

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: MUSINGA (P), KIAGE & GATEMBU,

JJ.A.) CIVIL APPEAL NO. 512 OF 2019

BETWEEN

KENYA COMMERCIAL BANK.....APPELLANT

AND

ROBERT KIMUTAI KORIR.....RESPONDENT

(An appeal from the Decree and Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (J. N. Abuodha, J.) dated 23rd October, 2015

in

ELRC Cause No. 677 of 2013)

***** JUDGMENT OF THE**

COURT

By this appeal, the Kenya Commercial Bank (KCB) challenges the judgment of the Employment & Labour Relations Court (Abuodha, J.) rendered on 23rd October, 2015, by which the learned Judge held in favour of the respondent in the following terms;

1. That the claimant's termination be and is hereby reduced to normal termination as per his contract of service with the consequence that he will be paid salary in lieu of notice as per his contract of service and any other exit

benefits and allowances he would have been entitled to if his services were terminated normally.

2. That the claimant be and is hereby awarded eight months salary as compensation for unfair dismissal.
3. That the claimant be awarded costs.

The respondent had filed a memorandum of claim against the appellant praying for;

- (a) A declaration that their termination of his employment on and upheld on was unfair 'sic', wrongful and illegal.
- (b) An order directing them to reinstate him to his former position in the organisation.
- (c) Payment of salaries, allowances and all other financial dues accruing from the date of dismissal.
- (d) In the alternative and without prejudice to the foregoing prayers, Kshs.99,838 being one month's pay in lieu of notice.
- (e) Damages for wrongful dismissal to a maximum of 12 month's pay amounting to Kshs.1,198,056.
- (f) Costs of the suit.
- (g) Interest on (d), (e) and (f) above.
- (h) Any other relief that this court may deem fit to grant.

The facts leading to the claim were that on 10th June, 1998, the respondent was employed by the appellant as a banking clerk and later promoted to a bank teller. His basic salary started at Ksh.16,579 but increased gradually to rest at Ksh.99,838. On 17th

June, 2011, the appellant dismissed him from duty after he failed to report back to work on time upon taking leave on 3rd May, 2010. The respondent claimed that the appellant's action of firing him was unfair, unreasonable and unlawful because he accounted for the time during which he was absent from work through medical records which showed that he had been ill, suffering from a stress induced ailment. He averred that the medical condition was brought about by a loan that he had taken out with the appellant but whose terms were changed midstream, causing him stress, anxiety and agitation. The respondent claimed that his dismissal from employment was illegal, particulars of illegality being;

- a. Failing to maintain humane working conditions that recognise a human being's susceptibility to illness and as expected by the Employment Act.
- b. Failing to abide by the collective agreement signed with the Finance Union by relieving the claimant of his duties without legal justification.

Further, the respondent alleged that he suffered severe loss and incurred pain as a result of his dismissal, particularised as;

- a. Inability to provide materially for his family.
- b. Psychological torture and low self-esteem from job loss.

c. Stigmatisation when seeking alternative employment.

In his sworn testimony during trial, the respondent reiterated the above stated averments.

In opposition to the claim, the Federation of Kenya Employers (FKE) filed a memorandum of defence on behalf of the appellant. It was admitted that the respondent was employed by the appellant on 10th June, 1998 as a clerical staff. That employment was guided by the Terms and Conditions laid in the Collective Bargaining Agreement (CBA) in force at the time, as well as the General Rules in respect of the Bank Staff. Other terms were as spelt out in the Letter of Appointment. The appellant explained that the respondent applied for leave, which was approved to run from 3rd May, 2010 to 17th May, 2010. However, on 18th May, 2010, the respondent failed to report back to his work station as expected. There was no communication from him or any one as to his whereabouts or his reasons for failing to return to work. The respondent remained absent from his work station from 18th May, 2010 to 12th June, 2010 when the appellant's Manager of Operations wrote a letter to him noting his prolonged absence from duty without lawful excuse and without informing the office of his whereabouts. He was required by the same letter to

report back to the office not later

than 16th June, 2010, failing which he would be considered to have absconded duty and would be removed from the bank's payroll forthwith.

The appellant went on to state that by 16th June, 2010, the respondent had not reported back to his workstation or in any way informed the office of his whereabouts. The appellant's Manager for Operations wrote yet another letter to the respondent in which he observed that the respondent had ignored calls from the office and had failed to inform the office of his whereabouts. The letter informed the respondent that he had been removed from the Bank's payroll for desertion of duty, with effect from 7th June, 2010. On 22nd June, 2010, the appellant's Manager, in charge of the branch where the respondent was stationed, wrote a letter to the HR Manager, Retail Banking and S&L, giving a report of the events concerning the respondent. She concluded by indicating that the respondent had absconded duty and should thus be dismissed from the Bank's services.

