



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1050 of 2011

LOICE OTIENO CLAIMANT

v

KENYA COMMERCIAL BANK LTD RESPONDENT

JUDGMENT

1. It is regrettable that this judgment is coming a couple of months after close of hearing. On 6 November 2012 after close of hearing I directed the parties to exchange submissions and appear in Court on 19 November 2012 to get a mention date for an award. I was transferred to a new station and in the event the Registrar failed to list the file before any other Judge for directions on 19 November 2012.

2. It appears from the record that on 17 January 2013 a representative of the Claimant went to the registry and had the matter fixed for mention on 6 February 2013. Before the mention date of 6 February 2013, the file one way or the other found its way to the Principal Judge on 30 January 2013 when he directed that the file be transmitted to me in Mombasa. The order by the Principal Judge was issued on 6 February 2013 and the Deputy Registrar, Nairobi wrote a letter dated 25 February 2013 advising the parties that the file was being transferred to Mombasa.

3. For reasons which are not on record, it was not until 25 April 2013 that the file was stamped as received in Mombasa. There was a hiatus of nearly two months before the file reached me.

Background

4. Loice Otieno (the Claimant) filed a Statement of Claim against Kenya Commercial Bank Ltd (the Respondent) on 5 July 2011 and the issue in dispute was stated to be *unfair termination of employment of the Claimant by the Respondent and refusal to pay her full terminal benefits.*

5. The Respondent filed its Response on 5 June 2012 and I heard the parties on 30 July 2012 and 6 November 2012. After the close of hearing, the Claimant filed her submissions on 17 January 2013 while the Respondent's filed its submissions on 5 February 2013. Clearly, the parties filed their submissions out of time and are partly to blame for the delay.

6. Because of the view I have taken of this matter, I will only make reference to relevant evidence as to whether the Respondent complied with the provisions of section 41 of the Employment Act. The section deals with what is generally called procedural fairness in employment law/practice or natural justice in administrative/public law.

The evidence and parties' cases

7. The Claimant testified that she was employed by the Respondent on 2 December 1985 as a bank clerk. On 14 April 2009 she was terminated and the reason given in the letter was loss of confidence. The termination letter stated the termination was based on Clause 5(d) of the Collective Agreement between the Respondent and Banking Insurance Finance Union.

8. According to the Claimant she was not taken before a disciplinary process but was instead communicated with through memos which she responded to. The Memos made reference to cash shortages.

9. At the time of termination the Claimant was earning Kshs 98,597/- gross per month.

10. Regarding the reasons for her termination the Claimant testified that the cash shortages which allegedly led to her termination were caused by a faulty cash counting machine.

11. For the Respondent, it was testified that the Claimant's services were terminated because of cash shortages/differences which the Claimant failed to explain satisfactorily and that the Claimant had been issued with 2 warning letters in 2006 over other cases.

12. It was also the case of the Respondent that there was a system migration for the Respondent all over the country and that the shortages in question had occurred even before the system migration and that other cashiers did not/report have cash shortages.

13. Concerning the faulty cash counting machine, it was the case of the Respondent that the same machine was also used by other cashiers but no shortages were reported or detected.

14. It was also stated that the Claimant was taken through a disciplinary process, and minutes of a disciplinary hearing of 31 March 2009 were annexed to the Response and referred to.

15. The Respondents' witness admitted in cross examination that the Claimant was not issued with a show cause letter over the cash shortages and that the Claimant was not invited to a disciplinary hearing. It was further conceded on behalf of the Respondent that no shop steward was invited to the disciplinary hearing.

16. The Respondent's witness maintained that the Claimant was terminated pursuant to Clause 5 (d) of the Collective Bargaining Agreement and therefore no warning was necessary and that this was a case of instant dismissal.

Evaluation

17. As I have had occasion to state in several decisions in the past, the Employment Act 2007 has caused a radical and fundamental shift in both the jurisprudence and practice in employment law in Kenya. The doctrine of natural justice or procedural fairness is now an essential part of the employment relationship. An employer must comply with the procedures set out in section 41 of the Act even in circumstances where summary dismissal or what the Respondent referred to as instant dismissal is contemplated.

18. And an employer who resorts to summary dismissal/instant dismissal will be required to demonstrate that the summary dismissal meets the requirements of sections 43 and 45 by proving the reasons for termination and that the reasons are valid and fair, where an employee challenges the summary dismissal.

19. And what does section 41 of the Employment Act require an employer to establish to demonstrate that there has been procedural fairness? In my view, an employer must demonstrate as a matter of fact that it

(i) Explained to the employee in a language the employee understood the reasons why it was considering the termination

(ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons

(iii) Heard and considered any explanations by employee or his representative

(iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act,

that it had and complied with its own internal disciplinary rules.

20. To demonstrate that it had complied with the requirements of section 41 of the Employment Act, the Respondent through its witness asserted that the Claimant was issued with several memos.

21. I must therefore examine whether the memos were in compliance with the requirements of section 41 of the Employment Act as I have set out in paragraph 19 above.

22. The first memo was dated 9 January 2009 (*appendix 2 to Response*) and it simply requested the Claimant to explain a cash difference of Kshs 5570.90. The second memo was dated 16 January 2009 (*appendix 4 to Response*) and it requested the Claimant to give a full report on the circumstances surrounding the cash difference of Kshs 5570.90 and a further shortage of Kshs 18086. It is apparent that the Respondent was not satisfied with the Claimant's reply dated 12 January 2009 to the first memo. The third Memo was also dated 16 January 2009 (*appendix 6 to Response*) and it required the Claimant to explain or respond to a complaint by a customer of shortage of Kshs 4660/- in coins. The fourth Memo was dated 21 January 2009 (*appendix 8 to Response*) and it wanted the Claimant to explain a cash difference of Kshs 5661/- which happened at time of migration to a new system on 17 October 2008.

