



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1660 OF 2013

BANKING, INSURANCE & FINANCE UNION (KENYA) CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LTD RESPONDENT

JUDGEMENT

1. On 16th October 2013, the claimant Banking, Insurance & Finance Union (BIFU) filed a claim for unlawful and unfair dismissal of Silas Koome Mwirebua the grievant against the respondent Barclays Bank of Kenya Ltd. The respondent filed the defence and Counter-claim on 12th February 2014 denying the entire claim and lodged a counter-claim for the payment of Kshs.938,802.20 from a personal loan and Barclays card debt of Kshs.29,766.88.

Claimant's case

2. The grievant Silas Koome Mwirebua was employed by the respondent in October 2005 on a contract for 2 years which was renewed and he was offered permanent terms. He was placed at different departments until the Credit Operations Department where he remained until termination. On 2nd June 2012, the grievant fell sick and the medical condition was diagnosed as acute case of depression, he was referred to MP Shah Hospital on 11th June 2012 but the condition was not diagnosed, on 17th June 2012 he visited Dr Okonji, a psychiatrist who confirmed the ailment to be acute depression. Upon treatment and review the Doctor confirmed that the claimant was fit to resume duties on 20th July 2012 but upon report to work the grievant had been dismissed vide a letter dated 12th July 2012. The grievant appealed against the dismissal mitigating his reasons for being absence from work but when he was called by the human resource officer, he was referred to Dr Frank Njenga for a second medical opinion. The second doctor referred the grievant to a health centre where he was admitted for 3 weeks and the respondent paid for the service. Upon discharge the grievant reported to work and was told to wait for Dr Frank Njenga report. When the doctor finally wrote his report there was a recommendation that the claimant was fit to work and could resume duty on 25th September 2012. As the grievant waited for communication from the respondent, he received mail indicating that his appeal had been rejected and the dismissal upheld. The claimant reported the dispute to the Minister and a conciliator appointed but the respondent failed to attend and a certificate of unresolved dispute was issued.

3. The claimant further stated that the grievant was suffering from acute depression which was not diagnosed properly and while being so sick he was unable to attend to his work duties and while the respondent got to learn of this condition he was referred for treatment but dismissed him despite recommendation by the doctor attending that he was fit for work. That due to the depression suffered by the grievant he was unable to live a normal life and was unable to communicate his whereabouts until he came back to his normal self. The decision to dismiss his while undergoing treatment was harsh, unfair

and not warranted in the case.

3. The claimant is seeking reinstatement of the grievant, payment of all due allowances and compensation for the unfair loss of employment or any other remedy the court may deem fit to grant.

4. In evidence the grievant supported the case and stated that he was employed by the respondent as a casual and moved through the ranks to Credit Department due to his good performance. He had no disciplinary record for the time he served. However on 28th March 2011 he got sick but only got to know of the nature of illness after going to the psychiatrist. The respondent was aware as to why he was unable to report to work. On 9th April 2011 the claimant was accused of having deserted duty without approval by the supervisor and in reply he noted that he was having sleepless nights and he was unwell not knowing what he was doing. On 5th June 2011 another notice was issued as he was absent from work again but he was still under depression and he made an apology noting that he was sick. The supervisor noted that the grievant was to be micromanaged or else be referred for counselling. The grievant went for counselling as his condition had not improved.

5. After the grievant was at counselling for three sessions he felt no change from what he was suffering from and another notice was issued on 27th June 2012 but the grievant failed to attend the constituted hearing since he was still unwell. It was recommended that he be terminated as he was absent and failed to attend at his hearing. He was dismissed on 12th February 2012.

6. The grievant took the initiative to see a doctor at MP Shah Hospital but his condition was not diagnosed. He went to Nairobi Hospital and Dr Okonji discovered the ailment that he was under acute depression. The grievant took the letter to the respondent but found that he had been dismissed. He had not been given a hearing. He had not been given a chance to appeal. His absence from office was due to illness. The grievant therefore went to seek professional help.

7. When the grievant lodged his appeal, he was also called by the human resource officer and advised to see Dr Frank Njega who reviewed his condition and admitted him to Chiromo Lane Medical Centre for 3 weeks. The doctor recommended that he was fit to resume work and he reported back to work but was advised to wait. Upon return home he received a letter that his appeal had been rejected.

