



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 396 OF 2010

AGNES MURUGI MWANGI.....CLAIMANT

VS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

AWARD

Introduction

1. This matter was heard on 14th March 2011, by way of oral submissions before Chemmutut J (as he then was). When Counsels for the parties appeared before me on 18th September 2013, they agreed that I proceed to issue an award on the basis of the proceedings before the former Judge and the written submissions filed on behalf of the parties.

The Claimant's Case

2. The Claimant was employed by the Respondent on 13th May 1991, as a Clerk Typist at a salary of Kshs. 48,852. She was subsequently promoted to be in charge of telephone operations and was earning a monthly salary of Kshs. 82,815 at the time she left the Respondent's employment on 6th September 2007.

3. In August 2005, the Claimant applied for a loan from the Respondent to undertake urgent repairs to her house. The application was declined because according to the Respondent, the Claimant's debt ratio did not allow any further borrowing as the Claimant was already servicing another loan with the Respondent. The Claimant therefore took a loan from one Ruth Kareka which she started repaying on 24th August 2005 but the monthly interests payable to her creditors became too high. In March 2007 the Claimant approached the Respondent again seeking a loan to offset debts owed to her creditors.

4. The Claimant was then summoned to a disciplinary hearing on 18th July 2007 on allegations of persistent financial misconduct where it was concluded that the Claimant would be issued with a warning letter but on 6th September 2007, the Respondent wrote to the Claimant terminating her employment effective 25th September 2007. The Claimant's appeal against the termination was declined and the termination of her employment upheld.

5. It was the Claimant's case that the termination of her employment was in breach of the Employment Act, the Collective Bargaining Agreement and the Respondent's Employee Handbook and Staff Manual. The Claimant therefore claimed the following:

- a. Severance pay at 30 days per year for 17 years.....Kshs. 1,407,855.00

- b. Service pay at 30 days per year for 17 years.....1,407,855.00
- c. Retirement benefits.....1,654,438.93
- d. 3 months' salary in lieu of notice.....248,455.00
- e. Leave pay at 30 days per year for 17 years.....1,407,855.00
- f. General damages for loss of employment
- g. General damages for wrongful termination of employment
- h. Aggravated/exemplary damages
- i. Costs and interest
- j. Any other relief the Court may deem just to grant

The Respondent's Case

6. In its Memorandum of Reply filed on 2nd June 2010, the Respondent admitted having employed the Claimant on 13th May 1991 as a Clerk Typist at a salary of Kshs. 48,852. It was a term of the contract of employment between the Claimant and the Respondent that the Claimant was not permitted to borrow money from third parties. Further, the contract of employment provided for termination by either party by giving one month's written notice or payment of one month's salary in lieu thereof.

7. On 20th March 2007, the Claimant wrote to the Respondent's Head Office Support Manager, requesting for an additional loan from the Respondent to assist her clear debts owed to third parties amounting to Kshs.840,000. At the time of this request, the Claimant had existing loans with the Respondent totaling Kshs.2,600,000.

8. Upon receiving the Claimant's request, which was in breach of the employment contract between the Claimant and the Respondent, the Respondent invited the Claimant for a disciplinary hearing on 13th July 2007 to explain her persistent financial indebtedness.

9. During the disciplinary hearing, which the Claimant attended accompanied by her representative, Isaac Newton, it was noted that the Claimant had breached the Respondent's regulations by borrowing from unregulated money lenders (Shylocks). A budget planner provided by the Claimant showed a monthly deficit of Kshs. (3,020). As at 2nd August 2007, the Claimant's indebtedness to third parties stood at Kshs. 855,000.

10. On 21st August 2007, the disciplinary panel recommended termination of the Claimant's employment on grounds of breach of her terms of employment and on 6th September 2007, the Respondent effected the termination by payment of one month's salary to the Claimant. It was the Respondent's case that the termination of the Claimant's employment was fair and lawful.

Findings and Determination

11. The first issue for determination in this case has to do with the applicable employment law. In her Memorandum of Claim and written submissions, the Claimant relied heavily on the Employment Act, 2007. However, the Claimant's employment was terminated on 6th September 2007 and the new Employment Act commenced on 2nd June 2008.

