



**Njiiri v National Bank of Kenya Limited (Cause 809 of 2020)
[2024] KEELRC 808 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 808 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 809 OF 2020**

**JK GAKERI, J
APRIL 17, 2024**

BETWEEN

JAMES M. NJIIRI CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. This case has a chequered history and remains one of the oldest suits pending determination as A. Mbogholi Msagha J. (as he then was) observed in his ruling dated 15th October, 2020 which reinstated a suit dismissed by another judge on 1st July, 2015 for want of prosecution.
2. The learned judge reinstated the suit and transferred it to this court having pended determination for over almost 17 years before it was dismissed.
3. Having been filed on 8th January, 1998, it is evident that the Claimant was not keen in having the suit concluded.
4. This is also evidenced by the number of times the plaint or statement of claim has been amended and responded to by the Respondent as well as changes in the amounts claimed under various heads.
5. The original plaint was drawn on 5th January, 1998 and filed on 8th January, 1998 and was amended on 8th May, 1999. The last amendment was made on 14th November, 2022, more than 24 years after the suit was filed.
6. In his further amended plaint, the Claimant avers that he joined the Respondent on 1st July, 1972 on permanent and pensionable terms and rose to become the Chief Inspector of Branches from 6th September, 1989 earning a basic salary and other allowances including housing, domestic servant, garden maintenance, transport leave travelling allowance, medical, night guard, staff pension benefit among others and was to serve up to the age of 55 years.



7. It is the Claimant's case that by letter dated 26th July, 1993, the Respondent's General Manager, Mr. A.H. Ahmed sent the Claimant on compulsory leave for 60 days for allegedly having released confidential bank information to unauthorised persons and would be paid all normal terms and conditions during the forced leave.
8. The Claimant avers that he served diligently and honestly.
9. That he remained on compulsory leave for 6 years as the Respondent refused to take him back and his employment was terminated by letter dated 12th January, 1999.
10. It is the Claimant's case that the allegations levelled against him were not proved.
11. That the Claimant was entitled to normal terms and conditions of service including salary increments from time to time.
12. It is the Claimant's case that although the Respondent computed his terminal dues as communicated vide letter dated 12th January, 1999, it relied on the salary as at the date of the suspension ignoring increments the Claimant would have enjoyed from July 1993.
13. The Claimant alleges that the Respondent was malicious in that it forced him to proceed on leave, refused to take him back despite demands and Presidential directive, refused to respond to his letters, refused to release his salary arrears.
14. The Claimant isolates his loss as Arrears in basic salary and Allowances as follows;
 - i. January 1994 – 1999 Kshs.3,281,378.00.
 - ii. Lost Basic Income per month 1999 – 2006 Kshs.16,750,816.00.
 - iii. Entertainment Allowance 1994 – 1999 Kshs.729,719.20.
 - iv. Lost Refund of entertainment 1994 – 1999 expenses Kshs.2,353,344.00.
 - v. Travelling Allowance 1994 – 1999 Kshs.558,768.00.
 - vi. Lost refund of travel expenses Grade 9 1994 -1998 Kshs.3,582,720.00.
 - vii. House Allowance Grade 9 1994 – 1999 Kshs.425,600.00.
 - viii. Lost House Allowance Grade 9 Notch 12 1999 – 2006 Kshs.3,360,000.00.
(Leave pay, Leave Allowance, Leave travel allowance, pay in lieu of notice, Pension Refund, refund of utilities) – Total Kshs.7,666,599.30

Total lost income 1999 – 2006 Kshs.28,832,040.00.

Grand Total Kshs.36,841,128.20.
15. It is the Claimant's case that owing to the Respondent's conduct, his reputation in the banking business was injured and was unable to secure employment or engage in profitable Forex Bureau business and his family relations was affected to.
16. Finally, the Claimant avers that his termination from employment was wrongful and unlawful.
17. The Claimant prays for;
 - a. General damages for violation of the Claimant's constitutional rights.