8. That the respondent had a policy on sickness and sick pay. There was provision for 8 weeks of full paid off and 8 weeks on half pay all being 120 days. The claimant was absent for a total 51 days while he was sick. When the claimant was unable to attend work he was not issued with a warning letter and he was unable to communicate to the respondent as he had a mental challenge and unable to contact management due to the poor health.

Due to the dismissal the grievant has suffered a lot as he has no source of income. He has been unable to take care of his ailing father who dies last year due to poor health.

9. That the grievant is unable to pay for the amount of kshs.968, 569.00 counter-claimed by the respondent as he has no source of income. He is able to work as he is only 35 years. He has been treated and fit to resume work. He is seeking to be reinstated as he is not able to secure new employment elsewhere due to his dismissal.

10. On cross-examination the grievant stated that while in employment he was referred to the Wellness Centre where he was attended to but failed to follow up and finish on the reasons that he did not feel the impact of the wellness sessions. He was not at work on 27th July 2011 and did not call to indicate where he was and that he had travelled home to see his sick father. On 28th May 2011 he was arrested and failed to report to work for several days and when he reported back he apologised and noted that he had bad friends who had negative influence on him. He used alcohol due to depression and the doctor made this observation and failed to attend to his disciplinary hearing since he was still unwell and the respondent helped by referring him to Dr Frank Njenga who admitted him for treatment and the respondent paid. The respondent treated him well and the human resource officer was kind to him. The respondent called the

grieving's aunt to try intervening and having him back at work and having a close relative follow up on his case. There is no certificate of sickness for the days the grievant was absent from work without permission. While the grievant was on medication he was still taking alcohol which complicated his condition.

Respondent's case

11. The respondent's case is that on 19th January 2011 the grievant was asked to show because why disciplinary action should not be taken against him for absconding duty over a period of time as he failed to communicate to his supervisor or any other officer about his whereabouts. On 24th January the grievant responded admitting to having absconded duty and apologised and promised never to repeat the same mistake. On 5th July 2011 the grievant was issued with another letter after absconding duty from 27th June to 4th July 2011 as he had not informed his supervisor or any other officer of his whereabouts. He was also issued with a show cause letter where he responded and admitted his mistake and offered an apology. On 5th July 2011 the grievant wrote to the respondent giving an explanation as to why he absconded duty, that there was a police raid and he was arrested and held in custody and upon release he was so stressed to go to work. On 5th October the grievant admitted to having absconded on various dates and being of poor performance due to influence from bad friends and promised to change. On 4th June 2012 the respondent supervisor wrote and indicated that he had referred the grievant for counselling as he had absconded duty again, he attended 3 sessions and stopped and thus failed to cooperate with the respondent in addressing his health condition and thus was invited to attend a disciplinary hearing which he failed to attend.

12. On 12th July 2012 the grievant was summarily dismissed from employment due to constant absenteeism which was viewed as gross misconduct by the respondent. The grievant appealed attaching a letter from his doctor who was treating him. He was invited for the hearing of the appeal and on 16th August 2012, the respondent rejected it. The grievant admitted that his appeal process was handled professionally but complained that his dismissal was inhumane in the circumstances of his case. He was therefore referred to the Employee Relations Manager and after being taken through the reasons for dismissal; the grievant admitted that the respondent had indeed given him good service in addressing his health condition.

13. Following the grievant dismissal, the claimant filed a dispute with the Minister and on 26th February 2013 a certificate was issued. The dispute was filed in court.

14. On the basis of the facts, the respondent invited the grievant for disciplinary hearing, he failed to attend and was thus dismissed under the provisions of section 44(4) (e) of the Employment Act. The grievant absconded duty for more than 5 days and the respondent was not aware of his whereabouts. The respondent only got to learn of the grievant condition after 12th July 2012; 5 days after the dismissal and after the grievant failed to attend the disciplinary hearing. At the time of dismissal there were genuine reasons that existed which caused the respondent to take the action of summary dismissal as the grievant had absconded duty which had been ongoing for a number of years. The grievant was under a duty to act in good faith towards his employer about his health condition.

15. In counter-claim, the respondent stated that the grievant had applied and received a personal loan and had a balance due of kshs.938, 802.20 and on his Barclay card had a debt of kshs.29, 766.88 that has not been repaid since 12th July 2012. That this amount is due and owing to date and should be paid with costs and interest.

