



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 677 OF 2013**

**ROBERT KIMUTAI KORIR.....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim filed on 14<sup>th</sup> May, 2013 the claimant avers, that he was employed in 1998 by the respondent as a teller at a salary of Kshs.16,579 which was increased from time to time and stood at Kshs.99,838/= at the time he was dismissed.
2. According to the claimant, for the 12 years he worked for the respondent, he did so with utmost diligence, dedication and without any case of indiscipline. However the respondent in the month of July, 2011 dismissed him from employment after he failed to resume duty after the end of his leave of absence. According to him failure to resume duty was as a result of illness which was stress induced and the medical records available which the respondent refused to take into account. The claimant further averred that his illness was as a result of a loan he had taken out with the respondent but whose terms were changed midstream causing his stress and anxiety.
3. The claimant therefore seeks an order of this Court that a declaration be made that termination of his employment was unfair, wrongful and illegal. He further seeks an order of reinstatement or alternatively compensation in form of one month's salary in lieu of notice and twelve month's salary for unfair termination of services.
4. The respondent in refuting the claimants claim averred that:-
  - a. The claimant applied for his leave which was approved to run from 3<sup>rd</sup> May 2010 to 17<sup>th</sup> May 2010.
  - b. On 18<sup>th</sup> May 2010, the claimant failed to report back to his work station as expected. There was no communication from him or any one as to his whereabouts or his reason and/or failure to report back to work on 18<sup>th</sup> May, 2010 as expected.
  - c. The claimant remained absent from his work station from 18<sup>th</sup> May 2010 and 12<sup>th</sup> June 2010, the Respondent's Manager Operations wrote a letter to the Claimant noting his prolonged absence from duty without lawful excuse and without informing the office of his whereabouts. He was required by the same letter to report to the office not later than 16<sup>th</sup> June 2010, failure to which he

would be considered to have absconded duty and would be removed from the bank's payroll forthwith.

- d. By 16<sup>th</sup> June 2010, the Claimant had not reported back to his workstation or sent word of his whereabouts or in any way informed the office of his whereabouts or reasons for his absence. The Respondent's Manager Operations wrote yet another letter to the Claimant which made reference to the letter of 12<sup>th</sup> June 2012 in which he observed that the Claimant had ignored calls from the office to his phone and had failed to inform the office of his whereabouts. As a result, his name had been removed from Bank's payroll for desertion of duty with effect from June 7<sup>th</sup> June 2010.
- e. On 22<sup>nd</sup> June, 2010, the Respondent's Manager of the claimant's branch wrote a letter to the Human Resource Manager, Retail Banking and S&L, giving a report of the events concerning the Claimant from 7<sup>th</sup> June 2010, the show cause letters written to him before and that efforts to contact him had borne no fruit as the calls went unanswered. The manager gave her logical conclusion that the claimant had absconded duty and should thus be dismissed from the Bank's services.
- f. On 6<sup>th</sup> July, 2010, the Manager Operations of the Claimant's Branch received an undated letter from one Phillip Kipkirui A. Korir who identified himself as the claimant's elder brother. The letter was forwarded to the HR Manager, Retail Banking and S&L vide a letter dated 7<sup>th</sup> July 2010. The said letter explained that the claimant's elder brother had received information on 10<sup>th</sup> June 2010 that the claimant had not reported back to work; and narrated how he managed to track him and the meeting they held at his father's home on 17<sup>th</sup> June 2010, where the claimant agreed to report back to work on 18<sup>th</sup> June 2010. The letter further stated that since the claimant failed to report back to work as agreed, on 21<sup>st</sup> June 2010, his elder brother was contacted by a Mr. Tanguis from Moi Avenue Branch inquiring about the claimant's whereabouts.
- g. In the letter referred to in Appendix 6 above, the claimant's elder brother merely informed Mr. Tanguis that he was following up on the claimant's absence from work and that he would upon contact with the claimant, notify either Mr. Tanguis or go to Nairobi with any meaningful information.
- h. According to the letter marked as Appendix 6, the family of the claimant made contact with him on 1<sup>st</sup> July 2010, and he agreed to see a doctor the following day wherein he was seen and treated by a Dr. Sitonik at the AIC Litein hospital and was to be reviewed on 9<sup>th</sup> July 2010. By the time this information was received by the Respondent's Branch on 6<sup>th</sup> July 2010, and on the 8<sup>th</sup> July 2010 by the Head Office, the Respondent had already issued the two show letters and the Claimant's Branch Manager had already given her recommendation for dismissal following his absence from duty for over 20 days.
- i. The respondent's HR Manager, Retail Banking and S&L received another letter from the Moi Avenue Branch dated 14<sup>th</sup> July 2010 which was forwarding a letter from the claimant's elder brother, Phillip Korir dated 9<sup>th</sup> July 2010 received at the Branch on 15<sup>th</sup> July 2010. The letter was forwarding the claimant's sick sheet and promising to present him before the Respondent's Branch Manager on 16<sup>th</sup> July 2010, upon completion of his medical doses and rest prescribed by the doctor.

5. The claimant in his oral evidence reiterated most of the averments in his memorandum of claim and submissions.

6. Mr. Molenje for the respondent submitted that under section 30(2) of the Employment Act, for an employee to be entitled to sick leave with full pay the employee must notify, or cause to be notified as soon as possible, his employer of his absence and reasons for it. Counsel submitted

that at no time did the claimant submit any medical documents to confirm total admission to hospital for over a month. Mr. Molenje therefore submitted that under section 44(4) of the Employment Act any employee who without leave or other lawful cause absents himself from place appointed for the performance of his work is guilty of gross-misconduct and can be summarily dismissed.

7. According to Counsel, the claimant applied for leave from 3<sup>rd</sup> to 17<sup>th</sup> May, 2010 and was to resume duty on 18<sup>th</sup> May, 2010. He failed to resume duty as expected and also failed to communicate reason why. He further submitted that for a period of 4 weeks the respondent made every effort to get in touch with the claimant through his mobile phone without success. According to Counsel, the respondent had on a balance of probability shown that it had valid, fair and justifiable reason to dismiss the claimant from employment.

8. This case presents a peculiar and rather unusual case of termination of employment on account of desertion. It is not in dispute that the claimant failed to resume duty upon expiry of the authorized leave of absence. The respondent made efforts to contact the claimant without success therefore after a period of one month of unauthorized absence the respondent removed the claimant from its payroll and eventually terminated his services. However on 8<sup>th</sup> July, 2010, the respondent received a letter from one Phillip Kipkurui Korir who described himself as the eldest brother to the claimant. In the letter Mr. Korir narrates how he and his family made effort to meet with the claimant to get to know what his problem was and why he was avoiding people. The letter narrated how on 1<sup>st</sup> July, 2010 Mr. Korir and the rest of the family had conversation with the claimant and they agreed with him that he be taken to Hospital at Litein. A Doctor Sitonik who examined the claimant diagnosed him with anxiety neurosis. Mr. Korir in his letter describes the claimant as too young and required a lot of counselling since whenever something unpleasant crisscrossed his heart he got carried away by emotional thoughts.

9. In his letter appealing against the dismissal, the claimant talks about his state of depression which came about after what described as frustration over a loan facility which was granted to him by the respondent to purchase a house.

10. The scenario presented by Mr. Korir's letter and those of the claimant is one of a person undergoing depression. It may therefore be safely said that his failure to return to work upon expiry of his leave was due to his mental condition. This status of affairs was not known to the respondent by the time recommendation was made for his dismissal for absconding duty and actually dismissed but became known by the time he appealed against his dismissal. These were material facts which if became known to the respondent earlier, perhaps a different decision other than dismissal on account of absconding duty could have been reached.

11. From 18<sup>th</sup> May, 2010 when the claimant was supposed to resume work to 22<sup>nd</sup> June, 2010 when recommendation was made for the claimant's dismissal was a period of just over one month. Whereas the length of time for unauthorized absence is immaterial every case must be decided in its own circumstances.

12. The Court is of the view that whereas the respondent had valid and justifiable reason for terminating the claimant's services initially, when it became known that he could have possibly suffered depression, his appeal ought to have been considered in that light. For this reason the Court finds the refusal to reconsider the claimant's dismissal on appeal to have been unfair.

13. In conclusion, the Court reduces the claimants termination on account of desertion to normal termination as per his contract of service with the consequence that he will be paid salary in lieu of notice as per his contract of service and any other exit benefits and allowances he would have been entitled to if his services were terminated normally. The Court further awards the claimant eight month's salary as compensation for unfair dismissal.

14. Costs to the claimant.

15. It is so ordered.

Dated at Nairobi this 23<sup>rd</sup> day of October 2015

Abuodha J. N.

Judge

Delivered this 23<sup>rd</sup> day of October 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge