letter dated 11th November 1996. His terms and conditions of employment were contained in this letter and in a Collective Bargaining Agreement concluded between the Respondent and the Claimant's Trade Union.

5. He was granted a staff loan by the Respondent for the amount of Kshs. 1,487,190, to purchase a house. The house was subsequently charged to secure loan repayment.

6. He was based at Industrial Area Branch Nairobi. A colleague of the Claimant, one Rosabelle Achanga Songo, a Cashier, was arrested upon a complaint of theft by servant lodged by the Respondent, and held in custody at Kileleshwa Police Station. On 6th April 2008, the Claimant visited his colleague at the Police Station. The Deputy Officer Commanding the Station informed the Claimant he had been instructed by the Respondent to arrest any Employee of the Bank who visited Songo. The Officer asked the Claimant if he had come to the Station to deliver the stolen money. The Claimant was therefore arrested, and without any other reason, detained at the Station on the instructions of the Respondent.

7. On 7th April 2008, the Police, under pressure from the Respondent, charged the Claimant with the offence of theft by servant vide Chief Magistrates' Court Criminal Case Number 461 of 2008. He was granted bail of Kshs. 200,000, which he could not raise, and could therefore not report to work while in custody. On 7th May 2008, the Respondent purported to summarily dismiss the Claimant, alleging the Claimant had been arrested by the Police and failed to report to work. His salary at the date of dismissal was Kshs. 33,775 per month.

8. The criminal case was subsequently withdrawn by the Prosecution on 10th December 2008. The Claimant demanded he is reinstated by the Respondent. The Bank alleged it was not its Investigators who had caused the Claimant's arrest and charging, stating this was occasioned by Central Bank Investigators. He was tossed between the Branch and the Head Office of the Respondent. Eventually the Respondent did not accede to the demand for Claimant's reinstatement. The Claimant sought the intervention of his Trade Union, the Banking, Insurance and Finance Union [B.I.F.U]. The matter was reported to the Minister for Labour. The Respondent refused to submit to the process of conciliation, compelling the Claimant to seek the intervention of the Court.

9. The Claimant testified that the decision by the Respondent was unfair and unlawful. His arrest and arraignment in Court was without justification. His Wife was compelled to sell their house Flat E3, L.R. No. 209/ 4361/11 at Shauri Moyo Estate for Kshs. 1.8 million. She paid the bail sum, reduced to Kshs. 100,000, and the Claimant left custody on 28th July 2008 two months from the date of arrest. The dismissal was unfair and unlawful. The Claimant was never accorded a chance to be heard. Dismissal was malicious, was not based on valid reason, and did not conform to fair procedure.

10. Oduori testified he has not secured alternative employment after dismissal. He lost his wife through the prolonged imprisonment. He has only been paid half his pension, with the rest locked until he attains the age of 50 years.

11. Cross-examined, Oduori testified he was a Class- Seven Graduate on recruitment by the Bank. He did not rise beyond the rank of a Messenger. He was dismissed because of his arrest and being in custody between April and July 2008. He did not seek the Respondent's permission to see Songo. No one from KCB went to see the Claimant when in custody. He was paid half of his pension. He does not seek the other half; he seeks service pay separately. He seeks overtime pay, but has no recollection this was in respect to which period. He received a cheque for Kshs. 226,490 as part of his pension, from the Pension Fund, and another for Kshs. 127,490 indicated to be from the Retirement Scheme. He did not have any outstanding loan; the money recovered from sale of his house was applied in liquidating outstanding obligations.

12. Redirected, the Claimant stated he visited Songo on 6th April 2008, which was a Sunday and not a working day. He was informed he had been sacked during his absence from duty, but only received the letter of dismissal in September 2008. The two cheques paid to the Claimant were from the Pension Scheme. The Respondent instructed the Police to arrest the Claimant, and was therefore aware why the Claimant could not report on duty during the time. The Claimant urges the Court to grant the Claim.

13. The Respondent concedes the Claimant was its Messenger, employed on 24th June 1996 and confirmed in the month of November same year, to the position. He was dismissed by the Respondent on account of being arrested by the Police, and being not released on bond, bail or otherwise lawfully set at liberty after 14 days, in terms of Section 44 [4] [f] of the Employment Act 2007 and Clause 5 [a] [vii] of the CBA.