16. In evidence the respondent called several witnesses. John Ng'ang'a stated that he is the Credit Manager of the respondent and worked closely with the grievant as the line manager and supervisor. He wrote a show cause letter to the grievant after absconding duty. After every pay day, the grievant would switch off his phone and fail to report to work. He would send his neighbour or the respondent would trace him using his next of kin. When he reported back he apologised and promised to change and be of

good conduct only to relapse again. On all occasions he was advised to seek help and treatment but the next pay day would result to more absenteeism. When he got a salary or a loan he indulged in alcohol. His peers were aware and tried to talk to him.

17. He referred the grievant for counselling. His aunt was called from Kenyatta University as the next of kin and grievant was offered wellness support through the medical scheme which was free to assist him get better. He attended some session then absconded without informing his supervisor. He did not know what condition he suffered as there was no medical certificate. The grievant was not changing despite all efforts being put in place to give him assistance and support and was thus referred to human resource for appropriate action.

18. The second witness was Joseph Wafula the Employee Wellness advisor for the respondent. The claimant was referred to him after frequently missing work and the supervisor requested that he address the case as he had an alcohol problem. Once he took alcohol, the grievant could not remember to report to work and that he was unable to call the office as his phone would have been lost. The respondent has a panel of professionals who assist in such cases to facilitate employee's productivity. The employee Assistance programme is a voluntary process and the grievant consented to it. It is confidential where the respondent does not get to know the condition. There are 6 counselling sessions that are paid for to enable the affected employee where there is need more sessions can be done. In this case the grievant only did 3 sessions out of the 6 the respondent had paid for and the report back indicated as much. He was therefore subjected to the available disciplinary process as he was not ready for the wellness sessions. The grievant as an employee of the respondent was expected to be mature and responsible officer but failed to cooperate even when there was support to address his condition.

19. The third witness was Odhiambo Ooko the respondent Employee Relations officer in charge of industrial Relations matters. The grievant was invited to a disciplinary hearing on 27th June 2012 due to constant absenteeism and conduct not consistent with his duties. The grievant had been referred for wellness sessions but absconded. He was invited for hearing but failed to attend despite acknowledging receipt of the invitation. He did not communicate to anyone as to why he failed to attend the disciplinary hearing. He was thus dismissed and the reasons were outlined in the letter of dismissal as there was gross misconduct. There was an appeal lodged by the grievant which was rejected. The grievant requested for another hearing and he was referred by human resource to the witness who explained to him as to why his appeal had been dismissed. There were minutes for this meeting where the grievant was given a detailed explanation and was treated fairly.

Submissions

20. In submissions, the claimant stated that the grievant served the respondent for over 7 years and due to illness that was not properly diagnosed he suffered depression causing him to abscond work and of peculiar behaviour. He noted in his responses after show because letters were issued that he was suffering from hallucinations and took himself for medical help at MP Shah Hospital and to Dr Okonji. The respondent after noting that the grievant had problem referred him to Dr Frank Njenga to help his get better and be productive. Despite the respondent being aware of the condition the grievant suffered, he was summarily dismissed on 12th July 2012 which was severe and punitive as he could have had the option to resign or retire for medical reasons.

21. That when an employee is sick, it is the responsibility of the employer under section 34 of the Employment Act to ensure the provision of sufficient and proper medical attention. The respondent sent the grievant for medical assistance but dismissed him before the report was made. This was prejudicial to the grievant.

22. The dismissal was done before hearing contrary to section 41 of the Employment Act. The CBA applicable was not followed. It was malicious, unlawful and unfair to dismiss the grievant while he was not well enough to attend at the hearing of his case. The grievant should therefore be reinstated and compensated for the unfair dismissal.

23. The respondent on their part submitted that the grievant was a habitual absentee, he was given verbal reprimands but on 19th January 2011 he was asked to show because why disciplinary action should not be taken against him for absconding duty following a repeated absence without any communication to the supervisor. The grievant responded to this notice with an apology and promise of not repeating the same mistake. However on 5th July 2011, 5th October 2011, the same mistakes were repeated which forced the respondent to recommend the grievant for referral to the wellness advisor for appropriate action. The grievant failed to complete the wellness programme and hence the respondent was forced to commence disciplinary process. The grievant failed to attend and thus on 12th July 2012 he was dismissed. The grievant lodged an appeal and the same was rejected. There was a review after he submitted a medical record causing the respondent to refer him to their doctors for treatment and by the time he completed treatment, the appeal had been rejected. The grievant was aware of the internal disciplinary process which he failed to attend and was thus dismissed for gross misconduct and his illness was only discovered after his summary dismissal by which time the respondent had a valid reason to dismiss him. These reasons were genuine and based on the case and efforts put to assist the grievant, the dismissal was lawful. There is therefore no unfair dismissal to warrant the claims or a reinstatement.

