



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NUMBER 25 OF 2013

NICHOLAS OTINYU MURUKACLAIMANT

VERSUS

EQUITY BANK LIMITED RESPONDENT

JUDGEMENT

This is a claim dated 2nd January 2013 by the claimant Nicholas Otinyu Muruka for unlawful termination and illegal backdating of summary dismissal, refusal to pay his dues and benefits during his suspension and unlawful, discriminatory and malicious dismissal by the respondent Equity Bank Limited. Summons herein dated 9th January 2013 were issued to the respondent and appearance entered by the firm of Sichangi and Co. Advocates dated 25th January 2013. No defence was filed or attendance at the hearing despite notice and returns filed in court in the sworn affidavit of Judith Musimbi dated 29th April 2013. Court entered judgment for the claimant on 2nd May 2013 and the matter proceeded for the claimant's case on 4th June 2013.

In the claim, the claimant was employed by the respondent in October 2008 as the Credit Officer-Consumer Lending at its Fourways Branch in Nairobi with the duties of appraisal of customer eligibility of credit facilities, verification of documents, assessment of customer eligibility, visits and approval of temporary overdrafts and other clerical duties. His salary was Kshs.47, 500.00 per month. That on 24th July 2010 he was suspended on alleged involvement in fraudulent transaction at his branch a time when he was on his leave. That following allegations of fraud he was arraigned in court and charged in Criminal Case No. 1974 of 2011, Nicholas Otinyu Muruka and John Ajode Odhiambo for theft and conspiracy to commit a felony in July 2010 which case was amended to include a third accused Peter Njuguna Kimani which charges were later withdrawn as against John Ajode Odhiambo and Peter Njuguna Kimani on the basis that John Ajode Odhiambo jumped bail while Peter Njuguna Kimani paid the respondent the sum of Kshs. 14,260.00.

That following the withdrawal of charges of his two co-accused, the claimant is now facing charges of theft by servant of Kshs.3,200,000.00 and 14,280.00 respectively, which case is still pending in court. That in August 2011, the claimant went to the respondent head office and was handed a letter of summary dismissal from the employment of the respondent for involvement in fraudulent actions involving stolen passwords as the Fourways Branch which letter was backdated to the date of his suspension which act the claimant contests was malicious, oppressive and a bad labour practice and thus claims his dues from July 2010 to August 2011.

That the claimant was summarily dismissed without any valid reason, no notice was issued or his dues paid. That this was a breach of the Constitution and the Employment Act. He therefore claims for compensation for unfair termination and discrimination all amounting to 12 months pay, his salary for

July 2010 to August 2011 being 14 months pay, notice pay, certificate of service and costs of the suit.

The claimant gave his own evidence that since his employment on 21st April 2008 he served diligently until 24th July 2010 when he reported back from his leave he was suspended and charged in court on allegations of fraud. That the suspension was to allow the respondent conduct their investigations. Subsequently, he was charged in court in together with two others whose charges were later withdrawn as the one absconded and the other paid the respondent but the charges against the claimant are still ongoing in court on charges of theft by servant.

It was the claimant's evidence that he had been on leave and when he returned back on duty he found ongoing investigations at the respondent Fourways Branch. That the branch manager called for a meeting following which the security officers came to the claimant and picked him up as headed by Mr. Nicholas Kyau and was taken to the respondent head office where he was questioned about a loan he had maintained of 3.2 million. He was detained at the office, later taken to the Banking Fraud Office a Nicholas Kyau wrote a statement but did not mention the claimant but noted that one John Ajode had opened an account and attempted to withdraw 3.2 million. That this money did not leave the bank yet the claimant has now been accused of stealing the same.

That another statement was done noting that Ndeda and Associate owned the account and was used to transfer the money, there was also an attempted transfer where Ndeda and Associates were to receive the 3.2 million. Mercy kimani was mentioned as she was the claimant's boss as the Credit Manager. That her password was used to disburse the 3.2 million as the last person to authorize the transaction where any payments being processed by the respondent officers the Credit Manager must approve before cash is released and in this case Mercy Kimani was the authorizing officer.

The claimant further stated that all the bank employees of the respondent are not allowed to share password as a security measure and once employed one is issued with their password as a matter of policy. Therefore Ndeda and Associates wrote a statement through Stephen Ndeda the advocate in the law firm and did not mention the claimant as the officer of the respondent responsible. That the investigating officer of the case was Corporal Jumba who wrote his statement but did not mention the claimant. That in this case an amount of Kshs. 600,000.00 was to be withdrawn from John Ajode to Ndeda and Associates and another 2.1 million and these transactions did not involve the claimant.

That on 24th August 2011 he was suspended and later summarily dismissed without payment of any benefits. He was not given a hearing and therefore the respondent had no valid reasons to terminate him and only met John Ajode in court during the hearing of the criminal case where they were jointly charged.

That the summary dismissal has affected him since in the banking sector integrity is crucial and since the respondent failed to issue him with a certificate of service he has no way of showing that he was their employees and cannot get another job and has to start afresh similar to somebody who just left school. He was not given notice or a hearing and thus claims pay in lieu of notice.