12. As held by Nduma J in the case of *Jeremiah Ojwang Ojak Vs Central Bank of Kenya [2012]eKLR* there is no provision for retrospective application of the Employment Act, 2007 to employment contracts terminated before its operationalisation. The applicable law in this case is therefore the repealed Employment Act (Cap 226). The Claimant's employment was also subject to the obtaining Collective Bargaining Agreement between Kenya Bankers Association and Banking Insurance and Finance Union (BIFU) as well as the Claimant's contract of employment.

13. Counsel for the Claimant submitted that the prohibition to borrow money from third parties contained in Clause 4 of the Claimant's contract of employment was unconscionable.

14. Black's Law Dictionary (Ninth Edition) defines an unconscionable agreement as:

“An agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept.”

15. Clause 4 of the Claimants contract of employment provided that:

“You will not be permitted to borrow money from, or lend money to any other member of staff, or to borrow from money lenders and others or to engage in betting, gambling or speculative transactions.”

16. Counsel advanced the argument that the Respondent, being the superior party in the employment relationship imposed an unreasonable and unfavourable restriction on the Claimant. In determining the reasonableness of the restriction on third party borrowing imposed on the Claimant by the Respondent, it is important to examine the rationale behind the restriction. In normal employment law and practice, there is a general restriction on the proportion of an employee's salary that may be committed to service debts. The rationale for this is straightforward; that an employee needs a fair proportion of their salary to meet their living expenses without undue worry and pressure.

17. This is even more critical where the employee is employed by a financial institution, which will ordinarily have a higher threshold for personal financial discipline for its employees. It is on record that at the time the Claimant asked the Respondent to bail her out of financial difficulties occasioned by third party borrowings, the Claimant had an outstanding loan of Kshs. 2,600,000 with the Respondent.

18. I therefore agree with the submission by Counsel for the Respondent that the restriction on borrowing from third parties was reasonable in the context of the employment relationship between the Claimant and the Respondent since the Respondent itself had extended an affordable staff facility to the Claimant. The restriction not only acted as shield to the Respondent's business reputation which was closely related to the reputation of its employees, but also protected the employees from financial ruin.

19. Having established that the restriction on third party borrowings in the Claimant's contract of employment was not in fact unconscionable, I will now determine whether the termination of her employment on the ground of breach of this clause was justifiable. Counsel for the Respondent submitted that the Claimant's action of borrowing money from third parties which she failed to repay amounted to gross misconduct within the meaning of Section 17 of the repealed Employment Act (Cap 226).

20. The Claimant did not deny having engaged in excessive borrowing from third parties and in fact wrote to the Respondent to bail her out. Banks are in the business of handling other people's money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face. The Claimant's conduct fell below this standard and I find that the Respondent had a valid reason for terminating her employment.

21. I will now examine the procedure adopted by the Respondent in effecting the termination of the Claimant's employment. The Claimant was invited to a disciplinary hearing on 13th July 2007. The invitation letter set out the charges facing the Claimant and notified her of her right to be accompanied by a representative at the disciplinary hearing, where she was given an opportunity to defend herself.

22. I therefore find that the Claimant was heard prior to the termination of her employment in accordance with the rules of natural justice. I further find that the offence committed by the Claimant amounted to gross misconduct within the meaning of the repealed Employment Act and

the terms of the Claimant's employment with the Respondent. The requirement for a progressive warning procedure was therefore dispensed with. The Claimant's claim for wrongful termination and loss of employment therefore fails and is dismissed.

23. With regard to the other reliefs sought, I find that the claim for severance pay is misplaced as the Claimant was not declared redundant. The Claimant was a member of the Respondent's Staff Pension Fund under which a lump sum payment Kshs. 1,176,542.90 was made to her. She is therefore not entitled to service pay or any other retirement benefits. The Claimant was paid one month's salary in lieu of notice as provided in her contract of employment and the applicable Collective Bargaining Agreement. The claim for three months' salary in lieu of notice consequently fails. The claim for leave was not proved and is dismissed.

24. In the final analysis the Claimant's entire claim is dismissed with no order for costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*