



**Omanga v Kenya Commercial Bank Limited (Cause E241 of 2023)
[2024] KEELRC 13357 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13357 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E241 OF 2023
SC RUTTO, J
DECEMBER 6, 2024**

BETWEEN

JOB EVANS OMANGA CLAIMANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim which was amended on 5th February 2024, the Claimant avers that he was employed by the Respondent as a teller under permanent and pensionable terms of employment. That he had a legitimate expectation that he would work until the retirement age of 60.
2. It is the Claimant's assertion that in his 15 years of employment, he discharged his duties diligently with unparalleled dedication and minimal or no supervision and perpetually maintained cordial relations with his colleagues, management and customers serving in 6 different branches. That prior to his termination from employment, there was never any complaint or disciplinary action against him.
3. He further avers that the Respondent failed to take into consideration his Responses, health condition and medical records vis a vis the allegation of desertion when arriving at its final decision therefore acting in unreasonableness, unfairness and unlawfulness.
4. The Claimant contends that he was constructively terminated while admitted in hospital as he was locked out of the bank's system from 17th November 2021 to 26th November 2021.
5. It is the Claimant's further contention that the disciplinary meeting occurred after he had been terminated constructively.
6. It is against this background that the Claimant has prayed for the following reliefs:
 - a. A declaration that the termination of employment was unfair, un-procedural, wrongful and illegal.



- b. A certificate of service.
 - c. Payment in lieu of notice Kshs. 201,835.00
 - d. Compensation for unfair termination (12 months salary Kshs.2,422,020.00)
 - e. Reinstatement.
 - f. Payment of salary from date of termination to appeal Ksh 2,018,500.00.
 - g. Compensation for loss in repayment of loan over and above the initial rate (Tabulated at Kshs.2,015,48.00 at page 14, paragraph 14.
 - h. Reversal of interest on loans to staff rate.
 - i. General damages for discrimination on sickness (epilepsy).
 - j. Any other relief that the court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the claimant submits on his final submissions.
 - k. Cost of the cause.
7. The Respondent countered the Claim through its Amended Response dated 8th April 2024. While admitting that the Claimant was employed in September 2008, the Respondent contends that it is unreasonable for the Claimant to believe that it was his entitlement and right to be employed during his whole working life as an employment relationship is contractual and terminable under the terms of the employment contract.
 8. Putting the Claimant to strict proof, the Respondent has denied that the Claimant was performing his duties diligently and satisfactorily prior to his termination. The Respondent further denies the Claimant's assertions that his termination was unfair. According to the Respondent, the Claimant was involved in several disciplinary issues prior to his termination including a caution letter as recent as 2nd September 2021.
 9. On account of the foregoing, the Respondent prays that the Claimant's suit be dismissed with costs.
 10. The matter proceeded for hearing on 24th June 2024 and 30th July 2024, during which both sides called oral evidence.

Claimant's Case

11. The Claimant testified in support of his case and to start with, he sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his Claim as exhibits before Court.
12. It was the Claimant's testimony that he was issued with a termination letter dated 19th August 2022. The termination was on grounds of desertion from work from 6th November 2021 to 7th February 2021.
13. Prior to this, he had attended a disciplinary meeting on 21st July 2022 vide an invitation letter dated 15th July 2022. He submitted to the hearing and comprehensively gave an account of what had transpired in that period and provided documentary proof.
14. Recalling the events that led to his termination from employment, the Claimant averred that he was working at the Respondent's TRM Branch on 5th November 2021, when he collapsed. He received first aid and recovered.



