



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
CAUSE NUMBER 56 OF 2020

BETWEEN

SIYAD MADEY MOHAMUD.....CLAIMANT

VERSUS

**NATIONAL BANK OF KENYA LIMITED
RESPONDENT**

RULING

1. The Claimant filed his Statement of Claim on 31st January 2020. He claims that he was unfairly dismissed by the Respondent, and seeks a raft of remedies, which include compensation, general damages, declaratory orders that various constitutional violations were committed against him by the Respondent, reinstatement, unpaid hardship allowance, costs, interest and any other suitable relief.
2. Filed with the Statement of Claim, is an Application, which is the subject of today's Ruling. The Claimant seeks that pending hearing and determination of the Application and the Claim, the Court compels the Respondent to hear and determine an Appeal he filed, after dismissal. This Application is supported by Claimant's Affidavit, sworn on 31st January 2020.
3. The Respondent opposes the Application, based on the Replying Affidavit of its Director, Human Resource Department, Rodgers L. Mungumi.
4. The Application was heard on 3rd December 2020.
5. The Claimant states, he was employed by the Respondent in 2002. He fell ill while on duty on 30th January 2017. He was rushed to Samaad Hospital in Wajir town. He was subsequently seen on follow-up by his doctor. On 6th March 2017, while still in hospital, the Claimant received a text message from Regional Manager Malinda Wambua, with instructions to visit Respondent's Head Office. He did so, and while at the Head Office, Nairobi, received a letter dated 1st March 2017, terminating Claimant's contract.
6. He lodged an Appeal internally against the decision. The Respondent did not respond to the Appeal for more than 2 years, prompting the Claimant to visit Respondent's Head Office to enquire what became of his Appeal. He was advised that the Appeal was never received by the Bank, and advised to furnish the Bank with a copy. He did so on 22nd May 2019. The Respondent still has not heard the Claimant's Appeal. The Claimant asks the Court to compel the Respondent to hear the Appeal, relying on Section 12

of the E&LRC Act.

7. Mungumi concedes that the Claimant was employed by the Respondent. He absconded duty on the dates he alleges to have been ill. The Respondent was not aware about his illness. He was issued Notice to Show Cause dated 25th January 2017. He was issued Notice of disciplinary hearing, scheduled for 2nd February 2017. He did not acknowledge receipt of, or respond to, any of the letters. The Respondent further wrote to him on 13th February 2017, asking him to explain his absence. There was no response. The Respondent investigated the absence and found out it was not based on any illness suffered by the Claimant. He was issued the letter dated 1st March 2017, terminating his contract. The Respondent only came to hear about the alleged Appeal, on 21st May 2019, when a copy was handed to the Respondent. Investigation done by Hawk Eye Technologies concluded that the stamp attributed to the Respondent, in the copy of the Appeal availed by the Claimant, was a forgery.

The Court Finds: -

8. Whether the Claimant fell ill, and was hospitalized, making him unable to work, and whether he communicated his illness to the Respondent, are matters to be dealt with and determined upon full trial.

9. Was he compelled to appeal, and did he appeal? Should the Court compel the Respondent to hear the Claimant on appeal? The Respondent disputes receiving any Appeal from the Claimant, and went to great lengths, to engage a private investigator, who concluded that the Claimant forged Respondent's stamp.

10. There is no reason suggested, why an Employee would forge a letter appealing a decision made against him by the Employer. Once the Respondent received a copy of the alleged Appeal, what prejudice would be occasioned by hearing the Appeal? Allegation of forgery does not sound convincing. Why did the Respondent not report forgery to the Police, instead of engaging a private investigator? What prejudice would the Respondent suffer, by hearing out the Claimant on appeal? The Claimant states his Appeal was accompanied by his own Affidavit. This Affidavit was sworn on 16th March 2017, close to the date of termination. It is not alleged that the Affidavit was forged. Documents showing *prima facie*, that the Claimant was hospitalized, and that the Operations Manager and Human Resource Manager, were notified through e-mail, are exhibited through the Affidavit. Should not the Respondent grant the Claimant a chance to explain his absence through his Appeal? There was really no compelling reason, not to hear him, after he forwarded copies of his Appeal Letter and Affidavit, to the Director Human Resources, Mungumi. The Appeal was forwarded to the Respondent in 2019, at the request of the Respondent.

11. Employers have an obligation to hear Employees on Appeal, where the Human Resource Policies and Disciplinary Codes, have provision for such Appeal. Hearing of the Appeal may have obviated the need for the Claim being filed in Court. Parties must exhaust internal dispute resolution mechanisms, and facilitate each other on exhaustion, before coming to Court. Hearing of the Appeal would also enhance the Respondent's position on the fairness of procedure.

IT IS ORDERED: -

a. The Respondent shall hear the Claimant's Appeal, based on his Affidavit sworn on 16th March 2017.

b. Costs in the cause.

Dated and delivered at Nairobi this 11th day of February 2021.

James Rika

JUDGE