

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO.56 OF 2020

SIYAD

MADEY

MOHAMED.....CLAIMANT

-VERSUS-

NATIONAL

BANK

OF

KENYA

LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. For determination is the Claimant's Amended Memorandum of Claim initially dated 31st January, 2020, and amended on 26th January, 2024. The Claimant seeks the following reliefs:-

- i. A declaration that the Respondent's action of suspending the Claimant is a violation of the Claimant's rights to fair administrative action, fair labour practices, and rights to due process.
- ii. A declaration that the Claimant was an employee of the Respondent up until 28th November, 2021, and is entitled to all the staff benefits and privileges enjoyed prior to the letter of 1st March 2017.
- iii. A declaration that the Claimant's Constitutional Rights have been violated owing to the inordinate delay in hearing and/or determining the Claimant's Appeal

- iv. A declaration that the unsubstantiated allegations and or insinuations that the Claimant forged the Respondent's stamp on his appeal is not only egregious but also a serious violation of the Claimant's rights.
- v. A declaration that the inordinate delay in processing the Claimant's statutory pension benefits was malicious and in bad faith, which was primarily intended to disadvantage the Claimant while at the same time penalizing him for defaulting in the repayment of his staff loan facilities.
- vi. A declaration that all the recovery costs, charges, and interest charged between 1st March, 2021, and 28th November, 2021, were irregular and ought to be reversed
- vii. A declaration that the seizing and auctioning of the Claimant's motor vehicle registration number KBU016U in August of 2018 was illegal and ought to be reversed.
- viii. A certificate of service indicating service until the date of determination of the Claimant's appeal.
- ix. A declaration that the act of the unlawful dismissal and premature termination of the Claimant's employment is a gross violation of the constitutional rights to fair labour practices, fair administrative action, and infringement of the protection offered by Articles 41 and 47 of the Constitution of Kenya to the Claimant.
- x. A declaration that the unlawful discharge and premature termination of the Claimant's employment without pay is a gross violation of the constitutional right to freedom from torture, cruel, inhuman, and

- degrading treatment or punishment offered by Article 25 of the Constitution of Kenya.
- xi. Or in the alternative, an order for immediate Reinstatement with all the benefits for the Thirty Four (34) Months' salary for unlawful and unfair termination of employment from the date of the said dismissal.
 - xii. Unpaid hardship allowance from November 2013 to November 2015 of Kshs. 27,000 per month, adding up to Ksh 675,000/=.
 - xiii. General damages for unfair and unlawful termination of employment
 - xiv. Compensation for unfair dismissal and General damages for violation of the Claimant's fundamental rights and for being subjected to degrading and inhuman treatment by the Respondent.
 - xv. Costs of this cause.
2. The Respondent filed a Response to the Amended Memorandum to the claim dated 29th February, 2024, denying the allegations and further asserting that the Claimant's dismissal was on account of gross misconduct.
 3. The Claimant's case was heard on 20th November, 2024, when the Claimant testified in support of his case, adopted his witness statement, and produced his list and bundle of documents as exhibits in the matter. The Respondent's case was subsequently heard on 29th May, 2025. Mr. Stephen Opiyo Ombogo, the Head of Employee Relations, testified in support of the Respondent's case, adopted his

witness statement, and produced the list and bundle of documents filed in support of the Respondent's case.

4. Submissions were filed for the Claimant and have been duly considered.

The Claimant's Case

5. The Claimant's case is that he was appointed as a cashier by the Respondent on 14th May 2002 on permanent and pensionable terms after a competitive recruitment process. He avers that on 27th November 2013, he was promoted to the position of Relationship Manager for Islamic Banking at a management grade salary of about Kshs. 298,000 per month, subject to six months' probation.
6. The Claimant avers that on 15th January 2014, he was appointed Acting Managing Director of the Respondent's Wajir branch and that he served in that capacity until 22nd December 2014, when he was confirmed as Branch Manager after serving in an acting capacity for over twelve months, contrary to the employer's policy and the Employment Act.
7. The Claimant alleges that he was promoted from Relationship Manager to Branch Manager without a proportional increase in pay, as his salary remained on the same scale despite the higher position. He avers further that he remained in an acting capacity as Acting Branch Manager for 12 months, contrary to the Respondent's Human Resources Manual, and that his 2015 performance

review was unfairly downgraded in a biased and discriminatory manner.

8. The Claimant states that he was not paid a monthly hardship allowance from November 2013 to December 2015.
9. The Claimant states that on 30th January 2017, while on duty, he fell ill and was rushed to Samaad Hospital in Wajir by a colleague, where he was admitted for three days and advised to take an additional three days of bed rest. He avers that he was later readmitted on 6th February 2017 and discharged on 8th February 2017, with a referral to a specialist in Nairobi.
10. It is the Claimant's case that he continued treatment at Aga Khan Hospital, where he was referred to a neurosurgeon for specialized care, with an appointment scheduled for 21st March 2017, of which the Respondent was aware. He maintains that throughout his illness, he kept his line manager and the Human Resources department informed of his whereabouts through email and telephone communication.
11. The Claimant further states that on 6th March 2017, while still unwell and hospitalized in Wajir, he received a text message from the then Regional Manager instructing him to report to the Human Resource department, and that on 15th March 2017, upon visiting the Respondent's

headquarters in Nairobi, he was served with a letter dated 1st March 2017, referring to an earlier letter dated 13th February 2017, which terminated his employment on grounds of alleged absconding of duty.

12. He contends that he was never served with the letter dated 13th February 2017 or any prior notice of the Respondent's intention to terminate his employment.
13. The Claimant states that he appealed his dismissal by a letter dated 17th March 2017, supported by an affidavit and 13 annexures, including medical reports from Kheybar Hospital (2nd and 18th February 2017), Samaad Hospital (6th February 2017), and Aga Khan Hospital (27th February 2017). He avers that in his appeal, he not only challenged the termination but also sought review and compensation for other injustices allegedly suffered in the three years preceding his dismissal.
14. The Claimant contends that the Respondent failed to respond to his appeal for over two years, prompting him to visit the head office in Nairobi, where he was informed that the appeal had not been received. He states that he was advised to resubmit it, which he did by a letter dated 22nd May 2019.
15. The Claimant states that his dismissal was malicious, biased, procedurally and administratively unfair, and in violation of his fundamental rights. He further claims the Respondent deliberately delayed determining his appeal in

breach of its internal regulations, which require disciplinary appeals to be resolved within 30 days.

16. It is his case that he did not abscond duty, as his whereabouts were known to his line manager and the Human Resources Division, as supported by emails dated 2nd and 6th February 2017 from the Branch Operations Manager. He maintains that by a letter dated 24th June 2019, emailed in September 2019, the Respondent informed him that the stamp on his appeal letter was not theirs, allegedly disregarding the substance of his appeal.
17. The Claimant asserts that even if the Respondent had not been aware of his illness, it should have considered and accepted his medical reports at the appeal stage.
18. The Claimant contends that the Respondent terminated his employment in a callous and unjustified manner, without lawful cause and without affording him an opportunity to be heard in his defence. He states that he was never given a chance to respond to the allegations that led to his dismissal and that the decision was unlawful and unconstitutional.
19. The Claimant further asserts that he received no prior warning, whether verbal or written, before being dismissed, and that he has consequently suffered loss and damage for which he holds the Respondent responsible.

20. It is his case that the reasons advanced for his dismissal were unreasonable and had already been addressed in his appeal. He argues that his suspension and summary dismissal were carried out in violation of the Fair Administrative Action Act No. 4 of 2015, Section 45 of the Employment Act No. 11 of 2007, and Article 47 of the Constitution of Kenya, rendering the administrative action unlawful and procedurally unfair. He maintains that he was denied an opportunity to respond to the allegations in the letter recommending his suspension and dismissal, making the process unfair and unconstitutional.
21. He further claims that the Respondent breached his legitimate expectation to continue serving until retirement in accordance with his letter of appointment.
22. In examination in chief, the Claimant told the court that he was dismissed for absconding duty.
23. On cross-examination, the Claimant told the court that the letter of summary dismissal indicated the reasons for his dismissal. It is his testimony that he supplied a medical report to support his absence from work, and that he is not a medical doctor and no medical doctor is a witness in his case.
24. It is the Claimant's testimony that he served medical reports on the Respondent, indicating that he was indisposed. He further stated that his Operations Manager notified the Human Resources office of his whereabouts.

25. The Claimant prays that his claim be allowed.

The Respondent's Case

26. The Respondent states that the Claimant was employed on permanent and pensionable terms as a clerk and was subsequently promoted to Relationship Manager, Islamic Banking, and posted to the Wajir branch. The Respondent further states that the Claimant accepted the terms of his appointment as Relationship Manager, Wajir branch, by signing and returning a copy of the appointment letter.

27. The Respondent further confirms that the Claimant was appointed Acting Branch Manager of the Wajir branch on 15/01/2014 and was later substantively confirmed to that position by a letter dated 22/12/2014.

28. The Respondent denies knowledge of the Claimant's alleged illness and contends that he absconded duty on the material dates, with his whereabouts unknown. It maintains that no evidence of sickness was provided to the Respondent or to the Claimant's line supervisor when requested.

29. The Respondent further states that it issued the Claimant with a Show Cause letter dated 25th January 2017 and a reminder dated 30th January 2017, notifying him of a disciplinary hearing scheduled for 2nd February 2017. It states that the Claimant failed and/or refused to acknowledge or respond to these letters.

30. The Respondent further avers that its Human Resource Department investigated the Claimant's assertion that he was absent due to illness and found that, per information obtained from Madison Insurance Company, the Claimant had not utilized his medical smart card in 2017, and no medical facility had sought preauthorization for his admission, and no reimbursement claim had been made. It states that the Claimant failed to provide any sick sheet to the branch or his line manager to justify his absence, contrary to the Respondent's Leave and Attendance Policy.
31. The Respondent states that it issued the Claimant with a Desertion Notice dated 13th February 2017, requiring him to explain his absence without lawful authority and to report back to duty within five days. It contends further that the Claimant failed and/or declined to respond.
32. The Respondent states that Clause 1.5.2.2 of its Leave and Attendance Policy requires sick leave to be supported by a medical certificate from a registered medical practitioner, and maintains that the Claimant failed to provide such documentation, even after being requested to do so. It avers that owing to the Claimant's alleged failure to comply with the Desertion Notice, it summarily dismissed him by a letter dated 1st March 2017, pursuant to Section 44(4)(a) of the Employment Act, its Attendance Policy (Clause 1.6), and the Employee Relations Policy (Clause 1.5).

33. The Respondent denies ever having been served with the letter of appeal dated 17th March 2017, and states that it only became aware of the purported appeal during a meeting with the Claimant on 21st May 2019, when he provided a copy.
34. The Respondent further states that it observed discrepancies in the bank stamp affixed to the alleged appeal letter and instructed Hawk Eye Technologies Ltd, by a letter dated 14th June 2019, to examine the stamp impression. It states that, according to a forensic report dated 17th June 2019, the stamp impression was made by a different instrument and was therefore deemed a forgery.
35. The Respondent contends that the Claimant never properly lodged an appeal and that any allegation of delay is unfounded. It argues that the appeal was raised as an afterthought when the Respondent sought repayment of outstanding loan arrears, leading the Claimant to file CMCC No. 6917 of 2018, a case that was later dismissed.
36. The Respondent asserts that the Claimant had a history of unexplained and unauthorized absences, and states that he had previously been invited to disciplinary hearings by letters dated 18th January 2016 and 27th October 2016, and was issued with a final warning on 11th November 2016 for similar offences of absconding duty.

37. The Respondent denies the allegation that the Claimant's appeal was deliberately delayed, maintaining that no appeal was ever lodged within the timelines set out in its Separation Policy. It reiterates that no internal regulations were breached and relies on its Separation Policy and the letter dated 24th June 2019. The Respondent further contends that the Claimant absconded duty by failing to provide any sick sheet to his branch or line manager, contrary to its Leave and Attendance Policy.
38. The Respondent further denies that the Claimant was denied an opportunity to respond, asserting that he was given such an opportunity but failed to respond. The Respondent maintains that attempts to communicate with the Claimant were unsuccessful because his email inbox was full and he failed or declined to acknowledge hard copy letters delivered to him.
39. The Respondent maintains that the Claimant breached Clause 1.5.2.2 of its Leave and Attendance Policy and reiterates its earlier position regarding non-compliance with sick leave requirements.
40. In response to the allegations of unlawfulness and procedural unfairness, the Respondent asserts that it fully complied with the Employment Act, the Fair Administrative Action Act, and Article 47 of the Constitution in dismissing the Claimant.

41. It is the Respondent's position that following a disciplinary hearing, it was concluded that the Claimant had demonstrated gross indiscipline and insubordination warranting dismissal, which was carried out lawfully.
42. On cross-examination, RW1 told the court that the Claimant's appeal was heard 9 months after the court had directed that it be heard. It is his testimony that he is not aware of an appeal earlier filed against the decision to dismiss the Claimant.
43. The witness confirmed that the Claimant was alleged to be unwell, but states that he could not confirm the ailment since he had not seen documents supporting the allegations.
44. It is RW1's testimony that the Claimant, having been a Branch Manager, was entitled to Kshs. 27,000 as a hardship allowance.
45. On re-examination, RW1 clarified that the affidavit sworn on 16th March, 2017, does not indicate that the Claimant was admitted to hospital. He further states that no appeal was served upon the Respondent at the time of dismissal, but was served 2 years after the dismissal.
46. RW2, a forensic documents examiner, told the court that he examined stamp impressions given to him by the Respondent and found no agreement between the stamp

impressions and concluded that the stamp impressions were made by different instruments.

47. The Respondent prays that the Claimant's suit be dismissed with costs.

Analysis and Determination

48. Having carefully considered the parties' pleadings, the evidence adduced, and the Claimant's submissions, the dispute narrows down to the following issues:-

- i. Whether the Claimant's summary dismissal was wrongful.
- ii. Whether the Respondent violated the Claimant's Constitutional rights.
- iii. Whether the Claimant deserves the reliefs sought.

Whether the Claimant's summary dismissal was wrongful.

49. Section 41 of the Employment Act requires that an employer contemplating termination/dismissal explain to an employee in a language the employee understands the charges against him/her, accords the employee a hearing in the presence of another employee or shop floor representative, and allows the employee an opportunity to respond to the charges.

50. The Claimant contends that his dismissal was malicious, biased, procedurally and administratively unfair, and in violation of his fundamental rights, on account that the

Respondent deliberately delayed determining his appeal in breach of its internal regulations, which require disciplinary appeals to be resolved within 30 days.

51. It is his case that he did not abscond duty, as his whereabouts were known to his line manager and the Human Resources Division, as supported by emails dated 2nd and 6th February 2017 from the Branch Operations Manager.
52. On its part, the Respondent asserts that it issued the Claimant with a show cause letter and, subsequent thereto, a hearing was scheduled. It maintains that a desertion notice was further issued to the Claimant and that finally, a letter of summary dismissal was issued on 1st March, 2017, pursuant to Section 44 of the Employment.
53. The Claimant denies receiving all the letters issued by the Respondent. The Respondent, as a general rule, bears the burden of proving that the Claimant was accorded a fair hearing before the decision to summarily dismiss him from service was reached in accordance with Section 41 of the Employment Act, 2007, and Article 47 of the Constitution.
54. In ***Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR***, the Court of Appeal held that procedural fairness is mandatory and non-negotiable.
55. From the record, it is evident that no disciplinary hearing took place with the Claimant present. The record, however,

confirms that the Claimant received the letter of summary dismissal dated 1st March, 2017, which he produced in evidence. It is also apparent that the said letter was from the Respondent's evidence sent in the same way as the show cause letter dated 25th January, 2017, the disciplinary hearing notification dated 30th January, 2017, and the desertion notice dated 13th February, 2017, all of which the Claimant denies receipt of.

56. The Claimant was dismissed and summarily so for desertion of duty. In ***Boniface Francis Mwangi v B.O.M Iyego Secondary School [2019] eKLR***, the Court held that: -

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

57. Further, in ***Joseph Nzioka v Smart Coatings Limited [2017] eKLR*** Nduma J. observed that:-

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

58. In my view, the fact that the Respondent issued a show cause notice, an invitation for a hearing, and a desertion notice to the Claimant before summarily dismissing him from their service, is sufficient evidence that the Respondent made effort to accord the Claimant an opportunity to defend himself, but which opportunities the Claimant squandered.
59. It is also not lost on this court that the Claimant failed to prove his assertion that he was ailing, as the medical records were not produced by the doctors who treated him. Further, the Respondent's evidence that the Claimant's medical insurance card/cover was not used in the period the Claimant purports to have been taken ill further casts doubt on his reason for deserting duty.
60. In the premise, I find and hold that the Respondent, in the circumstances of the Claimant's case, has shown that it made attempts to give the Claimant a fair hearing, which in my view renders the dismissal procedurally fair, and so I hold.
61. On whether the Claimant's dismissal was substantively justified, Sections 43 and 45 of the Employment Act, 2007, demand that an employer prove the reasons for termination/dismissal, and further prove that those reasons are valid and fair.
62. The Respondent dismissed the Claimant under Section 44(4)(a) of the Employment Act for absconding duty.

Absence without lawful cause, no doubt, amounts to gross misconduct. The Court of Appeal in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** held that for a termination to be fair, an employer must prove both substantive justification and procedural fairness.

63. The Respondent's position is that the Claimant absconded duty and failed to provide medical documentation to show that he indeed was taken ill and could not report for his duties. The Claimant, on the other hand, states that he was hospitalized and that his whereabouts were known to management through internal emails.
64. Although the Claimant alleged ill health, he failed to prove that he was indeed taken ill, as the medical reports were not produced by the various doctors he alleged treated him. There is also no denying that the Claimant did not at all rebut the allegation of non-utilization of his medical smart card and the lack of pre-authorization from its insurer, or otherwise show that he paid for medical treatment by way of receipts.
65. Additionally, the Claimant did not provide any sick sheets as required under the Respondent's Policy, and did not call the Human Resources Manager, whom he says was aware of his whereabouts, to corroborate his assertions.
66. Finally, on a balance of probabilities, I find and hold that the Respondent has sufficiently discharged the burden under Section 43 to demonstrate that the Claimant had

absconded from duty without lawful cause and therefore justifying his summary dismissal.

Whether the Respondent violated the Claimant's Constitutional rights.

67. In ***Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd [2008] eKLR***, the Court cautioned against constitutionalizing ordinary employment disputes where statutory remedies suffice.
68. The Claimant alleges violation of Articles 41 and 47. Article 41 is directly engaged in employment disputes, and given the finding that no procedural defects were identified, it follows that there was no violation of fair labour practices.
69. Further, the claim under Article 25 is also not supported by evidence before this court. Dismissal, even if unfair, does not amount to torture.
70. Finally, the alleged delay in hearing the Claimant's appeal does not create an independent constitutional violation on the premise that dismissal is already actionable under the Employment Act, 2007.
71. I therefore hold that the Claimant has not sufficiently proved violation of his constitutional rights, and his claim on this account is unfounded.

Whether the Claimant deserves the remedies sought

72. The remedies sought herein, except the claim for hardship allowance, are only tenable upon a finding of an unfair termination or wrongful dismissal. Having found the dismissal lawful and fair, it follows that the Claimant does not deserve the reliefs sought.

73. On the claim for hardship allowance, RW1 admitted that as Branch Manager, the Claimant was entitled to Kshs. 27,000 as a hardship allowance, and the Respondent did not lead any evidence showing this payment.

74. This claim therefore succeeds.

75. In the end, the Claimant's claim partly succeeds, and orders granted as follows:-

- a) A declaration that the Claimant's summary dismissal was lawful and fair.
- b) That the Respondent shall pay the Claimant the unpaid hardship allowance of Kshs. 27,000 per month from November 2013 to November 2015
- c) That the Respondent shall issue the Claimant with a Certificate of service within 14 days of this judgment.
- d) The Respondent shall bear half the costs of the suit.

76. Judgment accordingly.

SIGNED, DELIVERED, AND DATED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2026.

C. N. BAARI
JUDGE

Appearance:

Mr. Lakicha SC present for the Claimant

Mr. Nyamweya present for the Respondent

Ms. Esther s- C/A

ORIGINAL