On 6th July, 2010, the Manager of Operations for the respondent's branch received an undated letter from one Philip Kipkirui A. Korir, who identified himself as the respondent's

brother. The letter explained that the said Philip had received information on 10th June, 2010, that the respondent had not reported back to work. That he had tracked the respondent and had a meeting with him at their father's home, on 17th June, 2010, whereupon the respondent agreed to report back to work on 18th June, 2010. The letter from the respondent's brother further indicated that as a family they made contact with the respondent on 1st July, 2010, at which point he agreed to see a doctor the following day. The respondent was seen and treated by a Dr. Sitonik at the AIC Litein hospital and was reviewed on 9th July, 2010.

The appellant explained that by the time they received information on the respondent's medical condition, they had already issued him with two show cause letters and the Branch Manager had already given her recommendation for dismissal following his absence from duty for over 20 days. Soon thereafter, the appellant's HR Manager, Retail Banking and S&L, received another letter from the Moi Avenue Branch dated 14th July, 2010, which was forwarding a letter from the respondent's elder brother dated 9th July, 2010, received at the Branch on 15th July, 2010. The

letter was forwarding the respondent's sick sheet and promising
to

present him before the Branch Manager on 16th July, 2010, upon completion of his medical doses and the rest prescribed by the doctor. The appellant recounted that the respondent appealed against his termination vide a letter dated 28th July, 2010, in which he narrated how he “lost himself” and how his brother explained to the Branch Manager his condition. The respondent appealed again vide a letter dated 10th August, 2010, in which he reiterated the reasons he gave in the first letter. He was later issued with a letter which referred to an Appeals Committee Meeting which he attended on 2nd September, 2010. By that letter he was informed that his appeal had been considered but the decision to terminate upheld. The respondent wrote yet another appeal dated 24th September, 2010, but the decision to terminate his employment was affirmed.

The appellant set out the respondent’s disciplinary record, explaining that back in 2003, the respondent was issued with a cautionary letter dated 3rd January, 2003, for performing his duties negligently thereby incurring an overage of Ksh.9,200 which he was unable to account for. The respondent was issued with another cautionary letter dated 16th June 2005 for overdrawing his

account with the appellant, which resulted in a debit balance of

Ksh.45,710.95. On 22nd May, 2006, he was issued with a warning letter for failing to record cheques for Ksh.460,111 and Ksh.1,762,128 in the month of February 2006, which cheques were later found to be fraudulent. Further, the respondent was issued with a cautionary letter dated 21st December, 2009, for giving cheques to third parties without sufficient funds in his account. In the end the appellant prayed that the respondent be ordered to pay it one month's salary in lieu of notice and his suit be dismissed for lack of merit, with costs.

The respondent filed a reply to the appellant's memorandum of defence in which he contended that the letters that were written to him by the appellant were sent to an address that he never used. He questioned why his appeal before the appellant's Appeal Committee was rejected. The respondent claimed that the disciplinary record submitted by the appellant was misrepresented. He admitted having incurred the overage of Kshs.9,200 but explained that it occurred because he had just been posted from another department. He denied having an overdrawn account and issuing cheques to third parties without sufficient funds. Further, the respondent contended that he was

absolved from blame on the

accusation concerning the fraudulent cheques. He contended that according to the CBA, an employee was not supposed to be victimised for past mistakes unless they occurred within intervals of less than 12 months.

At the end of the trial, the learned Judge (Abuodha, J.) delivered a judgment on 23rd October, 2015, holding in favour of the respondent as aforementioned.

The appellant was aggrieved by that judgment and filed this appeal, on 5 grounds which, in summary, are that the learned Judge erred by;

- a) Awarding compensation to the respondent despite holding that the appellant had a valid and justifiable reason to terminate the respondent's services.
- b) Making a judgment that was in contravention of sections 49(4) and 50 of the Employment Act, 2007.
- c) Failing to have regard to the admission by the respondent that he had failed to report on duty.
- d) Failing to appreciate and refer to the appellant's judicial authorities filed in court.

The appellant prays that the appeal be allowed with costs, the impugned judgment and consequential orders be set aside and the respondent's memorandum of claim be dismissed with costs.

