



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1093 OF 2010**

**BETWEEN**

**DAVID KABUI.....**  
**CLAIMANT**

**VERSUS**

**DHL GLOBAL FORWARDING [K] LIMITED .....**  
**RESPONDENT**

*Rika J*

*CC. Leah Muthaka*

*Mr. Mosei instructed by K.Mosei & Company Advocates for the Claimant*

*Ms. Guserwa instructed by J.A.Guserwa & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. David Kabui filed his Statement of Claim on 20<sup>th</sup> September 2010. The Respondent filed its Statement of Response on 13<sup>th</sup> April 2011. The Claimant testified and closed his case on 6<sup>th</sup> March 2012. The Respondent testified through its one time Human Resource Manager Claudio Onyango Otieno, and closed its case, on 22<sup>nd</sup> April 2013. The dispute was last mentioned in Court on 4<sup>th</sup> June 2013, when the Parties confirmed compliance with the order for the filing of Final Submissions, and were advised Award would be delivered on notice.
2. Kabui testified he was employed by the Respondent Multi-National Enterprise as the Cash Accountant, on 2<sup>nd</sup> August 2001. He was initially employed by a company called Excel, which was later acquired by the Respondent.
3. On 29<sup>th</sup> October 2008, he was summoned by the Respondent's Chief Finance Officer over a Real Time Transfer, which owing to pressure of work and human error, the Claimant filled in the wrong Bank Account Number. Immediately the error was brought to the attention of the Claimant, he re-transferred the money to the correct Account. He was suspended on 30<sup>th</sup> October 2008 over a matter he considered to be a human error. He was sent a letter to show cause why disciplinary action should not be taken against

him. He answered the Respondent's query in detail, making it clear there was no intention to defraud the Respondent. He was nonetheless summarily dismissed on 7<sup>th</sup> November 2009 in circumstances he considers to amount to unfair termination. He was not heard fairly, and rules of natural justice were violated by the Respondent. He appealed the decision by the Respondent in accordance with the Human Resource Manual on Disciplinary Procedure, but received no response.

4. He explained that his duties were diverse. He maintained the cash book, paid the creditors and sundry statutory bodies. His duties also involved the filling of the Outward Telegraphic Transfer Application Form. He filled one such Form dated 27<sup>th</sup> October 2008, which was signed by the Finance Officer Mr. Mwongera. The Claimant also prepared a second document of the same date addressed to the Respondent's Bank Standard Chartered Bank Limited, instructing the Bank to transfer Kshs. 20 million from Respondent's Standard Chartered Bank Limited KES Account Number 0106096357200 to Respondent's Barclays Bank Limited KES Account Number 70-8019178. The first document had Account Number 70-8139041, which belonged to the Claimant, as the beneficiary of the telegraphic transfer. He testified that this error was occasioned by pressure of work. He did not fill in his personal Account Number deliberately. The Respondent intended to buy dollars. It was realized the Kshs. 20 million was in the Claimant's Account on 28<sup>th</sup> October 2008. He wrote to his Bank on 29<sup>th</sup> October 2008 and the money was retransferred to the intended Account. It was after this that the Respondent initiated disciplinary proceedings against the Claimant.

5. The Claimant seeks a declaration that dismissal was illegal and in violation of the rules of natural justice; compensation; exemplary damages; pension; costs; and any other suitable relief.

6. On cross-examination, the Claimant testified he was the Cashier and carried out the role of reconciliation of Accounts. He would be assigned the duty to transfer money on behalf of the Respondent. He filled the Form honestly. He filled his own Account Number, but did not intend to transfer Kshs. 20 million to his own Account. His Account was at the same Bank where the Respondent had the Account the telegraphic transfer was destined. His Account and the Respondent's Account at Barclays Bank however, had different digits. He conceded that Kshs. 20 million left the DHL Account and was deposited in the Claimant's personal Account. He succeeded in having the huge amount of money in his Account. If he did not write to his Bank there would have been no re-transfer. He was not able to say if the Respondent would go on trusting him again after the incident. He disagreed that he was negligent in performance of his duties. He would not blame the Management for losing confidence in him. Redirected, the Claimant testified that he re-transferred the money willingly. He had always performed his duties diligently, did not have any warning, and was never reported to the Police. Kabui urges the Court to grant his prayers.

7. The Respondent concedes Kabui was its Employee. He was instructed to transfer Kshs. 20 million from one Respondent's Bank Account to the other; he instead redirected the money to his own Account. He had no authority of the Respondent to do so. He was dismissed from employment in accordance with the Claimant's Disciplinary Procedures. He was given the chance to explain himself. Termination was fair, in accordance with the Employment Act 2007 and the rules of natural justice.

