



**Kihima v Postal Corporation of Kenya (Cause 2397 of 2017)
[2023] KEELRC 2161 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2161 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2397 OF 2017
SC RUTTO, J
SEPTEMBER 22, 2023**

BETWEEN

BERNARD MUNG'ASIA KIHIMA CLAIMANT

AND

POSTAL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. Through a Statement of Claim amended on 21st February, 2022, the Claimant avers that he was employed by the Respondent in July, 1980 and that he served with loyalty and diligence until 9th January, 2017 when he was wrongfully and unlawfully terminated. His claim against the Respondent is for the sum of Kshs 1,210,96.17 being one months' salary in lieu of notice, compensatory damages, salary from 8th December, 2015 to 9th January, 2017 and leave pay.
2. The Respondent opposed the Claim through its Response dated 11th April, 2022 in which it avers that the Claimant's contract of service was terminated lawfully as provided for under Section 44(4) of the *Employment Act*. The Respondent has termed the Claimant's termination from employment as justifiable as it was on account of his wilful neglect to perform work which was his duty to perform and or carelessly and improperly performing work which under his contract he ought to have performed carefully and properly. The Respondent contends that the Claimant is not entitled to any of the reliefs sought hence prays that the Claimant's Claim be dismissed with costs.
3. The matter proceeded for part hearing on 1st March, 2023 and subsequently on 22nd March, 2023, when the Respondent closed its case. At the trial, each side called one witness.



Claimant's Case

4. The Claimant testified in support of his case and to start with, he adopted his witness statement and bundle of documents to constitute his evidence in chief. He also produced the documents filed on his behalf as exhibits before Court.
5. It was the Claimant's evidence that while serving at Loitokitok as Post Master, he was suspended from duty. This was after an inspection team visited the Respondent's office at Loitokitok. He received the letter of suspension on 22nd December, 2015. He was also taken to Loitokitok Police Station in January, 2016 with regards to a fraud.
6. The Claimant further stated that there was fraud at the post office and his assistant by the name Ms. Susan Warui accepted responsibility and promised to pay back the money. It was his testimony that he was not aware that the said Susan had taken the money. The Claimant contended that he did not have a shortage and that the money that had allegedly been defrauded was banked in the Respondent's account immediately.
7. The Claimant further testified that he was invited for a disciplinary hearing where he explained himself. He further averred that he was served with the letter of dismissal on 18th January, 2017. That is when he knew that his employment had ended.

Respondent's case

8. The Respondent called oral evidence through Ms. Beatrice Singoei, its Assistant Human Resource Manager, who testified as RW1. At the outset, she also adopted her witness statement and the documents filed on behalf of the Respondent to constitute her evidence in chief.
9. RW1 told Court that the Claimant was employed from 1980 as a postal officer and was subsequently promoted through the ranks to the position of Postal Superintendent and was dismissed on 9th January 2017 for gross misconduct.
10. It was RW1's evidence that sometime around 27th November, 2015, the Respondent discovered a shortfall amounting to the sum of Ksh.137,815/= which arose in relation to the Claimant's charge. The Respondent's efforts in assisting the Claimant ascertain the source of the shortfall by providing him with additional staff to trace the source of the shortfall were fruitless as the Claimant offered little assistance to facilitate the success of the exercise. It also became apparent that the shortfall was attributable to the Claimant's willful neglect, carelessness in the conduct of his duties and responsibility as supervisor together with his inflation of unclaimed payments so as to conceal apparent loss of funds.
11. It was also discovered that the Claimant had allowed an employee, Ms. Susan Warui, his subordinate on a personal leave without bringing the same to the attention of the branch manager and further to it, failed to instruct her to sign for the deposit of the keys as mandated by the Respondent's policies. The said Ms. Susan Warui had equally on various dates, inclusive of the date the Claimant allowed her to go on leave, embezzled the sum of Kshs 138,300.64 from the Respondent.
12. RW1 further averred that the Claimant as the Postmaster superintendent was negligent in his responsibilities as he failed to detect theft of official funds through fraudulent false accounting of Mpesa transactions by the aforementioned Ms. Warui. It was the responsibility of the Claimant to confirm closing balances indicated by the officers under his supervision in their P.165 forms on a daily basis while checking books. This was not done and therefore the fraud was not detected by the Claimant.



13. The Respondent's personnel carried out investigations and determined that the misappropriation and shortfall of money was caused by the Claimant's willful neglect of responsibilities. As a result, the Claimant was placed on suspension vide a letter dated 8th December, 2015 to pave way for further investigations.
14. RW1 further stated that the Respondent reported the missing of official funds at the DCIO Kajiado South whereupon the Claimant and the aforementioned Susan Warui were summoned to record statements with the investigations officer. Upon taking the statements of the two suspects, the investigation report returned a finding that the Claimant had indeed converted official funds for personal use and therefore recommended the charging of the Claimant with the offence of converting official funds into personal use contrary to postal rules.
15. Accordingly, the Respondent issued the Claimant with a Notice of Disciplinary Charges dated 27th July 2016, informing him of the disciplinary charges against him. By the same notification, the Claimant was accorded a chance to respond and/or make his representations.
16. It was RW1's evidence that the Claimant made his representations at the disciplinary hearing and the Respondent by its letter dated 9th January, 2017, duly informed him that it had carefully considered his representations and found the same wanting and had come to the decision to dismiss him on grounds of gross misconduct.
17. By a letter dated the 23rd January, 2017, the Claimant appealed the decision to terminate his contract of employment, which appeal was accorded due consideration and a decision reached in good faith. The Respondent found no new grounds to overturn its decision. The Claimant was informed of the dismissal of his appeal vide a letter dated 4th May, 2017.
18. In RW1's view, the Claimant's termination was done in strict adherence to the labour laws and was justifiable on account of the Claimant's willful neglect to perform work which under his contract he ought to have performed carefully and properly as well as blatant disregard for procedures.
19. She further stated that the Claimant was terminated on account of gross misconduct and therefore was not entitled to the benefits as outlined in his Claim. That further, the Claimant was paid his salary up to the last date he reported to work.

Submissions

20. The Claimant submitted that the Respondent did not have a valid reason to terminate his employment. It was his further submission that he did not occasion the loss and that the person responsible for the loss committed to pay the Respondent back. It was the Claimant's further submission that there was no procedure followed before terminating his services. It was further submitted by the Claimant that he was not invited for a disciplinary hearing and that none ever took place.
21. The Respondent's submissions were missing from the Court's physical record and were not traceable on the online portal.

Analysis and determination

22. Flowing from the pleadings on record, the evidentiary material placed before me and the opposing submissions, it is apparent that the Court is being called to determine the following issues:
 - i. Whether there was justifiable cause to terminate the services of the Claimant;
 - ii. Whether the Claimant was accorded procedural fairness;



iii. Is the Claimant entitled to the reliefs sought?

Justifiable cause?

23. The starting point in determining this issue is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove-
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
24. The significance of Section 45 (2) (a) and (b) is that the reason for termination must pass the “fairness and “validity” test. To this end, over and above proving existence of reasons to justify termination, an employer is required to prove that the said reasons were fair and valid.
25. It is also instructive to note that pursuant to Section 43 (2) of the Act, such reasons resulting in an employee’s termination must be matters the employer genuinely believed to exist at the time.
26. In the instant case, the Claimant was dismissed from service on grounds of gross dishonesty and loss of confidence. The specific allegations levelled against the Claimant was that he misappropriated official cash to a tune of Kshs 137,815.00. In his testimony before Court, the Claimant denied the allegations of misappropriation and maintained that he did not have any shortage on his part and that it was his assistant Ms. Susan Warui who had a shortage.
27. Notwithstanding the Claimant’s denial, his testimony before Court states otherwise. During cross examination, the Claimant testified that he paid the Respondent’s money the same day. This information is in consonance with the investigation report exhibited by the Respondent in which it was noted that the Claimant made good his shortage on 27th November, 2015 in the presence of compliance officers, worth Kshs 137,815.00. This goes to discount the Claimant’s assertions that he did not have a shortage. Indeed, one wonders why the Claimant would pay back money to the Respondent if at all he did not have a shortage?
28. To this end, I find the Claimant’s version that he did not have a shortage not plausible. This leads me to conclude that it is more than probable that the Claimant indeed had a shortage.
29. What this points to is that the Claimant was not completely honest in his dealings with regards to the funds belonging to the Respondent. This is further noting that he was the Post Master and was the overall in charge of Loitokitok post office.
30. Being the Post Master, in charge of the Respondent’s post office at Lotokitok, it was reasonably expected that the Claimant would act prudently and honestly in dealing with the funds belonging to the Respondent. It was therefore imperative that the Claimant carries out his duties in a manner that instilled confidence in the Respondent. Apparently, this was not the case.
31. It did not matter that the Claimant returned the Respondent’s funds the same day the shortage was ascertained. The bottom line is that there was a shortage in the funds entrusted under the Respondent’s care thus pointing to misappropriation on his part. This without doubt impaired the trust relationship between the Claimant and the Respondent and moving forward, the Respondent would have found



it difficult to entrust him with the responsibility of overseeing its post office in Loitokitok. Obviously, this would have had an impact on his job.