- b. Special damages tabulated above with interest at 30% from due date till payment in full.
- c. Certificate of service
Or in the alternative
- d. Early retirement settlement package as enumerated above.
- e. Costs of this suit.
- f. Interest on (a), (b), (c), (d) and (e) above at court rates.
- g. Any other or further relief as this Honourable Court may deem fit.

Respondent's case

- 18. In its response to the Further Amended Plaint filed on 20th April, 2023, the Respondent admits that the Claimant was its employee from 1st July, 1972 as alleged and was entitled to the benefits in paragraphs 4A – 4L of the Plaint but denies those in 4M – 4N i.e unlimited medical, security, club-membership and other facilities such as housing, loans, car loan etc.
- 19. It avers that the employment contract was subject to termination by due notice and admits having sent the letter dated 26th July, 1993. It denies that the Claimant was diligent and the suspension was procedural to facilitate investigations on leakages of confidential information to unauthorised persons and the Claimant was paid all dues as well as upon termination of employment.
- 20. That the compulsory leave was extended and dues were paid.
- 21. The Respondent admits having terminated the Claimant's employment in accordance with the terms of the contract of employment.
- 22. The Respondent avers that salary increments were at the discretion of the employer based on performance and number of years served and denies that the Claimant suffered any loss.
- 23. The Respondent denies having acted malafide or maliciously as forced leave was justified, dues were paid for the entire duration, 3 months pay in lieu of notice, there was no obligation to give a reason for termination, salary increments were discretionary, Presidential directives did not bind the Respondent and the Claimant is entitled to a certificate of service.
- 24. It is the Respondent's case that its obligations to the Claimant ended when the contract of employment was terminated and the Claimant was not entitled to retirement settlement.
- 25. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

- 26. On cross-examination, the Claimant confirmed that the benefits claimed were due to him during the subsistence of his employment and compulsory leave was extended in writing.
- 27. He admitted that he wrote a letter dated 13th November, 1996 on salaries and benefits and was paid 3 months' salary and other dues as tabulated by the letter of termination.
- 28. On entertainment allowance, the Claimant admitted it was payable solely for the purpose of entertaining officially on behalf of the bank and accurate accounts and record of expenditure and the guests entertained had to be kept. The witness admitted that he had no evidence of having entertained anyone between 1994 and 1999 or evidence of travelling allowance.



29. The witness further admitted that between 1999 and 2006, he was not an employee of the Respondent in relation to the claims for lost house allowance, refund of expenses and other claims.
30. CW testified that he was out of the country from 2006 to 2016.
31. On re-examination, the Claimant testified that the allowances claimed did not require production of receipts while he was on compulsory leave.
32. That the claims from 1999 to 2006 related to pre-mature retirement and referred to the shortfall in the Claimant's working life and had used the rates of 1999 as they would have been earned but for the termination of employment and did not claim from 2006 to 2016.

Respondent's evidence

33. On cross-examination, RWI, Stephine Opiyo confirmed that he had no minutes of any meeting between the Claimant and the bank, copy of the notice to show cause or authorisation of leave and the termination letter had no reason for the termination.
34. The witness testified that when the Claimant was on compulsory leave, he was paid part of the entitlements but had no evidence of the payment.
35. That from 26th July, 1993 to 12th January, 1999, the Claimant was on suspension.
36. On re-examination, RWI testified that the Respondent's documents showed that payment had been made as per the termination letter.
37. The witness admitted that the Claimant had written to the Respondent on salary arrears and allowances and there had been discussions as evidenced by letter dated 17th October, 1994 by the Claimant.