8. Otieno stated he worked with Kabui at DHL for 8 years. The Claimant was instructed by Mwongera to transfer Kshs. 20 million from the Respondent's Standard Chartered Account to Respondent's Barclays Bank Account. The money was to be moved from the Respondent's US Dollar Account to Respondent's Kshs. Account. He transferred the money to his own Account held at the same Barclays' Bank as the intended Respondent's beneficiary Account. The Respondent discovered no money was transferred to its Account. It enquired From Kabui, who alleged there was an innocent error on his part. He retransferred the money on being asked to do so by the Respondent, and not of his own free will. The Respondent formed the view that Kabui acted intentionally. The Respondent did not consider his explanation to be satisfactory. He was suspended, called to explain, and subsequently dismissed. The Respondent lost confidence in him. Dismissal was preceded by a fair procedure, was justified and the remedies claimed are not merited.

9. Cross-examined, Otieno stated Kabui did not have any warnings in his file. The Witness could not

recall if the instructions to transfer the money were communicated orally or in writing. Mr. Mwangera signed the transfer Form. He was not able to say if Kabui signed, but was certain the Bank would not act on the transfer of the money, without signatures of the relevant DHL Officers. Both documents were forwarded to the Bank by the Claimant. There was no innocent mistake in filling the Form, although it was possible to make such a mistake. The Claimant was instructed to reverse the transfer from his Account after the Respondent discovered what had transpired. Chief Finance Officer Mwangera and the Security Officer investigated the incident, but Police Officers were not called in. Suspension letter was signed by Mwangera. The Witness explained this was in order, as every Organization has its own Rules to guide conduct of business. Mwangera was Head of Department and signed the letter in that capacity. Redirected, Otieno testified that money was transferred to Kabui's Account, not Mwangera's. Kabui completed the transfer Form. The documents contained written instructions to Kabui. Mwangera was the Claimant's Departmental Head. The Respondent prays for dismissal of the Claim, with costs to the Respondent.

***The Court Finds and Awards:-***

10. The facts in this dispute fall within a very narrow compass. David Kabui was employed by the Respondent Courier Company as its Cash Accountant. It was his responsibility to fill in the Outward Telegraphic Transfer Application Form, as instructed by the Respondent, to enable the Respondent move its money from one currency Account to the other. He filled one such Form on 27<sup>th</sup> October 2008. Kshs. 20 million was to be moved from the Respondent's Standard Chartered Bank Limited Account Number 0106096357200, to its Barclays' Bank Account Number 70-8019178. Instead, the Claimant gave his own Barclays Bank Account Number 70-8139041 on the Telegraphic Transfer Form. The sum of Kshs. 20 million was actually transferred to the Claimant's own Account.

11. The Claimant attributes this open and shut case of monumental fraud, to human error. He consciously gave his own Account as the beneficiary of transfer. His Account was in the same Bank as the Respondent's. The Court believes the evidence of Mr. Otieno that the Claimant only retransferred the money after the Respondent discovered its Cash Accountant was up to no good. The Respondent had more than reasonable grounds to suspect the Claimant engaged in a crime against Respondent's property, in which the Respondent stood to suffer substantial loss. The reversal of the transfer did not absolve the Claimant of the employment offence. It was up to the Respondent to determine whether or not to call in the Police. The decision not to involve the Police again does not absolve the Claimant of the employment offence.

12. The Court finds no worth in the Claimant's attempt to draw his Departmental Head Mwangera into the fraud. The Claimant, and the Claimant alone, bore the responsibility for the preparation of the Telegraphic Transfer Form; he delivered the documents to the Bank; and momentarily held a favourable Bank Balance of up to Kshs. 20 million. This was not his own money, but money he deliberately diverted from his Employer's Account. Whatever role Mwangera and other DHL and Bank Officers might have played, have no bearing on the dismissal of the Claimant from employment. It is unlikely that the Respondent would go on working with the Claimant after 28<sup>th</sup> October 2008, in full trust and confidence. The Court is satisfied the Respondent had adequate grounds to justify its decision against the Claimant.

13. The disciplinary procedure was not in material departure from the minimum statutory disciplinary procedure contemplated under the Employment Act 2007, and the Respondent's own internal disciplinary mechanisms. The Claimant was investigated, suspended, called upon to show cause, given a chance to state his own case and appeal against the initial decision. His appeal was dismissed and the decision communicated in a letter from the Respondent dated 11<sup>th</sup> December 2008. In sum:-

***[a] The Claim is dismissed in its entirety.***

***[b] The Claimant shall meet the costs of the Claim.***

Dated and delivered at Nairobi this 17<sup>th</sup> day of January 2013

**James Rika**

**Judge**