REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & J. MOHAMMED,JJA)

CIVIL APPEAL NO. 168 OF 2006

BETWEEN

SIMON P.M. KARIMI…….....APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED …….....1ST RESPONDENT SAVINGS & LOAN (KENYA) LIMITED.....2ND RESPONDENT

(Appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (Kasango, J) Dated 19th August, 2005

in

H.C.C.C. No. 998 of 2001

****

JUDGMENT OF THE COURT

The appellant herein, ***Simon P.W. Karimi,*** was engaged in the services of ***Kenya Commercial Bank,*** the 1st respondent, first on probation as an officer trainee as per the contents of the letter of appointment of 17th August, 1979. A total of fifteen (15) terms of engagement were set out and accepted by the appellant as forming a level playing field for both contracting parties. Of these fifteen (15), clause 14 is relevant to the matters in issue herein. It reads:-

"14. You will initially be required to serve at our Thika Branch but it is a condition of this employment that should the Bank so desire, you may be called upon to serve in any other places and in any capacity as the Bank shall from time to time direct."

The acceptance note at the bottom of the said letter of appointment was duly endorsed by the appellant on 21st August, 1979. Clause 1 of the letter of appointment indicated that the appellant would be on probation for a period of twelve (12) months and following successful completion of the probational

period, he would be confirmed in his employment, which confirmation was effected by the 1st respondent letter of 8th September, 1980.

Thereafter the appellant was seconded to Savings and Loan (Kenya) Ltd, the 2nd respondent, till the time he was transferred to the 1st respondent's Voi branch vide the 1st respondent's General Manager's Head Office **circular No.93/3998** dated 31st December, 1992 addressed to all branch managers Kenya Commercial Finance Co. Limited, Savings & Loan Kenya Ltd, Chief Managers, Chief Operating Managers, KCFC and Savings & Loan, Area Managers, Assistant General Managers and Head Office Division Managers. The directive in the said circular indicated clearly that no alteration would be made to its content without authority from the Head Office.

The appellant's name appeared 4th from the bottom at page 4. It was indicated that the appellant was moving from Savings and Loan, Nairobi to Voi to perform the duties of a manager effective 11th January, 1993. It is common ground that the appellant did not honour the directions contained in the specified circular. It was not until the 12th day of February, 1993 when one

R.N. Gachogu, the then Chief Operations Manager, Savings and Loan Head Office, wrote an internal memo to the appellant releasing him from his duties at Savings and Loan with instructions that he reports for deployment at the 1st respondent's Voi Branch effective 15th February, 1993.

The appellant did not take kindly the directive orders issued by the said

R.N. Gachogu. This is borne out by both the tone and content of the letter dated 15th February, 1993. In summary, the appellant appears to have believed that his transfer was a form of punishment for his apparent questioning of shaddy deals carried out at the addressor's work station to which the appellant had flatly refused to be party. He was therefore not willing to give the instigators of the said transfer a chance to rejoice by resolving not to honour the directive issued because according to him, doing so would not only have been tantamount to compromising his principles (personal/professional) but also betraying the good ideals that the system stood for, which he himself had not only all along cherished but stood for and protected.

On the 22nd April, 1993, ***Mr. S.K.A. Lasoi*** wrote a letter to the appellant. The central message in this communication was clearly that since the appellant had defied the management's advice that he does proceed on transfer to the 1st respondent's Voi Branch as the management looked into his request to appeal against that transfer, he was deemed to have deserted his duty and that the appellant's name had thereby been removed from the 1st respondent's pay roll, and he was therefore instructed to surrender back to the 1st respondent any bank property issued to him in his capacity as an employee of the 1st respondent bank. This communication was followed up by another of 20th August, 1993 under the same hand of ***Mr. Lasoi*** informing the appellant that the 1st respondent's work records had accordingly been amended to reflect that the appellant's last working day with the 2nd respondent was 18th February, 1993 on which date he was finally released to report to the 1st respondent's Voi branch on transfer. The appellant's dues from the first respondent were to be calculated upto and including that date.

It was not until the 22nd day of December, 1993 when the appellant filed an appeal against the 1st respondent's actions specified in their communication of 22nd April, 1993 and 20th August, 1993 addressed to a ***Mr. Kaminchia,*** the then Executive Chairman of the 1st respondent. In summary, the appellant reiterated his belief in the letter of 15th February, 1993 that he was being transferred as a punishment for standing up against malpractices in the bank; he had expected the 1st respondent to shield him from such attacks

in view of his good working record with them; complained that although he had honestly relayed to the management the facts of what he believed to have been a true state of affairs, the management had not

found it fit to respond to his letter of 15th February, 1993 and instead, they unjustifiably removed him from the payroll. The conduct of his employers had resulted in hardship and financial embarrassment as he could no longer meet his financial commitments comfortably.

The Executive Chairman responded to the appellant's plea to him vide a letter dated the 24th day of January, 1994 declining to intervene in the manner requested by the appellant.

The 1st respondent having slammed its doors on the appellant's face, he had no alternative but to move to a court of law to seek redress for his grievances. The appellant's first plaint was dated and filed in court on the 21st day of April, 1994. It was amended on the 28th day of March, 2001 and then further amended on the 19th day of April, 2005. In it, the appellant averred, *inter alia,* that by a letter of appointment dated the 17th day of August, 1979 the 1st respondent employed the appellant as an officer trainee in its establishment which appointment was confirmed by a letter dated 8th September, 1980; in or about the month of July, 1991 whilst the plaintiff was working at the 1st respondents' Tom Mboya Street Branch, as its Branch Manager the 1st respondent by a letter transferred the appellant to its subsidiary, the 2nd respondent, as its Operations Manager Head Office; on or about 22nd April, 1993 whilst the appellant was working as the 2nd defendants' Operations Manager Head Office as herein above stated, and without any cause and in breach of natural justice the 1st defendant unlawfully dismissed the appellant from his employment; as a consequence of the matters complained of, the appellant suffered loss and damage for which he claimed against the respondents for an order for reinstatement; in the alternative, damages for wrongful dismissal and payment of early retirement dues based on pension Rules of Early retirement; costs of the suit, interests on (b) and (c) above at court rates and such other relief as the court may deem fit and just to grant.

The respondents' response to that claim is contained in a defence dated and filed on the 26th day of November, 2001. In it, it is averred that it was an express term of the contract of employment that the 1st respondent had with the appellant that the appellant could be called upon to serve the 1st respondent in any capacity, at any branch within the first respondent's wide branch network within the Republic of Kenya at the 1st respondent's sole discretion. On 31st day of December, 1992 it called upon the appellant to serve at its Voi Branch as the Branch Manager but the appellant refused to report to his new place of duty as directed by the 1st respondent and thereby deserted his employment and discharged the 1st respondent from all obligations there under; denied the appellant's averment that he was working as the 2nd respondent's Operations Manager on or about the 22nd April, 1993 but that the appellant was released by the 2nd respondent on the 12th day of February, 1993 to enable him report to his new place of duty as directed by the first respondent but the appellant failed to report to his new place of duty as aforesaid; the 1st respondent conceded to having written the letter dated 22nd day of April 1993 to the appellant but specifically denied that the said letter dismissed the appellant from employment and put the appellant to strict proof.

Further, that the contract of employment was terminated by the appellant's desertion of duty and the 1st respondent's letter of 12th day of April, 1993 merely advised the appellant that by reason of his desertion of duty his name had been removed from the 1st respondent's pay roll and that the appellant was consequently required to make arrangements to meet his indebtedness with the first respondent and surrender his staff identity card; the first respondent denied that the appellant had suffered any loss or damage as a consequence of any act or omission on its part and that no cause of action had been disclosed against the 2nd respondent; there was no contract of employment between the 2nd respondent and the appellant. Lastly, that there was no basis or foundation in law upon which both respondents could

properly be found liable to the appellant in any manner whatsoever; the 1st respondent could not in the result be compelled to reinstate the appellant in his employment, the contract of employment having been terminated by the appellant's desertion aforesaid. In consequence thereof both respondents asked the court to dismiss the appellant's claim against them in its entirety.

A total of five (5) issues were drawn and agreed upon for determination. These were:-

1. ***Was the plaintiff an employee of the 1st defendant on secondment to the 2nd defendant at all the material times?***

2. ***Was the plaintiff dismissed from his employment by the 1st defendant whilst on secondment to the 2nd defendant?***

3. ***Was the plaintiff's dismissal lawful or unlawful?***

4. ***If the dismissal was unlawful, is the plaintiff entitled to reinstatement as prayed in the plaint?***

5. ***Is the plaintiff entitled to any other relief?***

The appellant was the sole witness in his favour. He gave his oral testimony in court and was fully cross-examined. The respondents called no witness because all the documents relied upon by them in support of their defence had been produced in evidence through the appellant. Thereafter parties filed written submissions and authorities. The learned Judge, ***Kasango, J.*** in a judgment delivered on the 19th day of August, 2005 dismissed the appellant's claim in its entirety.

The appellant was aggrieved by that decision and he has appealed to this Court citing eleven (11) grounds of appeal. These are:-

"1. That the Honourable Judge erred in law and in fact in dismissing the case yet the plaintiff's evidence had not been challenged at all.

2. ***That the Honourable Judge erred in law and fact when she held that the plaintiff was lawfully required to obey instructions from the 2nd defendant on matters relating to the employment contract.***

3. ***That the Honourable Judge erred in law and fact when she formed the opinion that a personal letter dated 15th February, 1993 written by the plaintiff to Mr. Gachogu was itself evidence of disobedience of a lawful order.***

4. ***The Honourable Judge erred in law and fact when she failed to appreciate that the dismissal action by the defendants was malicious and discriminative in nature.***

5. ***The Honourable Judge erred in law and fact when she subjected the plaintiff's evidence to a highier degree of proof than is required by the law.***

6. ***The Honourable Judge erred in law and fact when she allowed the defendants to introduce unchallenged evidence through written submission.***

7. ***The Honourable Judge erred in law and fact when she failed to take notice of the fact that the defendants having failed to call any evidence/witness they had actually abandoned their case.***

8. ***The Honourable Judge erred in law and fact when she failed to take notice that since the defendants had not visited the consequence of desertion to the plaintiff within a reasonable time, they had by their conduct condoned the alleged disobedience by the plaintiff.***

9. ***The Honourable Judge erred in law when she did not hold the plaintiff's employment had not come to an end since the defendanthas never issued any notice or salary in lieu of notice and the certificate of service to the appellant.***

10. ***The Honourable Judge erred in law and fact when she failed to hold that the relief that the***

plaintiff was seeking had been granted by the defendants to another member of staff who had similar complaints.

11. ***The Honourable Judge erred in law and fact when she failed to hold that the defendants' action of dismissing the plaintiff was against the natural law of justice."***

In consequence thereof, the appellant prayed for orders that:-

"1. The Honourable Court do allow the appeal.

2. ***The Honourable courts do quash the judgment and orders of the High Court and substitute the same with a judgment that the plaintiff /appellant succeeds in his suit and appeal against the defendants/respondent.***

3. ***The Honourable Court do make an order that the plaintiff/appellant be either reinstated in his employment or be compensated for the unlawful dismissal from his employment and for loss of earnings and opportunity as it deems fit and just in the circumstances of the case.***

4. ***The Honourable Court do award the plaintiff/appellant costs of the suit in the High Court and in this Court"***

At the hearing of this appeal the appellant appeared in person; while the respondents were represented by learned Counsel ***Mr. Chacha Odera.*** In his oral submission to Court, the appellant reiterated the contents of his grounds of appeal conceding the uncontested facts of the suit that he had been an employee of the first respondent; but was thereafter seconded to the second respondent; he recalled having been given instructions by an official of the 2nd respondent to proceed to the 1st respondent's Voi branch on transfer; he responded to that request vide his letter of 15th February, 1993 seeking to appeal against that transfer; he took up the issue verbally with a ***Mr. Lasoi,*** who kept on promising that he would look into the matter and since the appellant wished to have the matter resolved amicably and administratively, he waited; he was also at one time on sick off; and it was not until 22nd April, 1993 when the appellant was told that he had deserted duty. To the appellant, he had not deserted duty as alleged in the letter of 22nd April, 1993 because he received full salary for March; he moved to court to seek the Court's intervention after his appeal to the highiest ranking officer of the 1st respondent, bore no fruits.

Regarding the litigation culminating in this appeal, the appellant contented that he had genuine concerns which he wanted the Court to resolve; he tendered evidence which was not challenged and for this reason, the High Court ought to have allowed his claim. He took issue with the High Court taking sides and playing the role of a defendant when the defence had not challenged his evidence. It was further his argument that all that he was asking for was similar to what had been accorded to a colleague who had faced similar circumstances. Lastly, that the 2nd respondent was drawn into the litigation because the appellant was in its secondment when events

culminating in this appeal arose; it was its officer who gave the directive requiring the appellant to report to Voi branch; the appellant rightly resisted that move because since he was an employee of the 1st respondent he could only heed a directive from the 1st respondent.

The appellant also urged us to be guided by case law cited at the High Court and allow the appeal, reverse the decision of the High Court and grant him the reliefs he had sought in the High Court with costs.

Mr. Chacha Odera, learned counsel for the respondents, opposed the appeal on the grounds that since it was the appellant who had moved to Court seeking relief against the respondents, the law placed the burden of proof on him on a balance of probability to establish his claim, which the appellant failed to discharge. It was ***Mr. Odero's*** further contention that it was not in dispute that the appellant was an employee of the 1st respondent; he executed a contract of employment between him and the 1st

respondent; in this contract the 1st respondent reserved its right to deploy the appellant in any other capacity or station; the 1st respondent exercised that right vide its circular of December, 1992 under which the appellant was required to proceed on transfer to the first respondent's Voi branch; and that the appellant defied that directive as borne out by the contents of his letter of 15th February, 1993. In defence of the learned judge's judgment, ***Mr. Odera*** asserted that the judge was right in holding that the appellant had indeed been transferred but disobeyed the order to proceed on transfer; the facts of the case were straight forward and it was not necessary for the defence to call evidence to counter the obvious, mostly borne out by documentary exhibits produced by consent of both sides; there was sufficient material before the learned judge to enable her arrive at the conclusion that there had been a transfer affecting 78 officers of the 1st respondent; the rest honoured their transfers but the appellant declined and therefore disobeyed.

As for the authorities relied upon by the appellant in support of its case,

Mr. Odera urged us to find that these were distinguishable from the facts that were before the learned judge; and that the judge therefore rightly declined to follow them. As for the alternative reliefs sought by the appellant; ***Mr. Odera*** submitted that these were not proved and were rightly declined.

On case law, the appellant relied on the decision in the case of ***Tobias Ongany Auma & another versus Kenya Airways, Nairobi HCCC No. 4434 of 1992*** (**UR)** wherein ***Mbogholi, J.*** found that the plaintiffs had been unlawfully declared redundant and ordered payment of their salary arrears from the time they were unlawfully declared redundant upto the retirement age; the decision in the case of ***Captain J.N. Wafubwa versus the Hon. the Attorney General Nairobi, HCCC No.674 of 1993*** **(UR)**

wherein the plaintiff had sued for damages for unlawful termination of employment and upon trial ***Hayanga, J***. allowed promotion benefits lost by reason of the employer unlawful withholding promotion of the plaintiff for a period of five (5) years. These were to be paid along side other retirement benefits; the decision in the case of ***Jimmy Morris Ndirangu***

versus Kenya Commercial Bank Nairobi, HCCC No.177 of 1998 in which the plaintiff's grievance arose from a letter he had written to the defendant/employer dated 14th May, 1993 stating clearly that he wished to retire early. There were exchanges of correspondences on the issue between him and the employer over the best option. The employer then accused the plaintiff of unlawfully staying away from duty. The plaintiff moved to Court seeking the Court's intervention. The matter was later settled by consent of the parties and the plaintiff's rightful claims were acceded to by the employer and fully paid.

This is a first appeal. our mandate to reappraise the facts before us and draw inferences of fact and apply them to the relevant law. See the case of

Selle and another versus Associated Motor Boat Company Limited & 2 others [1968] EA123 where in, it was observed thus:-

"An appeal to this Court from a trial Court by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and then draw out its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular this Court is not bound necessarily to allow the trial Judge's finding of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities material to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally."

In the discharge of her mandate, the learned Judge ably evaluated, assessed and analized the evidence before her based on the facts of the case already set out above.

Turning to the law, the learned judge drew inspiration from the decision in the case of ***Konia versus Kanjee Naranja Properties Limited [1968] EA 233*** for the proposition that a master is entitled to dismiss

his servant summarily for unlawful disobedience of his master's lawful and reasonable orders which is his duty to obey; the decision in the case of ***Okongo versus Attorney General & another [1998] KLR 742*** for the proposition that at common law the Court has always declined to grant the remedy of specific performance as the Courts have always found it impossible to force the services of an employee onto an employer when the latter has lost all confidence and trust in the employee; the decision in the case of ***Addis versus Gramaphone [1909]A.C. 483*** for the proposition that 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 suffer from the dismissal or that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.

Applying the above principles to the facts before her, the learned judge drew out the following conclusions:-

1. Since the appellant was ordered to go on transfer to the Voi branch, he was released from his employment with the 2nd respondent on 12th February, 1993 and ought to have reported at the Voi Branch by 15th February, 1993 and since he did not get any written variation of that order he can only be said to have disobeyed his master's lawful and reasonable orders.

2. There was nothing before the learned judge to show that the respondents had breached the contract of employment with the appellant in any manner.

3. Since the appellant had disobeyed lawful directives from his master, the respondents were entitled to summarily dismiss him.

4. Accepted the respondents' submissions on the law as it related to master and servant as asserting the correct position in law.

5. Where there is a breach of master and servant contract, the aggrieved employees' remedy lies in damages but these do not cover damages for injured credit standing and reputation or any other injury and for that reason the appellant stood disentitled to the damages he had claimed for injured credit standing and reputation or any other injury.

6. The appellant's claim that he ought to have worked till the retirement age because the contract he signed did not provide for a termination clause stood faulted because section 14 of the Employment Act provides for termination of employment where the salary paid is on monthly basis. In this regard, the contract of employment between the appellant and the first respondent would be terminable by either side giving the other 28 days' notice.

7. Claim for payment according to the pension scheme which was in itself a special damages claim stood faulted because the same had not been particularized in terms of the principle in the decision of **Coast Bus services Limited versus Ndanyi, Civil Appeal No. 192 of 1992 (UR).**

On the basis of the above observations the learned trial judge dismissed the appellant's claim. The appellant has invited us to overturn the dismissal order as borne out by the eleven (11) grounds of appeal set out earlier. The appellant's complaints in grounds 1, 5, 6 and 7 which are interrelated touch on the issue of the burden of proof. He asserted that his claim should not have been dismissed as his oral testimony in court was unchallenged; his evidence was subjected to a highier degree of proof; the learned judge sneaked in the defence evidence through the respondents' submissions and lastly, that the respondent's failure to call oral testimony should have been treated as an abandonment of their case.

It is trite that the appellant as the prime mover of the litigation under review had an obligation to meet his case as against the obligation of the respondents to dislodge that claim, the learned trial judges' obligation was to weigh the competing interests based on the facts and the law before her and then arrive at the conclusion in one way or the other and give reasons either way. Both **order 21 rule 4** of the Civil Procedure Rules Cap 21 Laws of Kenya and **section 107** of the Evidence Act Cap80 laws of Kenya are very clear on the discharge of these two roles.

Order 21 rule 4 of the Civil Procedure Rules, provides that:-

"***Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decisions";*** where as **section 107(1) (2**) of the Evidence Act Cap 80 laws of Kenya provides as follows:-

"Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Case law has crystallized the principles on the standard of proof in civil litigation. See the case of ***Kituu versus Nzambi [1984] KLR 411*** for the proposition that a plaintiff as the person who would fail in the suit if no evidence were given on either side, the burden lies on such a plaintiff to prove, on a balance of probability his/her claim.

We have applied the above principles to the rival arguments on the appellant's complaints in grounds 1, 5, 6, and 7 and proceed to make findings thereon as follows:-

i. It is evident from the content of the judgment assessed herein that the learned trial judge set out the appellant's claim; analyzed the appellants oral testimony; considered the content of the common documentary exhibits relied upon by either side; considered both law and case law on the subject before arriving at the conclusion reached. We find this mode of approach compliant with the provisions of order 21 rule 4 of the Civil Procedure Rules (supra).

ii. As for the required standard of the burden of proof in civil cases, case law cited above is very clear that this is on a balance of probability. The claimant has an obligation to meet his claim irrespective of whether his/her opponent responds to that claim or not. It is therefore our finding that the respondents' failure to offer oral testimony in their favour did not in any way lessen the need for the appellant to prove his claim against the respondents to the required standard on a balance of probability. We therefore find nothing in the learned trial judge's assessment to suggest that the appellant's evidence was subjected to a highier standard of proof beyond the required balance of probability.

iii. As for the alleged introduction of the respondents' untendered evidence through their submissions, we find this is not borne out by the record. We agree the respondents tendered no oral testimony. The learned trial judge was alive to this fact when she observed thus:-

"The defence did not call any evidence"

The respondents' failure to call any oral evidence cannot be taken to amount to their having abandoned their case. Had this been the correct position, we doubt if the respondents would have participated in the trial and at the end of the appellant's testimony cross-examined him and then also filed submissions. We therefore find that the respondents did not abandon their case. They defended it up to its logical conclusion and the learned trial judge was obligated not to ignore assessing their defence and their submissions which were on the record. The learned judge made note of the following regarding the respondents' defence:-

"Mr. Ougo: in view of consents, we recorded an understanding defendants documents are in evidence. We shall not call any evidence (sic).

Court: for the record, parties have consented to the plaintiff's documents and the defendants' documents to be submitted in evidence. Hence the court adopts that consent."

Both the lists and bundle of documents that either side filed are on record. We note these were similar in

content. The law as set out in **section 67** of the Evidence Act (supra) stipulates clearly that documents must be proved by "***primary evidence"*** except in cases specified in **section 68** of the same Act. By primary evidence, it is meant the document itself produced for the inspection of the court. See **section 65(1**) of the same Act.

From the flow of the evidence on the record, the circumstances surrounding each document were not contested. What was in contest was the appellant's assertion that the conversation between him and one ***Lasoi*** the then Human Resource Manager of the 1st respondent with regard to the appellant's appeal against his transfer were merely verbal. The appellant admitted in his cross-examination that whatever verbal conversation he had with L***asoi,*** went with him to his grave. There was therefore no other material witness that the defence could have called to add value to the documentary exhibits that had been tendered in evidence by consent. In this regard, we find that calling oral evidence by the respondents to prove the contents of the same documents that the appellant had testified on would have not only been unnecessary but a waste of judicial time.

As for admitting the defence evidence through submission, this is what we have traced on the record;-

"***I accept the defendants' submission on the position of the law in regard to specific performance.***" This statement is clear that all that the learned judge had drawn from the respondents' submissions were principles of case law on the subject in controversy. She went further and set these out in the judgment. We have on our own revisited that case law. We agree with the statement put by the learned judge that these state the correct position in law with regard to the real parameters governing the granting of the relief of specific performance in contracts of employment.

With regard to grounds 2 and 3 of the appeal, the appellant's complaint is that, **one**, the learned Judge fell into an error when she held that the appellant ought to have obeyed the directions given by a ***Mr. R.N. Gachogu*** the then Operations Manager of the 2nd respondent in his letter of 12th February, 1993 purportedly releasing the appellant to report to the 1st respondent Voi branch where he had been transferred to and **two**, the learned judge fell into error when she construed the contents of the appellant's letter of 15th February, 1993 as proving the appellant's disobedience of a lawful order to proceed on transfer. The learned judge's findings on this were that the appellant had confirmed both in his evidence in Chief and cross examination that he had signed a contract of employment with his then employer, the first respondent; the said contract contained a clause which stipulated clearly that the 1st respondent could deploy the appellant in any of its branches country wide and at any time; in pursuance of the said clause the appellant was in the year 1991 deployed to the 2nd respondent's which is a subsidiary of the 1st respondent.

Further that as at the time of the release of circular No.93/3998 dated 31st December, 1992, the appellant was still deployed at the 2nd respondent; the appellant conceded to have had knowledge of the said circular; the appellant was expected to have reported to his new station on the 11th day of January, 1993 which date had coincided with the appellant's date of resuming duty from leave; thereafter the appellant allegedly lodged his appeal against the transfer but produced no letter from the 1st respondent either rescinding

or putting on hold the appellant's transfer; the appellant also alleged that he was waiting for the person who was to take over from him at the second respondent's so as to be released but he never mentioned so either in the letter he wrote of 15th February, 1993 or in any other communication; he mentioned two impediments that prevented him from going on transfer on the due date namely; that the date on which he was initially required to report to his new station coincided with the date he was reporting back to duty after his leave, **two,** that the person he was to hand over the duties of his office, a ***Mr. Mwangi,*** did not report to the office on the 11th January, 1993.

On the appeal against the transfer, the learned judge observed that the appellant allegedly lodged his appeal to the General Manager on the 14th January, 1993 and thereafter continued to work at the 2nd

respondent's till 12th February, 1993 when ***Mr. Gachogu*** released him to report to his new station at Voi and that is when the appellant replied to ***Mr. Gachogu's*** direction on release vide his letter of 15th February, 1993; the letter had raised various issues but singled out the portion with regard to the refusal to report to Voi; the letter of 15th February, 1993 was what the appellant had as his appeal against the transfer and yet there was no mention of any appeal in the said letter and that the content of the portion quoted clearly indicated that the appellant had declined to respect the instructions of ***Gachogu*** and in the absence of proof that the 1st respondent, the entity initiating the transfer had

halted it, the appellant disobeyed a lawful order.

We have on our own revisited the contents of the record and considered it in the light of the learned judge's reasoning set out above. Our findings are that as per the circular of 31st December, 1992 the appellant ought to have reported the 1st respondent's to Voi branch on 11th January, 1993 which date coincided with the appellant's last day of his leave; (ii) thereafter the appellant did not proceed on to Voi branch allegedly because he had lodged an appeal with the General Manager of the first respondent; (iii) the date (s) of the appellant's appeal is not borne out by the record; neither the General Manager nor ***Mr. Lasoi*** put on hold in writing the appellants transfer to Voi; (iv) it therefore follows that ***Mr. Gachogu*** who had knowledge of the circular on transfer and in the absence of any written communication from the 1st respondent halting the appellants transfer to Voi, and as the then in charge of the 2nd respondents' operations had no option but to release the appellant to proceed to Voi on transfer; (v) words extracted from the appellant's communication of 15th February 1993 such as:

"....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 so I will be compromising my principles...."

speak for themselves that the appellant had resolved to decline to take up his transfer. By declining, we mean he had disobeyed instructions to proceed on transfer; (vi) all that ***Mr. Gachogu's*** release note conveyed to the appellant was simply that he had been released to report to Voi. There was nothing in it to suggest that it was ***Mr. Gachogu*** who was transferring the appellant to Voi.

The appellant's complaint in ground 10 is that the learned trial judge should have availed the relief of early retirement and payment of retirement benefits according to the applicable pension rules he sought from the court because a similar treatment had been accorded to another employee of the 1st respondent arising from circumstances totally different from those surrounding the appellant's case. The colleague is one ***Jimmy Moris Ndenderu.*** What the learned judge had before her on the record as regards ***Mr. Ndenderu's*** issue was ***Mr. Ndenderu's*** plaint and a consent. A reading of the contents of ***Mr. Ndenderu's*** plaint reveals that ***Mr. Ndenderu*** was in the employment of the 1st respondent; he sought voluntary early retirement from his employment in circumstances totally unrelated to the appellants case; there was an exchange of correspondence between the two sides; the 1st respondent's took long to reach a decision on the matter; it was in the cause of waiting for the 1st respondent to take a decision on his request to voluntarily retire from the 1st respondents employment that the 1st respondent purported to fire him (***Mr. Ndenderu)*** from its employment. He was aggrieved and filed Nairobi HCCC No. 177 of 1998 challenging the purported dismissal.

Negotiations took place culminating in the recording of a consent finally settling ***Mr. Ndenderu's*** matter. The above scenario is a complete contrast of the circumstances surrounding the appellant's case in that (i) there was no request by the appellant to the respondent for voluntary early retirement; (ii) there was no transfer issue involved in the ***Ndenderu*** case; (iii) all that the appellant wished done for him upon declining his transfer to Voi was that he wished to be re-routed back to Nairobi; (iv) there is no documentary backup that he ever requested to be allowed to voluntarily retire from the 1st respondent's employment instead of being re-routed back to Nairobi;(v) the issue of the appellant's early retirement was never pleaded in the main body of the further amended plaint, the main pleading on the basis of which the trial of the appellant's claim commenced. It was only sloted in as an alternative prayer in the

reliefs section. The respondents had no chance to respond to it as a pleading. They only responded to it as a relief when they prayed that it and other reliefs prayed for a long side it be dismissed. No documents were tendered in evidence in support of it. Neither did the appellant in his oral testimony and cross-examination in Court raise that issue.

It is therefore our finding that it is now trite that a party cannot get a relief he had not asked for. Neither could the Court also grant a relief that the appellant or his opponents had not asked for. The predecessor of this Court in the case of ***Captain Harry Gandy versus CAS Par Air Charters Limited [1956] Volume XXII EACA 139, Sinclair vice-president*** (as he the was), *inter alia* had this to observe at page 140 paragraph 3:-

"The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given..."

Drawing inspiration from the decision of ***Scrutton L.J in Blay versus Pollard and Morris [1930] 1.K.B. 682-*** added the following:-

"Cases must be decided on the issues on the record and if it is desired to raise other issues they must be placed on the record by amendment..."

This position was approved and applied by the same predecessor of this Court in the decision in the case of ***Odd Jobs versus Mubia [1970] EA 476. Law, J.A*** (as he then was), at page 478 paragraph 9-11 had this to say:-

"On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision..."

Since then, this Court has trodden the foot steps of its predecessor. See the decision in the case of ***Uyas Industries versus Diocese of Meru [1982] KLR 114*** wherein the Court held, *inter alia*, that ***a court of law may base its decision on an unpleaded issue if during the course of the trial the issue had been left for the decision of the Court."*** In the case of ***Tracom Limited & another versus Hassan Mohammed Adan [2009] eKLR*** quoting with approval its own decision in the case of ***Galaxy paints Co. Ltd versus Falcon Guards Limited [2000] 2EA 385*** , this Court ruled *inter alia* that:-

"It is trite law, and provisions of order XIV of the Civil procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court by dint of the provisions of order X rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination"

This position was emphasized by this Court in the case of ***Thomas Dela Rue (K) Ltd versus David Opondo, Omutelema [2013] eKLR.***

We reiterate our earlier stand that the learned trial Judge cannot be faulted for not granting the appellant the relief complained of because, first it had not been pleaded, testified upon and submitted upon by the parties; second, it is not permissible to do so in terms of principles of case law assessed above; third, parties had not left such issue for the determination of the Court.

In ground 8 the appellant sought to fault the trial Judge for her failure to find that the respondents had not visited against the appellant any penal consequences for the alleged desertion of duty; and or alternatively that the respondents by reason of their conduct they should be deemed to have condoned the appellant's

alleged desertion of duty, if any. It is evident from the record that the issue of the appellant's desertion of duty was raised for the first time in the 1st respondent's letter to the appellant dated 22nd April, 1993. When assessing the circumstances leading to the issuance of this letter by the 1st respondent, the learned trial judge made observations on the said communication that the appellant had complained that he had not been given an opportunity to explain his predicament nor was he taken before any disciplinary committee before the writing of the said communication; neither was he advised to report to his station of transfer and wait for a decision to be taken on his appeal against the transfer to Voi.

In response to these, the learned judge had this to say:-

".... The plaintiff clearly was ordered to go for transfer to the Voi branch. He was released from his employment with the 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 order to transfer and therefore can clearly be said to have disobeyed his master's lawful and reasonable order. 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"

From the above observation, it is clear that according to the learned judge the penal consequences that the appellant's employer could visit and in fact did visit on the appellant was the summary dismissal. The appellant took issue with that stand because nowhere in the communication of 22nd April, 1993 did the first respondent use the word "***dismissal".***

On our own assessment, we find that it is correct that the appellant's employer did not use the words "***summary dismissal"*** In his communication to the appellant of 22nd April, 1993. The words that the employer used were as follows:-

"In view of this (desertion of duty) it has been taken you have deserted your employment. You have therefore been removed from the bank's pay roll from 11th January, 1993, the date you were required to report at your new station."

From the above, it is therefore not true as contended by the appellant that no penal consequences were visited against him as a result of his apparent desertion of his employment. Indeed there were. These were the removal of the appellant's name from the bank's pay roll and the requirement of him that he does surrender back bank properties inclusive of his employment identification card.

As to whether the words used by the employer amounted to summary dismissal or not, we have to interrogate the very section of law that the learned trial judge considered before arriving at that conclusion. This is non other than **section 17** of the Employment **Act cap 226** of the laws of Kenya, as it was then. In it, it is clearly stipulated that any employee who absconds from duty is liable to summary dismissal. All that this means is that it is the learned trial judge who ascribed the words "***summary dismissal"*** to the first respondent's action or conduct of removing the appellant's name from its payroll coupled with their requiring the appellant to return all bank properties and his employee's identity card as amounting to summary dismissal as stipulated by **section 17** of the Employment Act. It is therefore not true as asserted by the appellant in his grounds of appeal that no penal consequences were visited against him. Nor do we find any conduct on the part of the first respondent that can be deemed to demonstrate that the 1st respondent condoned the appellant's alleged desertion of duty. His employer did penalize him for desertion of duty and that is why he is before us.

It is correct that there is no evidence to show that the appellant was ever called before a disciplinary committee before the letter of 22nd April, 1993 was served on him. The appellant did not however specify from which policy document such a requirement was contained. All that both the learned trial judge had before her and what we have before us and that which was tendered in evidence with the consent of both sides is the original contract of employment contained in the letter of appointment of 17th August, 1979 as

confirmed by the letter of 8th August, 1980. A perusal of it reveals that it does not contain any clause on the requirement that before any disciplinary action could be taken against the appellant he had to appear before a disciplinary committee for that purpose. The onus was on the appellant to place such proof before the Judge. Since he failed to do so, the learned Judge cannot be faulted for not reading such a requirement in the contract of employment document that was before her.

In ground 9 the appellant sought to fault the learned trial judge for not finding that the appellant's employment with the first respondent had not been properly brought to an end by reason of the first respondent's failure to issue one months notice or pay one month's salary in lieu of notice. Besides clause 1 in the contract of employment that provided for termination of the contract of employment by either side giving either one month's notice or one months salary in lieu of notice during the appellant's probationary period, there was no other document of engagement that either side tendered in evidence providing for such prerequisites to be observed before bringing the engagement to a close beyond the appellant's probationary period. It is common ground that the appellant successfully completed his probationary period and he was duly confirmed in his employment. By reason of this confirmation, the functionary duty of clause 1 aforesaid became extinct. In the absence of existence of any other departmental policy document that provided for such prerequisites, the learned trial judge could not be faulted for not reading such prerequisite in the contract of employment that was before her.

In ground 4 of the appeal, the appellant sought to fault the learned judge for failing to appreciate that the appellant's dismissal by the 1st respondent was malicious and discriminatory in nature, whereas in ground 11 of the appeal the appellant blamed the trial court for failing to find that the appellant's dismissal from his employment was against the natural law of justice. We wish to adopt our above assessment and findings on the complaints raised in grounds 1, 2,3,5,6,7,8,9 and 10 as our response to the appellant's complaint in grounds 4 and 11 respectively. Our reason for saying so are one, we have already ruled that the appellant's desertion of his employer's duty fits grounds for summary dismissal as stipulated in **section 17(a)** of the Employment Act; **two,** it is correct that indeed he appealed against his transfer and when he took up the issue with his employer he was advised to proceed on transfer as the employer looked into his complaint against his transfer to Voi. He was therefore heard in the first instance. When he first received the 1st respondent's letter of 22nd April, 1993 he never disputed the contents of the said communication as not stating the correct position. When the first respondent made some amendments to the contents of their letter of 22nd April, 1993 vide their letter of 20th August, 1993 the appellant did not raise a voice against the said amendments as not stating the correct position.

In his letter dated 22nd December, 1993 the appellant mentions clearly that he raised the issue with a ***Mr. Hamilton,*** the Managing Director and ***Mr. Lasoi,*** the Human Resource Manager, but they had not responded favourably to him. This is clear proof that he had in fact been heard. The appellant's letter of 22nd December, 1993 was responded to vide the 1st respondent's letter of 24th January, 1994. We therefore find that the appellant was given a hearing hence allegations of breach of the rules of natural justice do not arise in the circumstances.

As for discrimination, this too does not hold as the appellant did not cite any case of a colleague who behaved in a like manner and was spared. Likewise, if he was referring to the case of ***Mr. Ndenderu,*** we have already ruled that the circumstances obtaining in ***Mr. Ndenderu's*** case were totally different from those obtaining in his case.

The upshot of all the above reassessment, re-analyzation, re-evaluation reasoning and finding is that, this appeal lacks merit. The injury suffered by the appellant was self inflicted as he was the sole author of his own misfortune. The appeal is dismissed with costs to the respondents both in this Court and in the High Court.

Dated and Delivered at Nairobi this 13th day of March, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR