



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1009 of 2012

BANKING INSURANCE & FINANCE UNION.....CLAIMANT

versus

POST BANK LTD.....RESPONDENT

JUDGMENT

1. The Claimants herein Banking Insurance and Finance Union brings the claim on behalf of its member Mr. Alexander Rotich. He putative Claimant was employment by the Respondent as a messenger. The Claimant's member was availed as a witness and stated, that he was employed by the Respondent on 16th October 1989. He testified that he was based at the Headquarters in Nairobi at first and was subsequently transferred to other stations – Nyahururu, Nyeri and Kisumu. He was at Keroka Branch at time of termination and has risen to the rank of clerical officer.
2. The Respondent represented by Federation of Kenya Employers denied the claim. It availed 2 witnesses being the Human Resource Officer at Post Bank Mr. Ben Bett and George Odiwuor Onyango of the Audit Risk and Compliance department. Both these witnesses testified that there was a series of complaints against the former employee of the Respondent. The investigations were carried out and the employee afforded opportunity to defend himself against allegations made.
3. The Court heard the submissions of both parties as ably made by Mr. Munoru for the Union and Mr. Masese for Federation of Kenya Employers who are on record for Respondent. The issue in contentions was really whether the Respondent was justified in terminating the services of the employee and secondly, if the termination was not fair, what remedies would be available.
4. The Claimant's member testified and was cross-examined. He testified that there was bad blood, between him and his manager leading to complaints being made to Kisumu which was the Regional office to intervene. Mr. Rotich testified that whenever he would be away there would be machination to precipitate complaints against him. The Respondent's Human Resource Officer testified that procedural steps were taken upon receipt of the complaints. Mr. Onyango of the Audit Risk and Compliance Department testified that the Respondent carried out investigations against the employee Mr. Rotich and the outcome of the investigation was revealed to him. It was not favourable to the employee hence the proceedings which culminated in his dismissal.
5. Mr. Masese for the Respondent and Mr. Monoru for the Claimant submitted before me. Due to Mr. Monoru being late, the Court heard Mr. Masese first. Mr. Masese submitted that the Respondent complied with the provisions of S.41 of the Employment Act. He submitted that there were investigations carried out, there was a show cause notice issued to the employee Mr. Rotich. That Mr. Rotich denied the stack of evidence availed to him in a casual manner and that the attended a disciplinary meeting on 15th March

2011 before his dismissal on 23rd March 2011. The Claimant's member appealed against the decision to terminate his services and the Respondent considered and rejected it.

6. Mr. Masese submitted that dishonesty is not an aspiration the Respondent would wish to have and as a consequence could not retain the employee on the basis of this streak which had manifested itself. Mr. Masese relied on the case of **DeBeers Consolidated Mines v. Commissioner of Metal Workers Union** a South African decision on the effect of the allegation of impropriety. The facts in that case were similar to this one. He also placed reliance on the Industrial **Cause No. 694 of 2010 – Moses Chavangi V. Barclays Bank Ltd.** where this Court held that if an employee is involved in dishonesty, the employer is within its rights to terminate the services of the employee. He urged the Court to dismiss the claim.

7. Mr. Munoru submitted that the evidence and submissions of the Claimant were cogent. He submitted that the Respondent had so far failed to file list of documents showing the transactions in the accounts which formed the basis of the termination. He submitted that the burden of proving the termination was justified and was on the Respondent. He relied on the case of **BIFU V. Kipsigis Teachers Cause No. 175 of 2012** in which the Court held that the employer must prove the reasons of the termination. He submitted that the Respondent had to prove the matters he believed to exist as to cause the termination of service. He submitted that in that case, the Court held that the Respondent failed to do so and the termination was therefore unlawful and unfair. He also relied on the case of **KUPRIPUPA v. Timber Treatment International Limited Cause No. 204 of 2012**. The Claimant submitted the Respondent had not proved the dismissal was justified. He submitted that the information on the transactions was inaccurate and the allegations by the Respondent were shaky. He submitted the case of **Chavangi v. Barclays Bank** relied on involved an aspect of criminality and the Claimant had even been reported to the police. He thus urged the Court to grant the Claimant what he had prayed for.

8. Evidence adduced and testimony given along the pleadings render two issues of determination. Was Mr. Rotich's termination lawful? The second question or issue to determine is whether there are remedies available to Mr. Rotich if the answer to the first is that the termination was unlawful. The evidence led by the Claimant confirmed he was employed by the Respondent. He suggested that there was friction and it may well be so. However, the issue of his termination did not turn on this aspect.

9. Section 41 of the Employment Act requires that the employee be accorded and opportunity to hear the reasons why the employer is terminating the employee. Mr. Rotich was according to the evidence of the Respondent accorded this chance. He was heard, he was given time to even appeal against the decision, it was upheld and he was terminated. The outcome of the investigations was captured in the show cause notice. He was asked for an explanation. He gave one. He was therefore, terminated in accordance with the law. He was also given opportunity to appeal the decision. I find that the cardinal rules of natural justice were followed.

10. As stated in **Chavangi V. Barclays Bank** (supra) the relationship between a banker and the employer is one which calls for high degree of honesty. I would be remiss if I did not reiterate that trust and confidence in some jobs is more critical than academic papers. If there was cause to terminate, as there was in this case, I will not stand in the way of the dismissal. I uphold it.

11. The final outcome is that the claim is dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 10th day of May 2013

Hon. Mr. Justice Nzioki wa Makau
Judge