15. On 6th November 2021, he woke up as usual and proceeded to work. He had an epileptic attack on the way and found himself at Prestige Hospital. The doctor explained that he had been taken to hospital by strangers.
16. On 7th November 2021, he had another attack and was rushed to a clinic called States View Medical Centre and was given 9 days' sick off. He instructed his brother to inform his colleagues as much. At the time, he was recuperating at home as the doctor gave him home-based care.
17. He suffered another attack on 15th November 2021 and the doctor advised him to go to a specialized hospital. As such, he was admitted at Chiromo Hospital on 17th November 2021.
18. The Claimant averred that for admission at the hospital, there has to be authorization from the company hence the Respondent was informed of his admission by email.
19. He was discharged on 26th November 2021 and given 8 days sick leave. He tried to access his accounts on 26th November 2021 to make a withdrawal for domestic purchases but his November salary had not been credited. This was unusual and when he enquired from some colleagues, he was advised to talk to the Operations Manager who casually responded that 2 letters had been sent to him.
20. He called the Branch Manager to inquire about the salary and to inform her of the sick off of 8 days. She replied that he (Claimant) should henceforth talk to the Human Resources office and hang up on him. No further information was disclosed.
21. The Claimant averred that on 3rd December 2021, he went physically to the Human Resource office and while at the reception, he got a call from one Dishon who advised him that he was no longer an employee of the bank and that he had been terminated on grounds of desertion from 1st November 2021. That this had been communicated through 2 letters sent to his postal address and work email. He (Claimant) gave him a brief history of his medical condition and also informed Dishon that the said Post Office Box was inactive and he could not access his work email.
22. He was advised to serve all documents pertaining his health and respond to the 2 letters. The Claimant contends that he was not given copies of the said letters. He tried to reach out to the Operations Manager and Branch Manager at the TRM but they completely avoided him.
23. On 9th December 2021, 13th December 2021 and 15th December 2021 he went back to the Human Resources department but the frustrations continued.
24. That on 15th December 2021, he decided to involve the union, who took over and started following up on the letters. After back and forth, they were directed to pick the letters from the TRM Branch.
25. According to the Claimant, there was another back and forth at the branch as the Operations Manager insisted that she could not issue the letters. It took a lot of intervention from the Union for the manager to give him the letters.
26. He replied to the letters on 7th February 2022 and attached supporting documents.
27. The Claimant stated he was informed that they were confirming the medical documents from the hospital and on 27th June 2022, he received an email apologizing for the delay and that they had received reports from the hospitals. On 15th July 2022, he received an email for invitation to a disciplinary hearing.



28. He submitted himself for the disciplinary hearing on 21st July 2022 and the outcome of the termination was communicated to him on 6th August 2022. He appealed on 6th August 2022 and got a final reply confirming his termination on 19th August 2022.
29. The Claimant averred that as per the letter of termination, his loans would be converted to the public rate by the end of August 2022. The adjustment was from 6.5% Staff rates of 13%. The monthly installments at public commercial rates as from September 2022 were deducted from his pension funds.
30. In the Claimant's view, his termination was wrong, unlawful and abrupt and in total contravention of all relevant labour laws.
31. It was his contention that the Respondent had a pre-determined mind before the issuance of the termination letter of 19th August 2022 as he was already terminated before the disciplinary hearing which was a public relations exercise.

Respondent's Case

32. The Respondent called oral evidence through Mr. Robley Ngoge who testified as RW1. He identified himself as the Respondent's Head of Employee Relations & Wellness and similarly, he adopted his witness statement to constitute his evidence in chief and produced the documents filed on behalf of the Respondent as exhibits before court.
33. It was RW1's testimony that on or about 20th August 2021, the Respondent's Branch Manager from the TRM branch reported an incident that had occurred on 16th August 2021 whereby the Claimant had collapsed at his workstation while serving a customer and was rushed to the Mater Hospital at TRM. Thereafter, he was transferred to the main hospital and admitted from 16th August 2021 to 18th August 2021.
34. Another incident report was filed by the Branch Manager to the regional office on 9th November 2021 with respect to an incident that occurred on 5th November 2021 regarding the Claimant's illness which affected his performance at work.
35. That the Claimant had fallen ill and was rushed to Avenue Hospital at the Greenspan Mall as per his request. From this day henceforth, efforts to reach the Claimant through his mobile phone and through his next of kin contact proved futile.
36. RW1 stated that in light of the Claimant's unexplained absence, the Respondent initiated an internal inquiry on 11th November 2021 pertaining to his absence and his suitability to perform his duties with reference to a doctor's report that had been presented.
37. The Human Resource department requested the Claimant's Branch management to share details of the action taken on the indiscipline issues levied against the Claimant which included financial misconduct cases for defaulting on his credit card and KBA Sacco loans.
38. RW1 further averred that in light of exhaustive endeavors to locate the Claimant since 6th November 2021, a letter dated 15th November 2021 was issued to the Claimant giving him 5 days to report to work or to show cause for his absence failure to which his name would be struck off from the Respondent's payroll. The said letter was sent to the Claimant vide his registered postal address P.O. Box 8147-00200 Nairobi as well as forwarded to him through his email address jomanga112@gmail.com.
39. The Claimant failed to show up for work for the 5 days duration given necessitating the Respondent to send another letter to him on 19th November 2021. He was notified that the Respondent Bank had



established that he had been absent from work without any notice to his manager of his whereabouts which amounted to desertion from employment and that consequently, his name had been struck off from the payroll.

40. RW1 further stated that on 7th February 2022, the whereabouts of the Claimant were finally known when the Claimant sent an appeal for the Respondent Bank to review its decision to summarily dismiss him.
41. Vide a letter dated 15th July 2022, the Respondent in consideration of the Claimant's appeal, invited him for a disciplinary hearing on 21st July 2022. The letter entailed a list of issues the Claimant was to respond to and he was invited to bring with him representation.
42. A disciplinary hearing was convened on 21st July 2022 whereby the disciplinary committee from the Respondent Bank thoroughly examined the circumstances surrounding the Claimant's absence.
43. The committee, in adherence to due process, interrogated the Claimant regarding his violations of the Employee Code of Conduct.
44. According to RW1, the Claimant failed to provide satisfactory explanations pertaining to his absence from duty spanning the period between 26th November 2021 and 7th February 2022. This led the committee to uphold the termination of his contract.
45. RW1 further averred that on 6th August 2022, the Respondent sent a letter to the Claimant terminating his employment effective 6th August 2022 as recommended by the disciplinary committee. In the termination letter, he was informed that his loans with the Respondent would be converted to public rates with effect from 31st August 2022.
46. RW1 maintains that the termination was justified and executed in compliance with legal principles and internal policies. He urged the Court to dismiss the Claimant's suit with costs to the Respondent.

Submissions

47. On his part, the Claimant submitted that he was never served with the notice to show cause and termination letter. It was his contention that the Respondent failed to adduce evidence of a certificate of postage or attach an email extract to prove service. In this regard, the Claimant posited that procedural fairness encompasses notification.
48. It was further submitted that the Claimant had the right to be afforded a hearing even after the summary dismissal. In the Claimant's view, the disciplinary hearing of 21st July 2022 was unfair and unprocedural.
49. Placing reliance on the case of *Miriam Siwa v Kenya Post Office Savings Bank (2014) eKLR*, the Claimant further posited that the second appeal was treated as a mere formality. In his view, the appeal process in and of itself is as important and critical as it provides the opportunity to remedy procedural or substantive defects that may have occurred during the disciplinary process.
50. Referencing the cases of *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School (2015) eKLR* and *Felistas Achela Ikatwa v Charles Peter Otieno (2018) eKLR*, the Claimant submitted that the Respondent has not demonstrated efforts to establish his whereabouts or contact his next of kin. It was the Claimant's contention that it was not sufficient for the Respondent to simply state that he had failed to show up for work. It was his position that the Respondent did not substantiate the charges against him.
51. According to the Claimant, his conduct does not portray a person who has deserted his place of work.



52. On its part, the Respondent submitted that it demonstrated consistent efforts to engage the Claimant by issuing notices and providing him opportunities to explain his absence. That despite these efforts, the Claimant failed to respond within a reasonable period and did not take reasonable steps to notify the Respondent of his situation which necessitated his summary dismissal from employment.
53. Citing the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others (2019) eKLR, the Respondent further posited that the Claimant's actions amounted to gross misconduct under Section 44(4) (a) of the *Employment Act*.
54. It was the Respondent's further submission that it had a genuine reason for terminating the Claimant's employment as required under Section 43 of the *Employment Act*.
55. The Respondent stated in further submission that following the Claimant's appeal, he was afforded an opportunity to be heard. To this end, the Respondent maintains that it adhered to the rules of procedural fairness as stipulated in the *Employment Act*.

Analysis and Determination

56. The Court has considered the pleadings by both parties, the evidentiary material on record together with the rival submissions, and isolated the following issues for determination: -
 - i. Whether the Respondent had a fair and valid reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

57. The record bears that the Claimant was terminated from employment on grounds of prolonged unauthorized absence from work between 6th December 2021 to 7th February 2022. To this end, the Claimant was cited for violation of Section 44(4) (a) of the *Employment Act*, Clause A5(a) (v) of the Collective Bargaining Agreement and the KCB Group Staff Leave Policy and Guidelines on Leave and Absence Management.
58. Section 43(1) of the *Employment Act* requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further along the Act, Section 45 (2) (a) and (b) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
59. In this regard, the Respondent being the employer in this case was required to prove to the requisite standard that the Claimant was absent from work without the requisite authority from 6th December 2021 to 7th February 2022.
60. It is common ground that the Claimant fell ill while at work on 5th November 2021. The point of divergence between the Claimant and the Respondent is what transpired thereafter. On one hand, the Claimant avers that he had an epileptic attack while on his way to work on 6th November 2021 and another one on 7th November 2021 hence he was given 9 days sick off. According to the Claimant, he instructed his brother to inform his colleagues as much. That he later had another attack necessitating his hospitalization at Chiromo Lane Medical Centre on 17th November 2021. He was discharged on 26th November 2021 and given 8 days' sick leave.



