



Employment Law

- *Master is entitled to dismiss a servant who willfully disobeys his master's lawful and reasonable order*
- *The only remedy for breach of contract of employment is damages*
 - *Damages payable are equivalent to notice period*
 - *Claim for special damages ought to be particularized.*

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

Civil Suit 998 of 2001

**SIMON P W KARIMIPLAINTIFF
VERSUS
KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT
SAVINGS & LOAN KENYA LIMITED.....2ND DEFENDANT
J U D G M E N T**

The plaintiff's claim against the defendants is for damages for wrongful dismissal, for an order for payment of early retirement dues and in the alternative an order for reinstatement of the plaintiff in to the defendant's employment.

The plaintiff's plead the following matters; that the following matters; that the plaintiff was appointed into the 1st defendant's employment on 17th day of August 1979 as an officer trainee, and was confirmed by the letter dated 8th September 1980; that in July 1991 the plaintiff was transferred from the 1st defendant's Tom Mboya's branch to the 2nd defendant as its operations manager; that on 22nd April 1993, whilst the plaintiff was working at the 2nd defendant's office, without reasonable cause and in breach of the natural justice the defendants unlawfully dismissed the plaintiff from employment. Hence the plaintiff seeks to be compensated as aforesaid.

The plaintiff in his testimony stated that he graduated from the Nairobi University in 1979 with Bachelor of Science in Mathematics. The plaintiff secured employment with the 1st defendant a a probationary officer trainee. The plaintiff was confirmed within twelve months as a bank officer. That during his 13/14 years of employment with 1st defendant the plaintiff was transferred to nine different branches of the 1st defendant, namely Thika, Kisumu, Mumias, Kisii, Kikuyu, Meru and Tom Mboya branch in Nairobi. In 1991 the plaintiff was transferred to the 2nd defendant. The 2nd defendant is a subsidiary of the 1st defendant. The plaintiff worked at the 2nd defendant as an internal auditor a position that led him to 'step on many toes', including those of his supervisor. The chief operations manager of the 2nd defendant was Mr. Gachogu. The plaintiff stated that his relationship with the said Mr. Gachogu became sour. Mr. Gachogu, according to the plaintiff's testimony threatened to transfer the plaintiff, as result of their sour relationship; this was in October 1992. The plaintiff in November 1992 applied for leave and the same was approved by the 1st defendant, which was approved to start on 30th November 1992 to 5th January 1993. The plaintiff in evidence said that, the dates of

leave were amended to end on 11th January 1993. Whilst on leave the plaintiff received instructions to go on transfer to Voi branch of the 1st defendant. There were two impediments that the plaintiff mentioned that prevented him from going on the said transfer on the due date. Firstly the plaintiff stated that the date of reporting at Voi branch was the same date he was due to report back after his leave, and accordingly he would not have been able to handover his duties to a person called Maingi, secondly Maingi did not report at the 2nd defendant's office by the said date of 11th of January 1993; thirdly the person who was being transferred from Voi branch was due to report at Homa Bay branch on 11th January 1993. The plaintiff therefore stated; "so it was not effectively possible to effect transfer because there were a number of gaps of days." The plaintiff therefore decided to appeal against the transfer. That he called upon the general manager on 14th January 1993 to appeal against the transfer and thereafter continued to work at the 2nd defendant's office until 12th February 1993 when Mr. Gachogu by a memo of that date released him to report to his new place of work. That memo of release provoked the plaintiff to write a letter dated 15th February 1993, addressed to Mr. Gachogu. The letter contained matters that were a concern to the plaintiff, but which I consider are not relevant to the issues before court. However in relation to the transfer to Voi Branch the following extract of that letter are relevant: -

"Judging, purely from the working relationship that had developed between us before and after my proposed transfer to Voi I am convinced that you consider my transfer as a punishment and you will therefore pride yourself for it for ever. I will deny you such a chance at all costs.....consequently I decline to take my transfer to Voi branch since by doing, I will be compromising my principles..... I will however be willing to take my transfer within Nairobi area.....for the time being I will consider a transfer outside Nairobi as punitive."

This letter dated 15th February 1993, was what the plaintiff stated was his appeal against the transfer to Voi. In regard to the memo of Mr. Gachogu, the plaintiff said since the 2nd defendant was not his employer, he could not obey his orders on when to report to Voi, he also termed the memo as malicious. The plaintiff said, **"I waited for instructions from the 1st defendant"**. The plaintiff continued to work at the 2nd defendant on 16th to 17th February but was on sick off on 18th to 21st February 1993. When he reported back at the 2nd defendant, the plaintiff was informed that his matter was being handled by the 1st defendant, on reporting there the human resource manager, Mr. Lasoi told the plaintiff to return in view of his letter dated 15th February 1993 to await further instructions. Plaintiff received salary for February and March 1993. On 22nd April plaintiff received a letter from the 1st defendant, which in part stated

"We note that todate you have not reported for duty at Voi branch as instructed. On your appeal, we advised you that your request would be looked into after you have reported at your new station. In spite of our advice, you did not report for duty. In view of this, it has been taken that have deserted your employment....."

Plaintiff, in regard to this letter said, that he was not given an opportunity to explain, he was not referred to the disciplinary committee and that no one complained that he was away. He denied that he had been advised to report to his new station whilst awaiting the appeal and said that the decision to terminate his employment was vindictive malicious and without basis. The plaintiff then narrated how he suffered as a consequence of the termination of his employment, that his professional life was ruined, he has been jobless since, that his career was terminated yet it was on the rise and he sought that on the court ordering for his reinstatement, that the court should take into consideration the career paths of two other employees, Ngatia and Towett. Plaintiff also stated that the defendant had failed to pay terminal dues as per contract and failed to pay him according

to the pension scheme. His dismissal he said had injured his credit standing and yet he had to meet educational needs and other financial needs.

The plaintiff claims in the plaint, for reinstatement into the defendant's employment; damages for wrongful dismissal, and payment of early retirement dues based pension Rules of early retirement.

The defence did not call any evidence.

The plaintiff by the letter of appointment, dated 17th August 1979, was required to accept transfer to wherever the 1st defendant required him to serve. Paragraph 14 of that letter stated.

“You will initially be required to serve at our Thika branch, but it is a condition of the employment that should the bank so desire, you may be called upon to serve in any other place and in any capacity as the bank shall from time to time direct.”

The plaintiff accepted all the terms and conditions of the said letter of appointment and signified that acceptance by his signature thereof.

By a letter dated 31st December 1992 written by the 1st defendant's General Manager, the plaintiff along with several other officers of the 1st defendant were informed, that they were being transferred to various branches of the 1st defendant, and each officer had indicated next to his/her name, the station to which there were being transferred, the duties they were being assigned to do and the effective date of reporting. In regard to the plaintiff, he was transferred to Voi as a manager and his effect date of reporting was 11th January 1993. The letter stated.

“The following officer posting have been decided upon and should be implemented as indicated. Any variation of these dates must have head office written approval.”

The plaintiff has not produced to this court any written approval to vary the transfer. The plaintiff instead gave various reasons why he could not report to his station of transfer but to me it does seem that the plaintiff was obligated after the letter of release, of 12th February 1993, to have reported at Voi branch, but the plaintiff refused to do so. His letter of 15th February 1993 is clear in this regard, as follows: -

“Consequently I decline to take my transfer to Voi Branch since by doing, I will be compromising my principles, and I will betray.....the same systems that I worked hard to protect.”

In the case of KONIG – VERSUS – KANJEE NARANJEE PROPERTIES LIMITED [1968] EA 233 LAW J.A. stated:

“A master is entitled to dismiss his servant summarily for willful disobedience of his master's lawful and reasonable orders, which is his duty to obey.”

This case is pertinent to the facts of our case in that the plaintiff clearly was ordered to go for transfer to the Voi branch, he was released from his employment with 2nd defendant on 12th February 1993 and ought to have reported at the Voi branch by 15th February. The plaintiff did not get any written variation of the orders to transfer and therefore can clearly be said to have disobeyed his master's lawful and reasonable orders.

I therefore cannot find that the defendants in any manner breached the contract of employment. The plaintiff failed to obey the order and consequently as per section 17 of the Employment Act the defendants were entitled to summarily dismiss the plaintiff.

I accept the defendant's submission on the position of law in regard to specific performance of contract of employment as being correct. Indeed the only remedy for breach of contract of employment is a claim for damages. The case of OKONGO – VERSUS – ATTORNEY GENERAL & ANOTHER 1998 KLR 742 held that:

“At common law, by which this court was guided on contract, specific performance of a contract of service has never been ordered because the court has felt it impossible to force the services of an employee onto an employer, when the latter has lost all confidence and trust in the employee.”

That being the position of law where there is found to be breach of contract of service the only remedy an employee has is to claim damages, and damages so claimed cannot be damages at large, they are to be calculated in accordance with the terms of the contract. That is, where the contract provides period of termination the damages payable is the salary equivalent to that period. See the case of ADDIS – VERSUS – GRAMOPHONE [1909] A.C. 483, where it was held: -

“If there is a dismissal without notice, the employer must pay an indemnity; but the indemnity cannot include compensation either for injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.”

From that decision it follows that the plaintiff would not be entitled to claim damages for injured credit standing and reputation or for any other injury.

The plaintiff claimed that his compensation ought to be up to the retirement age because, as he said, the contract of employment does not provide for termination. Section 14 of the Employment Act provides that where a contract of service does not provide for the period of termination, the same can be terminated, where the salary is paid on monthly basis, within 28 days. Section 14 (5) (iii) provides:

“Where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract terminable by either party at the end of the period of twenty eight days next following the giving notice.”

The contract of service between the plaintiff and the 1st defendant could be terminable by the giving of 28 days notice. It is therefore not correct to say that the plaintiff had security of tenure.

The plaintiff's claim for payment according to the pension scheme is itself a claim in special damages. The plaintiff should indeed have particularised that special damage for him to succeed in his claim. See COAST BUS SERVICES LTD – V – NDANYI CIVIL APPEAL NO. 192 OF 1992 (unreported).

The end result is that the plaintiff has failed to prove on a balance of probability his claim. The plaintiff's case is therefore dismissed with costs to both defendants.

Dated and delivered this 19th day of August 2005.

**MARY KASANGO
JUDGE**