



**Ochieng v NCBA Bank Kenya PLC (Cause E630 of 2022)
[2024] KEELRC 1823 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1823 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E630 OF 2022**

**SC RUTTO, J
JULY 12, 2024**

BETWEEN

JOSEPH MKWANAH OCHIENG CLAIMANT

AND

NCBA BANK KENYA PLC RESPONDENT

JUDGMENT

1. It is common ground that the Claimant was employed by the NIC Bank Kenya with effect from 7th January 2013. The contract of employment was for one year. Subsequently, with effect from 2nd July 2014, the Claimant was employed on permanent and pensionable terms of service.
2. All seemed well in the employment relationship until sometimes in September 2019 when the NIC Bank and the Commercial Bank of Africa (CBA) entered into a merger resulting in the formation of NCBA Bank Kenya, the Respondent herein. According to the Respondent, the undertaking, business, business and assets of NIC Bank were transferred to the Respondent with effect from 1st October 2019.
3. It is the Claimant's case that on or about 30th September 2019, the Respondent purported to unfairly terminate his employment without any notice following the aforementioned merger between NIC Bank and CBA. Consequently, he claims *inter alia*, the sum of Kshs 2,296,770.00 against the Respondent being compensatory damages for unfair/unlawful termination, severance pay, accrued leave for the years 2019, and one month's pay in lieu of notice. The Claimant has further sought damages for discrimination and harassment.
4. Opposing the claim, the Respondent avers that as a consequence to the merger, a tripartite agreement was entered into between NIC Bank, CBA and the Respondent and the employees of NIC Bank and CBA who agreed to transfer their employment to the Respondent on comparable terms.
5. It is the Respondent's case that the Claimant was offered employment by the Respondent under the terms of a new employment contract and the tripartite agreement to continue his employment with the



Respondent. That the Claimant rejected the new terms of the tripartite agreement and the new offer of employment on the basis that the merger between NIC Bank and CBA would bring an increased customer base and added responsibilities.

6. It is the Respondent's contention that by his conduct, the Claimant resigned from the employment of NIC Bank and there is no basis for the allegation that he was dismissed from employment. In the Respondent's view, the Claimant is not entitled to any of the prayers sought in the Statement of Claim and as such, has asked the Court to dismiss the claim with costs.
7. During the hearing which proceeded on 18th March 2024, both parties tendered oral evidence in support of their respective cases.

Claimant's Case

8. The Claimant testified in support of his case and for starters, he sought to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed alongside the Statement of Claim as exhibits before Court.
9. It was the Claimant's evidence that on or about 29th September 2019, he received an email from the Group Director Human Resource of NIC Bank Kenya informing him of the merger between NIC Bank Kenya and CBA into NCBA Group, the Respondent herein.
10. That vide the same email, he was also sent a letter of offer of employment and a letter on transfer of undertakings, business and assets of NIC Bank to the Respondent. Both letters were dated 30th September 2019 and he was required to sign both unconditionally and return them by close of business on 30th September 2019.
11. Under the transfer of undertakings letter, it was stated that his employment with NIC Bank had been terminated as of 30th September 2019 by 'mutual consent' without the necessity of a termination notice or payment instead of notice together with any redundancy entitlements or termination benefits.
12. According to the Claimant, this surprised him since he never consented to the terms as there were no prior discussions with NIC Bank touching on any changes that would be made to his contract of service due to the merger. Further, the Bank never sought his opinion as to whether he would be agreeable to working for the new entity, the Respondent, under similar terms he had.
13. On 30th September 2019, he responded to the Group Director Human Resource's email with reasons as to why he had not accepted the new offer. He also indicated that he would wait for the Bank's response as he believed there was need to negotiate the terms of the offer of employment dated 30th September 2019. The Bank chose not to respond thus affirming his termination as at 30th September 2019.
14. The Claimant further averred that as the Respondent was unwilling to consider his views, via his email of 30th September 2019 and noting that the Respondent had already taken over NIC Bank as at 1st October 2019, he wrote a letter dated 14th October 2022 to the Respondent seeking among other things, his terminal benefits being notice pay, severance pay, leave pay and service pay.
15. The Respondent ignored the same and refused to pay any benefits accruing to him as a result of his involuntary loss of employment at the initiative of the Respondent through none of his fault.
16. The Claimant further averred that the Respondent not only subjected him to acute discrimination by treating him differently from his former workmates but also harassed him in respect of the terms and conditions of employment; and unfair termination of his employment without notice or payment of terminal benefits.



17. According to him, the harassment by the Respondent has continued to date since he had a staff loan at the time of his termination which the Respondent has continued to demand from him despite the fact that the Respondent ought to have speedily computed his benefits less the staff loan or pursuant to his proposal vide his letter dated 14th October 2019.
18. It is the Claimant's contention that the Respondent has continued to unjustifiably apply interest on the said staff loan despite knowing that he is not in any gainful employment.
19. In closing, the Claimant asked the Court to allow his claim as prayed.

Respondent's Case

20. The Respondent called oral evidence through its Senior Legal Counsel, Ms. Christine Wahome who testified as RW1. Similarly, she adopted her witness statement and the initial list and bundle of documents as well as the supplementary list and bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
21. RW1 testified that before the tripartite agreement was concluded, NIC Bank notified, engaged, and consulted all its employees, including the Claimant, on the amalgamation process and its possible impact on their employment contracts.
22. The employees were well-informed of the amalgamation process and were assured severally that their employment contracts would not be affected by the amalgamation process.
23. Consequently, the undertaking, business, and assets of NIC Bank were transferred to the Respondent with effect from 1st October 2019.
24. The Claimant was offered employment by the Respondent under the terms of a new contract and the tripartite agreement. In order to be transferred to the Respondent, the Claimant was required to sign both the tripartite agreement and the offer of employment contract.
25. The Claimant rejected the terms of the tripartite agreement and the new offer of employment on the basis that he could not accept the offer on terms comparable to his employment contract with NIC Bank.
26. According to RW1, the Claimant was the only NIC Bank employee who declined to sign the tripartite agreement and the Respondent's offer of employment. However, following the Competition Authority of Kenya's precondition for approving the merger that no redundancies would be effected within a period of 12 months from the date of closing of the transaction, NIC Bank could not declare the Claimant redundant.
27. In RW1's view, the Claimant, by his conduct, resigned from the employment of NIC Bank and there is no basis for the allegation that he was dismissed from employment.
28. RW1 further stated that the entire process leading to the amalgamation and subsequent transfer of employees from NIC Bank and CBA to the Respondent was conducted in accordance with all applicable laws and was above board.
29. She further averred that the Claimant was never treated any differently from his colleagues. That during the amalgamation process, NIC Bank applied uniform policies to all its employees.
30. That further, the Claimant was provided with sufficient information through periodic meetings and correspondence, as with all other employees, about the amalgamation process and the fact that his employment was secure.



31. RW1 further averred that the Claimant has not provided proof of the particulars of discrimination, harassment, or inequitable treatment. In her view, if such particulars are proved, they would not be attributable to the Respondent.
32. She further stated that the Claimant in the course of his employment with NIC Bank received a loan facility through a Staff Loan Policy under terms and conditions agreed upon by the parties by virtue of his employment with the NIC Bank. That the Respondent is obligated under the loan agreement, in the event of default, to commence recovery action for the outstanding balance against the Claimant.
33. In RW1's view, the issuance of demand letters to the Claimant, as a loan defaulter, to pay up the outstanding loan amounts cannot amount to harassment.
34. She maintained that the Claimant was duly obligated to pay the loan amount, including the agreed monthly installment amounts, as and when they fell due, the fact of his unemployment notwithstanding.
35. According to RW1, the Claimant was not entitled to terminal dues having, by his conduct, resigned from the employment of NIC Bank.

Submissions

36. It was the Claimant's submission that the Respondent deliberately failed to give him a termination notice in writing as required by his contract of employment and Section 40(1)(a) *Employment Act*.
37. The Claimant further submitted that the Respondent failed to meet the procedural fairness requirement outlined by Section 40 thereby causing unfair termination contrary to Section 45(2)(c) of the *Employment Act*. The Claimant further argued that the Respondent (through NIC Bank) also lacked any valid or fair reason to summarily terminate his contract without any notice yet there was no gross misconduct. In support of the Claimant's submission, reliance was placed on the case of *Janine Buss vs Gems Cambridge International School Limited* (2016) eKLR.
38. The Claimant maintained that the Respondent unfairly terminated his employment by failing to follow lawful termination procedures which demand both procedural and substantive fairness before an employee is dismissed/terminated.
39. It was the Claimant's position that he was harassed and discriminated against by the Respondent. To buttress his submissions, the Claimant placed reliance on the provisions of Section 5 (3) and (7) of the *Employment Act* and the case of *Geeta Joshi vs Pandya Memorial Hospital* (2019) eKLR.
40. On the Respondent's part, it was submitted that there is no legal foundation for the Claimant's claim that his employment was terminated unfairly. On this score, the Respondent maintained that it did not terminate the Claimant's employment and that he left employment on his own volition.
41. The Respondent further submitted that the Claimant had a thorough knowledge of the amalgamation process.
42. It was the Respondent's position that the Claimant voluntarily left his employment by rejecting the terms of the offer of employment, which is equivalent to resignation by conduct, and that he cannot be allowed to benefit from his decision to reject employment given that he was involved through the amalgamation process both directly and through his union representatives and was aware of the proposed terms of employment.
43. According to the Respondent, the transfer of the Claimant's employment (including the years served) to the Respondent did not result in the termination of his employment. In the same breath, the



Respondent argued that the purpose of the transfer of the Claimant's employment was to guarantee its continuation and certainty, and the Respondent should not be punished for the Claimant's refusal of the offer. The Respondent cited the case of *Elizabeth Washeke & 62 others vs Airtel Networks (K) Limited & Another* (2013) eKLR to buttress this argument.

44. With respect to the Claimant's assertions of discrimination and harassment by the Respondent, it was submitted that the Claimant failed to submit evidence to support his claims and did not contest the fact that he had defaulted on his loan obligations to the Respondent.
45. The Respondent further argued that the Claimant by his own choice is not its employee and cannot benefit from preferential interest rates, which are employment benefits.

Analysis and Determination

46. Flowing from the pleadings on record, the evidentiary material before me and the rival submissions, the following issues stand out for resolution by the Court: -
 - i. Whether the Claimant was terminated from employment;
 - ii. If terminated, was the Claimant's termination fair and lawful?
 - iii. Whether there is a case of discrimination and harassment;
 - iv. Is the Claimant entitled to the reliefs sought?

Whether the Claimant was Terminated from Employment

47. Before I delve into this issue, I need to address a question raised by the Claimant in his submissions in which he has urged that the Respondent's pleadings be struck out on account of lack of authority by the Advocates on record to represent the Respondent and lack of authority on the part of RW1 to testify on behalf of the Respondent.
48. In support of his proposition, the Claimant has sought to rely on a number of authorities which I must say with due respect, relate to the institution of suits as opposed to the defence of suits.
49. In any event, I find the Claimant's argument to be majorly anchored on mere technicalities that do not affect the substance of this suit. If I may say, the Claimant's arguments are contrary to the spirit of Article 159(2) (d) of the *Constitution*.
50. Ultimately, I dismiss the Claimant's argument and I now proceed to consider the first issue for determination which is whether the Claimant Was Terminated From Employment.
51. It is the Claimant's case that on or about 30th September 2019, the Respondent terminated his employment unfairly. Disputing this assertion, the Respondent has averred that the Claimant rejected the terms of the tripartite agreement between NIC Bank, CBA and the Respondent and the new offer of employment. According to the Respondent, the Claimant resigned from the employment of NIC Bank by his own conduct.
52. It is unequivocal that the dispute herein stems from the merger between the NIC Bank and CBA. Testifying under cross-examination, the Claimant stated that he was offered employment with the Respondent and that he rejected the offer when he received it.
53. The Claimant further confirmed during cross-examination that there were discussions within the departments leading up to the merger. His contention was that the Human Resource office did not take his reservations.



54. In his email of 30th September 2019, the Claimant rejected the offer of employment with the Respondent as follows:

“Dear Monicah,

I am greatly humbled by your offer.

However, I am unable to accept the terms of the offer for the reasons that I harboured different expectations in terms of my package and/or position. The merger comes with added responsibilities in terms of increased customer base and it would only make much sense if the current remuneration, benefit and role which I have held for over five years were upped reasonably.

I appreciate being part of NIC Bank PLC for over 6 years which saw me grow commendably and would have loved to be part of the merged family.

I look forward to your kind response on my decision and wish the NCBA Bank all the very best as it officially begins operations on 1st October 2019.

Kind regards,

Joseph Ochieng.”

55. It is worth noting that the Claimant did not indicate that he was rejecting the offer for want of consultations. His only contention at that point in time appeared to be his expectations with regards to the package he was being offered on grounds that he was anticipating an increased workload.

56. It is further discernible from the Claimant’s email that he did not intend to be part of the Respondent’s employment moving forward. In his words, he appreciated being part of NIC Bank PLC for over 6 years which saw him grow commendably and would have loved to be part of the merged family.

57. The long and short of it is that the Claimant rejected the offer of employment by the Respondent and with that, he exited employment with the NIC Bank.

58. In this regard, the record bears that the Claimant cleared with the NIC Bank and in his Exit Interview Form, he indicated that he was leaving the NIC Bank to pursue personal interests. Indeed, he did not cite lack of consultations on the merger process between the NIC Bank and the CBA.

59. It is trite that in order to sustain a claim for unfair termination, the Claimant was required to prove the fact that he had been terminated from employment. This is the position under Section 47 (5) of the *Employment Act*, which provides as follows:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.” Underlined for emphasis

60. Expounding on the import of the above statutory provision, the Court of Appeal had this to say in the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR: -

“So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): ”to prove the



reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.” Underlined for emphasis

61. Fundamentally, the burden was on the Claimant to prove that he had been terminated from employment. Applying the provisions of Section 47(5) of the *Employment Act* to the case herein, it is apparent that the Claimant has failed to discharge his burden by proving the fact of termination. In the circumstances, he cannot lay a claim for unfair termination.
62. If I may say, the Claimant is the captain of his own misfortunes. I say so because he was offered employment by the Respondent on the same terms he had with the NIC Bank but he declined to take up the offer. Effectively, he exited employment with the NIC Bank and did not take up employment with the Respondent. As such, he cannot lay blame on the Respondent for being out of employment.
63. The upshot of my finding is that the Claimant has failed to discharge the burden under Section 47(5) of the *Employment Act*, by proving that he was indeed terminated from employment by the Respondent or NIC Bank for that fact.
64. All in all, I find that the Claimant was not terminated from employment.
65. Having determined as such, it is not logical to determine the second issue identified for determination as it falls by the wayside.

Discrimination and Harassment?

66. The Claimant has pleaded that the Respondent discriminated against him in respect of his terms and conditions of employment and termination of his employment without notice and pay.
67. The *Black's Law Dictionary*, (10th Edition), defines the term “discrimination” to mean: “Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”
68. In the case of *Barclays Bank of Kenya Ltd & Another vs Gladys Muthoni & 20 Others* [2018] eKLR, the Court of Appeal held that arbitrary discrimination in the workplace is outlawed at the highest level of the *Constitution* and has always been. Therefore, a claim of discrimination is a serious claim that must be supported by evidence.
69. In this case, the Claimant's assertion that he was discriminated against by the Respondent, was not backed by any evidence. I say so because, the Claimant did not, for instance, indicate let alone suggest that any of his counterparts at the NIC Bank was offered more favourable terms with the Respondent compared to him. In any event, he was being offered employment with the Respondent on the same terms he was enjoying with the NIC Bank. The terms were not less favourable. What's more, during cross-examination, the Claimant admitted that he did not have evidence of discrimination.
70. In the circumstances, it is my finding that the claim for discrimination has not been substantiated hence it collapses.
71. With respect to the claim for Harassment, the Claimant avers that the Respondent required him to sign a letter of offer without an option of perusing and discussing the terms thereof within less than a day or face termination. Revisiting the Claimant's email of 30th September 2019, it is apparent that he did not indicate that his refusal of the terms of the offer was due to the fact he had not had time to consider the same. If anything, he appeared to have considered the terms of the offer and made the decision to reject the same.



72. Still on harassment, the Claimant has pleaded that the Respondent harassed him after termination by constantly demanding payment of loans while knowingly withholding his terminal dues.
73. A review of the Claimant's contract of employment reveals that he was entitled to staff loan facilities. Notably, the offer of employment with the Respondent similarly provided that he was to be entitled to loans within the prevailing staff loan policy. Logically, as the Claimant rejected the offer of employment with the Respondent, the staff loan terms could not subsist.
74. In any event, the Claimant did not deny that he had an existing loan facility with the NIC Bank. Following the merger, the said loan was taken up by the Respondent Bank and this being the case, the Respondent is entitled to claim repayment of the loan from the Claimant. By all means, this cannot be termed as harassment.

Reliefs?

75. As the Court has found that the Claimant was not terminated from employment, the claim for compensatory damages and notice pay cannot be sustained.
76. Equally, the claim for severance pay is declined as there is no finding that the Claimant was declared redundant. Indeed, one of the conditions spelt out by the Competition Authority of Kenya in approving the merger, was that there would be no redundancies within 12 months of closing the transaction. Therefore, there was no way the Claimant would have been declared redundant. In any event, the Court has found that the Claimant has not proved that he was terminated from employment either by NIC Bank or the Respondent.
77. Similarly, the claim for general damages for discrimination and harassment is declined as the Court has found that the Claimant has failed to prove that he was discriminated against and harassed by the Respondent.
78. The only claim that succeeds is with respect to leave pay as the same is an entitlement under Section 28 of the Employment Act and is independent of the Claimant's termination or otherwise. Regardless of the manner in which the Claimant exited employment, he remains entitled to the leave earned while in employment with the NIC Bank. This is further noting that the Respondent has not availed the Claimant's leave records in accordance with its obligations under Section 74 (1) (f) of the Employment Act. To this end, the Claimant's leave pay shall be prorated.

Orders

79. In the final analysis, I find that the Claimant has not proved his case to the requisite standard hence the Claim of unfair termination collapses. As the Court has found, the claim only succeeds to the extent of accrued leave which upon being prorated is Kshs. 91,870.80. Interest shall apply on the amount awarded at court rates from the date of Judgment until payment in full.
80. As the claim has substantially failed, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

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STELLA RUTTO

JUDGE

Appearance:



For the Claimant No appearance

For the Respondent Ms. Wangila

Court Assistant Millicent Kibet

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

