



**Rotich v Postal Corporation of Kenya (Cause E04 of 2020)  
[2023] KEMC 305 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEMC 305 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CAUSE E04 OF 2020  
PA NDEGE, SPM  
AUGUST 10, 2023**

**BETWEEN**

**LOICE JEPKONGA ROTICH ..... CLAIMANT**

**AND**

**POSTAL CORPORATION OF KENYA ..... RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Claim dated September 22, 2020, the Claimant herein, Loice Jepkonga Rotich, avers that her employment was unfairly terminated by the Respondent herein, Postal Corporation of Kenya. The Claimant avers that she was employed by the Respondent's predecessor being the Kenya Posts & Telecommunications Corporation in 1985 on a probationary basis, and confirmed to permanent and pensionable terms on March 1, 2019 as a Postal Officer, a position she retained until May 14, 2019, when her employment was unfairly terminated by the respondent herein on account of misappropriation of official funds totaling to Kshs. 132,612.00/-.
2. That on February 6, 2018, she was the acting in charge of Mwingi Post Office, in place of her boss, the Post master in charge, a Mr. Nyaga who was then on leave. That in the course of her duties, she realized that funds amounting to Kshs. 44,800.00/= were missing from the Postmaster Balance Book (P 89). That after making all efforts to identify the destination of the missing funds, she immediately called the Postmaster in charge, Mr. Nyaga, who instead informed her to continue with her duties until he resumes. That upon resuming duties on 12.02.2018, the Postmaster in charge, Mr. Nyaga, did not request for any briefing with regards to the missing funds in the Postmaster Balance Book (P 89) but went ahead to notify the Branch Manager, a Mr. Mweu, who was then based in Kitui, but had supervisory duties over Mwingi Post Office, of the anomaly. That on 13.02.2018, the Branch Manager, Mr. Mweu, arrived and together with the postmaster in charge of Mwingi Post Office, Mr. Nyaga, they proceeded to audit all the books of accounts as well as receipts so as to identify the source of the anomaly as well as the destination of the missing funds. That the Postmaster in charge of Mwingi Post Office, Mr., Nyaga, instead and despite her protests, proceeded to illegally transfer all the



missing funds from the Postmaster Balance Book (P 89) to her Counter Balance Book (P 165). That she was subsequently subjected to further audits and investigations under the guidance of the Regional Manager – Machakos. That she co—operated with all the auditors and the investigators. That on 26.03.2018, she was not assigned any duties unto 23.04.2018 when the Postmaster in charge of Mwingi Post Office, Mr. Nyaga wrote to the Human Resources Manager based in Machakos requesting for her interdiction. That she was informed of the interdiction to pave way for investigation whereof she was issued with an interdiction letter on 24.04.2018 which letter was dated 17.04.2018. That she was letter issued with a show cause letter for which she later appeared for a disciplinary hearing on 29.11.2018 whereof she made presentations before the Regional Disciplinary Committee in Machakos on charges of misappropriation of funds. That during the hearing, she was questioned by the Regional Disciplinary Committee but was unfairly not permitted to produce any documentary evidence before the committee despite having documents which would have shown that she was not culpable for the offence of misappropriation of funds. That on 14.05.2019, she was issued with a dismissal letter effective from 14.05.2019 on the charges of misappropriation of official funds of Kshs. 132,612.00/= at Mwingi Post Office and was granted 14 days right of appeal. That on 23.05.2019, she appealed against the decision of the Regional Disciplinary Committee on grounds that she was not given a chance to defend herself and that no such funds were lost or missing. That she was duly invited and indeed appeared before the Disciplinary Appeals Committee sitting in Nairobi on 15.10.2019 and that she informed the committee that her documentary evidence had been ignored by the Regional Committee. That on 09.03.2020, she instead received a letter from the Respondent upholding the decision to dismiss her. That during the pendency of her employment with the Respondent herein, she wholeheartedly dedicated herself to her employment, until such time as she was unfairly terminated by the Respondent herein. She contends that the procedure adopted by the Respondent in terminating her employment was unfair and unlawful; as the same was not guided by sections 43 and 45 of the *Employment Act*, 2007 which require employers to invite a claimant to a disciplinary hearing before termination. She particularized the unfair dismissal in Paragraph 28 of her Memorandum of Claim as follows: -

