



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE 1288 OF 2014**

**HARRY KIBET TEIMUGE.....CLAIMANT**

**VERSUS**

**DIAMOND TRUST BANK LIMITED...RESPONDENT**

**JUDGEMENT**

1. The claimant pleaded that he joined the respondent on 14<sup>th</sup> July, 2009 as an Operations Officer at a monthly salary of Kshs 75,000/=. He resigned from the respondent for greener pastures on March, 2011 but later re-applied and joined the respondent as Operations Officer on 27<sup>th</sup> September, 2011. According to the claimant an Operations Officer was equivalent to Section Head or Supervisor which fell in the category of unionisable employees. The claimant further pleaded that his terms were governed by banking sector CBAs and regulated by the respondents Human Resource Policy Procedures Manual.
2. The claimant further pleaded that from June 2009 to February 2011 they paid him Kshs 75,000/= per month against the CBA creating an underpayment of Kshs 4,888/= per month. On rejoining the respondent was paid Kshs 95,000/= per month which revealed an underpayment of Kshs 4,788 per month. The claimant further claimant a sum of Kshs 306,992 on account of leave earned but not taken.
3. On 19<sup>th</sup> March, 2014 he was asked to see the Human Resource manager by his line Manager Mr Ashif while at the Human Resource Manager's office, he was questioned by a Mr Ben Kerero in the presence of another officer about his relationship with his line manager and whether he had any problems and he denied having any problems with his line manager. On the same day a team which was assigned to talk to him informed him that it had been decided by the management to transfer him to Meru Branch on Monday, 24<sup>th</sup> March and that the transfer letter would be handed on over on Saturday 22<sup>nd</sup> March, 2014.
4. According to him he made several attempts to see the respondents HR Manager Ms Lilian Ngala to seek extension of time for reporting to Meru because he had to put some of his personal affairs in order but Ms Ngala avoided him claiming she was busy. On Monday 24<sup>th</sup> March, 2014 he was called to a meeting by the Human Resource Manager where he was handed a termination letter without being given reasons for his termination. He appealed against the termination but by the time of filing suit no response had been received.
5. The respondent pleaded that the claimant resigned and was reappointed as a new employee and was subject to six months' probation period that all new employees undergo. The respondent further denied the claimant was a unionisable employee hence was not covered by the CBA between the respondent and the relevant union. The respondent further pleaded that the claimant was paid a consolidated salary of Kshs 75,000/= per month and denied that the remuneration resulted in any underpayment.
6. According to the respondent the claimant had on several occasions absented himself from work without lawful excuse and carelessly and improperly performed his duties which constituted offences under the respondents Human Resource Policy and Procedure manual. According to the respondent, through its relevant department it asked the claimant to state reasons for his non-performance and that the claimant was accorded a fair hearing but could not account for his non-performance and absenteeism from work place.
7. As a result the respondent rather than terminate the claimant resolved to transfer the claimant from Nairobi Branch to Meru Branch. The respondent gave the claimant two months' notice about his transfer. The claimant was to report on 24<sup>th</sup> March, 2014 but on that day the Branch Manager Meru called Nairobi Branch asking about the claimant since he had not reported to Meru. The claimant was asked to explain his failure to report to Meru and upon hearing the claimant the respondent decided to terminate the claimant's service. The respondent further stated that the claimant was only entitled to unpaid leave days, one month's salary in lieu of notice and other terminal dues which was payable upon the claimant complying with the exit formalities.
8. In his oral evidence the claimant further stated that he never knew he was underpaid and that he learned of the underpayment through his lawyer. It was further his evidence that he never received any warning letter during the time he was employed by the respondent. According

to him he was aggrieved by the transfer because he was not given ample time. He was notified of the transfer on 20<sup>th</sup> March, 2014 to take effect on 24<sup>th</sup> March, 2014. This was done orally and that he was to pick the transfer letter on a Saturday. According to him he had no objection to the transfer he just needed more time. One transfer, the respondent was to give disturbance allowance and get hotel accommodation for at least one month.

9. It was his evidence that he wrote a letter seeking extension and when he went to the office on Saturday the Human Resource Manager was not there. On Monday he was asked to put his request in writing which he did and waited for a response until 6:05 pm but instead he was served with a termination letter. According to him the HR manual provides for procedure for termination. It states that a show cause letter should issue first yet he never received any. He was never shown any accusations against him. In cross-examination he stated that he was in a junior management position.

10. According to him he was a unionisable employee but was not a member of a union. On transfer to Meru, he stated that he should have reported to Meru first then sought extension after reporting. He further stated that he could only be paid the transfer allowance after reporting to Meru. It was his evidence that he received a cheque for Kshs 153,922.10 as terminal dues. The respondent's witness, Ms Yvonne Wamboi stated that she was the Assistant Manager, Human Resource. According to her, section heads authorize officers when posting or withdrawals. The MG3 which the claimant was an officers role. The claimant was an officer not a section head. It was her evidence that the procedure for extension was that the officer transferred requests from the Branch he is transferred to.

11. In cross-examination she stated that the respondent would not pay below the CBA and further that the claimant was not under the CBA since he was a manager. The claimant herein was allegedly terminated from the respondent's employment on 24<sup>th</sup> March, 2014 on accusation of refusal to report to Meru Branch where he was transferred. The termination letter however does not give reasons for the termination. According to the claimant he sought extension of his transfer to Meru to enable him reorganize his personal issues. The respondent however construed his failure to report to Meru as misconduct and terminated his services. According to the respondent, the claimant ought to have reported to Meru first then sought extension there.

12. The letter of transfer is dated 21<sup>st</sup> March, 2014 requiring the claimant to relocate to Meru by 24<sup>th</sup> March, 2014 that is in three days' time. The letter smacks of some sort of emergency. Meru and Nairobi are far apart. It requires some time to reorganize oneself to relocate. The three days given to the claimant was rather short and unreasonable in the circumstances. According to the respondent, the transfer was punitive and was meted out after a hearing in which the respondent opted for the transfer instead of termination of service.

13. Although the respondent contends that the termination of claimant's service was done procedurally, no evidence was tabled or put on record that the claimant was called upon to show cause why his services should not be terminated for failing to report to Meru. Besides he was terminated the very day he was supposed to report to Meru.

14. In termination of employment cases, the test usually is whether a reasonable employer confronted with a similar situation would resort to dismissal as the best option. It is the courts view that the respondent in these circumstances not only acted unreasonably but contrary to the laid down procedure in the Employment Act. The termination letter does not give reasons for the termination. The respondent further failed to table any evidence to show that the claimant was taken through any disciplinary hearing before his service was terminated. The court therefore finds and holds that the termination was unfair.

15. Concerning the claim for underpayment, the claimant did not tender any evidence to show what his actual salary ought to have been. The claim is therefore not proved and is hereby disallowed.

16. In conclusion the court awards the claimant as follows:

a. One month's salary in lieu of notice            106,000

b. Ten months salary as compensation for

Unfair termination of service                    1,060,000

**1,166,000**

c. Costs of the suit

d. Items (a) and (b) shall be subjects to taxes and less the sum of Kshs 153,992.10 already paid to the claimant but shall attract interest at court rates from the date of judgment until payment in full.

17. It is ordered.

**Dated at Nairobi this 14<sup>th</sup> day of June, 2019**

**Abuodha J. N.**

**Judge**

**Delivered this 14<sup>th</sup> day of June, 2019**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.