Determination

There are several emerging issues herein for determination;

Whether there summary dismissal was unfair

Whether there is a remedy

Whether the counter-claim should be granted

24. I note the counter-claim was not challenged by the claimant in any material way. The grievant admitted that indeed the amounts claimed were due only that he could not pay as he was unemployed and he needed to be reinstated to be able to repay this amount. This part of the claim being admitted saves for the reasons of inability to pay will therefore be granted.

25. It cannot be disputed that the Employment Act (the Act) has now addressed the rights of parties to an employment relationship quite extensively. Looking at all aspects of matters that are likely to happen at the work place, the Act has gone way out to incorporate as much as looking at how an employee when unwell or sick should be treated. This goes to the extent of making such provisions in the employment contract as part of the terms and conditions of work. In the contract of employment, part of the terms to be included is a policy framework as an attachment to or as a work place policy that outline matters outlined under section 10 of the Act. Under section 10 (3) (a) (ii) part of the policy documents are to include;

- a. *any terms and conditions relating to any of the following—*
 - i. ...
 - ii. *incapacity to work due to sickness or injury, including any provision for sick pay;*

26. Sickness is a serious occurrence that can happen suddenly to any employee while at work or outside the workplace the is likely to affect the work and duties of such an employees. When such sickness happens, section 30 of the Act apply and is important to quote here;

30. (1) *After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.*

(2) *For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall*

notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

(3) For the purposes of sub-section (1) and (2) “full pay” includes wages at the basic rate excluding deductions from the wages allowable under section 19. [emphasis added].

27. The employment relationship is based on agreement between parties so as to enhance productivity. Therefore parties undertake consultations, notification and hearing of each other side of view even in serious cases where there may be a case of misconduct. Hearing and giving the other party a chance to be heard before sanctions or drastic action is undertaken is the cornerstone of an employment relationship. Therefore even in a case of sickness, an affected employee has a duty that is mandatory to bring to the attention of the employer as soon as is reasonably practicable of any absence due to sickness or illness. Where the absence is caused by sickness or illness such an employee is required to produce a certificate as to the medical condition from a qualified medical practitioner. This is a fair and basic requirement of the employee as indeed where one is sick or ill and unable to attend work, then as a matter of good faith, due diligence and good practice, such an employee should attend to the subject issue causing sickness or illness and have a certification by a medical practitioner. As apart from such sick off there are other compassionate leave and annual leave days that an employee can take to commiserate if there is persistence in sickness or illness that is not addressed by a medical practitioner.

28. It is appreciated that sickness or illness can happen in the most unforeseen circumstances. In such cases, section 34 of the Act applies;

34. (1) Subject to subsection (2), an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

29. Therefore where an employee is sick, the employer is to provide sufficient and proper medicine and take steps to ensure the notification of the illness of an employee as soon as practically possible. Failure to bring to the attention of the employer of one's sickness and illness gives such an employer a good defence that the sickness and illness had not been brought to their attention in good time and especially where the employee contributes to such illness of sickness such as overindulgence in alcohol intake or self-injury.

30. In this case, the grievant was absent from work on various occasions. In his evidence, the grievant stated that in 2011 he started having nightmares and seeing visions that he could not explain and did not know what was affecting him. He would be unable to report to work once under this condition and did not know what was happening until he consulted Dr Okonji at the Nairobi hospital who diagnosed him with acute depression. This was on 17th July 2012, 4 days after he had been dismissed from work due to gross misconduct and failing to attend to the wellness programme organised and paid for by the respondent.

31. Can the respondent then be said to have been aware of the grievant illness as of 12th July 2012 when the summary dismissal was done? Was there good reason for the respondent to know of the claimant's circumstances? These are important details to consider despite the above provisions outlined as under section 30 and 34 of the Act. The grievant gave evidence that he started;

... I recall the 28th of March very well. I was sick for some time. In March 2011 my sickness started. I knew the nature of my sickness after going to the psychiatrist. The respondent was aware and I explained

why I was out of work. The respondent wrote to me the letter dated 19th January 2011 on my dissertation from employment. That from 9th April 2011 ... I was absent from duty with my supervisor permission... I did my response noting that I was having sleepless nights due to my being unwell.