During the hearing, learned counsel **Mr. Okeche** holding brief for **Mr. Ouma** appeared for the appellant and sought to rely on the filed written submissions. There was no appearance for the respondent although there were written submissions on record filed on his behalf by the law firm of **Kiruja Mbaya & Company Advocates.**

Submissions made on behalf of the appellant begin by faulting the learned Judge for awarding the respondent compensation when he had converted summary dismissal to normal termination. The learned Judge is further castigated for faulting the appellant's appeal committee for not considering that the respondent could have been suffering from depression, information that was not available when the decision was made to separate with the respondent. It is urged that the impugned judgment is ambiguous and misleading since the respondent never prayed for compensation, which he was awarded, but damages. Counsel contends that the learned Judge was precluded from framing and determining an issue that was not specifically pleaded by the respondent and which was neither denied nor admitted by the appellant. The Nigerian decision in **ADETOUN**

OLADEJI (NIG) LTD

Vs. NIGERIA BREWERIES Plc SC 91/2002 as cited with approval in **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER Vs. MULE & 3 OTHERS [2014] KECA 890 (KLR)** is

cited for the argument that parties are bound by their pleadings.

In opposition to the appeal, the respondent commenced by narrating the history of the matter, stating that the origin of his troubles was a loan facility that he took with his employer, the appellant, for the purchase of a house. He explained that in the course of processing the loan, the appellant changed the conditions for the loan and that caused him anxiety and distress. He decided to apply for leave so that he could clear up his mind and find a solution. While on leave, he fell into depression and was diagnosed with anxiety neurosis, as evidenced by a medical report. The disease, allegedly, affected his ability to function normally including, the ability to return to work on time or to respond to the appellant's inquiries concerning his overstay after the leave ended. The respondent proceeded to state that the appellant was informed about his condition through a letter prepared by his brother, Philip

K. Korir.

It was urged that when the respondent was invited for a disciplinary hearing, he was not issued with an official notice of the time and sitting of the disciplinary panel as contemplated by **section 41** of the **Employment Act**. Further, he was not duly informed of his right to have a fellow employee or trade unionist witness the disciplinary hearing. Thus, the respondent contended that the disciplinary hearing was substantially and procedurally unfair. He further questioned why the appellant did not interrogate and controvert his medical report which, according to him, justified his late return to work. While defending the decision of the learned Judge, the appellant argued that his dismissal was unfair pursuant to **section 45(1) (4)** of the **Employment Act**. In the end, we were urged to dismiss the appeal with costs.

We remind ourselves that this being a first appeal, we proceed by way of a re-hearing with express obligation to re-appraise and re-evaluate the entire evidence with a view to making our own independent inferences and conclusions. This we have faithfully done, while cognizant that we are not possessed of the advantage the learned Judge had of hearing and observing the witness who testified before him, for which we make due

allowance. See **rule**

**31(1)(a) of the Court of Appeal Rules; SELLE & ANOTHER
Vs. ASSOCIATED MOTOR BOAT COMPANY LIMITED &
ANOTHER [1968] EA 123.**

From the record of appeal and submissions, the single issue that emerges for our determination is whether the learned Judge erred in awarding compensation to the respondent, while he had made a finding that the termination was normal.

The appellant's main contention is that since the learned Judge converted the summary dismissal to a normal termination, there was no basis upon which he could grant the respondent compensation, as he did. On his part, the respondent asserts that his dismissal was unfair and thus the court was right in granting him the remedies for unfair dismissal. In concluding his judgment, the learned Judge decreed as follows;

"13. In conclusion, the court reduces the claimant's termination on account of desertion to normal termination as per his contract of service with the consequence that he will be paid salary in lieu of notice as per his contract of service and any other exit benefits and allowances he would have been entitled to if his services were terminated normally. The Court further awards the claimant eight month's salary as compensation for unfair dismissal."

It would seem, as rightly argued by the appellant, that the learned Judge made ambiguous final orders. Having concluded, and correctly so in our respectful view, that the termination was normal as per the respondent's contract of service, it is perplexing that he then went ahead to award the respondent compensation for unfair dismissal. It is not in dispute that the respondent failed to resume duty upon expiry of the authorised leave of absence, and the appellant proceeded to remove him from its payroll and eventually terminate his services. Indeed, the learned Judge noted as much in his judgment. The learned Judge also observed that the respondent's alleged mental condition was not known to the appellant when it made the decision to dismiss him for absconding duty. The said mental condition was only communicated to the appellant later, when the respondent appealed his dismissal. In the circumstances, we are not persuaded that the respondent was unfairly dismissed. Neither was he entitled to the remedies for unfair dismissal. We think, the learned Judge misdirected himself and fell into error, leaving us with no choice but to interfere by reversal.

Ultimately, we allow the appeal to the extent that the judgment and decree of the Employment and Labour Relations Court is set aside and substituted with an order that, the respondent's termination being a normal termination, he will be paid salary in lieu of notice as per his contract of service and any other exit benefits and allowances he was entitled to as per that contract. Each party shall bear own costs of the appeal.

Dated and delivered at Nairobi this 21st day of November, 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb, C.Arb.

.....
JUDGE OF APPEAL

I certify that this is
a true copy of the
original.

Signed

DEPUTY REGISTRAR