



**Twaha v Standard Chartered Bank Kenya Limited (Cause  
34 of 2019) [2022] KEELRC 1603 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1603 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 34 OF 2019  
B ONGAYA, J  
JULY 22, 2022**

**BETWEEN**

**SAID MOHAMMED TWAHA ..... CLAIMANT**

**AND**

**STANDARD CHARTERED BANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on 24.06.2019 through Ahmednasir, Abdikadir & Company Advocates. The claimant prayed for judgment against the respondent for:
  - a) A declaration that the respondent's conduct amounts to unfair labour practices contrary to Article 41 of *the Constitution* of Kenya.
  - b) A declaration that the respondent breached its duties in the contract of employment dated 13<sup>th</sup> August 2013
  - c) A declaration that it was illegal to debit money from the claimant without instructions or any reason whatsoever
  - d) An order directing the respondent to serve the claimant with an apology.
  - e) Payment of Kshs 3,300,00 for 12-months compensation for unfair termination.
  - f) Payment of unpaid salary arrears for the period July 2017 to July 2018 amounting to Kshs 2,946,462.
  - g) Payment in lieu of notice of Kshs 275,000
  - h) Severance pay for 5 years of Kshs 687,500
  - i) Payment of loss of future earnings for 27 years amounting to Kshs 89,100,000



- j) Payment of General damages for discrimination of Kshs 5,000,000
  - k) Payment of Kshs. 5,000,000 for general damages for breach of contract and breach of employability
  - l) Payment of Kshs 1,000,000 for breach of Contract of Fiduciary relationship
  - m) Payment of Kshs 3,300,000 being pension due for 5 years of employment and not paid under the contract of employment
  - n) Exemplary damages
  - o) Costs of the suit
  - p) Interest at court rates on prayer (f) above from the time the respondent failed to pay the claimant's salary
  - q) Interest on all of the above at court rates from the date of filing until payment in full
  - r) Any other relief this honourable court may deem fit to grant in the circumstances.
2. The claimant's case is that the respondent employed him initially as a Relationship manager effective 13.08.2013 at a monthly salary of Kshs. 275,000.00. The claimant's further case is as follows:
- a) He was initially dismissed from his employment and sent home by the respondent without any reason whatsoever.
  - b) He received a letter of summary dismissal on 17.08.2017 terminating his services outside the provisions of Section 41, 43 and 45 of the Employment act 2007.
  - c) The claimant contends that the initial termination of his services by the respondent was contrary to Clause 13.1 of the contract of employment between the employer and the employee rendering the same unfair and un-procedural both under statutory and natural law
  - d) That the claimant instructed the firm of MMC Africa Law to serve the respondents with a demand letter dated 23.08.2017 and upon receiving the same, the respondent opted to re-instate the claimant on 01.09.2017 - after establishing a committee on 29.08.2017 and which reviewed the initial decision to terminate the claimant.
  - e) The claimant pleads that despite the re-instatement after the first dismissal, the respondent never re-instated the claimant's contractual rights.
  - f) The claimant pleads that he never received his entitled salary during the termination period, neither, did he receive any payments after his re-instatement.
  - g) That the respondents failed to issue him with a notice of termination prior to the second dismissal.
  - h) The claimant pleads that by a contract of employment dated 13.08.2013 between the claimant and the respondent, the claimant is subject to one month's written notice before termination of his contract and the same was not served to him prior to the second termination by the letter dated 25.06.2018.
  - i) The claimant pleads that on account of ill health clause 13.4 of the aforementioned contract of employment restricted the respondent from dismissing the claimant from work without serving him with not less than three months' notice.



- j) The claimant pleads that on 22.01.2018 the respondent gave him an account of what had transpired.
  - k) That on the 4.07.2018 he received his certificate of service via email.
  - l) The claimant pleads that the working relationship after the re-instatement on 01.09.2017 was nothing but tumultuous.
  - m) The claimant pleads that the respondent illegally debited his bank account with respect to July, 2017 salary after depositing the said amount without any notification and or reason whatsoever.
  - n) He pleads that his employer did not give him an opportunity to explain his medical challenges to him.
  - o) That the respondent stopped, failed, neglected and refused to make any contribution as entitled to the staff pension scheme as stated in the terms of contract of employment
3. On 21.03.2022 the claimant filed a notice of change of Advocates for Ahmednasir Abdullahi Advocates LLP to act in place of Ahmednasir, Abdikadir & Company Advocates who were previously on record.
  4. The respondent filed on 18.07.2019 a response to claim through Cootow & Associates Advocates. The respondent prayed that the claim be dismissed with costs. The respondent pleads that it summarily dismiss the claimant from employment with effect from 17.08.2018 for absconding duty. Further, the termination was done within the provisions of Section 41, 43 and 45 of the *Employment Act*, 2007. The respondent states that the termination was done in line with clause 13.1 of the claimant's contract of employment. Further, the respondent pleads that it did re-instate the claimant upon receipt of the claimant's sick sheet documents. The respondent states that the claimant was reinstated with full contractual rights and benefits. The respondent denies that it failed to pay the claimant his entitled salary during the termination period. The respondent states that the claimant did not return to work despite having been reinstated.
  5. Further, the respondent states that the claimant did not comply with Section 30(2) of the *Employment Act*, 2007 which provides that for an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for the absence.
  6. The respondent's case is that clause 13.1 (b) of the contract of employment gives the employer power to terminate an employee with immediate effect and without notice or compensation where an employee has committed any serious breach, or repeated or continued a material breach of the terms of his employment. The respondent denies that the claimant's termination was not procedural, fair and lawful.
  7. The respondent denies having a tumultuous relationship with the claimant upon his reinstatement as alleged and that it is the claimant's full knowledge that he voluntarily stayed out of his duty station for a period of 10 months. The respondent denies that the claimant is entitled to the claims as sought. The respondent pleads that the staff pension is only available subject to the rules governing the pension scheme. The respondent states that the claimant's dismissal was justified, fair, lawful and, that the same was done in strict compliance with the provisions of *Employment Act*, 2007. In particular, sections 35(1), (c), (5), 41(1),44 (4),45 (2), 28 (10) of the Act and section 15 of the *Labour Institutions Act*, 2007. The respondent denies that the claimant is entitled to any terminal dues as prayed for.



8. The claimant testified to support his case. The respondent's witness (RW) was Matta Ngao, the respondent's Senior Manager, Specialist Delivery, East Africa. The Court has considered the pleadings, the evidence and the final submissions filed for the parties. The Court makes findings as follows
9. To answer the 1<sup>st</sup> issue for determination, the Court returns that there is no dispute that the parties were in a contract of service and whose details and history of service is as pleaded for the claimant and admitted for the respondent.
10. To answer the 2<sup>nd</sup> issue for determination, there is no dispute that the respondent terminated the claimant's employment the first time by the letter dated 17.08.2017. The letter stated as follows:
11.
  - a) The respondent had made numerous efforts to contact the claimant since 03.07.2017 when his authorized sick leave had expired.
  - b) That under the circumstances the respondent has no other option but to summarily dismiss the claimant with immediate effect as at 03.07.2017, on the grounds of absconding duty.
  - c) The claimant's terminal dues were set out as salary earned up to and including 03.07.2017 and any leave days earned but not taken which were subject to statutory deductions and or, any money owing to the Bank.
  - d) The claimant to receive the pension dues as per the rules of the existing Retirement Benefits Scheme.
12. The parties are in agreement that the claimant was subsequently reinstated on 01.09.2017 after it was established that the claimant had been unwell. Thereafter, the claimant testified that he received the letter dated 07.06.2018. In a contradictory manner he testified that he had seen it with his lawyers. The letter was titled "Reporting to duty". It conveyed to the claimant that the respondent had noted that he had not reported on duty as at up to 07.06.2018 and his whereabouts were unknown. He was required to report on duty by 14. 06.2018 and failing, he would be considered to have deserted. The claimant further testified that his contract of service was terminated by the letter dated 25.06.2018 titled absconding duty. It conveyed that he had failed to report on duty as required by the letter dated 07.06.2017 (construed 07.06.2018) and, there was no other option than to take it as a sign or act that the claimant had abandoned his job. The letter stated that the claimant had been terminated from employment without any further reference to him. The Court returns that the contract of service between the parties ended by the letter dated 25.06.2018. The claimant testified that he received that letter on WhatsApp from a colleague called Evelyn.
13. The 3<sup>rd</sup> issue for determination is whether the 2<sup>nd</sup> termination by the letter dated 25.06.2018 was unfair. The claimant's case is that the termination was unfair in substance and procedure. The respondent says the termination was fair in procedure and merits.
14. The claimant testified that he does not recall the date he went back to work after his re-instatement on 01.09.2017. The claimant further testified that he did not have a password key to get into the Bank and his colleagues opened for him or facilitated him to enter the work premises because he lacked the log credentials for access. Further, he testified that he was kept idle and without any duties assigned to him. Further, the claimant testified that he got half pay for the period between 01.09.2017 up to 30.07.2018. In cross-examination, he testified that it would be normal to be required to report at work as per the letter dated 07.06.2018 even if he was already at work and reporting consistently. He also stated that he was not sure if on 08.06.2018 (just before the letter of 07.06.2018) he had been at work or not. He confirmed that on 25.06.2018 he was not at work. By that evidence the Court finds that



the claimant has failed to confirm that he ever worked after 01.09.2017. In re-examination he stated, “After reinstatement I did not get log-in credentials to enable me to work. I was not able to access unless I called a colleague to use their password for me to access. So I have no evidence of accessing office.” That testimony confirms he did not access his work station. He appears to shift the blame to the respondent that he was not given access credentials but there was no evidence of a grievance in that regard or a grievance of being locked out –while he continued to earn half salary over the period after 01.09.2017 to 30.07.2018, per his own testimony. As per the respondent’s submissions, the claimant was the author of the termination of his contract of service. The Court finds that after 01.09.2017 he voluntarily decided not to report at work.

15. The Court upholds the respondent’s case that the claimant was terminated on account of absconding duty, which amounted to gross misconduct and insubordination contrary to clause 13.1 (a), (b) of the employment contract. The claimant did not also comply with section 30(2) of the Employment Act, 2007 to notify the respondent about his ill-health, if at all that was the case, after 01.09.2017. Further, section 44 (4) (a) of the Act gave the respondent the power to summarily dismiss the claimant if, without leave or other lawful cause, the claimant absented himself from the place appointed for the performance of his work. Further, clause 13.1 (b) of the contract of employment gave the respondent power to terminate an employee with immediate effect and without notice or compensation where claimant had committed any serious breach, or repeated or continued a material breach, of the terms of his employment. The respondent has established that after the reinstatement on 01.09.2017, the claimant failed to return to work between 01.09.2017 up to 25.06.2018 when his services were terminated - having voluntarily stayed out of work for a period of 10 months and therefore amounting to gross misconduct of repeated absence from work. The respondent has shown that the claimant’s dismissal was justified, fair, lawful and that the same was done in strict compliance with the provisions of sections 44, 43, and 45 of the Act as pleaded and submitted for the respondent.
16. The Court therefore returns that the respondent has established the burden of proving the reasons or grounds of the termination as provided for in sections 43, 44 and 47(1) of the Employment Act, 2007. Further, the procedure adopted to dismiss the claimant was not unfair. His absence amounted to gross misconduct and the respondent was entitled to dismiss with shorter or no notice than was contractually agreed upon.
17. In answer to the 4<sup>th</sup> issue for determination, the Court returns on the remedies as follows:
  - a) There was no established unfair termination and compensation as prayed for is found unavailable. Similarly, the respondent has established the termination was on account of absconding duty which amounted to gross misconduct and a fundamental breach thereby disentitling the claimant the claimed payment in lieu of termination notice.
  - b) As submitted for the respondent it was not a case of redundancy under section 40 of the Act and the prayer for severance payment will collapse as unjustified.
  - c) Nothing is established attributable to the respondent incapacitating the claimant from gainful engagement after the termination. Indeed, the claimant confirmed he was engaged as a mechanic. The claim and prayer for loss of future earnings will collapse as unjustified and not available at all.
  - d) No pleadings and contractual basis for the claims of breach of fiduciary relationship and damages for discrimination has been established. The evidence was that the respondent complied with the statutory and contractual regimes for payments during sick leave at all the material time the claimant established valid absence on account of ill-health, nothing in arrears of salary has been established by the claimant as outstanding from the respondent.



- e) The evidence was that the claimant was paid all contractual salaries and benefits and the claim for salary arrears is found unjustified.
- f) As urged for the respondent pension benefits are due as payable per the applicable law, regulations, rules, and contractual terms.
- g) The claimant has failed to establish grant of any of the remedies as prayed for and the suit is liable to dismissal.
- h) The Court has considered all circumstances of the case including that the claimant was seriously sick for a considerable period of service with the claimant and there will be no orders on costs of the suit.

18. In conclusion, judgment is hereby entered for the respondent against the claimant for:

- a) Dismissal of the suit.
- b) No orders on costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22<sup>ND</sup> JULY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