Every employer has a right to discipline their employee on good reason or reasons where an employee is found to have committed any acts of gross misconduct or acted in a manner putting the employer into loss. However such disciplinary action must follow due process as outlined under section 44 of the Employment Act. In this case pertinent questions must be addressed being;

- a. Whether the claimant engaged in gross misconduct thereby justifying summary dismissal.
- b. Whether the claimant's termination was fair or unfair;
- c. Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.

On whether the claimant engaged in gross misconduct, the court is guided by the provisions of subsection 44 (3) of the Employment Act, 2007 which provides that an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

In this case, the claimant was suspended on 24th July 2010 with effect from 15th July 2010 in regard to ongoing investigations of fraud at the respondent Fourways branch where the claimant was alleged to have been involved and the suspension was to last until these investigations were complete. On 24th August 2011, the respondent wrote to the claimant to the effect that he had summarily been dismissed with effect from 15th July 2010 on the reasons of his alleged involvement in a case of fraudulent transactions involving stolen passwords at Fourways Branch for which he had been suspended. That he had been taken to court and charged with this offence and that his integrity and credibility had been compromised and thus the respondent had no faith in him as their employee hence the decision to terminate him from their employ. He was to be paid up and until the 15th July 2010.

The court has examined the letter of suspension keenly, the letter of termination and all the statements written by various officers in regard to the alleged investigations following the alleged fraud at the respondent Fourways Branch and I note that the respondent suspended the claimant vide their letter dated 24th July 2010 to pave way for investigations over a case of fraud and later terminated the claimant vide their letter dated 24th August 2011 for alleged fraud and theft of passwords both the suspension and the summary dismissal taking effect on the same date of 15th July 2010.

It is however not demonstrated what actions were taken from 24th July 2010 to cause investigations into the alleged fraud by the respondent as against the claimant. The criminal charges against the claimant are still pending in court and even though this does not exonerate the claimant, if the charges were instigated by the respondent, the duty rested upon the respondent to pursue these proceeding as part of their investigations into the alleged involvement of the claimant, otherwise even with the application of section 44 (4) (g) must be satisfied;

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

The employer must demonstrate reasonable and sufficient grounds that link an employee to acts of criminal nature that amount to gross misconduct to justify a summary dismissal. Mere suspicion is not enough; there must be reasonable and sufficient grounds. Otherwise if employers are allowed to hold mere suspicions, they would use these simple reasons to harass, intimidate and or harass their employees for no just cause.

Even where an employer has a just cause as to apply the provisions of section 44(4) (g), the same must still comply with the provisions of section 41 and 43 of the Employment Act. If the reasons for termination are not proved to amount to gross misconduct, then the application of Section 41 of the Act will apply. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct.

Accordingly, the court finds that employers cannot take the discretion to terminate contracts of service on account of gross misconduct in disregard of due process of notification and hearing under Section 41 of the Act. To do so, such an employer must face the wrath and price of unfair termination.

Under section 43 of the Act it was the obligation of the Respondent to prove that the reasons for terminating the employment of the Claimant amounted to gross misconduct. If the Respondent failed to discharge that obligation, then the court will make a finding that the termination was unfair.

In this case the court has carefully considered the pleadings, the evidence on record and submissions by the claimant counsel and makes the following findings:

1. The reason for termination of the contract of employment at the time of the termination cannot be matters that the Respondent can be said to have genuinely believed to exist to justify the termination of the employment of the claimant.
2. The court finds that it is an unfair labour practice for the employer to suspend an employee to commence investigations and then backdate a summary dismissal on the same date without giving that employee an opportunity to be heard as under Section 41 and 43 of the Employment Act.
3. The court further finds that in the instant case the Respondent did not demonstrate and prove that it had internally given the Claimant a chance for due process before the termination and before the arraignment in court for the criminal charges.

In a case where an unfair labour practice is established to have been committed, the court can award damages. In this case the respondent unfairly terminated the claimant and the court will award 3 months pay in compensation. This amounts to Kshs.142, 500.00

On the finding that that claimant was placed under suspension vide the respondent letter dated 24th July 2010 and his letter of termination dated 24th August 2011, the effective date of termination was 24th August 2011 and not the stated date of 15th July 2010. The salary due to the claimant for the period until the issuance of the letter of termination dated 24th August 2011 both dates inclusive is payable to him. This amounts to pay for 13 complete months all amounting to Kshs.617, 500.00.

The respondent should have informed the claimant the outcome of their internal investigations or issued notice for termination or payment in lieu of the summary dismissal. This is what amounts to due process even in cases that fall under the provisions of section 44 of the Employment Act. This notice was not given and the court will award month pay in lieu amounting to kshs.47, 500.

For the above reasons judgment is entered for the Claimant against the Respondent for:

- a. **A declaration that the termination of the employment of the Claimant by the Respondent was unfair.**
- b. **the Respondent to pay the Claimant the following;**
 - i. **compensation at kshs.142,500.00;**
 - ii. **notice pay at Kshs.47,500.00**
 - iii. **salaries due at kshs.617,500.00**

All amounting to Kshs.807, 500.00 plus interest at court rates from the date of the judgment till full payment;

- c. **The respondent to issue the claimant with a Certificate of Service within 14 days from the date hereof. and**
- d. **The Respondent to pay costs of the cause.**

Delivered in open court this 24th day of June 2013.

M. Mbaru

Judge

In the presence of

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