

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E043 OF 2025

BETWEEN

ELIJAH JOHN NTHIGA.....APPELLANT

-AND-

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

*(Being an appeal from the Judgment by Hon. J.Otieno delivered on 15th May 2024
at Embu Law Courts in ELRC Cause NO. E003 of 2021)*

JUDGMENT

1. Through a Memorandum of Claim dated 9th June 2021, the Appellant instituted proceedings before the Chief Magistrate’s Court at Embu seeking, *inter alia*, a declaration that his dismissal was null and void. He also prayed for three months’ salary in lieu of notice, unpaid salary for the period 2021 to 2023, and remittance of the National Social Security Fund (NSSF) contributions and dues to the Postal Corporation of Kenya Staff Retirement Benefits Scheme for the period 2013 to 2023.

2. The Appellant’s case before the trial court was that he was employed by the Respondent on or about 9th January 1990 as a Clerical Officer III, and was

confirmed on permanent and pensionable terms on 29th November 1991. He averred that he was later promoted to Senior Clerical Officer II with effect from March 2001, and subsequently appointed as an Accounts Assistant with effect from 1st December 2012.

3. The Appellant further averred that on or about 18th April 2015, the Respondent caused his arrest on allegations of theft, leading to his arraignment before the Embu Chief Magistrate's Court in Criminal Case Nos. 1057, 1058 and 1059 of 2015. He stated that he was thereafter suspended from duty without pay pending the determination of the said criminal proceedings.
4. It was his case that he was acquitted in all three criminal cases under Section 210 of the Criminal Procedure Code. He contended that despite the acquittal, the Respondent declined to reinstate him, notwithstanding that he was due to retire in 2023.
5. The Appellant further averred that after making several visits to the Respondent's offices, he was eventually issued with a dismissal letter dated 16th January 2021.

6. He further contended that the Respondent had ceased paying his salary and remitting his NSSF contributions and dues to the Postal Corporation of Kenya Staff Retirement Benefits Scheme from December 2013.
7. The Appellant maintained that prior to his dismissal, the Respondent neither proved the allegations of misconduct nor accorded him an opportunity to be heard. To this end, the Appellant asserted that his dismissal from service was unfair, unprocedural, unlawful and illegal.
8. In response, the Respondent filed a Reply to the Claim dated 10th September 2021 together with a Counterclaim. In the Reply, the Respondent averred that while serving at its Regional Accounts Office in Embu, the Appellant engaged in fraudulent activities that resulted in a loss of Kshs 1,180,249.00 through the fraudulent reissuing and encashment of money orders. The Respondent stated that it reported the matter to the police and initiated internal disciplinary proceedings, which culminated in the Appellant's dismissal on 16th July 2014.
9. The Respondent further averred that the Appellant had been invited to appear before the Regional Disciplinary Committee on 30th May 2014 to defend himself, but failed to attend, whereupon the proceedings were conducted in his absence and a decision to dismiss him was reached.

10. It was the Respondent's position that the Appellant's dismissal took effect in 2014, and that his visit to its offices in January 2021 was merely to obtain a copy of the dismissal letter, as he alleged to have misplaced the original. The Respondent contended that the collection of the letter on 16th January 2021 did not alter the effective date of dismissal, maintaining that the Appellant had long been aware of his termination, as evidenced by cessation of salary and receipt of pension benefits.

11. The Respondent further contended that the claim was statute-barred under Section 24(a) of the Postal Corporation of Kenya Act and Section 90 of the Employment Act.

12. On the basis of the foregoing, the Respondent denied liability for the sums claimed and urged the Court to dismiss the suit with costs.

13. In its Counterclaim, the Respondent sought recovery of Kshs 1,180,249.00 from the Appellant, being the alleged loss occasioned by his fraudulent conduct.

14. Upon hearing the matter, during which both parties adduced oral evidence and filed written submissions, the trial court evaluated the evidence and entered judgment in favour of the Appellant. To this end, the trial Court awarded the

Appellant notice pay, unpaid half salary from 22nd May 2013 to 16th July 2014, together with costs of the suit plus interest at court rates. The Counterclaim was dismissed with costs for want of merit.

15. In arriving at his determination, the learned Magistrate found that there was insufficient evidence to demonstrate that the Appellant had knowledge of the purported disciplinary hearing scheduled for 30th May 2014. The court further observed that the said meeting was a Regional Manager's meeting rather than a disciplinary hearing. Additionally, the court found no evidence of compliance with due process, including issuance of a notice to show cause or production of disciplinary proceedings. Consequently, the court held that the Appellant's dismissal was procedurally flawed and therefore unlawful.

16. The trial court also found that there was no proof of service of the dismissal letter, and accordingly rejected the Respondent's contention that the suit was time-barred.

