



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1061 OF 2013**

**GIDEON MOGAKA ATURA.....CLAIMANT**

**-VERSUS-**

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

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 12.7.2013 alleging that his contract of employment was unlawfully and unfairly terminated by the respondent on 15.2.2012 and was denied his terminal benefits. He therefore prayed for the following reliefs:-

- a. The claimant be allowed access to his work station and to continue working as provided under the contract of service between the claimant and the respondent without victimization of any kind whatsoever;
- b. In the alternative and/or in addition and without prejudice to (a) above, the claimant be reinstated to his job or a job of similar or nearly similar or higher description, responsibilities and remuneration;
- c. In the alternative and/or in addition and without prejudice to (a) and (b) above, the claimant be paid what he could have earned were it not for the wrongful, illegal and unfair termination of his employment contract, that is the salary the claimant would have earned were it not for the unfair, wrongful and unlawful termination of his employment, that is;

$Kshs.30,530 \times 11 \text{ years} \times 12 \text{ months} = \mathbf{Kshs.4,029,960.00}$

- d. The claimant be paid all his accrued but unpaid salary and allowances from the date of cessation of payment thereof up to the date of judgment.
- e. The claimant be paid all salary and allowances which shall accrue after the date of judgment until the same is lawfully and regularly terminated and/or until retirement, whichever comes earlier.

In the alternative and without prejudice to the foregoing, it is humbly further prayed that this Honourable Court be pleased to order the Respondent do pay the claimant his statutory entitlements and/or terminal dues totaling Kshs.603,476.00 with interest at Court rates from the date of purported termination until payment in full as more particularly shown below;

- a. Payment in lieu of notice (equal to one month's in view of the provisions of section 36 of the Employment Act) = **Kshs.30,530.00**
- b. Accrued but unpaid salary of 6 months from September 2011 to February 2012 (6 x 30,530.00) = **183,180.00**
- c. Accrued but untaken leave 23 days times the daily rate of earnings: 23 x 30,530 divided by 30 = **23,406.00**.
- d. Compensation for unfair termination remuneration equivalent to 12 months remuneration:- 12 x Kshs.30,530 = **366,360.00**.
- e. The Respondent do provide the claimant with a certificate of service as required under the Employment Act and
- f. Costs of the claim.

2. The respondent admitted the employment relationship with the claimant but denied the alleged unfair termination of the same. She averred that the termination was fair and lawful because it was due to the claimants misconduct, and that a fair procedure was followed. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard before Ndolo J. on 23.9.2015 and 1.12.2015 when the claimant testified alone and the respondent called her Assistant manager security and investigation Mr. Michael Njagi Macharia. Thereafter the matter came to me for further defence hearing on 19.9.2018 and 23.10.2018 but the defence case was closed without calling any other witness after it emerged that the awaited witness has since died. Despite the court's directions that parties do file submissions, none filed.

#### **Claimant's case.**

4. The claimant testified that he was employed by the respondent in 1984 as a Postal Officer and his last station was Kajiado Post Office reporting to the Post Master there. He was dealing with Sale of Money Orders and custody of strong room.

5. He further testified that on 30.5.2011 he was suspended from work on allegation that he had absented himself from 26th to 30th May 2011. He stated that the suspension was done without being accorded a hearing and he responded on 2.6.2011. Thereafter he received two other letters dated 30.8.2011 and 2.9.2011 accusing him of fraud and misappropriation of Kshs.130,705.05.

6. He admitted that on 26.5.2011, the respondent's inspection team went to Kajiado Post Office while he was away with permission from the Postmaster. He further stated that although he had the keys to the strong room, he had kept the money in another safe in the office and when he reported back to the office on 30.5.2011 he banked the money vide a banking slip produced as exhibit (page 17 of his bundle). He was not paid salary from July 2011 but he was served with a dismissal letter dated 15.2.2012 and his pension was also withheld. He appealed on 6.3.2012 but the same was never heard. He therefore prayed for the reliefs set out in his suit contending that no money was lost and for 28 years of service he never received any warning letter.

7. On cross examination, he stated that he had permission from the Postmaster to be away from 26.5.2011 to 30.5.2011. He admitted that on 26.5.2011 he was called twice by the inspectorate team to go back to the office but never did so because he had permission to be away in Nairobi. He further contended that he had misplaced the strong room key but never reported the same. He also contended that he returned to the office on Saturday 28.5.2011 but adduced no evidence to prove that.

8. He admitted that there cross contradiction between his letters dated 2.6.2011 and 6.3.2012. He further admitted that he recorded a statement with the investigator, that money was a sensitive issue; he that there were impromptu inspections to check on money, he was in charge of the strong room key that he was aware of Respondent's Guidelines on handling of money, that he had filled a form to signify that there was shortage in the money in his custody, that the shortage was Kshs.120,000 and not Kshs.130,000 and He contended by admitting that he was given a chance to explain himself by the employer. He however contended that there were other metallic safe on the counter where he had kept the money.

9. On re-examination he contended that his statement was written down by the investigator at the Postmaster's office and thereafter given to him to sign. He maintained that there was no shortage in the money collected adding that it was in a safe at the counter. He denied that he was called to any disciplinary hearing before the dismissal.

#### **Defence case**

10. Mr. Michael Macharia holds a Diploma in Criminology from the CID Training School, BA in Sociology and Masters in Criminology. He joined the respondent in 1993 and on 26.5.2011 he was based at the respondents Head office.

11. He further testified that on 27.5.2011 he was sent to Kajiado Post Office where there was an inspection going on headed by Kimetto. His brief was to witness the breaking of the strong room because the claimant had disappeared. He reported the matter to the OCS Kajiado Police Station who accompanied him with CPL Muturi. That strong room was opened by a Blacksmith called Mr. Kamau, in the presence of the said officer plus Mr. Onyango the Postmaster Kajiado and himself.

12. He further testified that the OCS and the Postmaster confirmed that the claimant had balanced his cash before leaving office on 25.5.2011 and declared the cash in hand as Kshs.166,580.45. That they expected to find Kshs.146,580 in the safe because the claimant had given Kshs.20,000 to the Postmaster but they only found Kshs.26,284. They therefore concluded that there was a shortage of Kshs.120,295.85.

13. He further testified that there were other safes in the office which could only hold Kshs.50,000 but after inspection, they found them empty. They then changed the office locks to bar the claimant from accessing to the office. That on 30.5.2011 he was in the Kajiado Post Office when the claimant reported to work carrying a banking slip. He then made a report recommending for the dismissal of the claimant.

14. On cross examination, he stated that the claimant's job included front office service and strong room. He admitted that the strong room had duplicate key which could not open the safe. He contended that they searched the whole place but they only broke the main safe. He admitted that all the lost cash was returned and as such it was necessary to forward form P.241 to Headquarters.

15. He contended that money was stolen but they chose not to press criminal charges but follow the way of disciplinary action. He contended that the Cashier's Balance Book was filled by the claimant on 25.5.2011 and on 26.5.2011 it was filled by the Postmaster Mr. Onyango but on 27.5.2011 it was filled by the Inspection Team. He contended that he was mandated break the safe by the Regional Manager by phone.

16. He admitted that the respondent had a Disciplinary Committee but he declined to answer questions related to HR matters. He contended

that his concern was only that money was lost and later recovered. He concluded by admitting that he recorded the claimant's statement and he signed.

### **Analysis and determination**

17. There is no dispute that the claimant was employed by the respondent until 15.2.2012 when he was dismissed. The issues for determination are:-

- a. Whether the termination was unfair and unlawful.
- b. Whether the reliefs sought should be granted

### **Unfair Termination**

18. There is no dispute that the respondent dismissed the claimant from his employment on 15.2.2012. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) and that it was done after following a fair procedure. A valid and fair reason is one that relates to the employees conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand includes but not limited to the according of a hearing to the employee before termination.

### **Reason for the dismissal**

19. In this case dismissal letter dated 15.2.2012 stated as follows:-

**“RE: DIMISSAL FROM SERVICE**

**This office letter dated 30th August 2011 charging you with suspected fraudulent accounting and misappropriation of official funds and your representation vide your defence letter dated 14th September 2011.**

**This is to advice you that the reasons advanced in your defence have been carefully considered but found unacceptable. The Postmaster General has therefore approved your dismissal from service on grounds of loss of confidence in your continued service with effect from 26th June 2011.**

**You will be paid your pension contributions for the period you were in service. Payment will be processed by Posta Pension Scheme in accordance with the current retirement benefits scheme regulations...”**

20. The claimant admitted that he was the person in charge of the strong room at Kajiado Post Office in May 2011. He admitted that when he closed business on 25.5.2011 he had a shortage of Kshs.120,000 but quickly changed to allege that he kept it in another safe at the counter as opposed to the strong room safe. He admitted that on 26.5.2011 he was absent from work and when he was called back to the office by the respondent's Inspection Team he declined to comply because he had permission to be away until 30.5.2011. That he reported back to the office on 30.5.2011, picked the money from where he had kept, took it to the back and brought the banking slip to the office. He produced copy of the slip as an exhibit to prove that no money was lost.

21. The defence witness, however, contended that the claimant had stolen and misappropriated the respondent's Kshs.120,295.85. He testified how he was instructed to supervise breaking of the strong room safe of Kajiado Post Office on 27.5.2011 after the claimant disappeared on 26.5.2011 and refused to report back for an impromptu inspection by the inspection team of the respondent. He explained in details how he reported the matter to the area OCS who together with another police officer accompanied him to the Post Office and in their presence, a blacksmith broke open the strong room safe. He further explained how he witnessed the Postmaster and the OCS Mr. Kilele verify the Cashier Balance Book record and the cash in the safe. That the cash in hand as per the record left by the claimant on 25.5.2011 was Kshs.166,580.45 out of which Kshs.20,000 had been given to the Postmaster. That the balance expected to be in the safe was Kshs.146,580.45 but only Kshs.26,284 was found, meaning that there was a deficit of Kshs.120,295.85.

22. Mr. Macharia further testified that he caused the office locks to be changed to prevent the claimant from accessing the office. That he arrived at the office on 30.5.2011 in the morning before the claimant, who reported later carrying a banking slip for the lost money. He therefore contended that the money had been stolen but returned and for that reason criminal charges were not pressed against the claimant but preferred dismissal of the claimant.

23. After considering the evidence adduced by both parties, I find on preponderance of evidence that the respondent, has proved that there was a valid and fair reason for dismissing the claimant. The claimant was employed in a position of trust to handle his employer's money.

He betrayed that trust by failing to keep the money in the office strong room safe where he was supposed to keep and went away with it from 26.5.2011 till 30.5.2011 when he banked the same on his way back to work. The said conduct entitled the employer to dismiss him for betraying the trust she had in him. Consequently I return that the respondent has proved the reason for the dismissal as require by section 43 and 45 of the Employment Act.

### **Procedure followed**

24. Under section 41 of the Employment Act, before employer terminates the employment contract of his employee on ground of

misconduct, poor performance or physical incapacity, the employer must explain to the employee, in a language he understands and in the presence of another employee or shop floor union representative, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations, which must be considered by the employer before the dismissal is decided.

25. In this case, the said mandatory procedure was not followed. The defence witness admitted that the respondent has a Disciplinary Committee, which hears employees' disciplinary cases. The claimant contended that he was never heard before the dismissal as required by section 41 of the Employment Act. That contention was confirmed by the dismissal letter which stated that the dismissal was approved by the Postmaster General based on basis of the show cause letter dated 30.8.2011 and his response dated 14.9.2011.

26. The said procedure was not in accordance with section 41 of the Employment Act, which entitled the employee to an oral hearing in the presence of another employee or his union official. Consequently, I return that the respondent has failed to prove that a fair procedure was followed before dismissing the claimant and as such the dismissal of the claimant was rendered unfair and unlawful. In my view it is immaterial whether hearing of the employee would not change the outcome or the belief held by the employer on the guilt of the employee.

### Reliefs

27. The claimant prayed for reinstatement or salary for the 11 years he would have worked before his normal retirement age. In my view the two prayers mean the same thing. Under section 12(3) (vii) of the ELRC Act, the court is barred from ordering reinstatement where 3 years have lapsed after the separation. I will however grant the alternative prayer of damages under section 49(1) of the Employment Act being salary in lieu of notice plus compensation for unfair termination based on salary of Kshs.30,530 indicated in the payslip filed as exhibit.

28. I therefore award the claimant Kshs.30,530 being one month salary in lieu of notice plus Kshs.183,180 being 6 months salary compensation for unfair termination. In making the award, I have considered the claimants long service of 28 years but also that he contributed to the termination through misconduct.

29. In addition, I award the claimant salary for 5 ½ months from September 2011 to February 2012 when he was under suspension being Kshs.167,915. Although the dismissal of the claimant was backdated to June 2011 that amounted to unfair labour practice because the claimant was bound by the terms of his contract until 15.2.2012 when the separation letter was written and served. The claimant was not free to look for another job while his case was being investigated and not yet heard. Such practice of backdating the effective date by employers and especially in the public sector must now come to an end because we are now in the era of fair administrative action which must be done with some degree of efficiency and effectiveness.

30. The claim for accrued leave was not disproved by leave records from the employer who is the custodian of employment records under section 74 of the Employment Act. I therefore award **Kshs.18,030(Basic pay) x 23/26 days = Kshs.15,949.60**.

31. The claimant will also be issued with a certificate of service.

### Conclusion and disposition

32. I have found that the respondent had a valid and fair reason for dismissing the claimant but she failed to follow a fair procedure which rendered the dismissal unfair within the meaning of section 45 of the Employment Act. I have found that it is too late to order reinstatement and instead awarded damages under section 49 (1) of the Act plus accrued benefits. Consequently I enter judgment for the claimant in the following terms:-

- (a) Notice .....**Kshs.30,530.00**
- (b) Compensation.....Kshs.183,180.00
- (c) Salary arrears.....Kshs.167,915.00
- (d) Leave.....Kshs. 15,949.60

**Kshs.397,574.50**

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The award is subject to statutory deductions. The claimant will however have costs plus interest at court rates from the date hereof.

**Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of March, 2019**

**ONESMUS N. MAKAU**

**JUDGE**