



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1021 of 2011

FRANCIS GYIDEYI CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED..... RESPONDENT

JUDGMENT

The claimant herein Francis Gyideyi filed his statement of claim dated 24th March, 2011 on the 24th June 2011, through the firm of Nyabena Nyakundi & Company Advocates. The Claimants contention is that he was unfairly terminated from his employment by the Respondent herein.

The claimant also gave his oral evidence and he told court that he was employed by the Respondent on 21st June, 1983 as a messenger at a monthly basic salary of Ksh.1235 and a house allowance of 230/=. He exhibited his appointment letter before court. He says that due to his hardwork and improvement in his study, he was promoted to the position of clerk with effect from 1st November, 2001, with a monthly salary of Ksh.24,844/= and house allowance of Ksh.2321/= per month vide a letter from the respondent dated 1st August, 2002. He was confirmed to this position with effect from 1st May, 2002.

The claimant continued with his services until on or about 22nd May, 2010 when his services were terminated on account of below expected performance. According to the said letter of termination, the claimant was being terminated

“In terms of clause 5(d) of the Collective Bargaining Agreement (CBA) covering Section heads, check clerks, clerical, technical and subordinate staff”

At the time of termination the claimant was earning a gross pay of 142,919.25 per month.

The claimant appealed against this decision and requested to be reinstated in his previous position as per the letter dated 28th May, 2010. The Respondent failed to respond to this letter prompting the claimant to seek counsel’s help. The claimant’s counsel wrote a letter to the Respondent who indicated that they were liaising on the matter internally and would respond to the same in due course.

The Respondent thereafter informed the claimant verbally that they would reinstate him to his previous position upon withdrawal of his matter from his Advocates which claimant did by a letter to his Advocates dated 2nd August, 2010. Despite their assurances that they were attending to the claimant’s case, the Respondent never addressed the claimant’s case and it is then that claimant filed this suit.

In cross examination, the claimant told court that he was appointed and conditions of service were to be as per CBA from time to time in force. He says that issues of performance score card never applied to

him. He says he never received any report that this performance was below per. He admitted signing some documents pertaining to his performance (App 5). He indicates he signed his performance being at a score of 3 and not 2.65 as is indicated in the said documents. He says that as per the CBA, he was to be given 1 month's notice period and he was indeed given this notice.

In re-examination he admits he signed App 6 on his performance score card under coercion for score 3 and not 2.65. In relationship to complaints against him relating to app 9 to 15 (Respondent's documents), he indicated that these events occurred in 2006 and he responded to them through his union and the matter was laid to rest. The other matter appendices relate to events that occurred in 2005 and could not have formed the basis of his termination.

The Respondent on the other hand filed their statement of response on 29th August, 2011 through Harrison Oketch, Advocate of the Federation of Kenya Employers. They admitted that the claimant was the Respondent's employee as submitted by the claimant. However in relation to the Claimant's termination, they indicated that the claimant's services were terminated for performing below expected standards in 2007, 2008 and 2009, despite a number of warnings and notices to improve.

That in 2008, the claimant was informed of his poor performance and had a meeting with his Line Manager to resolve the same and agree on an improvement plan. The claimant did not however improve and instead his performance remained below expectation. In 2009, August, he was issued with a warning letter for unsatisfactory performance. When he did not improve, his services were terminated in terms of the applicable CBA and terms of employment.

Apart from poor performance, the Respondent contends that in the year 2005/2006, the claimant had also been involved in some indiscipline conduct due to irregular payment of cash and cheque.

Having considered the evidence of both parties, I do find that indeed the claimant was employed by the Respondent as a Clerk. The issue is whether the reasons adduced by respondent could warrant the dismissal of the claimant. There is the issue of performance being below the standard required. Some of the poor performance goes back to 2005 and yet the claimant was allowed to work up to 2010 when he was dismissed. The Respondent contends that they gave claimant a hearing before dismissing him.

Section 41 of the Employment Act indicates how this hearing should be conducted. The said Section states as follows:

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

Though issues of poor performance could have been brought to claimant's attention, the hearing as envisaged by law was not granted to him.

Under Section 45 of the Employment Act,

“(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) *related to the employees conduct, capacity or compatibility; or*

(ii) *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

(a) *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”*

Given this, I find the dismissal was unfair as fair procedure were not followed. I convert the claimant's termination into a normal one.

What remedies then is the claimant entitled to? I find that the claimant is entitled to the following remedies which I accordingly award:-

1. 12 months compensation for unfair and wrongful termination
= 142,919.25 x 12 - Ksh.1,715,028/=
2. 1 month salary in lieu of notice - Ksh.142,919.25/=
- TOTAL - Ksh.1,857,947/=**
3. Claimant be issued with Certificate of service.
4. Respondent will also pay costs of this suit.

Signed, dated and delivered in court at Nairobi this 14th day of December, 2012.

HELLEN WASILWA
JUDGE

Appearances:

Onyango holding brief for Nyabena

Nyakundi & Company Advocates

for Claimant

Omolo holding brief for Molenje of FKE
Ms. Rachael Gichuki

for Respondent
Court Clerk