



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT KISUMU

CAUSE NO. 266 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2014)

SETH ATIANYI INGAIRU

GEOFFREY OBADO NGESA.....CLAIMANTS

-VERSUS-

ECO-BANK KENYA LTD.....RESPONDENTS

JUDGMENT

The claimants herein Seth Atianyi Ingairu & Geoffrey Obado Ngesa filed their memo of claim on the 24.9.2013 through the firm of Mwamu & Co. Advocates. They claim that they were unlawfully summary dismissed and therefore this was unfair and wrongful. They also contend that their dues were withheld by the respondents.

The 1st claimant's case is that he was employed by the respondents on 1.10.91 based in Mombasa. He was transferred to Kisumu on 1.11.2005. He avers that in 2011, a new computer system was introduced by the respondent's bank. The system was problematic and led to many errors. It is then that the claimants were accused of stealing from the bank and were finally dismissed.

The 2nd claimant on his part told court that he was employed by the respondents in November 2008 as per his letter of appointment at pg 144 of the bundle. He avers that due to the systems change in 2011, he too was accused of misappropriation of funds and together with the 1st claimant were arrested and charged with stealing. They were charged on 21.12.2010 in Kisumu Criminal Case No. 695/2012 where proceedings were submitted before court (pg 16 to 64 of the claimant's documents).

They were found innocent and discharged under S. 45 of CPC. They left the bank, they decided to resign as the whole issue was handled unfairly. So on 19.11.2011, they gave a 25 days notice to the bank of their intention to resign. However one Benard and Catherine who were investigating the matter sent email messages to all staff of respondents portraying them as thieves and indicating that they had been sacked from the bank. The bank also referred the matter to the BFIU to investigate without giving them any hearing or information. They therefore had decided to resign due to duress. At the time of their resignation, the claimants were earning Kshs 98,000/= and Kshs 119,502/= respectively. Both claimants were members of NSSF and made their contributions regularly.

They both told court that they never received any letter from the bank acknowledging their resignations but saw emails indicating that they were among staff who had been dismissed. 1st claimant admits

having received Kshs 229,842/= as his terminal dues. 2nd claimant was paid Kshs 310,000/= which was used to clear his loan.

The respondents on the other hand filed their reply to the memo of claim on 13.11.2013 through the firm of Macharia Mwangi & Njeru Advocates. It is their contention that the claimants voluntarily resigned from employment on 26.11.2011 as per *Exh EBKL-1A & 1B*. They deny summarily dismissing the claimants but that they acknowledged the resignation letters of the claimants as per annexure *EBKL 2A & EBKL 2-B*. They further paid the claimants their terminal benefits as per annex – *EBKL 3A & 3B*.

The respondents further contend that the decision to end the employment relationship was initiated by the claimants as such the allegation that they were dismissed is unfounded and baseless. The respondents also deny that the claimants are entitled to any gratuity or any other benefits being registered members of NSSF as well as a pension scheme.

They want the claimant's case dismissed accordingly. The respondents also called 2 witnesses who reiterated the respondents averments in the statement of defence. They deny forcing the claimants to resign.

I have considered the evidence of the parties and their respective submissions. The issues for consideration are as follows:-

1. Whether claimants resigned or were dismissed.

2. Whether the claimants are entitled to prayers sought.

On 1st issue, there is evidence that the claimants wrote resignation letters to the respondents dated 26.11.2011. They were received by respondents on 28.11.2011. A purported reply came on 28.12.2011 – a month later which letters the claimants aver they never received and there is no proof that the resignation acknowledgement was received by the claimants though some dues were paid to the claimants.

In the subsequent period on the 30th December 2011 at 20 – 27, an email was sent to all staffs of the respondents stating that the claimants and others had been dismissed from service for various reasons. Whereas it may be true that the claimants did serve the respondents with letters of resigning from the service, the email of 30.12.2011, shows that the respondents treated claimants as staff who had been dismissed. It was even in bad light for this email to be circulated to all staffs indicating that the claimants had been dismissed from service. This court therefore finds that though claimants had intended to resign from the service of the respondents, the respondents went ahead and dismissed them and this was tantamount to an unlawful termination given that no hearing was given to them as envisaged under S. 41 of Employment Act 2007 which states that:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub –section (1) make.”

Given that the termination was unfair, are the claimants entitled to the remedies they sought? There is proof that the claimants were paid their terminal dues which they acknowledged. There is also proof that they were members and contributors of NSSF and a pension scheme.

They are therefore not entitled to payment of any gratuity or service pay as provided for under S. 35(6) of the Employment Act 2007 which states that:-

“(6) This section shall not apply where an employee is a member of—

- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;**
- (b) a gratuity or service pay scheme established under a collective agreement;**
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and**
- (d) the National Social Security Fund.”**

The claimants are therefore entitled to the following:-

1. 1 months salary in lieu of notice;

1st claimant - Kshs 98,000/=

2nd claimant - Kshs 119,502/=

2. 12 months salary as damage for unlawful termination;

1st claimant - 12 X 98,000 = 1,176,000/=

2nd claimant – 12 X 119,502 = 1,434,024/=

SUB-TOTALS:

1st claimant = 1,274,000/=

2nd claimant = 1,553,526/=

Less statutory deductions.

3. Each claimant shall be issued with a certificate of service.

4. Respondents will pay costs of this suit.

HELLEN S. WASILWA

JUDGE

3/12/2014

Appearances:-

Omondi for 1st and 2nd claimants present

Omondi M. M. for respondents

CC. Wamache