



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 426 OF 2013

ANDREW NGIGI NJOROGE CLAIMANT

VERSUS

KENYA COMMERCIAL BANK RESPONDENT

Mr. Koceo for Claimant

M/S Gladwell Mumia for Respondent

JUDGMENT

1. By a Memorandum of Claim dated 25th March 2013, the Claimant seeks reinstatement to his former employment as a Brand manager of the respondent and in the alternative be paid terminal benefits to wit;

- a. one (1) month salary in lieu of leave in the sum of Kshs.200,000/=; and
- b. three months salary in lieu of notice in the sum of Kshs.600,000;
- c. twelve (12) months salary being compensation for unfair dismissal in the sum of Kshs.2,400,000/=.

Notice Pay

2. From the outset, it is common cause that the letter of appointment for the Claimant provided giving of one month notice by either party who wishes to terminate the employment or payment in lieu thereof. The Claimant was paid in lieu of one month notice and puts this claim at an end.

Termination

3. The Claimant was employed on 6th August 2012 as a Brand Manager and worked continuously until the 6th March 2013 when the employment was terminated.

He therefore served the Respondent for a period of eight (8) months only.

4. The letter of termination attached to the Memorandum of Claim partly reads;

“This has reference to the discussions held with you on 5th March 2013 and the morning of 6th March 2013 on non-disclosure of information regarding the reasons for leaving your previous employer. As a consequence the Bank has lost confidence in you and your services

with the Bank are hereby terminated with effect from the date of this letter.”

5. The Claimant admits in his statement of claim that while working with Barclays Bank of Kenya in January 2008, he forwarded an email to some of his colleagues comprising of child pornography and his employment was terminated by the Bank for that offence.

6. It is also common cause that while he was being recruited by the Kenya Commercial Bank, the Respondent, he was required to fill a form which inter-alia, had provision to state the reasons for leaving the previous employers.

7. It is not in dispute that the Claimant stated the reasons why he left some previous employers and specifically stated that he had worked for Barclays Bank but did not give the reasons for leaving the Bank.

8. The Respondent of its own initiative discovered this fact leading to the summoning of the Claimant while he was on leave to explain this anomaly.

9. The Claimant Andrew Ngige Njoroge, in his sworn testimony told the Court that he was employed on permanent and pensionable terms by the Respondent and earned Kshs.200,000/= per month. That he was entitled to 28 days leave. That while on paternity leave he heard that he was to be relieved of his job and on 6th March 2013, he went to see the Human Resource Director about the matter. This was hardly a month after confirmation.

10. The Director asked him to write a resignation letter or else his employment would be terminated.

That he refused to resign and was given a letter of termination dated the same day, 6th March 2013.

11. The biodata form filled by the Claimant was produced and the section to indicate previous employment including self employment has four (4) slots. He named previous employers to include Ayen Global Limited who he left for career growth; Epson Europe B.V. who he did not provide a reason for leaving; Nile Broadcasting Services who he did not indicate reason for leaving and Barclays Bank of Kenya who he did not indicate the reason for leaving. He held the position of Team Leader – Direct Sales at the Barclays.

12. The Respondent alleges in the Memorandum of defence that the omission to state the reason for leaving Barclays was deliberate with the intention to mislead the Respondent about his previous record especially because his employment had been terminated for misconduct.

13. The Claimant disputes this allegation saying that he was not obliged to self incriminate himself in respect of an incident that had occurred more than 5 years ago when he was still very young and naive. That he had since learnt his lessons and moved on and therefore it was wrong for the Respondent to dismiss him for a matter he was not obliged to indicate in the Biodata form.

14. The Respondent relies on the certificate at the end of the biodata form concluded in the usual terms as follows; **“I certify that the information given on this form is correct and complete to the best of my knowledge. I further certify that I have never (1) been convicted of a criminal offence nor (2) been dismissed from my employment for misconduct”** as evidence of fraudulent conduct by the Claimant aimed at covering his past with previous employers.

15. The Court agrees that the Claimant who appended his signature on the biodata form immediately below the aforesaid certificate was duty bound to disclose that he had been dismissed from his employment for misconduct.

This he failed to do and the Respondent was justified to take the action it did in terminating his services after conduct of due diligence months down the line. The Claimant has only himself to blame for this non-disclosure which eventually became career threatening. It would have been better for him to make a full disclosure and plead as he did in Court that he had misconducted himself due to naivety while he was still very young and he should not be disqualified for that as he had matured, reformed and moved on.

16. The Claimant is a young professional and should be candid in his future endeavours to avoid this sort of disappointment in an unforgiving work environment.

17. In the case of **MEC for Education Vs. Mgijima and others, Labour Court of South Africa case No. JR 1846/09.**

Mgijima was appointed as the Deputy Director General in the Gauteng Department of Education (GDE) on 1st December 2008. Prior to this appointment, she had been employed by the National Department of Arts and Culture ('DAC').

18. During the interviews for the new position, she failed to disclose that she had been on 3rd July, 2007 suspended by DAC in relation to disciplinary charges. When she was specifically asked if she had any '**skeletons in the closet**' she had replied in the negative. She was successful in the interview and was given a contract on 5th November 2007 effective 1st December 2007.

19. Meanwhile she settled the pending disciplinary matter by tendering her resignation to DAC. DGE learnt of the matter and conducted disciplinary proceedings against her and 'pre-dismissal' arbitration was conducted before the arbitrator under the auspices of the Bargaining Council.

20. On a review application after the arbitrator found the employee innocent **Van Niek J.** stated:

"what was required was that Mgijima should disclose the fact that she was, at the time that she attended the interview in August 2007, on suspension pending a substantial number of charges of serious misconduct. The arbitrator appears to have understood the issue to be determined by him to be whether Mgijiwa was infact guilty or not of the disciplinary charges brought against her by the DAC – that was manifestly not the case."

The judge set aside the award by the arbitrator. This case is on all fours with the present one and serves to buttress the Court's decision in finding that the non-disclosure by the Claimant was manifestly wrong and became a subsequent justification for dismissal in terms of **Section 43** as read with **Section 47(5)** and **45(1)** and **2(c)** of the **Employment Act, 2007** in that the decision to dismiss was valid.

21. There is an issue as to the procedure followed by the Bank in dismissing the Claimant as no proper disciplinary hearing took place and the Claimant was not asked to have a representative in terms of **Section 41** of the **Employment Act**.

22. It is important that Employers conduct proper disciplinary hearing upon providing a show cause letter to give an opportunity for the employee to provide an explanation as to why disciplinary action ought not to be taken against them.

23. There was an omission in this respect which however does not invalidate the reason for termination because the Court has satisfied itself from the evidence before Court that indeed there was a good reason to terminate the services of the Claimant.

24. **Section 45(1)(c)** provides that a termination of employment ought to be in terms of a fair procedure. This did not happen in this case and the Court grants the Claimant two (2) months

salary as compensation in terms of Section 49(1)(c) for procedural unfairness.

Leave Pay

25. The Claimant had served eight months. He did not go on leave nor was he paid in lieu thereof. He was entitled to 28 days leave in a year and thus he ought to be paid for the prorata leave days he had during the 8 months of service which translates to 18 days leave. The Court awards him Kshs.120,000/= as payment in lieu of leave which the Claimant has on a balance of probabilities established that, he was entitled to but did not take.

Final Award is as follows:

- i. Kshs.120,000/= in lieu of 18 days leave;
- ii. Kshs.400,000/= being 2 months salary for unprocedural and therefore unfair termination;
- iii. **Total Award Kshs. 520,000/=.**
- iv. interest on (i) and (ii) at Court rates from date of this judgment until payment in full;
- v. costs of the suit.

Dated and Delivered at Nairobi this 9th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE