



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 26B OF 2020**

**KIPTUM NYAOKE.....CLAIMANT**

**VERSUS**

**KENYA POST OFFICE SAVINGS BANK.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged this claim through a Memorandum of Claim dated 10<sup>th</sup> March, 2020, and filed in court on 13<sup>th</sup> March, 2020, through the Firm of **Chepkwony & Company Advocates**. He seeks a declaration that his termination is unlawful, and further seeks payment of Kshs. 245,097 being three months' salary in lieu of notice, 12 months' salary as compensation for unfair termination and Kshs.18,627,372 for loss of prospective earning.

2. The Respondent neither entered appearance nor defended the suit, despite service. The case proceeded by way of formal proof.

**The Claimant's Case**

3. The Claimant's case is that he was appointed by the Respondent to the position of Clerical Officer on 30<sup>th</sup> August, 1994, where he served until 21<sup>st</sup> March, 2017.

4. The Claimant states that there was an alleged case of fraud at the Respondent's offices that resulted in criminal charges being preferred against him in relation to the fraud. It is his further case that he was acquitted of the criminal charges on 8<sup>th</sup> January, 2019.

5. It is the Claimant's case that he was terminated from the service of the Respondent on 21<sup>st</sup> March, 2017, without being informed of the reasons for the termination. He further states that he was not accorded an opportunity to be heard prior to the termination.

6. The Claimant further avers that he was neither given a termination notice nor was he paid in lieu of the three months' notice provided for in his contract of employment.

7. The Claimant states that he was underpaid during his time with the Respondent contrary to the Regulation of Wages (General) (Amendment) Order in force at the time. He avers that he worked overtime, and on public holidays without pay.

8. The Claimant states that his salary at termination was Kshs.81,699/-

**Analysis and Determination**

9. I have considered the pleadings filed by the Claimant, his oral testimony and the written submissions. The issues for determination are:

- i. Whether the Claimant was unfairly terminated
- ii. Whether the Claimant is entitled to the reliefs sought.

**Whether the Claimant was unfairly terminated**

10. To make a determination of fairness or lack thereof in the termination process, the court is guided by the provisions of Sections 41, 43, 45 and 47 of the Employment Act, 2007. The Sections relate to fair process and substantive justification.

11. Section 41 of the Employment Act states:

**“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”**

12. The Claimant’s case is that he was terminated without notice and without being accorded a hearing. The Respondent not having defended this suit, denied herself an opportunity to show that she complied with the provisions relating to fair procedure prior to terminating the Claimant, or by otherwise rebutting the Claimant’s assertions.

13. The Claimant produced his letter of dismissal in evidence which is proof that he was indeed terminated from the service of the Respondent. The dismissal letter states in part:

**“You will recall that on diverse dates while serving as a CRO/Cashier in Bondo Branch, you were involved in acts of operational irregularity contrary to the laid down procedures in the Bank. The noted facts on the case were explained to you during the disciplinary hearing held on 27<sup>th</sup> January, 2017 and the notification meeting held on 17<sup>th</sup> March, 2017, through which the intention to dismiss you from service was communicated to you..”**

14. The termination letter makes mention of a disciplinary hearing which the Claimant is said to have attended, and further alludes to the Claimant being informed of the intention to terminate his services. The Claimant denied being given a hearing, and the Respondent failed/neglected to produce contrary evidence leaving the court with just the Claimant’s position.

15. The Respondent had a statutory obligation to explain to the Claimant the reason she was contemplating termination, and further allow him an opportunity to make representation in relation to the charges, before arriving at the decision to terminate. The Claimant admittedly faced criminal charges related to his employment, but which charges, did not in my view waive his right to fair process. **(See Kenfreight (EA) Limited v Benson K. Nguti (2016) eKLR)**

16. The court finds and holds that the termination of the Claimant, failed the procedural fairness test. **(See Walter Ogal Anuro v Teachers Service Commission).**

17. On the second test of fairness, which is the substantive justification test, Sections 43, 45(2) and 47(5) of the Employment Act, 2007, places on the employer a legal and evidential burden of proof of reasons for termination where an employer alleges unfair termination. The provisions of Section 43 require that an employer proves the reasons it terminated the services of an employee, and if she fails, the termination shall be deemed to be unfair.

18. The employer is further required to establish the validity of the reasons for termination and further prove that the reasons are fair and justify the termination. **(See Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR)**

19. The Respondent’s letter terminating the services of the Claimant, indicated the reason for the dismissal as **“... you were involved in acts of operational irregularity contrary to the laid down procedures in the Bank.”**

20. The burden was on the Respondent to show that the reasons given for the termination were valid, fair and justified. She did not.

21. The court finds and holds that the termination of the Claimant is both procedurally and substantively unfair.

### **Whether the Claimant is entitled to the Remedies Sought**

22. The Claimant seeks payment of three months’ salary in lieu of notice, 12 months’ salary in compensation and 19 years’ salary for loss of prospective earning.

### **Three Months’ Salary In lieu of Notice.**

23. Termination notice or pay in lieu thereof, is a statutory requirement. Section 35 of the Employment Act states:

**“(1)A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be?**

.....

**(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.**

**(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.”**

24. The Claimant's appointment letter provides as follows in respect of termination notice:

***“(c) During the probationary period your services may be terminated for reasons other than misconduct by either party giving one month's notice in writing or paying one month's salary in Lieu of notice.***

***(d) On satisfactory completion of probationary period you will be confirmed into permanent and pensionable establishment of this Bank and the notice of termination by either party will thereafter be three months' notice in writing or a month's salary in Lieu of notice.***

25. The employment contract/letter of appointment provides for a three months' notice period or pay of ***one month's salary in lieu of notice***. Salary in lieu of notice is in most instances tied to the notice period. In the current case, the amount payable per the parties' agreement is shorter than the period for which notice was required. It is not in the interest of this court to re-write the contract between the parties. In the circumstances, the Claim for three months' salary in lieu of notice is found to be without merit, and instead, the Claimant is awarded a one-month salary in lieu of termination notice.

#### **Compensation for unfair termination**

26. The termination of the Claimant has been found to be both procedurally and substantively unfair. This holding entitles the Claimant to compensation for the unfair termination per Section 49 and 50 of the Employment Act, 2007.

27. The Claimant was in the service of the Respondent for a record 23 years. The Respondent made no effort to justify her decision to terminate him.

28. Considering the Claimant's long service, I find and hold that the Claimant has made a case for maximum compensation and is hereby awarded 12 months' salary as compensation for unfair dismissal.

#### **Loss of prospective earning.**

29. The Claimant seeks payment of salary he would have earned had he remained in the service of the Respondent until his retirement.

30. The general principle in employment contracts is that even if retirement age were to be specified in the contract of employment, an employer and an employee are not bound until the mandatory retirement age. Nothing guarantees that an employee will remain in the service of the employer to retirement.

31. Secondly, upon termination, an employee ceases to actively render labour to the employer and therefore the court is not compelled to grant anticipated salary for the employees unserved term, for if it does, it may be construed to amount to unjust enrichment of an employee. In ***David Mwangi Gioko & 15 Others v Nairobi City Water & Sewerage Co. Ltd Cause No. 1722 of 2011***. Rika J held that employees are paid salaries for contributing labour, and where there is no contribution, there is no compensation.

32. Further, Section 49(4)(f) of the Employment Act, did not open an avenue for this court to award damages over and above the 12 months' maximum compensation provided therein. Courts have largely agreed that the fact that an employee's contract is said to be permanent and pensionable, does not mean it cannot be terminated. (***See Francis N. Gachuri v Energy Regulatory Commission Cause No. 203 of 2011***).

33. In light of the foregoing, and having awarded the Claimant the maximum 12 months' compensation for unfair termination, I find the claim for loss of earning lacking in merit and is hereby dismissed.

34. In conclusion judgment is entered for the Claimant as against the Respondent, as follows:

- i. A declaration that the dismissal of the Claimant is unfair.
- ii. One-month salary in Lieu of Notice at Kshs. 81,699/-
- iii. 12 months' Salary as compensation for unfair dismissal at Kshs. 980,388/-
- iv. Costs of the suit and interest until payment in full.

35. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17<sup>TH</sup> DAY OF MARCH, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Chepkwony Present for the Claimant

N/A for the Respondent

Christine Omollo- C/A