



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1009 OF 2014**

**PAUL KARANJA KIMANI.....CLAIMANT**

**- VERSUS -**

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

(Before Hon. Justice Byram Ongaya on Friday 15<sup>th</sup> March, 2019)

**JUDGMENT**

The claimant filed the statement of claim on 18.06.2014 through K. Mosei & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the retirement in the public interest is unlawful, wrongful, unjust, punitive, null and void.
- b) That the respondent to compensate the claimant for the remainder of his normal retirement age as pleaded in paragraph 16 (Kshs.33, 284, 356.90).
- c) General damages for loss of employment and other opportunities.
- d) Any other remedies as the Court may deem fit to grant.
- e) Costs of the suit be borne by the respondent.

The statement of response was filed on 18.08.2014 through Akide & Company Advocates. The respondent prayed that the claimant's statement of claim be dismissed with costs.

The claimant was employed by the respondent by the letter of offer dated 04.03.1991 for the position of Assistant Postal Controller. The claimant accepted the offer and reported on duty on 13.03.1991. The claimant successfully served the probationary period and was confirmed in the permanent and pensionable service of the respondent. The claimant was promoted through the ranks the last being the position of Regional Postal Manager stationed at Northern Kenya.

By the letter dated 07.09.2011 the claimant was interdicted from duty with immediate effect on account of an interim report on the claimant's suspected misuse of official funds through false per-diem (PD) claims and improper use of imprest. The claimant was to draw half salary during the period of interdiction until the case was finalised.

The claimant was served with a show-cause letter dated 06.01.2012 alleging gross misconduct and negligence of duty leading to frauds and misuse of office. The letter alleged as follows:

- 1) Fraudulent claims of Kshs. 53, 200.00. That on 29.04.2011 the claimant applied for authority to travel to Wajir, Elwak and Mandera for 5 days but he failed to take up the journey so that he obtained Kshs.15, 000.00 as travel allowance. Further on 19.07.2011 he obtained Kshs.6,000.00 when he got authority to accompany integrity assurance officers to Bura, Hola and Masalani for 3 days and spent only one night and failed to refund two nights he failed to spend. On 7<sup>th</sup> and 9<sup>th</sup> May 2011 he was authorised to travel to Wajir and paid Kshs. 6, 000.00 but he never travelled. In April 2011 he was paid Kshs. 15,000.00 to travel to Mandera for 5 days but spent only 2 days hence obtaining Kshs.9,000.00 fraudulently and he failed to refund as expected. The amount misused in the cited cases was in the sum of Kshs. 36,000.00. Further on 12.01.2011 he was irregularly paid Kshs. 17, 200.00 on mileage for attending a budget meeting at Nairobi using his private car but which had not been used. He had instead used a public vehicle KAY 394V so that the claim was fraudulent.
- 2) Misuse of office leading to misappropriation of funds Kshs.211, 600.00. That the claimant failed to manage use of subsistence

allowance by officers working under him leading to misuse of Kshs.115, 700.00 intended for travel on official duty. Some 5 officers were accommodated at a hotel in Garissa at a cost of Kshs.2, 500.00 per person making Kshs.25, 000.00 but a cheque of Kshs.36, 500.00 was prepared with overpayment of Kshs. 11, 500.00 and on inquiry the claimant alleged the hotel made an error when issuing the invoice and upon investigation the hotel issued a credit note and it amounted to a case of attempted fraud. Also it was alleged that the claimant misused imprest by irregularly authorizing use of imprest to buy a television set at Kshs.29,000.00 and DSTV equipment at Kshs.17, 300.00. He also authorised repair of motor vehicle KAJ 426S through imprest funds which were meant to pay incidental expenses only. The claimant's secretary, the imprest holder, encashed the voucher and retained Kshs.20,000.00 to replenish official imprest earlier given to the claimant and she gave the claimant's driver Kshs. 6, 300.00 to pay Ms. Cushion makers, the Vehicle repairer and which was irregular. Further, when the claimant travelled to Wajir and Mandera with his officers, the claimant authorised one officer to carry imprest of Kshs. 18,000.00 which the claimant purportedly used to buy lunch for the officers and the district administration staff. Imprest funds had also been used to pay repair charges for the photocopier machine for cyber cafe at Kshs. 13,800.00 which was irregular. It had also been observed that payment vouchers for suppliers had been cashed by staff working under the claimant and which was against the regulations.

3) Negligence of duty. The official driver assigned to the claimant was involved in fuel fraud and made unofficial journeys under the claimant's supervision. The fraudulent fuel consumption amounted to Kshs. 311,000 being negligence of duty on the part of the claimant. Also the claimant failed to constitute a regional procurement committee and went on to falsify minutes, passing of LPOs and purporting to have held meetings and eventually payment vouchers would be prepared.

The letter concluded that the claimant's integrity was therefore doubted and a severe disciplinary action was proposed against the claimant. He was to reply through his controlling officer within 7 days of receipt of the letter and failing to reply, action would be effected without further reference to the claimant.

