



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1640 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**ANTHONY MWANGI KIIRU.....CLAIMANT**

**VERSUS**

**FIDELITY COMMERCIAL BANK LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, Antony Mwangi filed this suit vide a Memorandum of Claim dated 17<sup>th</sup> September 2014 alleging wrongful and unfair termination of employment by the Respondent Fidelity Commercial Bank Limited. He avers he was employed by the Respondent as Credit Manager from 1<sup>st</sup> April 2008 to 22<sup>nd</sup> July 2014. That he performed his duties efficiently, competently and diligently to the expectations of his employer and the law up to the time the Respondent illegally terminated his contract of employment.

He contends he had not committed any misconduct and that the Respondent did not have a valid reason to abruptly terminate the contract. That the Respondent failed to follow fair procedure and merely issued him with a termination letter in disregard of the provisions of the Employment Act. He prays for:-

- 1) A declaration that the Claimant's termination was unfair, unlawful and wrongful,
- 2) Damages equivalent to salary for the remainder of the contract of employment, i.e. up to time of expected retirement,
- 3) Costs,
- 4) Interest.

The Claimant also filed his Witness Statement dated 12<sup>th</sup> February 2019. That by a letter dated 25<sup>th</sup> March 2014 he was informed by the Respondent that his salary had been increased to Kshs.236,775/= with effect from 1<sup>st</sup> March 2014. That he was entitled to 24 days annual leave in accordance with the Respondent's Policy and Procedures Manual. That staff members were also permitted to take casual leave for 1 or 2 days. That on 15<sup>th</sup> April 2014, he applied for one day leave for 22<sup>nd</sup> April 2014. That on 16<sup>th</sup> April 2014, the Respondent's Executive Director issued a Memorandum to staff in the management of leave informing them that 1 day leave would no longer be approved and that only a minimum leave period of 7 days was permitted. The Memo further stated that the leave requests should be submitted 8 weeks and not less than 6 weeks in advance.

That he had applied for leave so that he could urgently travel home and take his ill mother to hospital. That he took the day off on 22<sup>nd</sup> April 2014 as he had requested. He reported back to work on 23<sup>rd</sup> April 2014 only to be issued with a three months' notice of termination of employment with effect from 24<sup>th</sup> April 2014. He contends that the Memorandum by the Executive Officer was issued after he had applied for leave. That the Respondent did not explain to him the reasons for termination and neither was he given an opportunity to prepare and defend himself against any charges. He states that his absence from work for one day did not affect operations in his department as there was a manager of equal responsibility who was present. That he is entitled to compensation for the wrongful and unfair termination. That he wrote a demand letter dated 5<sup>th</sup> August 2014 to the Respondent demanding compensation which it responded to by its letter dated 13<sup>th</sup> August 2014 denying that the termination was unlawful.

The Respondent filed a Defence dated 13<sup>th</sup> October 2014. It avers that the Claimant's contract was terminated due to misconduct being the taking of a day off without the management's permission. That the claimant's request for an off day had been declined because other managers were away on leave but he left his work unattended knowing well that his position was very sensitive. The respondent contends that it explained to the Claimant the reason for his termination and he was given a chance to explain himself. That upon hearing him, it decided to terminate his services. That the respondent followed due procedure therefore the termination was lawful. That the Claimant's

claim is bad in law, misconceived and meant to enrich the Claimant unjustly and that the same ought to be dismissed with costs to the Respondent.

The Claimant filed a Reply to Defence dated 21<sup>st</sup> October 2014. He avers that he had never been found guilty of misconduct as claimed by the Respondent, that the law is clear that the employer should prove that a termination is valid. That the Defence is a sham as it does not answer any of his claims and ought to be dismissed with costs.

At the hearing the Claimant relied on his filed Witness Statement, List of Documents dated 17<sup>th</sup> September 2014 and the Further List of Documents dated 20<sup>th</sup> November 2015 as his evidence in chief. He prayed for orders as particularised in the Claim.

The respondent did not attend court on the hearing date and its case was closed.

### **Analysis and Determination**

The first issue for determination is whether the Claimant was wrongfully and unfairly terminated from employment by the Respondent. The second issue is whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim.

In *Elijah Kioko Kitavi –v- Allied Plumbers Limited [2019] eKLR*, the Court found that the claimant's claim remained uncontroverted because the respondents had not rendered any evidence in court. The court cited the case of *CMC Aviation Limited vs. Cruisair Limited (NO1) 1978) KLR 103, (1976-80) 1 KLR 835* wherein Madan J. (as he then was) rendered himself thus:-

*“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them, or any of them, by the parties, they are not evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, until their truth has been established or otherwise, they remain unproven...”*

In his Further List of Documents dated 20<sup>th</sup> November 2015, the Claimant's Leave Application form dated 15<sup>th</sup> April 2014 is included wherein the HR Officer wrote on 15<sup>th</sup> April 2014: *“Has to seek permission from ED as the policy does not allow leave less than 7 days”* and there is further a *“No”* comment made together with a signature. This shows that the Claimant proceeded for the 1 day off even though the same had been rejected. The Respondent on the other hand only filed its *Human Resources Policy Manual* in its List of Documents dated 3<sup>rd</sup> December 2015 but did not file any witness statements or show up in court during hearing.

In the case of *Samsung Electronics East Africa Ltd –v- K M [2017] eKLR* the Court observed that

*“29. In a claim such as this, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer.*

*See Section 47(5) of the Employment Act. Whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair. See CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing. The right to a fair hearing is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is this right that the legislature secured under Section 41 of the Employment Act...”*

The Claimant was informed of the reasons for termination in the notice of termination letter/termination letter from the Respondent's Executive Director as follows –

*“..a senior staff member such as yourself chose to disobey the decline to your request for one day off as two of our Senior Executives are currently on leave, and also as any leave of less than 7 days is contrary to Bank Policy, and were absent yesterday the 22<sup>nd</sup> April 2014*

*You also chose not to notify the bank and just stayed away informing your colleagues that you had taken a day off, even after being notified by HR/us...”*

The Respondent therefore had valid and fair reasons in terminating the Claimant's employment considering the managerial position he held at the Respondent bank. He took a day off despite his application for the same having been declined. The foregoing notwithstanding, the termination was procedurally unfair as the respondent did into comply with the provisions of Section 41 of the Employment Act. The claimant was given a termination notice but was not subjected to a disciplinary hearing. He was not even issued with a notice to show cause to give him an opportunity to respond to the charges against him.

Having concluded that the Claimant was unlawfully terminated from employment, he is entitled to compensation as under **Section 49(1)(c)** of the Employment Act. This Court has however considered that he was the author of his situation by disobeying the Respondent's management orders. I will therefore award him compensation of 4 months gross salary in the sum of (Kshs.236,775 x 4) **Kshs.947,100/=**. (From the evidence on record the claimant had received a salary review with effect from 1<sup>st</sup> March 2014 which increased his basic salary to Kshs.236,775/= per month). In awarding this, the court has taken into account his fairly clean record and his length of service of about 6 years. The respondent shall pay costs on the lower scale and the decretal sum shall attract interest at court rates from the date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**