- a. Terminating the claimant’s employment without valid reason
  - b. Failing to consider the claimant’s documentary evidence to the effect that she did not misappropriate any funds belonging to the Respondent
  - c. Turning against the Claimant herein for blowing the whistle on misappropriation of funds at Mwingi Post Office
  - d. Victimizing the clamant for carrying out her duties as a civil servant
  - e. Ignoring the Claimant’s evidence and branding the same as inadmissible despite the fact that the Regional Disciplinary Committee and the Disciplinary Appeals Committee are quasi-judicial bodies which are not strictly bund by the rules of evidence
  - f. Conducting disciplinary proceedings with a pre-determined outcome of summarily dismissing the Claimant herein
  - g. Failing to provide the claimant with the necessary documents being P 89 and P 165 as well as the Post Global Operator Summary and all books of accounts to enable her prepare for a charge of misappropriation of funds
3. The Claimant further avers that the Respondent owes her monies in respect of her retained half salary from the month of July, 2018 up to April, 2019 as well as her salary for the 14 days she worked as a n employee in May, 2019 prior to termination on the said date. That she is similarly owed 1 month’s salary



in lieu of notice being the last monthly salary at the time of termination of employment in line with the Employment Act, 2007. That since leaving the respondent's employment, she has made concerted efforts to meet the respondent so that the issues highlighted herein can be amicably settled, however the respondent has consistently turned its back on her. That she has at all times acted within the ambits of the Employment Act, 2007, and all the relevant laws and should therefore be accorded a fair settlement by the Respondent.

4. The Claimant is therefore praying for judgment against the respondent as hereunder: -
  - a. That a declaration be made to the effect that the claimant's summary dismissal was unfair and as the same was not within the ambits of the Employment Act 2007, and other employment laws.
  - b. That the claimant herein be awarded 12 months compensation for the unfair termination as provided for under section 49(c) of the Employment Act 2007, laws of Kenya totaling to Kshs 505,260.00/=
  - c. That the Respondent herein to pay the Claimant 1 month's pay in lieu of notice as provided in the Employment Act 2007 at Kshs 42, 105.00/=
  - d. That the Respondent herein to pay the claimant her retained half salary from the month of July, 2018 up to April, 2019 as well as her salary for the 14 days she was an employee in May, 2019 prior to termination totaling to Kshs. 220,975.00/=
  - e. That the Respondent to refund and or to desist from deducting the total of Kshs. 132, 612.00/=
  - f. That the Respondent to pay the claimant her salary for the 14 days she was an employee in May, 2019, prior to termination at Kshs. 22,671.92/=
  - g. That the Respondent to reinstate the claimant herein to her position of Postal Officer with all the benefits the claimant was enjoying prior to termination
  - h. THAT the Respondent to pay the claimant all monetary and employment benefits accruing to her from the date of unfair termination un to the date of re-instatement together with interests from the date of such dismissal
    - i. That the Respondent herein to issue then claimant with certificate of service
  - j. That the claimant be awarded costs of the case
  - k. That the court may grant any other relief as it may deem necessary to grant
5. The Respondent in its Memorandum Response dated 03.06.2022 averred that the Claimant was employed by it on permanent and pensionable terms until 14.05.2019 when she was dismissed from service on account of her dishonesty and misappropriation of public funds. That the termination of her employment was done in strict adherence to constitutional principles of fair administrative action, provisions of the Employment Act 2007, its in house disciplinary code of conduct (known as the Posta Code) and the rules of natural justice. That the decision to terminate the Claimant's employment was made after finalization of an investigative and disciplinary hearing process that lasted for more than 1 year. That the decision to terminate the Claimant's employment was therefore not arbitrary. That the Claimant was accorded an opportunity to present her defense in respect to charges of misappropriation of public funds totaling Kshs. 132, 612/-. That she was heard by it Regional Disciplinary Committee at 1<sup>st</sup> instance and later accorded the right of appeal where she presented her case to the Appeals committee



at the Respondent's headquarters in Nairobi and was found culpable at both levels. That her dismissal was therefore procedurally fair and lawful. The respondent further denied that the discovery of the missing funds herein was through the Claimant's whistleblowing as claimed, but that the same was done after a snap check carried out by its compliance team. That such snap checks are normally carried out across all post offices country wide to ensure that cash accounts are in order and are never preceded by advance notices since such notices would defeat the purpose of conducting the snap check in the first place. That the decision to interdict the claimant was based on preliminary investigations findings which revealed that she had a case to answer. It therefore denied the claim that it is Mr., Nyaga who instigated the claimant's interdiction. That the Claimant was duly issued with a Notice of Disciplinary charges which clearly communicated that one of its purposes was to provide the Claimant with the evidence which the Respondent intended to rely upon and to accord her opportunity to respond to the same and present any evidence that she may have in her defense to the said allegations. The respondent therefore denied in toto that the claimant was not permitted to produce any documentary evidence before the Disciplinary Committee. That the Claimant, despite being notified of the right, chose not to show up with another person during the disciplinary hearing and instead opted to appear alone. That the Respondent's Disciplinary Committee, upon conclusion of the said hearings carefully weighed the Claimant's defense against the findings of the investigation report and found the Claimant guilty of misappropriation of funds and forwarded its decision to the Postmaster General who in turn reviewed the decision and issued directive to dismiss the Claimant from service. That it therefore does not owe the Claimant any money, but instead, the Claimant should refund it the public funds amounting to Kshs 132, 612/- which she converted into personal use. It therefore prayed that the Claimant's suit be dismissed with costs.

6. The Respondent raised a Counterclaim praying for orders against the Claimant for:
  - a. Payment of Kshs. 132, 612/- being public funds which were converted into private use
  - b. Interest on (a) above at commercial rates
  - c. The Costs of the Claim and the Counter Claim
  - d. Any other just relief
7. Curiously, there was no Defense or Response to the Counterclaim. The records herein however indicate that the Respondent has never attended any of the court sessions herein. On 05.12.2022, this Claim was fixed for hearing on 25.07.2023. Despite being notified of the hearing date, the Respondent still failed to attend. It did not also bother to further its counterclaim herein. The Claimant was therefore allowed to proceed with the hearing of her claim ex parte.
8. She testified as the only witness herein. She adopted her statement filed herein as CEXH. NO. 1. Further documents produced herein are copies of her National Identity Card, copy of letter dated 30.03.1991 upgrading her from semi-skilled service to pensionable post, copy of confirmation in appointment letter dated 08.05.1997, copy of Demand Letter dated 06.07.2020, copy of certificate of posting dated 06.07.2020, copies of claimant pay slip for June, 2018, and April, 2019, letter of interdiction from duty dated 17.04.2018, Notice of Disciplinary charges dated 30.07.2018, letter from Claimant to Respondent in response to notice of Disciplinary Charges dated 30.07.2018, claimant's letter of appeal from dismissal from service dated 23.05.2019, letter of dismissal from service dated 14.05.2019, respondent's letter on appeal against dismissal dated 09.03.2020, bundle of forms P 165 for the period 01.02.2018 to 01.03.2018, bundles of extracts from Postmaster Accounts Book (P 89), and bundle of extracts from operators summary, respectively as CEXH. NOS. 2, 3, 4, 5, 6, 7A, 7B, 8, 9, 10, 11, 12, 13, 14, 15 and 16. She further stated that since she has reached the retirement age, she is no longer interested in reinstatement as prayed for in her Memorandum. That there was an unlawful



deduction of Kshs. 132 610/= which is claimed to have been lost in her hands. That the respondent had insisted that the amount would be deducted from her pension. That she wants the amount to be reimbursed. She denied owing the Respondent any amount as claimed in the counterclaim.

9. The witness statement produced herein reiterated the averments in the Memorandum of Claim. The documents produced herein backs the claims. They thus remain uncontroverted that the claimant herein was dismissed upon an investigation on the allegation that she had misappropriated public funds entrusted to her while working as Postal Officer at Mwingi Posts office. They however also remain uncontroverted that she is the one who raised the issue of the missing money when she was acting as the in charge of the post office. That instead, she was unfairly and illegally implicated with the loss, subjected to investigations and then disciplined in an unfair manner. That during the disciplinary process, her documentary evidence, some of which she produced as CEXH NO 14, 15 and 6 herein were unfairly omitted and/or excluded. Prima facie, the Claimant's position as far as her uncontroverted evidence herein is concerned, is that she was unfairly implicated, interrogated, investigated, disciplined and dismissed. There is no other evidence to rebut this. Sections 43, 44 and 45 of the Employment Act place the burden of justifying a termination on the employer. All the law requires of an employee is to provide prima facie evidence of a wrongful termination. Once this is done, it is for the employer to provide evidence to demonstrate that the separation was lawful. To this extent, the Employment Act has reversed the concept of burden of proof as encapsulated in section 107 of the Evidence Act so as to adopt the reverse burden of proof.
10. Addressing the issue, the Employment and Labor Relations Court in Peter Otabong Ekisa Vrs County Government Of Busia [ 2017] e KLR had this to say: -

The standard of proof as set out under section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words, the respondents bear the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.
11. In my view, the effect of the uncontroverted evidence by the claimant that she was unfairly and illegally implicated by her boss, Mr. Nyaga, after she had blown the whistle over the missing money herein, and that her documentary exhibits, were not considered during the disciplinary process, all on a prima facie basis, points towards an unfair process. Having reviewed both sets of the pleadings filed herein and the evidence, I do find that the same establishes a prima facie case for unfair termination within the meaning of section 43 of the Employment Act. The burden of proof shifted onto the Respondent to justify the termination. Justification in this case could only be achieved by means of evidence. Pleadings are not enough. No evidence was tendered herein by the respondent.
12. The uncontroverted evidence by the claimant herein thus established that she had been unfairly terminated to the required standard of law. Her first claim and all her other claims therefore succeed. In summary, judgment is hereby entered for the Claimant against the respondent as prayed; that is: -
  - a. A declaration be and is hereby made to the effect that the claimant's summary dismissal was unfair and as the same was not within the ambits of the Employment Act 2007, and other employment laws.
  - b. The claimant herein be and is hereby awarded 12 months compensation for the unfair termination s provided for under section 49(c) of the Employment Act 2007, laws of Kenya totaling to Kshs 505,260.00/=



- c. The Respondent herein to pay the Claimant 1 month's pay in lieu of notice as provided in the Employment Act 2007 at Kshs 42, 105.00/=
- d. The Respondent herein to pay the claimant her retained half salary from the month of July, 2018 up to April, 2019 as well as her salary for the 14 days she was an employee in May, 2019 prior to termination totaling to Kshs. 220,975.00/=
- e. The Respondent to refund and or to desist from deducting the total of Kshs. 132, 612.00/=
- f. The Respondent to pay the claimant her salary for the 14 days she was an employee in May, 2019, prior to termination at Kshs. 22,671.92/=
- g. The Respondent to pay the claimant all monetary and employment benefits accruing to her from the date of unfair termination un to the date of re-instatement together with interests from the date of such dismissal
- h. The Respondent herein to issue then claimant with certificate of service
- i. The claimant be and is hereby awarded costs of the case

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 10<sup>th</sup> DAY OF August, 2023**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

