



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 553 OF 2014

MATHEW KIPKEMBOI KITAI

CLAIMANT

v

POSTAL CORPORATION OF KENYA

RESPONDEDNT

JUDGMENT

1. On 24 June 2014, Mathew Kipkemboi Kitai (Claimant), a Motor Transport Officer was dismissed by Postal Corporation of Kenya (Respondent) after about 29 years of service.
2. The reason given for the dismissal was that the Claimant had misused a fuel card. The letter also made reference to loss of confidence.
3. The Claimant appealed unsuccessfully against the dismissal and this prompted him to commence legal proceedings against the Respondent alleging unlawful termination of employment.
4. The Claimant sought *unpaid overtime, pay in lieu of notice lost prospective income to retirement and compensation*.
5. The Respondent filed a Memorandum of Response on 18 February 2015, and the Cause was heard on 3 December 2015 and 7 March 2016.
6. After close of hearing, the Claimant filed his submissions on 21 March 2016, while the Respondent filed its submissions on 13 April 2016.
7. The Court has considered the pleadings, evidence and submissions as, *whether the dismissal of the Claimant was unlawful and appropriate remedies/entitlements*.

Whether dismissal was unfair

Procedural fairness

8. Among the grounds advanced by the Claimant in challenging the dismissal was that he was not accorded a fair hearing.
9. The right to be accorded a hearing in employment before dismissal is anchored in Article 41 of the Constitution. Section 41 of the Employment Act, 2007 gives statutory content to the right by providing for the irreducible minimums of the right.
10. Where there are contractual provisions, the same will also be taken into consideration in determining whether a dismissal was procedurally fair.
11. The Claimant was issued with a show cause notice dated 31 January 2013. The notice informed him that disciplinary action was under consideration and it also outlined the allegations and requested the Claimant to give a written response within 7 days.
12. The Claimant responded through a letter dated 8 April 2013 but his explanations were found wanting and he was dismissed on 24 June 2013.
13. On 4 July 2013, the Claimant addressed a letter of appeal to the Respondent but after consideration of the appeal, he was informed on 28 August 2013 that the appeal was unsuccessful

- but that the dismissal was being substituted with retirement in the public interest.
14. About a year later, the Communication Workers Union of Kenya sought that the Claimant be reinstated on the ground that the reasons for dismissal were unfair. It is not clear whether the Respondent replied to the letter from the Union.
 15. The Court is satisfied from the correspondences produced in Court that the process conducted by the Respondent was in compliance with the statutory requirements as the Claimant knew of the allegations to confront, he was given time to respond and he did respond and he was also informed of a contractual right of appeal which he utilised.

Substantive fairness

16. Procedural fairness is not all that is there in a dispute of this nature.
17. An employer is under a legal obligation to prove the reasons for dismissal (section 43 of the Employment Act, 2007) and that the reasons are valid and fair (section 45 of the Act).
18. *Validity* of reasons for dismissal is measured against the yardstick of whether there are legally sufficient reasons for the dismissal while *fairness* is a question of the justness or equity of the dismissal on the facts and circumstances of the case.
19. The Court has already adverted to the reasons proffered by the Respondent in dismissing the Claimant. Misuse of an employer's property or unauthorised use of such property borders on dishonesty and if proved would be a valid reason for dismissal.

Fairness of the dismissal

20. However, the Court intends to deal with the fairness of the dismissal first.
21. The particulars in the instant case were that the Claimant unprocedurally, and without authority used a fuel card for motor vehicle KBJ 191U to fuel motor vehicle KBB 874 S between 27 August 2012 and 1 September 2012.
22. An application seeking authorisation to use the fuel card for KBJ 191U to fuel KBB 874S and addressed to the Respondent's Regional Manager through the Claimant's Supervisor and dated 27 August 2012 was produced in Court. The reasons for the request were stated.
23. The Supervisor recommended approval, but it appears the application did not reach the Regional Manager. The fuel was drawn though.
24. These facts were brought to the attention of the Respondent's Headquarters Disciplinary Committee which noted that though the card was not misused, it would have opened the doors to misuse.
25. The Committee, supported by the Respondent's Corporation Secretary recommended that the Claimant be cautioned and the fuel card system be reviewed.
26. However, the Respondent's Postmaster General overruled the Committee and returned a verdict of dismissal.
27. The Respondent has not disputed the fact that no fuel was actually lost (misused) or that the fuel card for KBB 874 S had been exhausted, hence the request by the Claimant to use the fuel card for KBJ 191U.
28. The question therefore arises whether it is open to an employer to alter a Disciplinary Committee's decision or recommendations, without contractual or statutory authority in employment underpinned by statute, and without further hearing the employee on the alteration.
29. In my considered view and I so endorse, the position taken by the Labour Appeal Court of South Africa in *South Africa Revenue Service v CCMA & Ors* (2014) 1 BLLR 44 (see also *South African Revenue Service v CCMA & Ors* (2015) ZALCCT 14), that for an employer to alter or overturn a decision of a disciplinary committee would be procedurally unfair if the employee is not given a hearing on altering the recommended sanction, as equally sound under the framework envisaged by Article 41 of the Constitution (but I must place and repeat a caveat, that where a contract or statute allows such alteration, unfairness may not be an issue).
30. It is not clear on the material placed before Court whether the Respondent's Human Resource Policies/Procedures clothed the Postmaster General with such a mandate to alter or vary the recommendation of the Disciplinary Committee.
31. On that ground, the Court is of the considered view that the dismissal of the Claimant was not fair.

32. But if the Court were wrong on the basis of what has been stated above, it is of the view that the dismissal in the public interest was an overreaction. It was too severe a penalty or sanction that it cannot be deemed as equitable or just on the circumstances of the case.
33. The Court's finding is buttressed by the unchallenged evidence before the Court that the Claimant was an excellent performer.
34. In 2010 he was appraised and rated **Excellent**. In 2011, the Claimant was rated as **Very Good** at 92% and in 2012, he surpassed targets and achieved a rating of 101%, a performance marked as **Excellent**.

Appropriate remedies

1 month pay in lieu of notice

35. The Claimant was offered 1 pay in lieu of notice as indicated in the Respondent's letter dated October 2013. He did not deny the testimony that it was part of the dues he was paid.

Overtime

36. The Claimant sought overtime for the period 2009 to 2013, amounting to Kshs 551,594/65.
37. Overtime Docket Schedules were produced as exhibits. The schedules lack signatures to illustrate that they were checked and certified, and the Court is therefore unable to concede to this head of claim.

Lost prospective lost income

38. The Claimant did not provide any contractual or legal basis to lay a claim to income he would have earned up to retirement which he quantified as Kshs 2,487,000/- and the claim is declined.

Compensation

39. With the conclusion that the dismissal was not for a fair reason, the Court, considering the length of the Claimant's service of 29 years would award him the equivalent of the maximum 12 months gross wages as compensation (gross wage as of June 2013 was Kshs 41,450/-).

Conclusion and Orders

40. The Court finds and holds that the dismissal of the Claimant was unfair and awards him and orders the Respondent to pay him

a. Compensation **Kshs 497,400/-**

41. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 29th day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Onyancha instructed by Chepkwony & Co. Advocates
For Respondent	Mr. Githiru instructed by Githiru & Co. Advocates
Court Assistant	Nixon