Claimant's submissions

38. Counsel for the Claimant submitted on whether termination of the Claimant's employment was unfair and the remedies available to the Claimant.
39. Counsel relied on the provisions of Section 47(5) and 41 of the *Employment Act*, 2007 to urge that the termination of the Claimant's employment was unfair as the Claimant was not accorded a fair hearing and compulsory leave was unjustified.
40. That the alleged release of confidential information to unauthorised persons was not proved and no notice to show cause was issued.
41. As regards the reliefs sought, counsel submitted that since the Claimant would have worked until 2006, he lost income he would have earned.
42. According to counsel, the Claimant is claiming special damages in the sum of Kshs.35,314,479.31 being unpaid allowances and other payments from 1994 – 1999 and 1999 to 2006, Kshs.10 million for violations of the rights to fair labour practices, full compensation or retirement settlement.
43. Counsel cited the decisions in *Felix Mwalimu V Nairobi Safari Club* (2022) eKLR, *Karambu V Chandaria Industries Ltd* (2023) eKLR and *Brian Nshau Kashero V Five Forty Aviation Ltd* to reinforce the Claimant's case.



Respondent's submissions

44. During the mention to confirm the filing and exchange of submissions on 13th February, 2024, the Respondent's counsel had not filed submissions and prayed for 10 days and the request was granted but by 29th February, 2024 when the court retired to prepare this judgment, counsel had not filed submissions.

Findings and determination

45. It is common ground that the Claimant was an employee of the Respondent from 1st July, 1972 to 12th January, 1999 when his employment was terminated by the Respondent within which time he had risen to become the Chief Inspector of Branches at the Respondent's Head office.
46. It is also not in contest that he was sent on compulsory leave by letter dated 26th July, 1993 for 60 days which was extended by 30 days in September, 45 days in November 1993, 30 days in January 1994, 60 days in February 1994 and 60 days in April 1994 and termination in January 1999.
47. It is also not in contest that the Claimant had written to the Respondent more than once inquiring about salary and benefits, in particular annual salary increments which the Respondent did not respond to decisively and they constitute the body of the Claimant's case.
48. The issues that commend themselves for determination are;
- i. Whether the Claimant's compulsory leave and dismissal by the Respondent were unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
49. As adverted elsewhere in this judgment, it is not in dispute that the Respondent ordered the Claimant to proceed on compulsory leave and subsequently terminated his employment in January 1999.
50. In his written statement dated 13th April, 2022, the Claimant details the circumstances in which he proceeded on compulsory leave. The Claimant states that he was directed to proceed on leave on 20th March, 1992 by the Executive Chairman of the Respondent but declined and sought to know the reason by letter dated 23rd March, 1992 and was informed that the Permanent Secretary, National Treasury (herein after PS) had given instructions to that effect, but the Claimant remained adamant.
51. That on 26th July, 1993, the Executive Chairman of the Respondent summoned him to his office and showed him a letter from the Permanent Secretary, National Treasury to the Respondent and another from the then Head of Civil Service and Secretary to the Cabinet to the Permanent Secretary National Treasury.
52. That the Executive Chairman of the Respondent read out the contents of the letter to the Claimant that the Government had information that the Claimant was divulging confidential information to members of the opposition and the press and action was required against the Claimant.
53. According to the Claimant, the Executive Chairman of the Respondent informed him that his hands were tied and he had no alternative but to take action, which culminated in the letter dated 26th July, 1993.
54. The Claimant's uncontroverted evidence reveals that the Respondent bank had no reason to send the Claimant on compulsory leave or dismiss him from employment but appear to have been compelled to do so by the shareholder of the Respondent, the National Treasury at the behest of the government of the day.



55. The Respondent appear to have found itself in the quagmire and had to pay the Claimant's salary and allowances for 6 years while he was on compulsory leave.
56. This is clear from the letter which did not promise any investigation into the matter but the Respondent would "look into the matter" and further exemplified by the numerous extensions without any reference to an outcome or investigation and termination of employment followed.
57. The Respondent relied on the contract of employment to terminate the Claimant's employment by paying him 3 months' salary in lieu of notice.
58. Since the cause of action arose in 1999, the law applicable is the *Employment Act* Cap 226 and the Trade Dispute Act, Cap 334.
59. Regrettably, counsel for the Claimant invoked the provisions of the *Employment Act*, 2007 as if the cause of action arose post 2nd June, 2008 when the statute came into force. The cause of action having arisen in the 1990s, the operative law then must be the applicable law as the provisions of the *Employment Act*, 2007 have no retroactive application. (See the Court of Appeal decision in *Gerald Muli Kiilu V Barclays Bank of Kenya* (2016) eKLR where the cause of action arose in 2005).
60. Section 16 of the *Employment Act* accorded parties to a contract liberty to terminate the employment contract without notice provided the party paid the other the wages or salary which would have been earned by that other party or paid by him or her as the case may be in respect of the period of notice required to be given.
61. The provisions of the *Employment Act*, Cap 226 did not expressly require the employer to give a reason for termination of employment. However, if the Industrial Court determined that the dismissal was wrongful, the court could order reinstatement and could in addition award compensation or award compensation not exceeding twelve months wage.
62. The court had no jurisdiction to award damages for breach of the contract of employment.
63. In the instant suit, the Respondent invoked the provisions of the employment contract and accorded the Claimant the requisite 3 months' notice but opted to pay the three months salary perhaps because the Claimant had been out of the shop floor for a long time.
64. From the foregoing, it is evident that while the termination of the Claimant's employment complied with the applicable law as of 1999, the compulsory leave cannot pass muster as having been free from blame on the part of the Respondent, as it was instigated by a 3rd party and the Respondent took inordinately long to address the challenge placed before it.
65. Placing an employee on compulsory leave for almost 6 years without any update on the status of his employment, payment of salary and allowances notwithstanding cannot escape the tag of being wrongful, which is wholly attributable to the Respondent's indecisiveness which it cannot benefit from.
66. In sum, it is the finding of the court that placement of the Claimant on compulsory leave from July 1993 to January 1999 was wrongful as the Respondent ought to have devised and proposed to the Claimant an exit strategy and commensurate package within the first one year of the leave, but failed to do so.

Whether the Claimant is entitled to the reliefs sought

67. The Claimant prays for various reliefs as examined herein-below.



- a. General damages for violation of the Claimant's constitutional rights
68. Regrettably, the Claimant adduced no evidence of the alleged violations of the provisions of *the constitution*.
69. Neither the Further Amended Plaintiff nor the witness statement or the oral testimony adduced in court make reference to any constitutional violations or specify the provisions of *the Constitution* of Kenya, No. 5 of 1969 were infringed and how as enunciated in *Anarita Karimi Njeru V Attorney General (1979) KLR 154* and restated in legions of decisions including *Mumo Matemu V Trusted Society of Human Rights Alliance (2013) eKLR*.
70. In the absence of the specific provisions of *the constitution* allegedly infringed by the Respondent, manner of violation and evidence to buttress the same, the court is satisfied that this prayer has not been established, is unmerited and it is declined.
- b. Special damages pleaded in paragraph 14 and 15 above with 30% interest from date due till payment in full
- i. 1994 – 1999
71. As adverted to elsewhere in this judgement, the Claimant prays for arrears of monthly salary and allowances which would have been paid to him from January 1994 to January 1999 but for the compulsory leave by the Respondent.
72. The Claimant argues that he would have risen to Grade 9 but for the unwarranted compulsory leave.
73. The contract of employment on record make no reference on how an employee moved from one grade to another other than length of service and experience as the Claimant was already in Senior Management.
74. The Claimant testified that he served the Respondent diligently and rose through the ranks to become the Chief Inspector of Branches by 1989 after about 17 years of service and produced copies of promotional letters from the Respondent.
75. Indeed, evidence on record reveal that the Respondent was ready and willing to accord him leave to undertake a higher responsibility out of the country and would resume his duties on his return to Kenya.
76. The evidence on record portray the Claimant as a honest and diligent employee who served the Respondent without reservations and the court is persuaded that had he not been sent on compulsory leave, he would have ascended to Grade 9 and earned the salary and allowances he now claims from the Respondent and the court awards the same to be thoroughly computed by the Respondent save for allowances paid during termination of employment and those that required proof such as travel allowance, entertainment allowance, travel allowance and expenses as no evidence was adduced to prove that the activities for which the allowances were payable took place during the compulsory leave. The Respondent shall compute the sums payable under the various heads.
- ii. Lost monthly income and allowances 1999 – 2006
77. The Claimant prays for salary and allowances he would have earned after termination until retirement from employment.
78. This claim is grounded on the premise that he was employed by the Respondent on permanent and pensionable terms.