32. It is apparent that the grievant was having problems in attending to work and indeed missed work for several days. However on cross-examination, it emerged that on some of the days that the grievant was away from work he was not unwell on one occasion he went to see his sick father back in his home and kept his phone off to a point that no officer of the respondent could reach him. On a different occasion, the grievant admitted that he was out with friends where he was arrested and put in custody and when released he was so distressed that he could not attend work but still failed to call or communicate his circumstances. Further the grievant admitted that when he was to attend the wellness programme, he found it not useful and decided not to follow all the sessions and decided to attend to a Doctor in MP Shah hospital and then Dr Okonji at Nairobi Hospital who diagnosed his condition. The medical report that diagnosed the claimant as having acute depression was issued on 17th July 2012.

33. It is my understanding of the facts of this case that the grievant was not sick or ill in the conventional sense. His case was that, based on what he considered *having sleepless nights* he had a condition that made him unwell and made him unable to attend to work. He was accommodated without any question by his line manager who tried all manner of interventions through friends and even his Aunt traced to Kenyatta University. No medical evidence was required to prove that he was indeed sick but the line manager decided to refer him to the wellness centre.

34. The problem seems to have started when the grievant was required to attend the wellness sessions of counselling for a full 6 sessions. It is only then that when he realised that these sessions were not useful to him that he opted to take the issue of illness and medical proof to the fore. The grievant then took the view that he could only be accommodated if he produced a 'medical certificate' as proof of his "medical condition". On the other hand, the grievant, in an attempt to comply with the requirements, obtained a report from Dr Okonji the doctor who diagnosed his 'condition'.

35. Section 30 of the Act provides, *inter alia*, that an employer is exempt from paying an employee on sick leave if the employee has been absent from work for more than 7 consecutive days on full pay and on a further 7 days on half pay within 12 months and fails to produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury, when requested by the employer to produce such a certificate.

36. The aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorisation or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer. In the South Africa Labour Court in **SACWU v Dyasi [2001] 7 BLLR 731 (LAC)** the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee fails to render service. Failing to contact the respondent constitutes unexplained absence for the period the grievant was away and he cannot compute his sick off days and consolidate them and state he had 51 days that he was entitled to out of the total due of 120 days as these sick off days were to be authorised and or approved by an officer of the respondent. If the grievant needed to utilise his sick off days up to a maximum of 51 days, he had the choice of making an application in compliance with the respondent's operational requirements and failure to do so and continued absence establish the fact of desertion. Absence from work without a justifiable reason or permission and or authorisation and notice to the employer is a subject for summary dismissal under section 44 of the Act.

37. I find no material evidence by the claimant that the grievant as a responsible employee even where he had a 'condition' that made him not able to attend work, caused the employer to know of this 'condition' that was later diagnosed by Dr Okonji as acute depression. At the point where the grievant was referred to the wellness centre for counselling sessions he absconded as he felt this was not useful to him. This far the respondent had complied with the provisions of the law as under section 30 and 34 of the Act by

offering the basic requirements to their employee the grievant. Where more medical assistance was required for the grievant, the respondent was ready and willing to undertake this costs as per the law and thus referred him to Dr Frank Njenga and the admission to Chiromo Lane Centre. Despite these efforts, the grievant still failed to attend to his disciplinary hearing when his case came up to give an explanation as to what condition he suffered from. There is no explanation as to why the grievant or his representatives were not at the disciplinary hearing. The respondent can therefore not be said they failed to comply with the provisions of section 41 of the Act.

38. I therefore find the summary dismissal of the grievant delivered on 12th July 2012 was valid to the extent that upon compliance with section 30 and 34 of the Act, the grievant failed to attend at his disciplinary hearing with no justifiable cause. The respondent can therefore not be faulted for the sanction taken as they had no knowledge or reason to know that the grievant had absconded his wellness session and opted to attend to a doctor of own choice.

I therefore dismiss the claim in its entirety and enter judgement for the respondent in terms of the counter-claim an in the following terms;

- a. **The grievant Silas Koome Mwirebua is to the sum of Kshs. 968,569.08;**
- b. **Each party will bear their own costs.**

Delivered in open court at Nairobi this 9th days of July 2014.

M. MBARU

JUDGE

In the presence of-

Lilian Njenga: court Assistant

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