



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1610 OF 2010
BANKING, INSURANCE AND FINANCE UNION (K).....CLAIMANT
VS
STANDARD CHARTERED BANK OF KENYA LTD.....RESPONDENT
AWARD

Introduction

1. The Claimant filed this case on 22nd December 2010 on behalf of 16 grievants claiming unlawful termination of employment of 3 of the grievants and forced resignation for 13 of them. By consent dated 4th February and filed in Court on 5th February 2013, the disputes relating to 14 of the grievants were settled leaving the disputes relating to Rose Awino Omollo, the first Grievant and Ben Kiplagat Tunduny, the second Grievant pending. Pursuant to this, the Claimant filed an Amended Statement of Claim on 4th June 2013 and the Respondent filed a Memorandum of Response on 19th June 2013.
2. The case was heard on 3rd July 2013 with Mr. Munoru appearing for the Claimant and Ms. Gladwell Mumia appearing for the Respondent. The first and second Grievants testified on their own behalf and the Respondent called Evans Munyori, the Head of Human Resources-Consumer Banking.

The First Grievant's Case

3. According to the Amended Memorandum of Claim, Rose Owino Omollo was employed by the Respondent as a Clerical Staff on 5th August 1978. She was dismissed on 5th August 1998 but was later reinstated on 14th August 1998, following her appeal.
4. On 9th December 2008, the first Grievant and her colleagues were called by the Branch Manager and coerced to resign. The first Grievant refused to resign and her employment was terminated by letter dated the same day. The first Grievant questioned the Respondent's action and was subsequently called for a meeting on 10th December 2008 and on 18th December 2008 she was given another termination letter this time giving the reason for the termination of her employment as "continued unsatisfactory performance." The first Grievant testified that the rating of her performance ranged from 2 (meaning "very good") and 3 (meaning "good") save for the first half of 2008 when she was rated 4 (meaning "room for improvement") which rating she disputed.
5. It was the first Grievant's case that she had no disciplinary case at the time of the termination of her employment and there was no proof of poor performance on her part. She prayed for twelve (12) months' pay in compensation and abandoned the prayer for reinstatement.

The Second Grievant's Case

6. The second Grievant, Ben Tunduny was employed by the Respondent as a clerical staff on 18th January 1985. He rose through the ranks to the position of Branch Operations Manager as at the time he left the Respondent's employment.

7. While on leave, the Second Grievant was called by the Branch Manager on 22nd December 2008 and asked to either resign or be terminated. By this time his access rights to the Respondent's system had been withdrawn and being unable to operate, he resigned. His resignation was accepted by letter dated 10th December 2008. The second Grievant testified that when he resumed duty after his leave, he found a new person in his position. He further told the Court that he was threatened by the Acting Branch Manager, the Operations Manager and the Cash Officer that if he did not resign, he would be dismissed.

8. It was the second Grievant's case that he suffered constructive dismissal as the Respondent had made his continuation in employment untenable. He prayed for reinstatement or in the alternative twelve (12) months' pay in compensation.

The Respondent's Case

9. In its Memorandum of Response, the Respondent stated that the 1st Grievant, Rose Awino Omollo was first employed by the Respondent on 5th August 1978 at an initial salary of Kshs. 17,784. She was dismissed on 5th August 1998 but was later re-employed on 14th August 1998 following her appeal.

10. It was the Respondent's case that the first Grievant had a long history of negligence in the performance of her work and had been issued with several verbal and written warnings. Arising from poor results in performance reviews, the first Grievant had been cautioned and urged to improve but her performance did not improve. On 9th December 2008, the first Grievant was called to a meeting to discuss her performance and being unable to explain her poor performance, her employment was terminated on 18th December 2008 on grounds of unsatisfactory performance. With regard to the second Grievant, Ben Tunduny, the Respondent denied that he was forced to resign. Rather, he voluntarily opted to resign and the Respondent accepted his resignation.

11. Overall, the Respondent denied that the separation of the Grievants was a redundancy exercise and submitted that the notice of redundancy was not in reference to the Grievants but to other employees of the Respondent who were still in employment at the time of the notice. The Grievants were paid all their terminal dues.

Finding and Determination

12. The role of the Court in this case is to inquire into the processes leading to the separation of the Grievants from the Respondent's employment with a view to determining whether the separation was within the law. The first Grievant, Rose Awino Omollo was terminated on the ground of performance. According to the Respondent, she had a long history of poor performance.

13. Section 43 of the Employment Act, 2007 recognises poor performance as a legitimate ground on which an employer may terminate the employment of an employee. Nevertheless, the same provision requires that the process applicable to cases of misconduct and physical incapacity be employed in cases of poor performance.

14. The process adopted by the Respondent in terminating the first Grievant's employment was somewhat unique. She was first issued with a termination letter on 9th December 2008. This letter did not however disclose the reasons for the termination and on the same day she sent an electronic mail to Olivia Oloo expressing shock at her unexplained termination.

15. Subsequently, a meeting took place on 10th December 2008 between the first Grievant on the one hand and the Regional Branch Manager-Western Region, Branch Manager-Kisumu and the Head of Human Resources-Consumer Banking on the other hand. Feedback from the review of this meeting was communicated to the first Grievant on 18th December 2008, the bottom line being that her performance

was below expectation. On the same day, the first Grievant was issued with a second termination letter, this time citing the reason for termination as “continued unsatisfactory performance.”

16. Evans Munyori testified that the first termination letter issued to the second Grievant on 9th December 2008 was issued in error and that the subsequent one issued on 18th December 2008 sought to rectify this error. In cross examination, Munyori set out the Respondent's internal disciplinary procedure as follows:

- a. Notification to the affected employee of the impending disciplinary hearing and the employee's right to be accompanied;
- b. Notification of the charge facing the employee;
- c. Disciplinary hearing followed by a determination by the Disciplinary Panel;
- d. Communication of the decision to the employee and the Union (where the employee is unionised).

In the case of ***Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR***, Radido J summarised the legal fairness requirements set out in Section 41 of the Employment Act as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

17. From the record, it is evident that the first Grievant had issues with her performance for some time. There is however no evidence that the Respondent followed the law or its own internal disciplinary procedures in effecting the termination of the first Grievant's employment. Infact, Munyori admitted in cross examination that the Respondent's internal disciplinary process was not followed in the first Grievant's case. I therefore find the termination of the first Grievant's employment to have been unfair for want of due process and award her the equivalent of 10 months' pay in compensation. For the avoidance of doubt, the compensation is to be based on the first Grievant's gross salary as at the time she left the Respondent's employment.

18. With regard to the second Grievant, the Claimant's case was that the Respondent made his employment untenable thus forcing him to resign and he was therefore constructively dismissed. In the case of ***Catherine Kinyany Vs MCL Saatchi & Saatchi [2013] eKLR***, Maureen Onyango J held that:

“ For a claim of constructive dismissal to succeed, the Claimant must show that the Respondent acted in a way that made it extremely hard for the Claimant to continue working.”

19. It was the second Grievant's case that while on leave he was summoned by the Branch Manager on 22nd December 2008 and told to resign. On attempting to log into the Respondent's system he realised that his access rights had been withdrawn. He therefore resigned on the same day. By this time his access rights to the Respondent's system had been withdrawn and being unable to operate, he resigned.

20. The second Grievant took issue with the Respondent's acceptance letter which was dated 10th December 2008, before his resignation on 22nd December 2008. Munyori told the Court that this was an error and the Court found that the dating of the Respondent's acceptance letter did not change the fact that the second Grievant actually tendered a letter of resignation on 22nd December 2008. The Court further

found that apart from his word, the second Grievant did not provide any corroborative evidence to support his claim for constructive dismissal. The claim for constructive dismissal therefore fails and is dismissed.

21. I will now address the issue of the Claimant's *locus standi* to represent the second Grievant. The second Grievant admitted in cross examination that his position was non unionisable and he was therefore not covered by the Collective Bargaining Agreement between the Claimant on behalf of its members and the Respondent.

22. The Claimant submitted that since the Respondent had settled cases of other grievants whose positions were non unionisable, then the Respondent was estopped from raising the issue of *locus standi* at this stage. I respectfully disagree. Categorisation of employee positions into unionisable and non unionisable cadres is clear and predictable. It cannot be that just because a non unionisable employee is terminated alongside unionisable employees then his status changes. It also cannot be that just because parties operate in error out of court, then the Court is called upon to give its seal of approval to that error. The Court must always operate within the four corners of the law. I therefore find that the second Grievant was a non unionisable employee and could not access the benefits of the Collective Bargaining Agreement as his terms and conditions of service were governed by a different arrangement.

23. As held by Nzioki wa Makau J in ***Kenya Chemical & Allied Workers Union Vs Polypipes Ltd (Industrial Court Cause No 1112 of 2012)*** “the only way a union has locus is when it represents a party who is its member.” By virtue of his position, union membership was not available to the second Grievant and he could not therefore have been a member of the Claimant Union. The logical conclusion then is that the Claimant Union had no capacity to bring a claim on behalf of the second Grievant and to that extent; the claim was incompetent *ab initio*. Ultimately, the second Grievant's claim fails and is dismissed.

Each party will bear their own costs.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER 2013

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JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**