



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 595 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 18<sup>th</sup> July 2016)**

**JOHN KABIRU .....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT OF THE COURT**

**CLAIM**

1. The Claimant filed his Claim on 29<sup>th</sup> April, 2010, through the firm of Okoth and Kiplagat Advocates in which he seeks damages for wrongful termination. He states that he was employed by the Respondent in September 1999, rose through the ranks and in 2007 he was promoted to the rank of Risk Manager. That he provided dutiful and loyal service to the Respondent upto 11<sup>th</sup> August, 2011, when his services were terminated.
2. According to the Claimant the events leading to his dismissal are that on or about February 2010, the Central Bank recommended for independence of the risk function of the Respondent which recommendations the Claimant shared with the Audit and Risk Committee of the Respondent.
3. The Claimant alleges that upon receipt of the said recommendations the Managing Director became hostile to him accusing him of highlighting to the members of the Respondent's Board of the infringements of the Central Bank Recommendations on streamlining the risk function without his approval.
4. It is the contention of the Claimant that on various occasions, he brought to the attention of the Managing Director the exposure the Respondent was facing relating to the bonds trade and made recommendations to which led to further frustrations from the Managing Director.
5. In June, 2011, the Claimant alleges that his functions were irregularly transferred to the division of Business Development in an attempt to whittle down and silence the Claimant. Shortly thereafter on 6<sup>th</sup> July, 2011, the Claimant states that he received a circular from the Managing Director transferring him to Maua.
6. The Claimant subsequently approached the Managing Director to discuss the difficulties involved in taking up the posting. He even produced medical reports to show that his health had been affected by the

continuous harassment by the Respondent but the Respondent maintained that the transfer would not change.

7. On 8<sup>th</sup> August, 2011, the Respondent wrote to the Claimant asking him to show cause why disciplinary action should not be taken against him for failing to honour the transfer instructions to which the Claimant referred to a letter he had previously written citing health and study reasons.

8. The Claimant avers that he was engaged in teaching during his spare time as part of his PhD study which the Respondent's Managing Director was aware of at all times and never raised any objection.

9. The Claimant states that the reasons for his dismissal are in genuine as the real reason behind his dismissal is challenging the management on their decisions on the Respondent's investments.

10. The Claimant therefore prays for Judgment against the Respondent as follows:

***a. A declaration that the Respondent's termination of the Claimant's contract of employment was unfair, illegal, null and void ab initio.***

***b. Damages in the amount of Kshs. 14,601,786/=***

***c. Certificate of Service***

***d. Costs of the suit***

***e. Interest***

***f. Any other or further relief that this Honourable Court may deem fit to grant.***

## **RESPONSE**

11. The Respondent filed a statement of response on 29.5.2015 through the firm of Oraro and Company Advocates wherein they admit the relationship of employment and the Claimant's position in the Respondent. One of the terms of the Claimant's employment they state was to the effect that he would serve in any of the Bank's branches or offices in Kenya. Further that his contract stipulated that he would not engage or be employed in any other business or occupation whilst in the service of the Bank.

12. On 6<sup>th</sup> July, 2011, the Respondent alleges that due to its operational exigencies, their General Manager, made a business decision, on the advice of the Human Resources department, to transfer the Claimant herein, together with other members of staff to manage branch operations in Maua, Meru County.

13. That the Claimant expressed reluctance to honour the transfer citing reasons that he was undertaking his PhD studies, supervising Masters students and lecturing higher institutions of learning. The Respondent states that their General Manager advised the Claimant to take up his posting but he was still reluctant to do so.

14. The Respondent persisted that the Claimant take up his posting at which point the Claimant produced a letter from a Dr. Mareko a Consultant Psychiatrist of Kenyatta National Hospital stating that the Claimant was on medication and required two weeks bed rest.

15. The Respondent alleges that they doubted the authenticity of the said report as the Respondent's policy was that any staff member wishing to visit a consultant would first seek the referral of a general practitioner and the approval of the Human Resource department which the Claimant failed to do.

16. It is the Respondent's further contention that after the lapse of the two weeks medical leave the Claimant produced another letter from the same Doctor Mareko extending his leave for a further two

weeks.

17. The Respondent further states that the Claimant was actively engaged in a teaching job at the Kenya Institute of Management when he was on alleged medical leave and have attached an affidavit by a process Server in support of this allegation annexed to their response marked “8”.