14. The Respondent did not direct the Police to arrest or charge the Claimant. There were no instructions emanating from the Respondent to the Police to arrest any KCB Employee who visited Songo. The Respondent did not have the authority to direct the Police. The criminal case was prosecuted by the State. The Claimant apparently presented himself to the Police at Kileleshwa and was subsequently detained and charged. He did not make any attempt to notify the Respondent of his whereabouts. The question of granting him a hearing in his absence of more than 14 days did not arise; he would not be available to attend the hearing.

15. He is not entitled to reinstatement as his contract was fairly terminated. The prayer relating to Flat No.E3, is a Land issue, and not within the jurisdiction of this Court. The prayers for accrued Overtime; Unpaid Salary; Salary in Lieu of Notice; and Bonus had been satisfied and are not merited. The Respondent relies on payment records attached to the Response as annexure 4.

16. Caroline Mutua testified that Overtime Pay was received by the Claimant as shown in his pay slips.

Salary Arrears were similarly paid in the month of May 2008. Summary dismissal disentitled the Claimant Notice Pay. Records indicated the Claimant had taken his annual leave. He was paid bonus less tax in March 2008, at Kshs. 28,046. This was reflected in the pay slip for March 2008 and Bank Statement for 12th March 2008.

17. Mutua testified on cross-examination that Oduori was the only Motor Rider at the Branch in 2007. She would not say if he took leave during the year. It would have to be confirmed from the Head Office. There were no records of a reliever. There were no outstanding annual leave days as per Respondent's records. She did not have the records for 2007. Overtime was paid in arrears every month. The process did not take 3 months. The Employee made the claim, the Line Manager approved and payment was made promptly at the end of the month. The Overtime Pay for the month of March 2008 was reflected in the pay slip of April 2008. The month of May pay slip indicated overtime arrears. These were accrued from April. The CBA was reviewed every March and 10% increment reflected in what was earned for April 2008 at Kshs. 7,000. The Claimant was arrested on 4th April 2008 and had not worked in excess of 164 hours in April 2008. Overtime worked was recorded at the Branch and paid in full. If a claim was not submitted by the 10th day of the month, it was paid in the following month. Mutua agreed that there was nothing wrong with the Claimant's visit to Songo. It was not forbidden under the Bank's Regulations.

18. Redirected, the Witness stated that the History of Employment at annexure 4 showed leave allowances and arrears. It was the same for the years 2006 and 2007. It would not be paid if he did not go on leave. It was not shown in 2008, because he did not go on leave in 2008. The claims for leave for 2006 and 2007 did not lie. The Claim paragraph 3.8 confirms the Claimant was arrested on 7th April 2008; he was in custody and would not be working to earn overtime. There were no instructions from KCB to arrest any KCB Employee who visited Songo. The Witness could not say if arrest was related to Songo's arrest. The Respondent prays for dismissal of the Claim.

The Court Finds and Awards:-

19. Mr. Oduori was employed by the Respondent Bank on 24th June 1996, as a Messenger / Motor Cycle Rider, on a monthly basic salary of Kshs. 10,584 and house rent allowance of Kshs. 1,137.50. He was dismissed from employment by the Respondent through a letter dated 7th May 2008. The reasons given by the Respondent in justifying dismissal were that the Claimant had been away from duty following his arrest by the Police, and had not been released up to the date of dismissal. Dismissal was based on Clause 5 [a] [vii] of the CBA. It was also clarified in the Closing Arguments, that dismissal was justified under Section 17 [f] of the repealed Employment Act Cap 226, then in force. At the time of dismissal, the Claimant monthly basic salary was Kshs. 33,775.

20. The issues that emerge from the facts in this dispute are whether the Respondent established valid reason or reasons to justify its dismissal action; whether the Respondent followed fair procedure in executing this decision; and whether the Claimant is entitled to the prayers sought?

