



**Busienei v Postal Corporation of Kenya (Cause 349 of 2019)  
[2025] KEELRC 439 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 439 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 349 OF 2019  
K OCHARO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**WESLEY PAUL BUSIENEI ..... CLAIMANT**

**AND**

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

**JUDGMENT**

**Background**

1. Contending that at all material times, he was an employee of the Respondent, whose employment they terminated unfairly, the Claimant sued them through a Memorandum of Claim dated 27<sup>th</sup> May 2019, and sought; a declaration that by their conduct, the Respondent breached the constitutional provisions of Article 41 of *the Constitution* of Kenya; compensation for unfair termination of employment, twelve months' pay; one month's salary in lieu of notice; an order directing the Respondent to issue him with a certificate of service; and general damages.
2. In response to the claim, the Respondent filed a response to the Memorandum of Claim dated 3<sup>rd</sup> July 2019. The Respondent denied the Claimant's assertion that the termination of his employment was unfair, and entitlement to the reliefs sought.
3. At the hearing, the parties adopted their witness statements filed herein as their respective evidence in chief and tendered in evidence the documents herein filed by them as their documentary evidence.

**The Claimant's Case**

4. It was the Claimant's case that he first came into the employment of the Respondent on 1<sup>st</sup> September 1990 as a Postal Officer and rose through the ranks to the position of acting Branch Manager "A" Machakos between November 2016 and January 2018.



5. He discharged his duties diligently, dedicatedly and honestly, always ensuring that he reported any cases of embezzlement of funds to the Board of Directors. This didn't sit well with his colleagues who lacked integrity and were unjustly enriching themselves by embezzlement of the Respondent's funds. This ignited hatred from senior officers against him. He had become an impediment to their schemes.
6. The Senior Officers could conspire with the Post Master Sultan Hamud to unlawfully siphon the Respondent's funds by failing to disclose excess remittances. No adverse action was ever taken against her as she had the protection of the Senior Officers.
7. On 17<sup>th</sup> January 2017, he reported to work as usual only to be informed that a fire had broken out and consumed a bag containing 1.2 million Kenya Shillings, which was an excess remittance from Sultan Hamud Post Master, Dorothy Njeru. The Post Master hadn't informed him of the remittance as per the requirements of the Respondent's Regulations.
8. The matter was reported to the Criminal Investigation Directorate. They carried out their investigations and concluded that the fire incident was just but a cover-up of infractions committed by various officers. It was recommended that Dorothy Njeru, Fredrick Mulwa and Duncan Musyoka be charged with criminal offences.
9. The investigators didn't find him culpable at all regarding the fire incident and the loss of 1.2 million shillings.
10. On 23<sup>rd</sup> August 2017 the Respondent served him with a disciplinary notice accusing him of negligence in duty leading to the loss of 1.2 million Kenya Shillings. On 8<sup>th</sup> September 2017, he responded to the notice, giving a detailed account of the happenings leading to the alleged loss.
11. On 25<sup>th</sup> September 2017, he was demoted and sent to Nairobi without transfer benefits paid to him.
12. On the 31<sup>st</sup> of October 2017, he received a letter inviting him to a disciplinary hearing that was slated for the 3<sup>rd</sup> of November 2017. He availed himself and presented his defence against the accusations. On 25<sup>th</sup> July 2018, he received a letter of termination of his employment effective from 26<sup>th</sup> July 2018.
13. The termination letter didn't embody the reasons for the termination and the findings of the disciplinary hearing.
14. On 3<sup>rd</sup> August 2018, he appealed against the decision to terminate his employment but he was never invited to any appeal hearing or served with the outcome of the appeal.
15. The act of transferring and demoting him, and going ahead to dismiss, him from employment was an act that amounted to a violation of his right against unfair labour practices as enshrined in [\*the constitution\*](#).
16. The termination of his employment was not justified. It was fueled by ill will, malice and the desire to frustrate his insistence for transparency within the Respondent corporation.
17. Cross-examined by Counsel for the Respondent, the Claimant testified that he was invited for a disciplinary hearing and allowed to make his representation.
18. He testified that he was in charge of Machakos Station. Sultan Hamud was under him. Therefore, Dorothy Njeru was under him.
19. The 1.2 million Kenya Shillings were never remitted to Machakos station. The officer who ought to have counterchecked the remittance was present. A dispatch couldn't be done if the counterchecking



officer wasn't present. If the Counterchecking officer wasn't present necessitating non-dispatch, he would be informed that much.