61. On the other hand, the Respondent avers that from 5th November 2021 when the Claimant fell ill at work, efforts to reach him through his mobile phone and through his next of kin proved futile.
62. In support of his case, the Claimant exhibited a medical report from Prestige Medicare Clinic dated 6th November 2021. He further exhibited a sick off sheet from States View Medical Centre dated 7th November 2021 indicating that he had been recommended for 9 days' sick off.
63. Further exhibited by the Claimant was a medical report from States View Medical Centre dated 16th November 2021 referring him to Chiromo Lane Medical Centre for further evaluation.
64. In further support of his case, the Claimant exhibited a copy of a letter dated 18th November 2021 from Chiromo Lane Medical Centre confirming that he was admitted at the said facility on 17th November 2021. He further exhibited a copy of an outpatient sick sheet from the said medical facility indicating that he had been recommended for 8 days off duty from 27th November 2021.
65. Notably, there is no evidence on record confirming that upon being recommended for sick off, the Claimant formally notified the Respondent of his illness in accordance with Section 30(2) of the [Employment Act](#).
66. Be that as it may, the Respondent seemingly acknowledged the sick-off sheets presented by the Claimant since he was only required to explain his absence from duty with effect from 26th November 2021 to 7th February 2022. Indeed, the letter of termination cited the Claimant for absence from work with effect from 6th December 2021 to 7th February 2022. As such, I take it that the Respondent was satisfied with the Claimant's explanation as to his absence from duty with effect from 6th November 2021 to 5th December 2021. The period in contention is therefore 6th December 2021 to 7th February 2022.
67. According to the Claimant, his salary was not paid in the month of November 2021 and it was upon making a follow-up, that he was notified by one Dishon from the Respondent's Human Resources office, that he was no longer an employee of the Respondent.
68. Explaining his absence from duty from 27th November 2021 to 7th February 2022, the Claimant stated that he was making follow-ups on the letters issued to him by the Respondent hence he was shuttling between the Human Resource office and his former Branch.
69. Despite the Claimant's assertions, it is rather odd that there is no single correspondence emanating from his end to the Respondent concerning the status of his employment.
70. Indeed, from the Claimant's version, he visited the Respondent's Human Resources office and his former Branch on several occasions. Therefore, one wonders why the Claimant would opt to make these many follow-ups for two months (December and January) without documenting his queries.
71. In the circumstances, there is no evidence to confirm the Claimant's assertions that during the period in question, he was making follow-ups between the Respondent's Human Resources office and his former Branch. As such, I am led to conclude that the Claimant did not account for his whereabouts after the end of the sick-off period from 6th December 2021 and 7th February 2022.
72. Pursuant to Section 44(4) (a) of the Act, absence from work without leave or lawful cause is one of the grounds for summary dismissal. To this end, the Claimant's absence from work with no leave or lawful authority, no doubt availed the Respondent a fair and valid reason to terminate his employment.
73. Granted, the Claimant may have been indisposed hence his need to be away from his workstation for a considerable period of time. Nonetheless, it was his responsibility as an employee to reach out to his



employer at the earliest opportunity to communicate his medical condition and provide the relevant medical records.

74. As a matter of fact, this is what was required of him under Section 30(2) of the *Employment Act*. What's more, it is notable the Claimant was able to reach the Respondent promptly upon noticing that his salary for the month of November 2021 had not been credited into his account. Why couldn't he act as promptly and communicate his medical situation?
75. The total sum of my consideration is that the Respondent has proved to the requisite standard that it had a valid and fair reason within the meaning of Section 45(2) (a) and (b) of the *Employment Act* to terminate the employment of the Claimant on account of his unexplained absence from work.

Procedural fairness?

76. The requirement of fair procedure is generally provided for under Section 45 (2) (c) of the Act. The specific requirements encompassing a fair hearing are provided for under Section 41(1) of the Act. In this case, an employer is required to notify an employee of the intended termination in a language he or she understands and give the employee an opportunity to present his or her defence in response to the allegations levelled against him or her.
77. From the record, the Respondent issued the Claimant with a letter dated 15th November 2021 asking him to report for duty or show cause for his absence, failure to which his name would be removed from the payroll.
78. Vide another letter dated 19th November 2021, the Claimant was advised that as he had neither reported for duty nor notified the Respondent of his whereabouts, his name would be removed from the bank's payroll with effect from the date he absconded duty.
79. It was subsequent to the foregoing correspondence that the Claimant wrote to the Respondent on 7th February 2022, pleading with the Respondent to reconsider its decision.
80. What is not clear to the court is why the Respondent regarded the Claimant's letter dated 7th February 2022 as an appeal whereas there is no decision on record terminating the Claimant's employment. I say so noting that in the letter dated 19th November 2021, the Claimant was only notified that he had been taken to have deserted employment and that his name had been removed from the Respondent's payroll. There was no mention of termination of the Claimant's employment. As such, it is hard to fathom why in the email dated 21st February 2022, Lilian Kagwiria, was acknowledging receipt of the Claimant's appeal against his separation from employment.
81. That issue aside, the record bears that following the Claimant's letter dated 7th February 2022, Lilian Kagwiria notified the Claimant that they had received the much awaited feedback from the hospitals and were attending to his "appeal".
82. What followed was a letter dated 15th July 2022, inviting the Claimant to a disciplinary hearing scheduled for 21st July 2022.
83. In the said invitation letter, the Claimant was informed that he was required to clarify a number of issues specifically; his failure to notify or submit to the branch management sick off sheets for the period 6th November 2021 to 26th November 2021; his whereabouts between 26th November 2021 and February 2022; why he violated the Bank's guidelines contained in GHRL Nos 65/2016 and 51/2016; and why severe disciplinary action should not be taken against him.



84. In his submissions, the Claimant has contended that he was never served with a notice to show cause. It is notable that Section 41 of the Employment Act has not prescribed the manner in which the allegations/charges are to be communicated to an employee. In my view, what is crucial is that the employee ought to be notified of the allegations levelled against him and granted an opportunity to tender a response/explanation to the same.
85. As such, it is this court's view that in this case, the letter of invitation dated 15th July 2022 served a dual role of "notification" and "invitation to the disciplinary hearing". In this regard, the Claimant was notified of the allegations/charges he was required to address during the disciplinary hearing and at the same time, was notified of the disciplinary hearing.
86. Therefore, failure to issue a separate notice to show cause detailing the allegations/charges against the Claimant did not in my view, invalidate the process.
87. My construction of Section 41 of the Employment Act is that the employer is enjoined to notify the employee of the allegations/charges raised against him or her and accord him or her an opportunity to be heard on his defense with respect to the said charges. The manner in which the same is communicated can vary from employer to employer and there is no standard form prescribed for that purpose.
88. The bottom line is that the employee must be forewarned of the charges ahead of him or her within reasonable notice to allow for adequate preparation for the hearing.
89. In light of the foregoing, the court is persuaded that the Respondent satisfied this requirement.
90. From the minutes of the disciplinary hearing, exhibited by both parties, it is apparent that the Claimant was given an opportunity to articulate his defense to the charges levelled against him. Further, it is notable that the Claimant's representative Joy Imali Adagi was given an opportunity to give her submissions in support of the Claimant's defense.
91. Applying the provisions of Section 41 of the Employment Act to the case herein, I am satisfied that the Respondent complied with the requirements of a fair hearing as contemplated in the aforementioned Section.
92. In the circumstances, I find that the Claimant was accorded procedural fairness prior to his termination from employment. To this extent, the Respondent cannot be faulted for want of procedure.

Reliefs?

93. As the Court has found that the Claimant's termination from employment was for a valid and fair reason and that the Respondent complied with the process contemplated under Section 41 of the Employment Act in effecting the Claimant's termination from employment, the reliefs sought in the Memorandum of Claim cannot be sustained.

Orders

94. In the final analysis, I dismiss the Claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

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STELLA RUTTO

JUDGE



In the presence of:

Mr. Njogu instructed by Mr. Kahiga for the Claimant

Mr. Mochache instructed by Ms. Wambui for the Respondent

Millicent Court Assistant

Order

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

STELLA RUTTO

JUDGE