21. Clause 5 [a] [vii] of the CBA to which the Claimant's terms and conditions of employment were subject, allowed the Employer to summarily dismiss the Employee:-

“If in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within 10 days either released on bail or on bond or otherwise lawfully set at liberty.”

Section 17 of the former Employment Act is in similar terms as the CBA, only extending the period of absence while under Police custody to 14 days.

22. The Court thinks it is proper to note, from the evidence of the Parties that the Claimant was in custody from 6th April 2008 to 27th June 2008. He did not undergo any disciplinary process during this time, as he was in custody. After release, he testified and was not contradicted by the Respondent, that he was tossed between the Head Office and the Branch, advised to reapply for his job, before finally being advised there

was no going back. The letter of dismissal, though backdated to 7th May 2008, was given to the Claimant only in October 2008. The date of dismissal would have, in the view of the Court, to be in October 2008 when the Respondent, after a period of vacillation, unequivocally informed the Claimant there was no going back. In effect, the applicable substantive law is the law in force at the time the Claimant received his letter of dismissal, not the law in force on the date indicated in the letter of dismissal. The Court finds the Employment Act 2007, in force from 2nd June 2008, to be the applicable substantive law.

23. There is considerable doubt in the mind of the Court on the lawfulness of the Claimant's arrest by the Police and his subsequent stay in Police custody. There is similar doubt on the explanation of the Respondent, that it did not have any role in the Claimant's arrest and prolonged stay in custody. The circumstances surrounding the Claimant's arrest, trial and eventual acquittal, do not show the Respondent as an innocent bystander, or an Employer who merely acted on information that the Claimant had independently been arrested by the Police for a cognizable offence, and failed to return to duty within 10 or 14 days, so as to make dismissal justifiable.

24. The position of the Respondent is that it did not order or instigate the arrest and detention of the Claimant. The evidence of the Claimant was that he went to visit a Colleague Songo, who served as Cashier at KCB and who was in Police custody at Kileleshwa suspected of theft by servant. The Respondent was the complainant. It was on Sunday 6th April 2008 when Oduori visited Songo. It was not a working day. He did not need the leave of his Employer to visit his Colleague. He was arrested upon visiting Songo. His evidence, and the Court believes him, was that the Deputy Officer in Charge of Station told him the Respondent had given instructions that any KCB Employee visiting Songo be arrested on the spot.

25. The charge sheet indicates the Claimant was arrested on 6th April 2008 as stated in his evidence. The complainant is given as Juma Amimo for KCB. The Police did not just arrest the Claimant on a Sunday, without the involvement of KCB; there was a complaint preceding arrest, and the complainant is shown to be a person acting for KCB. The Prosecution then withdrew the case against the Claimant on 10th December 2008, but the damage had already been done. The Respondent had used its Messenger's long stay in custody for want of cash to satisfy bail terms, to justify the dismissal decision.

26. Both the CBA and the Employment Act presuppose that arrest and detention of an Employee, are lawfully made. It cannot be the intention of the law that Employers engineer malicious arrest and prosecution of Employees such as was the case here, and rush to summarily dismiss Employees who fail to raise bail and return to work within the stipulated time. The Respondent knew where the Claimant was, and why he was not at work, for the period between 6th April 2008 and 27th June 2008. The reason given in justifying dismissal was not valid under the CBA and the Employment Act, arrest and detention having been conjured by the Respondent. It was an arrest that was not based on lawful exercise of the power of arrest, and fell out of the contemplation of the relevant CBA and Employment Act provisions. Dismissal was to this extent unfair.

27. The fact that an Employee is absent from work on Police arrest and detention for up to 14 days, does not give an Employer the right to dismiss the Employee without observing the procedural guarantees given under Section 41 and 45 of the Employment Act 2007. All that Section 44 of the current Employment Act states is that the specified acts, amount to gross misconduct for which summary dismissal may be justified. Summary dismissal is not dismissal on the spot, without a hearing or in the absence of the Employee. The right to be heard is never discarded. The Respondent had the duty to hear the Claimant, particularly as the Respondent was privy to the criminal case, and knew the circumstances of his absence. The Claimant left detention on 27th June 2008, and was available for a hearing, before any adverse decision could be made. He kept moving from the Head Office to the Branch Office of KCB, and could have been directed to submit himself to a disciplinary process, at the same time he was being asked to reapply for his job. All KCB did was slam him with a backdated dismissal letter, without regard to procedural guarantees. Dismissal was unfair on account of procedure.

28. The prayers are contained in paragraph 5 of the Statement of Claim. 5 [a] is in many words, but in the

view of this Court seeks a declaration that dismissal was unfair. ***It is declared that the Claimant was unfairly dismissed from employment.*** 5 [b] seeks reinstatement of the Claimant in the employment of the Respondent. Reinstatement in the circumstances is neither practicable nor reasonable. 6 years have gone from the time the Claimant left KCB. The Industrial Court has long established, even before the coming into force of the Industrial Court Act, that reinstatement could only be ordered within a reasonable time of the date of dismissal. The employment relationship is dynamic and based on mutual trust and confidence. Long passage of time works against the possibility that such trust and confidence can be rebuilt. Changes in the employment place also make it impracticable for the former employee to readily fit in the previous job. The Court is satisfied the prayer for reinstatement is not practicable or reasonable.

29. Prayers 5 [c] and [d] are on general damages. One seeks general damages for wrongful and unlawful dismissal, the other for loss of salary, allowances and career. In either case what is sought is compensation for economic injury, resulting from loss of employment. In the ***Industrial Court Cause No. 1227 of 2011 between G.M.V v. Bank of Kenya Limited [2013] e-KLR***, this Court held that the Court should exercise judicial restraint in granting damages that may exceed the statutory capping of 12 months' salary given under the Employment Act. Employment relationships are special relationships, not commercial contracts where parties seek to exact maximum benefit from each other in cases of breach. There is normally at the bottom one injury, which is adequately remediable through the orders of reinstatement, re-engagement and/ or capped compensatory award. It is improper, unless in special circumstances as explained in the case of ***G.M.V.*** to view the statutory limit of 12 months' salary in compensation as the floor rather than the ceiling. Parliament intended to create equilibrium between Employers and Employees, and stability on the socio-economic sphere as a whole, by capping employment compensation. ***The Court rejects the double prayer for damages and instead grants the Claimant 12 months' salary in compensation at Kshs. 405,300 for unfair dismissal.***

30. There was also a prayer for separate damages for loss of the Claimant's house Flat No. E3, L.R. No. 209/ 4361/ 11 Shauri Moyo Estate. The house was sold by the Claimant's wife for Kshs. 1.8 million, out of which she paid Kshs. 100,000 for the Claimant to be bailed. While the Court finds it has jurisdiction to determine this aspect of the dispute, the sale of the house falling within the larger employment dispute, there is insufficient material to conclude that the Respondent compelled the Claimant's wife to sell the house. The Respondent had not sought to sell the house to recover the loan given to the Claimant. The decision to dispose of the house appears to have been a matter between man and wife. It was they who determined to sell the house and how to apply the proceeds of the sale. It would be wrong to ask the Respondent to pay the Claimant damages for a decision made by the Claimant and his wife, under no compulsion from the Respondent. The prayer is rejected.

31. The Court is satisfied from the records availed by the Respondent that the Claimant is not owed accrued overtime pay; accrued leave; unpaid salary; and bonus scheme. These payments are reflected in the Claimant's pay slips and bank statements. They are rejected. ***The Claimant is entitled to 1 month salary in lieu of notice, which the Court grants at Kshs. 33,775.*** The prayers for costs and interest are both declined. In arriving at this Award, the Court has taken into consideration that for his years in service, the Claimant has received a total of Kshs. 353,980 from the Staff Pension Fund. In sum:-

[a] It is declared the Claimant's dismissal was unfair;

[b] The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimant 12 months' salary in compensation for unfair dismissal at Kshs. 405,300; and 1 month salary in lieu of notice at Kshs. 33,775- total Kshs. 439,075; and

[c] No order on the costs and interest.

Dated and signed at Nairobi this 5th day of June 2014

James Rika

Judge

Dated and delivered at Nairobi this 5th day of June 2014

D.K. Njagi Marete

Judge