18. As a result of the Claimant’s refusal to honour the transfer, the Respondent allege they asked the Claimant to show cause why disciplinary action should not issue and the Claimant wrote back on 10.08.2011 refusing to take up the transfer which led to the letter of dismissal dated 11.08.2011.

19. In response to the allegations that the Claimant’s work was frustrated by the management, the Respondent states that all recommendations to the Board of Directors were at times made through the Audit and Risk Committee to which the Claimant was not a member and therefore it is untrue that the Claimant would be castigated for resolutions of a Board Committee to which he was not a member.

20. The Respondent denies that the allegations by the Claimant that the Respondent contravened the Central Bank Regulations and that they frustrated the Claimant’s work. Further, the Respondent alleges that any Board papers or recommendations were prepared and laid before the Board as committee papers and not as individual papers as alleged by the Claimant.

21. The Respondent states that they did not act *malafides* in deciding to dismiss the Claimant and it was the Claimant who forced their hand for the reasons herein mentioned.

22. The Respondent stated that the Claim is frivolous and unfounded in law and prays that the same be dismissed with costs save for the issuance of a certificate of service.

### **SUBMISSIONS**

23. The Claimant submits that he is aggrieved by the manner the termination was carried out in both the procedural and substantive aspects.

24. He submits that he had a grievance concerning the decision by the Respondent to unilaterally transfer him to Maua branch which he advanced to the Managing Director. That as he was awaiting redress of his grievance, he fell sick and produced in Court evidence of the same. The Claimant submits that he Respondent illegally converted the said grievances into disciplinary issues.

25. The Claimant further submits that the Respondent’s intention was to transfer and re-designate the Claimant’s position without consulting him. This he states, is contrary to Section 10(2)(c) of the Employment Act which provides that a contract of service shall contain inter-alia state the job description of an employee. If such changes, Section 10(5) of the Employment Act provides that the same must be done in consultation with the employee and once the change is effected the employer to notify the employee. The Claimant submits that none of the requirements of Section 10(5) were met.

26. It is also the Claimant’s submission that when his grievance was resolved and was advised to report to Maua, he was also served with a show cause letter which goes to show that the Respondent was intent on dismissing him from the word go for airing his grievance as envisaged in Section 46 of the Employment Act.

27. He further submits that he was served with a show letter and given twelve hours to respond. The rush by the Respondent to deal with the matter the Claimant states clearly shows that a decision to dismiss him had already been made.

28. The Claimant states that his grievance was genuine and was not sufficient reason for dismissal. He relies on the case of Boniface **Nyamweya Ogeto Vs Mutsimoto Company Limited (2014) eKLR**; where it was stated:

***“The Court finds that the Claimant had a valid grievance to object to his transfer in view of his acquired skills that would not be useful in Mombasa and the duties as a chief shop steward... the court further finds that the punitive transfer was unfair so the ensuing dismissal predicated upon a genuine grievance by the Claimant, an unfair reason for termination under section 46(h) of the Act.”***

29. On failing to honour transfer on account of illness, the Claimant submits that this is a genuine reason and medical reports to that effect were submitted in evidence. He relies on the case of **Peris Nyambura Kimani Vs Albit Petroleum Limited (2014) eKLR**; the Court stated:

***“...in the circumstances where an employee is unwell for whatever reason, within the employment and labour relations regime, the basic requirement on the part of the employee under the Employment Act is that when one is sick or unwell, this is to be brought to the attention of the employer within a reasonable time. What therefore is reasonably practicable is based on the circumstances of each case. This must start with the employer establishing a policy as under section 10(3) of the Employment Act as to what framework to be followed by an employee when sick...”***

30. Paragraph 5.2.3 of the Respondent’s Human Resource Manual states as follows:

***“No employee shall absent himself/herself from duty on grounds of illness without producing to his/her manager a genuine medical certificate signed by either an authorized medical officer or a medical practitioner in the Bank’s approved list of providers. Where such medical certificate is not produced within two days, the employee shall be deemed to have been unlawfully absent from duty.”***

31. It is the Claimant’s contention that the Respondent was aware of his medical leave and as such he cannot be said to have refused to go to Maua on the day that he was allegedly supposed to report.

