



REPUBLIC OF KENYA



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**Mogere v Telkom Kenya Limited (Civil Appeal 531 of 2019)
[2025] KECA 736 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KECA 736 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 531 OF 2019
DK MUSINGA, F TUIYOT'T & GV ODUNGA, JJA
MAY 2, 2025**

BETWEEN

JOSEPHINE OBAGA MOGERE APPELLANT

AND

TELKOM KENYA LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of the Employment
and Labour Relations Court, Nairobi (M. Onyango, J). delivered
on 15th February 2019 in ELRC Cause No. 248 of 2013)*

JUDGMENT

1. Telkom Kenya Limited, the respondent herein, was one of three offspring birthed from the winding up of the Kenya Posts and Telecommunications Corporation (KPTC), vide a vesting order made on 1st July 1999 via [Legal Notice No. 157 of 1999](#). The other “siblings” of the respondent from that process were the Postal Corporation of Kenya and the Communications Commission of Kenya.
2. The appellant was one of the employees of KPTC on permanent and pensionable terms. She was employed at the position of Typist III with effect from 1st September 1982, and upon her successful completion of the probationary period of 6 months, was confirmed and her terms of employment were contained in the letters dated 6th September 1982 and 13th October 1983. It is not in dispute that the employees of KPTC were governed by their respective contracts and the Posta Code.
3. By a letter dated 16th August 2000, the appellant was suspended from employment on the grounds of obtaining a house loan fraudulently. She was informed by a letter dated 8th December 2000 of the respondent’s intention to take disciplinary action against her, and was directed to submit her representations in response to the allegations levelled against her, which she did. Vide a letter dated 12th October 2001, the respondent informed the appellant that it was not satisfied with her representations. While the appellant’s suspension was lifted, her position was revised from that of a Senior Typist (Scale



- 9) to Typist (Scale 10) and she was also transferred from her duty station in Finance department to Operations and Maintenance department. The appellant was also issued with a final warning against commission of a similar or any other offence within 12 months, failure to which she risked dismissal from employment. She was directed to report to the new department as soon as possible.
4. The appellant, however, did not report to her new station, and vide a letter dated 27th May 2002, the respondent dismissed her from service on account of vacation of office. Aggrieved by that decision, the appellant instituted Nairobi ELRC Cause No. 248 of 2013 vide a plaint which was subsequently amended and re-amended on 23rd April 2007, in which she contended that she was wrongfully and unfairly dismissed and sought the following reliefs:
- a. A declaration that the respondent's suspension of the appellant from employment on 16th August, 2000 and the termination of the appellant from employment on 27th May, 2002 was malicious, unlawful, null and void ab initio.
 - b. Special damages for the unlawful termination in the sum of Kshs.5,020,924.00 together with interest thereon at Court rates from the date of filing of this suit until payment in full.
 - c. General and Exemplary damages for injurious and malicious falsehood and for malicious suspension and termination of employment.
 - d. Costs of the suit together with interest thereon at Court rates from the date of filing of the suit until payment in full.
 - e. Any other relief that this Court may deem fit to grant in the interest of justice.
5. The respondent, in its response urging the court to dismiss the suit, averred that: the appellant's services were never wrongfully or otherwise terminated; that the appellant was suspended from duty after she fraudulently obtained a house loan; that the said suspension was lifted on 12th October 2001 on condition that the appellant be given a final warning, be demoted from senior typist scale 9 to typist scale 10 and be transferred from finance department with loss of her withheld salary; that the appellant declined the offer and/or refused to resume duty and vacated office and instead opted to pay the respondent three months' salary in lieu of notice; and that the appellant's prayer for services not rendered was tantamount to unjust enrichment.
6. In her evidence, the appellant, testifying as CW1, adopted her witness statement as her evidence in chief and stated: that she was employed by the respondent on 1st September 1978 as a messenger and was redesigned as a typist on 3rd November 1981; that on 6th September 1982 she was promoted to typist III on permanent and pensionable terms; that she rose through the ranks to the position of senior typist and maintained the same position until her services were unlawfully terminated by the respondent on 27th May 2002; that on 16th August 2000 the respondent suspended her from duty on the allegation of involvement in a fraudulent transaction in the purchase of a house on land title number Nairobi/Block 96/6; that the allegation was found to be baseless and the suspension was lifted; that she lodged numerous appeals to the respondent's Managing Director, protesting the decision to demote her and the harsh conditions of employment but was not given audience by the respondent; that vide her letter dated 27th May 2002 she made an enquiry as to why her name was removed from the payroll; that thereafter the respondent maliciously and in total disregard to the rules of natural justice terminated her services; and that her suspension, demotion and dismissal was malicious and unlawful.
7. It was the appellant's case: that the loan agreement in respect of the house purchase and the sale agreement for property Title No. Nairobi/Block 96/6 did not make specific reference to the title reference number of the said property; that at the time she applied for the loan she had sold the house to



a Mr. Onitita, who later on resold the house to her; that she was entitled to owner occupier allowance of Kshs.14,000 per month as her scale was 8 and 9 and that prior to the personnel circular no 1B she was entitled to 12,000 but the same was adjusted upwards as from 1st March 2000 when the circular became effective; that she was suspended effective 16th August 2000 on half salary till the resolution of the issue of the house; that the letter dated 12th October 2001 gave her conditions for resumption of duty but did not ask her to resume duty. As a result, she did not resume duty and was later terminated vide a letter dated 24th May 2002, which she received on 3rd July 2002 on grounds of vacating office.

8. The respondent, through its then Human Resource Officer, Isaiah Kandie Kangugo (RW1) stated: that the appellant was an employee of the defunct KPTC which was split vide the vesting order of 1st July 1999 into three entities, the respondent being one them; that the appellant was involved in several disciplinary issues while in the employment of KPTC; that the said issues were properly handled in accordance with the provisions of part J of the Posta Code; that one of the cases involved the appellant's acquisition of a house that was fraudulently acquired and as a result, the appellant was placed on suspension; that although the appellant was recalled back on duty, she failed to report and instead lodged appeals; that consequently, the appellant was issued with a letter of vacation of office dated 27th May 2002 under part J of Posta Code clause 2.6.3.1; that the appellant's services were terminated for failing to report back to work and absenting herself voluntarily for more than 48 hours contrary to the provisions of Posta Code; that the disciplinary action against the appellant took place at the time of her employment with KPTC and that by the time she left employment, the respondent, which came into existence on 1st July 1999, was not operational; and that the court should dismiss the claim.
9. In her judgement, the learned Judge found: that the appellant was indeed an employee of the respondent as it is the respondent who suspended her from duty by letter dated 16th August 2000 after the vesting order and also lifted her suspension by letter dated 12th October 2001 and proceeded to dismiss her from employment by letter dated 27th May 2002; that at the time of the termination of the appellant's employment the applicable law was the repealed *Employment Act* Cap 226 which, on the authority of the cases of Anthony Makala Chitavi v Malindi Water & Sewerage Company Limited (2013) eKLR, and Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute (2016) eKLR, did not provide for procedural fairness; that the respondent was bound by the provisions of the Posta Code which did not provide for a hearing before termination; that the appellant's termination was well founded on the provisions of the Posta Code as well as the repealed *Employment Act*;

that part J of Posta Code at clause 2.6.3.1 provided for vacation of office by virtue of an employee absenting himself from duty for more than 48 hours without leave or excuse acceptable to the corporation; that from the evidence adduced, the appellant did not resume duty after she was issued with the letter dated 12th October 2001 lifting her suspension until her services were terminated on 27th May 2002; that the appellant did not even write to state that she was not resuming duty; that the appellant ought to have resumed duty and then followed up her appeals against her demotion and other terms of her reinstatement set out in the letter dated 12th October 2001; and that the appellant's contention that the termination of her employment was wrongful had no basis in law.
10. On the basis of section 2.6.3.2 of the Posta Code, Typical Punishments and section 4 of Posta Code, that permitted reduction of salary and reduction in rank, the court found that the appellant did not demonstrate that any of the punishments meted against her as a condition for her reinstatement were unlawful or in contravention of Posta Code or the repealed *Employment Act* that was in force at the time. It was held that pursuant to section 6(1) and (2) of the Kenya Posts and Telecommunication Corporation (Pension) Regulations, the appellant was not entitled to payments after the date of termination to the anticipated date of retirement since there was no guarantee that she would have



worked with the respondent until attaining retirement age. Based on the decision in the case of *D. K Njagi Marete v Teachers Service Commission – Industrial Cause No 379 of 2009*, the learned Judge found that payment of the amounts sought by the appellant would amount to unjust enrichment. It was the learned Judge’s determination that the appellant failed to prove that the termination of her employment was wrongful or unlawful and that she was not entitled to any of the prayers sought. Her claim was dismissed, with each party being ordered to bear own costs.

11. Aggrieved, the appellant challenged the decision on the grounds that the learned Judge erred in law and in fact: in relying on the provisions of Posta Code which was only applicable to the defunct KPTC but not to the appellant; in failing to hold that upon the disbandment of KPTC on 1st July 1999 vide vesting order in [Legal Notice No. 157 of 1999](#), the applicable human resource policy was the Telkom Kenya Human Resource Manual and not Posta Code; in failing to hold that notwithstanding the provisions of the repealed [Employment Act](#) Cap 226, the Telkom Kenya Human Resource Manual expressly recognised an employee’s right to be heard before termination of employment; in failing to hold that the appellant ought to have been granted a chance to be heard before her employment was terminated; in failing to hold that the reasons given by the respondent for the appellant’s suspension from work were different from the reasons for which the respondent terminated the appellant’s employment; in failing to hold that the respondent’s refusal to consider the appellant’s appeals against her suspension was unjustified and contravened the provisions of the respondent’s Human Resource Policy Manual; in failing to hold that the termination of the appellant’s employment while the appeals against her were still pending, was unjustified, wrongful and unlawful; and in failing to hold that the termination of the appellant’s suspension from work and termination of employment was unjustified, wrongful and unlawful.
12. It was sought that the judgement be set aside and the appellant’s claim be allowed with costs.
13. We heard the appeal on the Court’s virtual platform on 5th February 2025 during which learned counsel, Mr Justus Otieno, held brief for Mr Mogere for the appellant, while learned counsel, Mr Peter Muno, held brief for Mrs Mbabu for the respondent. Both learned counsel relied entirely on their written submissions.
14. On behalf of the appellant it was submitted: that the transition from KPTC to Telkom Kenya Limited marked by [Legal Notice No. 157 of 1999](#), necessitated the adoption of Telkom Kenya’s Human Resource Manual and that Posta Code, which was relevant only to KPTC, ceased to be applicable post July 1999; that section 10 of the [Employment Act](#), 2007 requires clarity on employment terms and applicable regulations; that the position was confirmed by this Court in *Telkom Kenya Limited v John Ochanda & 996 Others* [2013 eKLR]; that applying Posta Code after the transition contravened the transition mandate; that the failure to give the appellant an opportunity of being heard before termination violated procedural fairness and was contrary to Telkom Kenya Human Resource Manual, section 10(5) of the [Employment Act](#), 2007 and Article 50 of [the Constitution](#) which guarantees this right; that in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court held that failure to give a fair hearing constituted unfair dismissal; that the reasons for the appellant’s suspension (fraudulent loan acquisition) and termination (absenteeism during suspension) were inconsistent, suggesting procedural unfairness and was contrary to section 41 of the [Employment Act](#), 2007 that mandates consistent and transparent reasons for termination; that the respondent’s refusal to consider the appellant’s appeals contravened the respondent’s own Human Resource Policy Manual as well as sections 41 and 45 of the [Employment Act](#), 2007; that that in the circumstances, the appellant’s termination was unjustified and unlawful; that the reduction of salary and demotion without consultation was contrary to [Employment Act](#); that the appellant’s failure to establish the alleged offences of fraud and forgery further undermined the respondent’s case against the appellant;



that in accordance with the respondent's service regulations, the appellant should have been reinstated and her withheld salary paid.

15. On behalf of the respondent, it was submitted: that just as it was held in *Isaac Simiyu v Security Group (K) Limited & Another* [2013] eKLR 9, the learned Judge correctly held that at the time of the appellant's termination on 27th May 2002, it was the repealed *Employment Act* that was applicable to the appellant's employment and consequent termination; that under the previous employment law regime and subject to the terms of employment contract, an employer could terminate the employment of an employee by giving the requisite notice and without assigning any reason for the termination; that upon the lifting of her suspension, the appellant did not resume work and was deemed to have deserted duty since she did not even explain why she had not resumed duty; that the decision to terminate the appellant on that ground was justified in light of part J of Posta Code clause 2.6.3.1; that the appellant's letter of appointment provided that the employment could be terminated by either party without reason by issuing 3 months' notice or paying one month's salary in lieu of notice; and that there is no reason to disturb the trial court's finding that the appellant's employment was lawful and justified.
16. The respondent contended: that during the course of the appellant's employment, the ensuing disciplinary process and the consequent dismissal, the appellant's employment was governed by her letter of employment and the provisions of the Posta Code; that the Human Resource Policy relied on by the appellant was not applicable during her employment and at the time of her dismissal; that even assuming that it was applicable, clause 2(d) thereof provided that if there is a conflict between the provisions of the policy and the terms of employment as contained in the appointment letters, then the latter would prevail; that in this case, the appellant's letter provided that the employment was terminable by a 3 months' notice or payment of 1 month's salary by either party; that clause 5 of chapter 4 of the Human Resource Policy provided that either party could terminate the employment contract by giving the required notice in accordance with the terms set out in the employment contract, while clause 5(a) of Chapter 17 of the Human Resource Policy provided that an employee could be summarily dismissed for unauthorised absence from work exceeding five consecutive working days; and that either way, the termination from employment was justified under the Posta Code or the Human Resource Policy, neither of which provided that an employee should be heard before their employment is terminated.
17. It was the respondent's case: that the contention that the trial court erred by failing to hold that the reason for appellant's termination was different from the reason for which she was terminated was without factual basis; that the appellant's terms of service (letter of appointment and Posta Code) did not provide for an appellate mechanism against disciplinary action taken by the respondent; that in any event, the appellant's letters purporting to appeal against the suspension were all written after the suspension had been lifted, and hence no useful purpose would have been served by considering an appeal against a suspension that had already been lifted; that the letter lifting the appellant's suspension was clear that one of the disciplinary measures taken by the respondent against the appellant was the forfeiture of the half salary withheld during the suspension; that Posta Code at section 4 permitted reduction of salary and reduction in rank; that the claims for unpaid house allowance and 3 months' salary in lieu of notice was not proved as the letter of appointment only provided for 1 month's salary in lieu of notice; that despite absconding duty for a long time, the appellant was paid 1 month's salary in lieu of notice as per her letter of appointment; that under regulation 6(1) and (2) of the Kenya Posts and Telecommunication Corporation (Pension) Regulations, the appellant was not entitled to pension, gratuity or other allowance; that under section 2.6.3.1 of part J of Posta Code, vacation of office would result in loss of pension and gratuity rights and privileges; and that since there was no guarantee that the appellant would have worked with the appellant till retirement age, based on this



Court's decision in *Elizabeth Kibe Wakanyi v Telkom Kenya Limited* [2014] eKLR, payments after the date of termination to the appellant's date of anticipated retirement would have amounted to unjust enrichment.

18. We were urged to dismiss the appeal with costs.
19. We have considered the appeal and being a first appeal, as was observed in *Abok James Odera Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR), our primary duty is to re-evaluate, re-assess and re-analyze the evidence on record and draw our own conclusions thereon, while making allowance for the fact that the trial Judge had the advantage of seeing and hearing the witnesses who testified before him.
20. From the outset it important to state that the appellant was not dismissed on the grounds of fraudulent loan claim, but on the ground of absconding or vacation of duty. The appellant, while not challenging the fact that prior to the said vesting order, the instrument regulating her terms of employment with the respondent was the Posta Code, contended after the vesting order of 1st July 1999 via [*Legal Notice No. 157 of 1999*](#), her terms and conditions ought to have been guided by the respondent's Human Resource Policy Manual and not Posta Code. The respondent, on the other hand, maintains that the appellant's terms and conditions of employment were regulated by the Posta Code as its Human Resource Policy Manual was not operational at the time of the appellant's dismissal. The appellant did not produce evidence as to when Posta Code ceased to operate and the Human Resource Policy Manual became operational. We have perused the copy of the Manual incorporated in the record before us and we are unable to confirm the date it came into force. Since it is the appellant who was alleging that the Posta Code ceased to exist on the coming into operation of the Human Resource Policy Manual, it was incumbent upon her to prove that position since section 109 of the [*Evidence Act*](#) provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

21. This Court in *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, expressed itself on the onus of proof by holding that:

“As a general proposition under section 107(1) of the [*Evidence Act*](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

22. The appellant cited the case of *Telkom Kenya Limited v John Ochanda* (Suing on his Own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [supra], apparently to persuade us that we ought not to rely on Posta Code following the making of the vesting order. We have read the said decision and we are not persuaded that the decision supports the appellant's submissions. That case revolved around an allegation of discrimination of a category of staff based on age in a restructuring programme by the respondent. The Court agreed with the trial court that the method adopted by the appellant in that case was discriminatory. The issue of the relevant document in determining the terms and conditions of employment did not arise.
23. As there is no evidence presented to us to show that as at the time of the disciplinary process undertaken against the appellant, Posta Code had ceased to operate, we agree with the learned Judge that the relevant document applicable was the Posta Code. It is also indubitable that the applicable law was



the repealed *Employment Act* which did not provide for procedural fairness in the termination of employment. The appellant has not disputed the contention that she did not report to her assigned station of duty after the suspension was lifted. Her contention was that the letter lifting the suspension did not direct her to report to work. It is however clear from the letter dated 12th October 2001 lifting the appellant's suspension that the appellant was required to:

“report to General Manager O & M to work under Manager/Power Plant as soon as you are released from your present station.”

24. As the appellant did not report as directed, clause 2.6.3.1 of part J of the Posta Code J came into effect. The section provided that:

An employee who, without leave or excuse acceptable to the corporation absents himself from duty for more than forty-eight consecutive hours commencing from the time he is expected to report for duty but does not do so, will be regarded as having vacated his office. Salary will be admissible only upto, and including, the day before the first full day of the absence commences. Vacation of office shall involve loss of pension and gratuity rights and practically all privileges.

25. As we have stated above, the appellant's suspension was lifted vide a letter dated 12th October 2001. Her letter of termination was dated 27th May 2002. The respondent contended that for that whole period, the appellant did not report to work. She did not inform the respondent of any justifiable reason that prevented her from resuming work. It would seem that the appellant assumed that as long as she continued challenging her suspension and terms of resumption of duty, no adverse action could be taken against her. We agree with the learned Judge that even if the appellant was unhappy with the terms of her resumption of duty, nothing prevented her from reporting to duty while pursuing her appeals. By not reporting to duty, the appellant created circumstances that warranted her dismissal on the new ground of vacation of office.

26. The appellant has not pointed to us any provision of the Posta Code that required that she be given a fair hearing before her dismissal. It is true as found by the learned Judge that the position prior to the enactment of the *Employment Act*, 2007 was as held by Radido, J. in *Anthony Makala Chitavi v Malindi Water & Sewerage Company Limited* (2013) eKLR, that:

“Section 41 of the *Employment Act*, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.

An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.”

27. Since the appellant's employment was terminated on the grounds of vacation of duty, in terms of section 2.6.3.1 of part J of the Posta Code, she was not entitled to “pension and gratuity rights and practically all privileges”. We also agree that she was not entitled to payment of salary she would have been paid till retirement age as that would clearly have amounted to unjust enrichment if she were to obtain another employment in the meanwhile.

28. We have considered this appeal and find it unmerited.



Accordingly, we dismiss it with costs to the respondent.

29. Judgement accordingly.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