32. On account of the foregoing, the Claimant presented the Respondent with a valid and fair reason to terminate his employment.
33. With regards to the issue of negligence of duty, the Claimant was alleged to have failed to detect theft of official funds through fraudulent false accounting of Mpesa transactions by Ms. Susan Warui. From the record, Ms. Susan Warui had been cited for loss of Kshs 134,736/=. She admitted as much in a commitment agreement dated 30th November, 2015, exhibited by the Claimant.
34. Testifying under cross examination, the Claimant admitted that he was to ensure that the Mpesa floats were okay at the end of the day. He further admitted that the said Ms. Susan Warui was his assistant. Therefore, it follows that she was working under the Claimant's direct supervision.
35. The fact that the said Ms. Susan Warui was posting inaccurate Mpesa closing balances, without the Claimant detecting as much and if so, failing to take appropriate action against her, point to negligence in the performance of his duty. It portrays the Claimant as an officer who was not quite diligent in the performance of his duties.
36. Yet again, the Claimant gave the Respondent a valid and fair reason to terminate his employment.
37. It is on account of the foregoing that this Court finds that the termination of the Claimant was based on valid and fair grounds within the meaning of Section 45 (2) (a) and (b) of the Act.

Fair process?

38. The requirement of a fair process is generally provided for under Section 45 (2) (c) of the Act. The specific requirements of a fair process are provided for under Section 41 of the Act. In this regard, an employer is required to notify an employee of the intended termination and the reasons thereof in a language he or she understands. During such explanation, the employee shall be entitled to have another employee or a shop floor union representative of his choice present.
39. From the record, the Claimant was notified of the charges against him through a letter dated 27th July, 2016. The specific allegations against him were stipulated in the said notification. The Claimant was also advised through the said notification to submit a written response within 7 days. He was further advised that he would be heard in person and was entitled to bring along a member of staff or union official of his choice. Further, the Claimant was advised that the Respondent had documentary evidence it intended to rely on and that the same would be availed to him upon request.
40. During the Claimant's testimony in Court, he admitted that he was informed of the charges against him and that he submitted a response. He further admitted that he was called for a disciplinary hearing which he attended and explained himself. He also confirmed that he was given a right of appeal which he exercised.
41. In light of the foregoing, I cannot help but conclude that the Claimant was accorded procedural fairness in terms of Section 41 of the Act, as he was informed of the reasons the Respondent was considering terminating his employment and was granted an opportunity to present his defence to the allegations against him both in writing and in person.
42. In the final analysis, I find that the Claimant's termination was neither unfair nor unlawful.



Reliefs

Salary during suspension

43. The record bears that the Claimant was suspended from duty with effect from 8th December, 2015, pending investigations. The Claimant remained on suspension without pay until 9th January, 2017 when he was dismissed from employment. During the period of suspension, the Claimant was presumed innocent as his culpability was yet to be determined. It is therefore my considered view that he was entitled to full salary during this period. In addition, the Respondent did not provide a justification for withholding the Claimant's salary during the period he was on suspension. What informed such a decision?
44. On this issue, I will follow the determination by the Court of Appeal in the case of Chief Justice and President of the Supreme Court of Kenya & another v Khaemba (Civil Appeal 522 of 2019) [2021] KECA 322 (KLR) (17 December 2021) (Judgment), where it was held that:
- “There was no express, implied or other provision or suggestion in the Judicial Service Act and Employment Act of 2007 that the salary of a judicial officer or other staff on suspension would be withheld or not paid during the period of suspension. The respondent could not be penalised in the absence of such a clear rule.”
45. I will arrive at a similar determination on this issue and find that the Claimant is entitled to the salary during the period he was on suspension.

Pension benefits

46. From the record, the Claimant had worked for the Respondent from 1980 until 2017, when he was dismissed from employment. This notwithstanding, the Respondent did not provide a justification as to why the Claimant was not paid his pension benefits despite the number of years served. In absence of any justification, I return that the Claimant is entitled to his pension benefits for the period served.

Notice Pay and Compensatory Damages

47. The claims with regards to notice pay and compensatory damages are not sustainable as the Court has found that the Claimant's termination was not unfair and unlawful.

Orders

48. In the final analysis, I dismiss the Claim substantially and find that the Claimant is not entitled to the prayers sought save for his pension benefits and salary during the 13 months he was on suspension. The said salary is assessed at Kshs 540,995.00 and shall be subject to interest at court rates from the date of Judgment until payment in full. The Respondent shall also process and pay the Claimant's pension benefits appropriately.
49. As the claim has substantially collapsed, I will order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

STELLA RUTTO

JUDGE

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