32. As to the charge of teaching contrary to his contract of employment the Claimant alleges that it contains no particulars and is as such not a valid reason for dismissal and in any event he had not received any warning letters on his after working hours activities and neither was he absent from work on account of undertaking other income generating activities.

33. The Claimant also submits that he was not heard before dismissal. He states that he was served with a show cause letter on 10<sup>th</sup> August, 2011, and responded to it the following day and dismissed on the same day. He submits that he was never invited for a disciplinary hearing and as the dismissal was unfair for want of due process. They rely on the case of **John Otieno Mukabi Vs Kenya Builders & Concrete Company Limited (2014)eKLR**; where it was held:

***“In my view, an employer is required to provide the reasons for termination of an employee in the course of the internal disciplinary process which is triggered by a notice to show cause... an employer who fails to discharge its obligation to an employee would not be forgiven merely because they seek to demonstrate the reasons for termination in Court. It is not the role of the Court to preside over a re-enactment of internal disciplinary process. The duty of the Court is to inquire into the legality of the process and its outcome and to make a determination thereon.”***

34. As to compensation the Claimant states that he worked for the Respondent for 11 years and had a clean record until he was unfairly dismissed. He prays for twelve months salary as compensation for unfair dismissal.

35. The Claimant further submits that he is entitled to loan benefit being the difference between the staff rate charged at 3% and the commercial rates here of 12% which later rose to 29%. He relies on the case of **Abraham Nyambane Asiago Vs Barclays Bank of Kenya (2013)eKLR** where the Court stated:

***“I have no doubt in my mind that an employer who grants an employee a loan facility on special***

***terms is entitled to vary terms of the facility or even recall it altogether once the employment relationship ceases to exist. However, there is a basic assumption in all such cases, that the employment relationship terminates within the law. If there is a whiff of unlawfulness in the termination of employment, then the employers' right to withdraw the special loan facility advanced to the employee is withheld."***

36. The Claimant also submits that he is entitled to end of service pay of Shs. 1,811,992/= which he states is contained in his letter of appointment.

37. The Claimant prays that the claim be allowed as drawn.

38. The Respondent submits that the Respondent exercised its right to transfer the Claimant to one of its branches as stipulated in Clause 2 of the letter of appointment.

39. The Respondent state that the Claimant had vast experience in the bank operations and was best suited to head its branch in Maua and therefore the transfer was not reflective of ill motive. By refusing to obey an order of transfer the Claimant was guilty of gross misconduct which entitled the Respondent to terminate the Claimant's contract of employment.

40. As for the allegation by the claimant that he was on medical leave the Respondent submits that this claim is unsubstantiated as the letter from Dr. Mareko did not provide any particulars or medical justification to warrant two weeks of medical leave. When the Claimant was served with the notice to show cause on 3.08.2011, he was that the Kenya Institute of Management ready to deliver his lecture at time when he was on medical leave.

41. The Respondent further submits that the Claimant was gainfully employed elsewhere a fact which goes against clause 6(d) of his contract of employment. It is the Respondent's submission that they were entitled to dismiss the Claimant for gross misconduct and for violating his contract of employment.

42. The Respondent further submits that they acted with procedural fairness as far as the Claimant's termination is concerned. The Notice to show cause to the Claimant contained sufficient details of the charges that the claimant was facing and he was given ample time to respond.

43. It is the Respondent's contention that the Claimant chose not to respond to the notice to show cause but instead referred the Respondent to an earlier letter he had written which letter in the Respondent's opinion was not a valid response. They rely on the case of **Anthony Mkala Chitavi Vs Malindi Water and Sewerage Company Limited (2013)eKLR** to buttress this position.

44. The Respondent states that the Claimant is not entitled to any of the remedies sought because he breached his contract of employment as was held in the case of **Godfrey Makindu Bs Trans Business Machines Limited(2013) eKLR**. The Respondent pray that that the Claim be dismissed with costs.