79. On cross-examination by the Respondent’s counsel, the Claimant confirmed that he was not an employee of the Respondent from 1999 – 2006 in respect of all the claims made under lost salary, allowances or refunds.
80. In his submissions, the Claimant refers the same as arrears of salary and outstanding allowances totalling to more than Kshs.20,000,000/=.
81. In the court’s view, this claim is unsustainable and unavailable for two reasons;
- i. The contract of employment between the Claimant and the Respondent had an exit clause which either party could invoke to terminate the employment relationship typical in contractual engagements.

Arguably therefore, neither the Claimant nor the Respondent had represented to the other that they would not invoke the exit clause.
82. In *Engineer Francis Gachuri V Energy Regulatory Commission (2013) eKLR*, Rika J. captured the foregoing as follows;
- “There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word ‘permanent employment’.”
83. The *Employment Act* Cap 226, Laws of Kenya has no provision on permanent employment.
84. (See also *Elizabeth Wakanyi Kibe and Telkom Kenya Ltd (2014) eKLR* as well as *D K Njagi Marete V Teachers Service Commission (2020)* where the Court of Appeal addressed claims for compensation until retirement.
- ii. Secondly, the Claimant has not demonstrated the legal anchorage of the claim as termination of an employment relationship discontinues the relationship between the parties in totality and all attendant dues ought to be settled at that point.

(See *D K Njagi Marete V Teachers Service Commission (Supra)*).
85. The claim for lost monthly salary and other allowances or refunds or reimbursements is unjustifiable and is dismissed.
- c. Certificate of service
86. The Claimant is entitled to a certificate of service by dint of Section 18(1) of the *Employment Act*, Cap 226.
87. In the alternative, the Claimant prays for early retirement.
- d. Settlement package at Kshs.36,841,128.20 being the aggregate of all the claims under “arrears” and “lost” as set out in paragraphs 16 to 19 of the Further Amended Plaintiff.
88. Early retirement packages are typically consensual not judicial pronouncements.



89. Although the court believes that the Respondent should have explored the option as an amicable separation mechanism, the court has no jurisdiction to impose the same on the Respondent at the instance of the Claimant and on his terms.
90. As the formulation suggests, it is a settlement between the parties and is declined.
91. In the end, Judgment is entered in favour of the Claimant against the Respondent in the following terms;
- a. Arrears due to the Claimant but for the compulsory leave 1994 – 1999 as follows;
 - i. Monthly salary.
 - ii. Entertainment allowance based on his average claim for the year.
 - iii. Travelling allowance based on his average claim for the year.
 - iv. House allowance as prayed for Kshs.425,600/=.
 - v. Leave pay – to be computed by the Respondent as appropriate.
 - vi. Leave allowance – to be computed by the Respondent as appropriate.
 - vii. Leave travel allowance – to be computed by the Respondent as appropriate.
 - viii. Refund of water, telephone, electricity and medical as claimed Kshs.57,077.60.
 - b. Costs of this suit.
 - c. Interest at court rates from date hereof till payment in full.
 - d. Certificate of service be issued within 30 days.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

ORDER

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

DR. JACOB GAKERI

JUDGE