23. To my mind, these Memos do not meet the prescriptions set out in section 41 of the Employment Act. Nowhere in the Memos was the Claimant informed that the Respondent was contemplating terminating her services and therefore the Respondent cannot seek to rely on the cases of *Kenya Scientific Research International Technical & Allied Institutions Workers Union v Stanley Kinyanjui & Magnate Ventures Ltd*, Industrial Cause No. 273 of 2010 and *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No. 108 of 2010.

24. While it is true that compliance with section 41 of the Employment Act may be conducted through written correspondence, to meet the requirements of section 41 of the Employment Act, the correspondence must

(i) Expressly state that the termination of the employee is under consideration

(ii) State the reasons why the termination is being considered

(iii) Inform the employee of entitlement to representation him/herself or by another employee on his/her behalf

(iv) Be copied to the union if the employee is a member of a union and the Collective Bargaining Agreement so provides as in the instant case.

25. Whether an employee has been given previous warnings in the past or not, when an employer is contemplating terminating the services of the employee, it must expressly and unambiguously inform the employee of the contemplated action. That is my understanding of section 41 of the Employment Act. I say so on the strength of section 41(2) of the Employment Act. Summary dismissal even in the face of a fundamental breach of the employment contract/obligations or gross misconduct must not be resorted to without complying with procedural fairness/natural justice. An employer who summarily dismisses an employee without a hearing will be falling foul of section 41(2) of the Employment Act.

26. But that is not the end of the matter. The Respondent annexed to its Response minutes of a disciplinary committee meeting held on 31 March 2009 where the decision to terminate the services of the Claimant was taken.

27. The minutes indicate that the disciplinary meeting was attended only by senior managers of the Respondent. The Claimant testified she did not attend the meeting nor did the Respondent show that the Claimant was invited to the meeting to present her side of the story as regards termination. In any case the Memos I have referred to did not mention that the Respondent was considering the termination of the Claimant.

28. And again, the termination letter indicated that the termination of the services of the Claimant was pursuant to clause 5(d) of the Collective Bargaining Agreement. This means that the Claimant was a member of the Banking Insurance and Finance Union. The Claimant annexed an extract copy of the Collective Bargaining Agreement in her Memorandum of Claim (*appendix 2a*). Although the complete copy of the Collective Bargaining Agreement was not annexed, I know as a matter of practice that these agreements make elaborate provisions for the processes to be followed in case termination of an employee is under consideration.

29. I am unable to tell whether the termination was really in accord with the Collective Bargaining Agreement in that in the Memos by the Respondent to the Claimant, no reference at all was made to the Union of which the Claimant was a member. The Memos were not copied to the Union.

30. The only conclusion I am able to reach is that the termination of the Claimant was not carried out in compliance within the parameters set out in section 41 of the Employment Act and therefore was procedurally unfair. The fact that the Claimant appealed against the termination cannot cure the fact that the termination was not in accord with section 41 of the Employment Act.

31. Because of the foregoing, it is not necessary for me to discuss whether the Respondent has proved the reasons for the termination or whether those reasons were fair and valid as contemplated by sections 43 and 45 of the Employment Act. Such an exercise will only serve an academic purpose which I need not venture into.

Appropriate remedies

32. In the main the Claimant sought a declaration that her termination was unfair and unlawful, reinstatement and in the alternative 12 months compensation.

Reinstatement

33. Section 49 of the Employment Act has provided for what I may refer to as the primary remedies where a termination of employment is found to have been unfair. These are reinstatement and re-engagement. Reinstatement would entail an employee going back to her job on the same terms as if no termination had occurred. Re-engagement on the other hand means that an employee may be taken back on new terms and conditions of employment, in fact for a different job.

34. In granting any of these two primary remedies, the statute at section 49(4) has set out some 13 factors which a court should consider. On its part the Industrial Court Act permits reinstatement if three years have not elapsed since the termination. In the case under discussion, it is now 4 years since the termination.

35. Bearing in mind the 13 factors, and that I did not venture to consider whether the Respondent proved the reasons for the termination or whether the reasons were fair and valid, it is my considered view that reinstatement would not be an appropriate remedy.

Compensation

36. The Claimant sought in the alternative, 12 months' compensation. Having found the termination of the Claimant was procedurally unfair, it is my humble view that an award of compensation would be just and fair. The Claimant wants the maximum 12 months compensation.

37. The Court is yet to develop the principles/guidelines upon which to rely on in granting the maximum compensation. The parties did not address me on that aspect and I will not delve into that exercise in this case. It will be addressed in an appropriate case in future.

38. Weighing and balancing the interests of the parties and considering that the Court is obligated to make orders that are just, it is my considered view that an award of 6 months' compensation would be just. It is not disputed that the Claimant was earning a gross salary of Kshs 98,597/- per month. I would therefore assess the 6 months' compensation at Kshs 591,582/-

Conclusion and Orders

39. With the foregoing, I do find and declare that the termination of the Claimant was procedurally unfair and order as follows:

(a) The prayer for reinstatement is declined

(b) The Respondent to pay the Claimant 6 months' compensation in the sum of Kshs 591,582/- with interest at Court rates from date of filing of claim.

40. There will be no order as to costs because of the interest I have awarded.

41. The Deputy Registrar to transmit this file back to Nairobi after the delivery of this Judgment.

Delivered, dated and signed in open Court in Mombasa on this 24th day of May 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Nyabena instructed by

Nyakundi Nyabena & Co. Advocates for Claimant

Mr. Okeche instructed by

Federation of Kenya Employers for Respondent