The Appeal

17. Being aggrieved by the determination of the trial Court, the Appellant preferred the instant Appeal, advancing the following six grounds: -

- 1) **The Learned trial magistrate erred in law and fact by not considering the fact that the applicant was served with the alleged termination letter dated 16th July 2014 only on 26th January 2021.**
- 2) **The learned trial magistrate erred in law and fact by awarding one month's salary in lieu of notice but not determine that the letter of termination was served on 26th January 2021.**
- 3) **The learned magistrate erred in law and fact by not considering an award of safety (sic) between the 22nd May 2013 and 2023 when the letter of termination was served upon the appellant.**
- 4) **The learned magistrate erred in law and fact by not deciding that the termination letter dated 16th July 2014 and served upon the appellant on 16th January 2021 was null and vóid since the appellant was dismissed without being heard.**
- 5) **The learned magistrate erred in law and fact by not considering that the appellant's dues to NSSF and the Postal Corporation of Kenya staff benefits scheme were not remitted to the said organizations.**
- 6) **The learned magistrate erred in law and fact by holding that there was no proof of actual amounts remitted for unrented (sic) Postal Corporation of Kenya staff benefits scheme.**

18. Consequently, the Appellant prays that the Appeal be allowed, the judgment of the learned Magistrate be set aside, and judgment be entered in his favour as prayed in the Claim.

Submissions

19. On the Appellant's part, it was submitted that it would be fair and just to award compensation for unfair termination, given that no disciplinary hearing was conducted. The Appellant further argued that, since he was never served with a termination letter and was acquitted in all three criminal cases, the least that could be awarded was the salary lost, if not reinstatement.

20. The Appellant further submitted that the learned Magistrate failed to take into account the fact that he only became aware of his dismissal on 26th January 2021. Consequently, the Appellant argued that the award of salary should have at least covered that period. To support this position, the Appellant relied on the case of *Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited (2014) eKLR*.

21. Regarding the remittance of his NSSF and pension contributions, the Appellant referred to the case of *Ochieng & another v Pride Kings Services Ltd (2025) KEELRC 213 (KLR)*, and urged the Court to order the Respondent to remit the outstanding dues to the relevant authorities.

22. On the Respondent's part, it was submitted that the trial Court did not err in limiting the award of half salary to the period between 22nd May 2013 and 16th July 2014, as this period accurately reflected the active disciplinary engagement prior to termination. In support of this position, the Respondent cited the case of ***Pauline Mesissy Omungala Chesang v Chief Justice and President of the Supreme Court of Kenya & another (2020) KEHC 4012 (KLR)***.

23. It was further submitted by the Respondent that the trial Court correctly awarded only one month's salary in lieu of notice, as this constituted a procedural remedy for the breach without disregarding the seriousness of the Appellant's alleged misconduct. This argument was supported with reference to the case of ***Sammuel Kalomit Murkomen v Telkom Kenya Limited (2017) KECA 664 (KLR)***.

24. Referencing the case of ***Simiyu v Nzoia Sugar Company Limited (2022) KEELRC***, the Respondent submitted that the trial Court did not err in dismissing the claims for NSSF and pension contributions, as the Appellant failed to provide evidence of the actual amounts remitted and improperly sought the Court's inference regarding statutory obligations.

Analysis and Determination

25. This being the first appeal, the Court is duty-bound to re-evaluate and re-analyse the evidence on record with a view to arriving at its own independent determination on whether the decision of the trial court ought to be upheld. In so doing, the Court must bear in mind that it neither saw nor heard the witnesses testify and should make due allowance for that. (See *Selle v Associated Motor Boat Co. Ltd & Others [1968] EA 123*).

26. That said, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion but noting that I did not see or hear the witnesses as they testified.

27. Having reviewed the record, the Court has distilled the following issues for determination: -

- a) *Whether the trial court erred in awarding the Appellant one month's salary in lieu of notice.*
- b) *Whether the trial court erred in declining to award the Appellant salary for the period from 22nd May 2013 to 2023.*
- c) *Whether the trial court erred in failing to find that the Appellant's dues were not remitted to the NSSF and the Postal Corporation of Kenya Staff Retirement Benefits Scheme.*

Whether the trial court erred in awarding the Appellant one month's salary in lieu of notice.

28. The Appellant has taken issue with the learned Magistrate's award of one month's salary in lieu of notice, contending that the court failed to take into account the anguish and ordeal he underwent, as well as the provision in his letter of appointment requiring a three-month notice period.

29. A review of the record indicates that the Appellant's letter of confirmation dated 29th November 1991, which placed him on permanent and pensionable terms, required him to give three months' notice or pay one month's salary in lieu thereof in the event of resignation. Notably, the letter did not expressly provide for the notice period applicable where termination was initiated by the Respondent.

30. It is thus clear that the three-month notice provision relates to the notice to be issued and does not translate into an entitlement to three months' salary in lieu of notice, which in such a case would be limited to one month.

31. Further, **Section 35(1)(c) of the Employment Act** prescribes a statutory notice period of 28 days.

32. In light of the foregoing, the trial court cannot be faulted for awarding the Appellant one month's salary in lieu of notice.

33. It is also noteworthy that the Appellant did not, in his Memorandum of Claim, seek compensation for unfair termination. Accordingly, his contention that he ought to have been awarded such compensation is misconceived.

34. As correctly observed by the learned Magistrate, parties are bound by their pleadings, and the Court cannot grant reliefs that have not been pleaded.

Whether the trial court erred in declining to award the Appellant salary for the period from 22nd May 2013 to 2023.

35. In challenging the trial Court's award, the Appellant contends that he only became aware of his dismissal on 26th January 2021, and that the award of salary ought therefore to have been extended to that date.

36. In its judgment, the trial court found that the Appellant had been suspended without pay from 22nd May 2013 and was subsequently dismissed on 16th July 2014.

37.The record confirms that the Appellant’s dismissal was effected by a letter dated 16th July 2014, with the dismissal taking effect retrospectively from the date of his suspension.

38.The trial court, however, observed that there was no evidence demonstrating that the dismissal letter had been served upon the Appellant.

39.With due respect, this Court takes the view that the Appellant’s lack of knowledge of his dismissal until 26th January 2021 does not entitle him to salary for the period from 22nd May 2013 to 2023. Such a lack of awareness does not alter the effective date of dismissal to 2021; rather, it only impacts the date when the cause of action accrued for purposes of limitation.

40.Notwithstanding the foregoing, it is unclear why the learned Magistrate awarded the Appellant only half salary for the period in question, particularly after finding that the Respondent’s withholding of the Appellant’s salary during suspension was neither contractually nor legally justified.

41.In this regard, I find the provisions of **Section 62(1) and (3) of the Anti-Corruption and Economic Crimes Act (ACECA)** to be relevant. Why do I say so?

42. It is not disputed that the Appellant was a public officer and that he was charged in court with the offence of conspiracy to defraud, which is considered an economic crime. As such, the Court finds the provisions of ACECA to be applicable to the Appellant's case.

43. In this regard, **Section 62(1) and (3)** of the ACECA provides as follows: -

(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:

Provided that the case shall be determined within twenty-four months.

(2).....

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

44. The record bears that the Appellant was acquitted of all the charges levelled against him, the court having found that the evidence adduced was insufficient to sustain a conviction against him and his co-accused.

45. In the circumstances, and upon application of **Section 62(3) of the ACECA**, the Appellant's suspension ceased and there was no justification for the Respondent to withhold his full salary during the period of his suspension following his acquittal.

46. Accordingly, the Court finds that the Appellant is entitled to payment of his full salary for the duration of his suspension up to 16th July 2014, being the date of his dismissal.

Whether the trial court erred in failing to find that the Appellant's dues were not remitted to the NSSF and the Postal Corporation of Kenya Staff Retirement Benefits Scheme.

47. The Appellant has further faulted the trial court for failing to consider that the Respondent did not remit his dues to the NSSF and the Postal Corporation of Kenya Retirement Benefits Scheme for the period between May 2013 and 2021.

48. In his Memorandum of Claim, the Appellant sought **Kshs 50,800.00** in respect of NSSF contributions for the period 2013 to 2021, and **Kshs 379,723.30** being dues payable to the Postal Corporation of Kenya Retirement Benefits Scheme for the period from May 2013 to 2021.

49. In its determination, the trial Court declined this claim, holding that it had no basis to interfere with the mandate of a statutory body. The Court further found that there was insufficient proof of the specific amounts allegedly not remitted to the Postal Corporation of Kenya Retirement Benefits Scheme.

50. Evidently, the Appellant had been placed on suspension without pay, hence it is reasonable to conclude that no statutory or pension contributions were remitted on his behalf during that period.

51. Nevertheless, such contributions are not payable directly to the Appellant as a monetary award. The appropriate remedy is to direct the Respondent to remit the requisite contributions to the NSSF and the Postal Corporation of Kenya Retirement Benefits Scheme for the period of suspension up to the date of the Appellant's dismissal from service.

Orders

52. In sum, the Appeal partially succeeds on the following terms: -

- a) The trial Court's finding awarding the Appellant one month's salary in lieu of notice is upheld.**

- b) The award of half salary for the period from 22nd May 2013 to 16th July 2014 is set aside and substituted with an award of full salary for the same period, totaling Kshs 471,660.00.**
- c) The Respondent is directed to deduct and remit the Appellant's contributions to the NSSF and the Postal Corporation of Kenya Retirement Benefits Scheme for the period from 22nd May 2013 to 16th July 2014.**
- d) Interest on the sum in (b) shall accrue at court rates from the date of this Judgment until full payment is made.**

53. As the Appeal has partially succeeded, the Respondent shall bear the costs in this Court as well as at the trial court, which are to be assessed based on the final award.

DATED, SIGNED and DELIVERED at NYERI this 24th day of March 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant	No appearance
For the Respondent	Mr. Baraza
Court Assistant	Ndati

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO
JUDGE