



**Wanyoike v Postal Corporation of Kenya (Cause 465 of 2016)
[2024] KEELRC 2230 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2230 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 465 OF 2016
DN NDERITU, J
SEPTEMBER 19, 2024**

BETWEEN

ELIZABETH W. WANYOIKE CLAIMANT

AND

POSTAL CORPORATION OF KENYA RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 22nd November, 2016 filed in court on 24th November, 2016 through Wambeyi Makomere & Co. Advocates. The memorandum of claim was accompanied with a list of witnesses, a written statement by the claimant, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking for the following reliefs –
 1. Notice payKshs38,780.00
 2. Compensation.....Kshs.465,360.00
 3. General damages.....Kshs.1,861,440.00

TOTAL Kshs.2,365,580.00
3. The respondent through Githiru & Company Advocates entered appearance on 31st March, 2017 and filed a memorandum of response to the claim on 11th August, 2017. The memorandum of response was accompanied with a list of documents and a bundle of copies of the listed documents. Two written witness statements were filed on 6th July, 2018; one by Catalina Barno and the other by Peris Sato. Other two witness statements were filed; one by Benjamin Kipkorir (RW1) was filed on 17th August, 2022 and that of Samuel Rotich (RW2) was filed on 29th September, 2022. With the leave of court, a further



list of documents and a bundle of copies of the listed documents was filed on 14th February, 2023. All the documents and bundles of copies of the documents filed by the respondent as enumerated above were consolidated in a list and bundle filed in court on 23rd February, 2023 following a direction by the court to that effect.

4. The claimant's case came up for hearing on 6th June, 2022 when the claimant (CW1) testified and closed her case.
5. The defence was heard on 2nd and 28th February, 2023 when RW1 and RW2 testified and closed the respondent's case. The claimant was recalled for further testimony on 28th February, 2023 and the hearing of the case came to a close.
6. Counsel for both parties addressed the court by way of written submissions. Mr. Wambeyi for the claimant filed written submissions on 1st September, 2023 while Miss Oseko for the respondent filed on 28th July, 2023.

II. The Claimant's Case

7. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence adduced by the claimant (CW1), and in the written submissions by her counsel.
8. In the memorandum of claim, the claimant avers that she was engaged by the respondent, a state corporation, as a casual postal assistant vide a letter of appointment dated 30th November, 1981. However, she went on to serve the respondent in various capacities for a period of over 30 years. Her last position/job description was postal superintendent based at Nyahururu Postal Office. Her last monthly gross salary was Kshs50,580/=.
9. It is pleaded that while the claimant had a clean disciplinary record during her entire lengthy period of service, she was unfairly and unlawfully dismissed without due process vide a letter dated 25th February, 2013. It is pleaded that the claimant appealed against the unfair and unlawful dismissal but her two appeals were unfairly dismissed.
10. In her testimony in court the claimant relied on her filed written statement dated 23rd November, 2016 as her evidence-in-chief. She produced all her filed documents as exhibits 1 to 14.
11. She stated that her troubles with the respondent, her employer, started with an allegation that she had stolen and or misappropriated a sum of Kshs10,950/=. She stated that she was neither called upon to defend herself nor invited for a hearing.
12. She stated that as at the time of her dismissal she was a senior cashier and used to receive money from the junior cashiers for banking. She further stated that she was in custody of the key to the strong-room. She denied that she was a habitual absentee from work. She stated that at no point was any money in her care or custody stolen, misappropriated, or lost.
13. In cross-examination, the claimant admitted that she had a shortage of cash that she had received that was discovered by a regional audit team from Nakuru on an impromptu audit carried out on 28th/29th May, 2012. She admitted that she had a shortage of Kshs10,950/= during the visit by the audit team. She admitted that she took the money on 24th May, 2012 allegedly to look for change but did not return the same by the time the audit team visited on 28th May, 2012.
14. She admitted that she responded to the allegations against her in a letter dated 27th May, 2012. She admitted receiving a show-cause letter. She admitted that she received the letter of dismissal dated 25th



February, 2013. She stated that her two appeals were dismissed but complained that she was not invited for a physical hearing at any point during the disciplinary process.

15. She stated that she had taken out the money to look for change over the weekend and that she returned the money after the audit team visited.
16. The submissions by her counsel shall be considered in a succeeding part of this judgment alongside those by counsel for the respondent.

III. The Respondent's Case

17. The respondent's case is expressed in the memorandum of response to the claim, the oral and documentary evidence adduced through RW1 and RW2, and the submissions filed by its counsel.
18. In the memorandum of response to the claim, it is admitted that the claimant was an employee of the respondent as pleaded in the memorandum of claim from 1981 to 2013. However, it is pleaded that the claimant was fairly and lawfully dismissed after she misappropriated Kshs10,950/=. It is pleaded that a regional audit team carried an audit in Nyahururu Postal Office on 28th/29th May, 2012 wherein the claimant was the cashier whereupon it was discovered that the claimant had misappropriated and or failed to account for the said sum of money. It is pleaded that the claimant admitted to the misappropriation.
19. It is pleaded that after the audit a report dated 7th June, 2012 was prepared and the claimant informed of the shortage and misappropriation in a letter dated 22nd June, 2012. The claimant responded to the allegations/charges against her in a letter dated 26th June, 2012.
20. It is pleaded that on 11th October, 2012 a show-cause letter was issued and served upon the claimant calling for a response to the charges. It is pleaded that the claimant admitted to unlawful and unauthorized failure to account for the sum of Kshs10,950/= and she also conceded to absconding duty without permission and handing over cash to junior cashiers during her unauthorized absence without following the laid down procedures.
21. It is pleaded that in the circumstances the claimant was fairly and lawfully dismissed for gross misconduct. It is pleaded that the claimant was accorded due process before her dismissal. It is pleaded that her two appeals were given due consideration but dismissed for lack of merits.
22. It is pleaded that the claimant was invited and indeed attended a hearing on 27th December, 2012 and a verdict reached on 25th February, 2013 which verdict was communicated to the claimant. It is pleaded that for her gross misconduct the respondent arrived at the right and lawful decision to dismiss her. It is pleaded that the claimant's conduct was against Section 44 of the *Employment Act* (the Act) and the applicable rules and regulations of the respondent as per the code of conduct.
23. It is pleaded that the claimant is not entitled to any of the reliefs sought and the court is urged to uphold the dismissal and dismiss the cause with costs.
24. The submissions by counsel shall be considered hereunder alongside those by counsel for the claimant.

IV. Submissions By Counsel

25. The claimant's counsel identified the following issues for determination – Whether the claimant was unfairly and unlawfully terminated; Was the claimant accorded a fair hearing? Was a notice issued? Did the claimant suffer any loss of prospective earnings? And, Who is to bear the costs?



26. On the first issue, it is submitted that the undisputed evidence is that the claimant was an employee of the respondent for over 30 years with a clean disciplinary record preceding the incident that culminated in her dismissal.
27. It is submitted that the dismissal was unfair and unlawful for lack and want in both substance and procedure. Counsel cited *Mary Chemweno V Kenya Pipeline Co. Ltd (2014)*, *Walter Ogal Anuro V Teachers Service Commission (2013)*, *Jane Nyandiko V Kenya Commercial Bank Ltd (2017)*, & *Daniel Mburu Muiro V Hygrotech East Africa Ltd (2021)* in demonstrating what constitutes substantive and procedural fairness before dismissal or termination.
28. Further, it is submitted that the respondent did not comply with Sections 41 & 42 of the Act. It is submitted that the evidence on record is that no money was lost and as such there lacked substance or reason(s) for the disciplinary action taken. It is submitted that the audit report did not recommend or find evidence of theft or misappropriation of the alleged funds or any other monies. It is submitted that the action of dismissal was too draconian and disproportionate in the entire circumstances of this cause.
29. On the second issue, it is submitted that the claimant was denied fair administrative action as envisaged in Article 47 of *the Constitution*. Counsel cited *Dry Associates Ltd V Capital Markets Authority & Another (2012)* & *Judicial Service Commission V Mbalu Mutava & Another (2014)* in emphasizing the ingredients of fair administrative action and urged the court to adopt the same reasoning and holding in the two decisions. Further, counsel cited *Mulwa Msanifu Kombo V Kenya Airways (2013)* to the effect that in a fair administrative action the rules of natural justice ought to be reasonably adhered to.
30. It is submitted that the respondent failed to follow the procedure provided for in its own code which mirrors *the Constitution* and the Act in terms of substance and procedure in fair administrative action.
31. It is submitted that no notice was issued to the claimant for the disciplinary hearing or upon the dismissal. The court is urged to grant the reliefs sought.
32. On the other hand, counsel for the respondent identified several issues for determination by the court as follows –
 - i. Whether the claimant misappropriated the Respondent’s official funds totalling to Kshs10,950?
 - ii. Whether the claimant was procedurally granted a fair hearing and whether such a hearing must necessarily be an oral hearing?
 - iii. Whether substantive fairness justice was arrived at in the final decision to dismiss the claimant.
 - iv. Whether the decision to terminate the claimant’s employment was harsh or just in comparison to the misappropriation of funds charge that she was found guilty of?
 - v. Whether the claimant’s case ought to be dismissed with costs to the respondent.
 - vi. Whether the claimant served the mandatory demand letter before filing suit and who should pay the costs hereof?
33. It is submitted that as head-cashier the claimant was in a fiduciary duty in handling of the respondent’s funds placed under her custody and care and entrusted to her. It is submitted that by taking a sum of Kshs10,950/= on 24th May, 2012 which was found missing during the audit on 28th/29th May, 2012 the claimant betrayed the fiduciary trust bestowed upon her. It is submitted that the evidence on record



confirms the unauthorized theft and or misappropriation of the funds by the claimant which she confessed to in her response to the show-cause and in the declaration of shortage form produced as exhibit by the respondent. It is submitted that upon taking the funds unlawfully the claimant absented herself from duty from Thursday, 24th May, 2012 to 28th May, 2012. It is further submitted that the explanation given by the claimant that she had taken the money to go look for change over the weekend did not make sense at all as no authority was sought and or obtained from her supervisor. In any event there were many financial institutions including commercial banks within Nyahururu town from which the claimant should have just walked in or even sent one of her many junior cashiers and obtained change.

34. It is submitted that the conduct of the claimant as described above amounted to gross misconduct as contemplated under Section 44(4)(g) of the Act. It is further submitted that the unauthorized absenteeism by the claimant amounted to gross misconduct under Section 44(4)(a) of the Act. It is submitted that those are the specific charges that the claimant faced as per the show-cause letter dated 11th October, 2012.
35. It is submitted that the claimant in her response to the show-cause letter admitted to perpetually absenting herself from work without leave or permission to attend to all manner of family and social issues.
36. It is submitted that notwithstanding that the claimant admitted to the two charges of misappropriation of funds and absenteeism she was nonetheless invited to a physical hearing that was held on 27th December, 2012. It is after that meeting and upon considering all the evidence availed that the disciplinary committee concluded that the claimant was guilty of gross misconduct and further noted that the claimant was not forthright and honest in her explanation of the gross misconduct on the two counts. It is submitted that whether the claimant intended to return the cash and or indeed returned the same did not make any difference as the claimant was clearly guilty of gross misconduct to which she owned up. It is submitted that the allegation by the claimant that she took out the money with intention of looking for change over the weekend is laughable and dishonest as change was readily available in banks and other financial institutions within Nyahururu town and, in any event, the claimant should have sent any of her junior cashiers to obtain the said change.
37. It is submitted that the appeals filed by the claimant were found to hold no water as she only expressed that she ought to have been accommodated for having served the respondent for a lengthy period of time. Moreover, the claimant admitted to her misconduct and the respondent had to decide her fit based on the express admission.
38. It is submitted that a physical or oral disciplinary hearing is and was not mandatory in the circumstances of this matter. It is submitted that having been summoned and attending the meeting of 27th December, 2012 even after admitting to her gross misconduct in her response to the show-cause letter, the claimant was afforded a fair hearing. It is submitted that a hearing may be conducted and concluded in written exchanges and correspondences. It is submitted that for all intents and purposes the claimant was heard and afforded due process when one considers the entire evidence and circumstances as brought out in the hearing. The court is urged to go by the holding and reasoning of the Court of Appeal in Kenya Ports Authority V Fadhil Juma Kiuswa (2017) eKLR.
39. It is submitted that the claimant did not avail or adduce any evidence in court that may prompt the court to interfere with the decision arrived at by the disciplinary committee of the respondent in dismissing the claimant as per the letter of dismissal dated 25th February, 2013.



40. It is submitted that the claimant was accorded both substantive and procedural fairness in accordance with the law and the respondent's code of conduct and the court is urged to dismiss the cause with costs.

V. Issues For Determination

41. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered by both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination -
- a. Whether the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
 - b. Whether the claimant is entitled to the reliefs sought.
 - c. Who should bear the costs of the cause?

VI. Dismissal

42. The uncontested evidence on record is that the claimant was an employee of the respondent for a lengthy period of over 30 years. She started off as a casual postal assistant in 1981 and as at the time of her dismissal on 25th February, 2013 she was a senior cashier. It is also not contested that for her entire period of service the claimant had a fairly impressive and clean disciplinary record. However, this is one case study on how one moment of letting the guard down can lead to very serious consequences that may completely ruin the party.
43. The evidence on record is that on or about 28th/29th May, 2012 the respondent's regional audit team visited Nyahururu Postal Office for an impromptu audit of accounts among other audit undertakings. The undisputed evidence on record is that on 24th May, 2012, without the authority from her supervisor or any other person placed in her authority by the employer, the claimant carried out a sum of Kshs10,950/=, the property of the respondent, her employer. From her response to the show-cause letter and her evidence in court, the claimant allegedly carried out the money to obtain change. By the time the audit team arrived the claimant had not returned the money and as such it was found to be a shortage. The claimant alleges that she was ready with the cash to settle the shortage when she was confronted by the audit team over the same.
44. Without reproducing the evidence from both sides and the submissions by their respective counsel as the same have been summarized above, the claimant was issued with a show-cause and in her response admitted to taking the said cash and to being out of workplace without authority or leave. A detailed audit report was prepared by the team and it was recommended that disciplinary action be taken against the claimant which culminated in her dismissal.
45. The claimant admitted and owned up to her misconduct but pleaded for leniency citing her long service. However, the respondent could hear none of that and the claimant was dismissed vide a letter dated 25th February, 2013. Her two appeals against the dismissal were dismissed for lack of merits. For ease of reference the letter of dismissal stated as follows –