20. Vide his letter dated 3<sup>rd</sup> August 2018, he sought to be allowed to appeal.
21. He was a member of the National Social Security Fund. Remittances were made to his account as can be discerned from his pay slips.

### **The Respondent's Case**

22. The Respondent presented Teresia Sakuda, their Human Resource Manager to testify on its behalf.
23. It was the Respondent's case that on the night of 16<sup>th</sup> /17<sup>th</sup> January 2017 consuming the 1.2 million. However, contrary to the Claimant's assertion, he was informed of the remittance by the Postmaster Sultan Hamud Post Office.
24. The matter was reported to and investigated by, the Directorate of Criminal Investigations. However, the investigations were inconclusive.
25. It was further stated that the internal investigation revealed that; the Postmaster Sultan Hamud Post Office had on 16<sup>th</sup> January 2017 informed the Claimant of the remittance of KShs. 1.2 million; as an officer in charge of Machakos Head Post Office, the Claimant had failed to mop up cash in hand from Sultan Hamud Post Office; the Claimant had failed to plan for safe custody of the incoming cash from Sultan Hamud; and his omission led to the loss of the cash remittance of KShs. 1.2 million.
26. On 23<sup>rd</sup> August 2017, the claimant was issued with a show cause letter. He responded to the show cause letter through his dated 8<sup>th</sup> September 2017.
27. Contrary to the Claimant's assertion, his transfer was normal. He was not entitled to any transfer benefits other than transport. Before deciding to terminate his employment, the Respondent considered his response to the show cause letter, and defence to the charges against him. The termination letter did set out the reasons for the termination.
28. The decision to dismiss the Claimant was reached after the Claimant had been given an opportunity to make written and oral representations before the Respondent's Regional Disciplinary Committee.
29. Cross-examined by Counsel for the Claimant, the witness testified that the Respondent lost KShs. 1.2 million, not necessarily out of the fire.
30. The show cause letter was on the Claimant's negligence of duty, which led to the loss of the forestated money.
31. The Claimant was in charge of the Machakos Headquarters Post Office. Sultan Hamud was under him. In his position, he was under a duty to ensure that all the money collected by all the offices was banked.
32. She admitted that though she alleges that the Claimant was aware of the remittance, there isn't any document placed before this Court from which that can be discerned.
33. The investigations by the Directorate of Criminal Investigation did not implicate the Claimant at all. The investigation didn't reveal any traces of money in the ashes.
34. The witness stated further that when the Respondent was making a decision to terminate the Claimant's employment, it didn't make any reference to the investigation report by the Directorate of Criminal Investigations. They only relied on the report of the internal investigators. However,



the Respondent didn't place it before this Court for consideration. Further, none of the internal investigators is a witness for the Respondent.

35. The duplicate copies regarding the remittance that were retrieved from Sultan Hamud and which the Internal Investigators relied on, do not in any manner indicate that the Claimant received the money. The document was signed by Dorothy Ngure. The police recommended her for prosecution. She was later dismissed from employment.
36. As the matter involved the loss of money, the Internal Investigators decided to escalate the same to the police.
37. The Claimant's employment was terminated at the 26<sup>th</sup> year of service.

### **Analysis and Determination**

38. I have carefully considered the pleadings by the parties herein, their evidence and submissions, and distil the following issues for determination: -
  - I. Was the termination of the Claimant's employment fair?
  - II. Whether the Claimant is entitled to the reliefs sought. Was the termination of the Claimant's employment unfair?
39. The Respondent's Counsel submitted that Section 47[5] of the *Employment Act*, places a legal burden in a claim for unfair termination on the employee to prove that an unfair or wrongful dismissal occurred. It is after transcending this, that the evidential burden shifts to the employer to justify the termination or dismissal. I agree, this is the correct position of the law.
40. Where the employee fails to discharge the legal burden imposed on him by this provision of the law, his case will fall at the hurdle. See also the case of Omar Ndaro Zumu v Modern Coast Express [2019] eKLR, cited by Counsel for the Respondent. What the provision requires of an employee alleging unfair termination, is a prima facie demonstration that both or one of the ingredients of unfair termination [lack of procedural and substantive fairness], were absent in the termination.
41. The Respondent's Counsel submitted that the Claimant failed to discharge the burden, as such, his case should fail. Considering that fairness in the context of termination of an employee's employment is the total sum of procedural fairness and substantive justification, and considering the Claimant's evidence on lack of substantive justification, and the Respondent's evidence tendered that was aimed at discounting the Claimant's, I am convinced that the Claimant has established prima facie that the decision to terminate his employment lacked substantive justification.
42. Section 45 of the *Employment Act* commands that no employer shall unfairly terminate an employee's employment. Under Sub-section 2, termination of an employee's employment shall only be fair if it is on account of a valid and fair reason[s], related to the employee's conduct, capacity or compatibility, or operational requirements of the employer. Further, the process leading up to the decision to terminate must be procedurally fair.
43. The Claimant urged this Court to find that the termination of the Claimant's employment was procedurally unfair. Faced with, the task of interrogating whether or otherwise termination of an employee's employment was procedurally fair, the Court must allow itself to be guided by the stipulations of section 41 of the *Employment Act*.
44. Section 41 of the Act provides a mandatory procedure that an employer contemplating terminating an employee's contract of service must conform with. The employer must notify the employee of the



reasons souring the intention, accord him or her adequate opportunity to make representations on the allegations against him or her in the presence of a fellow employee or shop floor union representative of his own choice, and consider the representations before taking a final decision on the matter. See also *National Bank of Kenya versus Samuel Ngure Mutonya* [2019] eKLR.

45. There isn't a doubt that the Claimant was served with a notice of disciplinary charges dated 23<sup>rd</sup> August 2017. The notice elaborately set out the accusations levelled against him. The notice informed the Claimant of his right of accompaniment and the Respondent's intention. By a letter dated 31<sup>st</sup> October 2017, he was invited to a disciplinary hearing that was slated for 3<sup>rd</sup> November 2017. The Claimant testified that he attended the hearing and made his representations.
46. The Respondent contended that before deciding to let go of the Claimant, his representations were considered. The Claimant didn't discount this.
47. Considering the foregoing premises, I am convinced by the Respondent that the termination of the Claimant's employment was procedurally fair.
48. Section 43 of the *Employment Act* places a burden on the employer in a dispute regarding an employee's employment termination to prove the reason[s] for the termination. However, it won't suffice for the employer to just say, "We dispensed with him for this or that reason", they must demonstrate that the reason for the termination or dismissal was valid and fair, as this is the further legal burden that section 45[2] places on the employer. It follows, therefore, that a failure to discharge these legal burdens of any of them, will attract the deeming effect, and the termination or dismissal shall be deemed unfair.
49. In the case of *Pius Macha Isundu vs Lavington Security Guards Limited* [2017] Eklr the Court of Appeal aptly stated;

"There can be no doubt that the Act, which was enacted places in 2007, places a heavy legal obligation on employers in matters summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43] -prove that the reasons are valid and fair [section 45]-prove that the grounds are justified [section 47[5]], among other provisions. A mandatory elaborate process is then set up under section 41, requiring notification and hearing before termination."
50. In my view, a reason can be safely said to be valid, if capable, of forming a legitimate basis for the termination or dismissal. It has always been the position of this Court that interrogating validity and fairness of the reason[s] -section 45, and justice and equity of the decision section 47[5], requires a broader approach than would be required in the much-touted reasonableness approach. This view is emboldened by the Constitutional Court of South Africa's statement in *Sidumo v Prestburg Platinum Mines* [2007] 12BLLR 1097, thus;

"There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal a commissioner must approach the matter from the perspective of the employer. All indicators are to the contrary. A plain reading of the relevant provisions compels the conclusion that the commissioner is to determine the dismissal as an impartial arbitrator..... Any suggestion that the differential approach is rooted in the precepts of the LRA cannot be sustained."
51. The Court's decision is therefore reached not with reference to the evidential material that was placed before the employer at the time of their decision but based on all the evidential material placed before



the court. To the extent that the proceedings are a hearing denovo. In my view, this is an approach that will deliver justice.

52. There is no doubt that after the internal investigations, the Respondent as regards the loss of the money forested, the Respondent deemed it wise to refer the matter for investigation by the Directorate of Criminal Investigations for I hold deeper investigations. This reasonably could create a legitimate expectation that the report and findings of the Directorate could be relevant and not readily thrashed by the Respondent, once availed. The report, and the Respondent's witness in her evidence under cross-examination admitted, exonerated the Claimant from blame but pointed a finger at other employees of the Respondent.
53. The foregoing notwithstanding, and the Respondent's witness under cross-examination, testified in affirmation of it, that in deciding to terminate the Claimant's employment, the Respondent didn't refer to the investigation report and findings by the Directorate. The witness just asserted that the Report by the Directorate was inconclusive. I have carefully considered the investigation report, I see no inconclusiveness in any of the pivotal aspects that were under investigation.
54. The Respondent's witness testified that instead, the Respondent used the internal investigation report to conclude that the Claimant was liable for dismissal. However, the Respondent didn't place before this Court, the report that flowed from the alleged internal investigations.
55. Two conclusions emerge from the foregoing premises [para. 53 and 55]. With a prefixed mind to dismiss the Claimant from his employment, the Respondent deliberately avoided considering and placing reliance on material that could diminish the effectuation of the mind. Second, the alleged internal report was not tendered in evidence before this Court because its production could equally injure the Respondent's case.
56. The report by the Criminal Investigation Directorate made the findings inter alia:-
  - I. D2 neglected to inform her boss D1 about the intended remittance and also failed to involve a second officer in the confirmation and sealing of the remittance and signing of necessary documents. This is against the policy of the corporation and also makes one question if the remittance was indeed placed in the email bag or not.....
57. In its recommendation section, the report stated;

“The investigating officer finds a lot of discrepancies and suspects foul play in this. The question is whether the bag containing the remittance found its way to Machakos or even if the remittance was placed in the bag in the very beginning.....”

Prosecution of the Postmaster, Dorothy Njeru, Fredrick Mulwa[driver], and Duncan Musyoka [ security guard] was then recommended.
58. I take a clear view, that with the foregoing a reasonable employer could only charge an employee as did the Respondent, with negligence of duty, if they had cogent evidence that could discount the investigating officer's findings and recommendations. Inarguably, the Respondent had none.
59. By reason of the foregoing premises, I came to the inevitable conclusion that the Respondent, terminated the Claimant's employment without substantive justification. The termination was unfair, therefore.



**Whether the Claimant is entitled to the Reliefs Sought.**

60. The Claimant sought a compensatory award of twelve months' salary for unfair termination of his employment. Section 49[1][c] of the Employment Act, bestows this Court with the authority to grant the compensatory relief. However, it is pertinent to point out that the authority is discretionarily exercised, depending on the circumstances of each case.
61. I have carefully considered the circumstances under which the termination of the Claimant's employment occurred, the fact that in my view, the Claimant suffered for infractions committed by other people, unnecessarily, the inexplicable failure by the Respondent to consider the report flowing from the Directorate of Criminal Investigations, yet they are the ones who reported the matter to the investigators, failure which reasonably points out, the Respondent's ill faith in the decision to dismiss the Claimant, and the length of time[26 years] that the Claimant served the Respondent, and conclude that he is entitled to the compensatory relief, ten[10] months gross salary.
62. The Claimant's employment was terminable under section 35 of the Employment Act by a twenty-eight days' notice. The notice wasn't issued. The Respondent didn't prove that it paid salary in lieu of notice. As such, I hold that the Claimant is entitled to notice pay under section 36 of the Employment Act.
63. The Claimant sought a declaration that the Respondent's actions amounted to a breach of his right against unfair labour practices. I have carefully considered the material placed before me by the Claimant, and hold that the same doesn't sufficiently demonstrate the breach. It is a cardinal rule, that where a person alleges a violation of a constitutional right[s] or breach of a constitutional stipulation[s], such must be pleaded with reasonable precision, and sufficiently proved. This, the Claimant didn't do. Resultantly, I decline, to make the declaration sought and to grant the general damages sought based on the alleged violation.
64. In the upshot, I hereby enter Judgment for the Claimant in the following terms;
  - a. Compensation for unfair termination of employment pursuant to section 49[1][c] of the Employment Act.....KShs. 700,000.
  - b. One month's salary in lieu of notice.....KShs. 70,000.
  - c. Interest on the sums awarded in [a] and [b] above at court rates from the date of this Judgment till full payment.
  - d. Costs of this suit

**READ SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**OCHARO KEBIRA**

**JUDGE**