45. Having considered the evidence and submissions of both parties, issues for determination are as follows:

***1. Whether there were valid reasons to warrant dismissal of Claimant.***

***2. Whether due process was followed.***

***3. What remedies if any to grant in the circumstances.***

46. In determining issue No. 1 above, the dismissal letter of the Claimant state that:

***"-----The Bank has arrived at a decision to summary dismiss you from employment on account of loss of confidence in you as a consequence of inter-alia of our being reasonably and sufficiently satisfied of your gross misconduct arising from among other things your failure***

***and/or refusal to report to Maua Branch on transfer, your having engaged in employment or occupation whilst in service of the Bank, the full particulars whereof are well known to you----“.***

47. These reasons are therefore 3 fold:

***Loss of confidence.***

***Refusal to take a transfer.***

***Engaging in another job/occupation whilst in employment of Respondent.***

48. Section 43 of Employment Act states as follows:

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

49. The reasons the Respondent may wish to reply on to dismiss an employee must be valid reasons existing at the time of termination and loss of confidence is not one of the reasons enumerated under Section 44 of Employment Act on gross misconduct.

50. On the issue of refusal to take a transfer, the Claimant has submitted that he indeed got a letter transferring him to Maua dated 6.7.2011. He approached the Managing Director to discuss the difficulties involved in taking up the posting.

51. He also stated that his health was also affected by the continuous harassment by the Respondent and he sought medical attention and was given sick off of 2 weeks as per his Appendix 10 dated 15.7.2011. This sick off was also extended on 29.7.2011 for a further 2 weeks (Appendix 2).

52. The Respondents on their part insist that the Claimant medical records were suspect and that is why they wrote him a letter (Appendix 11) stating as follows:

***“...the bank has not ruled out the possibility of inaccuracy of information given to the Consulting Psychiatrist which is established would be contrary to your letter of employment that requires that staff shall always maintain absolute integrity and honesty. The bank reserves the right to call for a second or third medical opinion to verify the alleged infirmity of mind”.*** This letter is dated on 3.8.2011.

53. On 8.8.2011, the Claimant was served with a show cause letter to which he responded to the same day and offences leveled against the Claimant were for refusing to take up the transfer and also issued for engaging in active employment elsewhere.

54. The Respondent had reservations about the sick off but there is no evidence that the sick offs turned out to be inaccurate. This means that if Claimant had sick off from 29.7.2011 for 14 days, this sick off was to run upto 11.8.2011. On the last day of the sick off 11.8.2011, the Claimant was dismissed. The show cause letter was dated 8.8.2011 and the Claimant replied to it on 10.8.2011. On 11.8.2011 he was dismissed.

55. This Court notes that the Claimant was accused of failing to take up a transfer yet there is no proof that the medical report he presented was a falsehoods.

56. They could not rely on the issue of failing to take up a transfer as a reason for dismissal in the

circumstances. Had the Claimant failed to take up his transfer with effect from 12.8.2011 then this would have been a valid reason but in this case, the Claimant was dismissed while still on his sick off without proper consideration.

57. On the issue of taking up another job while in employment of the Respondent, there is no evidence presented in Court of this.

58. The Claimant stated that he was doing his PHD studies and as part of the course requirements, he undertook part time teaching after duty. That this cannot be termed as another job engagement in the circumstances.

59. Having considered all the above reasons, I do not find them valid reasons for dismissal of the Claimant and I find that there was no valid reason to warrant the Claimant's dismissal.

60. On the second issue, the Claimant was not taken through any formal disciplinary hearing as envisaged under Section 41 of the Employment Act which states as follows:

**“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.**

61. This is coupled with requirements of Article 50(1) of the Constitution which states:

**“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.**

62. In absence of any formal hearing, I find the dismissal of Claimant unfair and unjustified in terms of Section 45(2) of Employment Act which states:

**2. A termination of employment by an employer is unfair if the employer fails to prove:**

**a. that the reason for the termination is valid;**

**b. that the reason for the termination is a fair reason:-**

**i. related to the employee's conduct, capacity or compatibility; or**

**ii. based on the operational requirements of the employer; and**

**c. that the employment was terminated in accordance with fair procedure.**

63. I therefore find for the Claimant and award him as follows:

**1. 12 months salary as damages for wrongful and unfair termination =  $12 \times 557,536 = 3,345,216/=$ .**

**2. 3 months salary in lieu of notice = 1,672,608.**

**TOTAL = 5,017,824 plus interest.**

**3. Certificate of Service.**

**4. Costs of this suit.**

Read in open Court this 18<sup>th</sup> day of July, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**  
**JUDGE**

**In the presence of:**

Ogembo for Claimant – Present

Owiti for Respondent – Present