DR 6621

PF 21105

25th February, 2013

Human Resource Section



Rift Valley Region
Box 16620
20100- Nakuru
Tel: 051-2211444-Nakuru
Elizabeth W. Wanyoike
Postal Superintendent
Thro' Branch Manager "C"/Nyahururu
Thro' AM/Operations/RV
Dismissal From Service

This office letter dated 11th October, 2012 charging you with misappropriation of official funds at Nyahururu Head Post office to the tune of Kshs.10,950/= and your subsequent defence contained in your undated letters refers.

This is to advise you that the reasons you advanced in your defence have been carefully considered but found unacceptable. The Postmaster General has therefore approved your dismissal from service on grounds of theft by Servant and loss of confidence in you continued services with effect from the date of this letter.

You will be entitled to your pension funds contributed for the period you were in service. This will be processed by Posta Pensions Scheme in accordance with the regulations in force.

Please surrender your employment card and other official items in your possession to your Controlling Officer. Also acknowledge receipt of this letter by date and signature on the associated copy and return the duplicate.

As per the provisions of Posta Code J 7(ii), you have a right to submit your appeal within four (4) weeks upon receipt of this letter. Any appeal received after expiry of the stipulated period will be not considered.

R.C. Kandie(mrs)

For: Postmaster General

46. It is the finding and holding of the court that the respondent had substantive grounds upon which to found disciplinary action against the claimant as it did. Further, the court finds and holds that having admitted to the misconduct of misappropriation of the money and being absent from duty without permission and hence absconding her duties and allocating them to her juniors, there was really no need or necessity for the respondent to call for a physical or oral hearing as claimed by the claimant. The court agrees with the respondent's counsel that it is not every case that demands or calls for a physical or oral hearing. Since the claimant had already admitted to her misconduct in the response to the show-cause letter the court finds and holds that there was no necessity for any further hearing. There was nothing left to be heard and the best that the claimant could do was to mitigate the punishment which she already admitted to in her response to the show-cause letter.
47. In terms of the substance and procedure, the court cannot fault the respondent for proceeding in the manner and style that it did.
48. The only issue that the court may wish to comment on is whether the decision for dismissal was proportionate to the admitted misconduct. It is unfortunate that the claimant made feeble attempts in



justifying her misconduct. For her absenteeism she claimed various family and social issues that she had to attend to yet she did not explain why she did not seek for permission or leave of absence. For taking the cash away she claimed that she wanted to obtain change over the weekend. Yet, she did not avail evidence that she obtained permission from her supervisor to carry the money home over the weekend and that there was no change in the entire Nyahururu town for such not so large amount of money. The court takes judicial notice that there are several banks and other financial institutions that operate in Nyahururu town and if all what the claimant genuinely needed was change, she should simply have walked into such one bank or send one of her subordinate cashiers to obtain the change.

49. The court finds that the claimant was not forthright in her defence both during the internal disciplinary process and in court. She is the author of her own misfortune yet she attempted to give excuses for her misconduct instead of offering an outright and unqualified apology and seeking leniency. In trying to justify her misconduct the claimant kept on digging herself into a dark hole from which the court is unable to legally and lawfully pull her out of.
50. The claimant was bestowed with fiduciary trust by the respondent in handling and managing cash but she outrightly and inexcusably betrayed that trust. One characteristic of trust is that once broken it is rarely repairable. The court agrees with the respondent's decision to dismiss the claimant for gross misconduct based on Section 44(4)(a) & (g) of the Act. The court finds no reason for disturbing that decision by the employer.

VII. Reliefs

51. Flowing from the finding and the holding in the foregoing part of this judgment, the court, as sympathetic and empathetic as it may be considering the claimant's long service, finds and holds that none of the reliefs and or compensation is awardable to the claimant.
52. However, if the claimant has not been able to access her pension the respondent is urged to give to her all the support and help that may be necessary for the payment and settlement of the same.

VIII. Costs

53. The court orders each party to meet own costs.

IX. Orders

54. For all the foregoing reasons the claimant's cause is hereby dismissed and each party ordered to meet own costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 19TH DAY OF SEPTEMBER, 2024.

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DAVID NDERITU

JUDGE