The claimant's reply to the show-cause letter was dated 03.02.2012. It was to the following effect:

- 1) Whenever he did not complete or take up the journey subject to the per diem, he refunded the money in issue and there were receipts issued in that respect. In alternative, the per diem was utilised on subsequent official journeys.
- 2) When he travelled to Nairobi he used his private car KBH 467W 1800CC because the official car had broken down. The start mileage was 101461 and the return mileage was 102281 making 820Km. The amount paid was Kshs.17, 220.00 and not Kshs.17,200 as alleged in the show-cause letter and payment was at Kshs.21 per Km, the prevailing rate. The claimant denied that he had used the public service vehicle KAY 494V as alleged. The bus operator had confirmed that the claimant had not travelled on the bus on seat no. 4 of KBN 820A as had been alleged.
- 3) Is true that he approved per diems for his officers but without an audit report it would be very difficult for the claimant to tell if the same had been properly utilised. Negligence of duty as preferred was therefore unfair. Other officers who did not complete their authorised journeys had valid reasons for such failure and would later complete the journeys such as when the transport was available. For the hotel payments there had been errors in bills due to mix ups and the credit of Kshs. 10,000 from the hotel was being pursued as at the time of the claimant's interdiction.
- 4) The General Manager gave authority for the television and DSTV to be bought by cash. The claimant then authorised the purchase. He denied using imprest cash to make payments for non-imprest items as was alleged. He had not seen any signed documents by which imprest money had been misapplied as was alleged.
- 5) He admitted that he authorised use of imprest money to pay for repair of photocopier because the relevant contract had lapsed in April. It was crucial to repair the photocopier because the target of earning at least Kshs.60, 000.00 in July in the photocopier business had been projected. The circumstance was exceptional and imprest cash was applied accordingly.
- 6) It was only in one case where the secretary had collected payment cash on behalf of a supplier as the supplier had requested as much. Staff cashing vouchers on behalf of suppliers was not rampant as alleged.
- 7) Any discovered fuel fraud was acted upon. Failure to record fuel consumed on work tickets did not amount to fraud where fuel cards had been used. Where LPOs were used, it was the duty of MTO and Head Postmaster, Garissa to supervise – it was not under the claimant's direct responsibility.
- 8) The procurement meetings were held as required and minutes kept as appropriate. No records were falsified in that regard.
- 9) The claimant concluded that he had discharged his duties and led to increase of revenues in the region. Further he knew a senior officer in Audit headquarters and a few officers in the region had vowed that the claimant had to leave the region because he had failed to do as those officers had wanted him to do.

By the letter dated 02.02.2012 addressed to the Post Master General, the claimant requested for some documents to enable him prepare for his defence.

By the letter dated 14.03.2012 the respondent levelled against the claimant further charges of failure to refund Kshs. 48,000.00 subsistence allowance which he accepted but failed to produce evidence of travel or receipts refunding the same. It was alleged that the same amounted to fraud. It was further alleged that in 2010/2011 financial year he had approved 17 cases granting staff salary advance twice per year which was contrary to policy and standing regulations. He was to answer in 7 days. The claimant replied by his letter of 27.03.2012. He stated that failure to submit receipts or work tickets was not fraud because in Northern region one used any available transport and he had benefited from the assistance of provincial administration. (The reply as filed by the claimant is incomplete and the rest of the response is unknown).

The claimant was invited for disciplinary before the HR Committee scheduled for 13.09.2012. The Committee found as follows:

- 1) The claimant had been dishonest in use of per diems because he had failed to undertake journeys for which per diem had been paid to him. He had also refunded some money and failed to refund other monies thereby confirming the dishonesty.
- 2) Disciplinary action had been taken against the officers who failed to account for the subsistence allowances and the driver who had siphoned fuel had been dismissed. Thus the claimant had been negligent as was levelled against him.
- 3) The claimant failed to manage subsistence allowance for the claimant and other staff confirming negligence against the claimant.

Upon deliberating the case, the Committee recommended that the claimant's dismissal from duty on grounds of dishonesty, negligence of duty and doubted integrity.

The respondent's Board deliberated the case and by the letter dated 26.10.2012 it was conveyed to the claimant that his written and oral representation had been considered and found unacceptable. The Board therefore decided that the claimant be retired in public interest effective the date of the letter, 26.10.2012. The letter stated that the claimant would be paid one month's salary in lieu of notice, terminal leave dues if any, less monies owed to the respondent. He was entitled to pension per Posta Pension Scheme regulations. He was given a right to appeal in 4 weeks upon receipt of the letter.

The claimant appealed by his letter dated 08.01.2013. The claimant urged that the punishment imposed was excessive because other officers found culpable of not accounting for subsistence allowance had been reprimanded or warned. Further the hearing before the HR Committee had been unfair because he was asked to confirm the belated refunds and not allowed to make his representations generally. He asked to be heard by the full board and he prayed for leniency because he otherwise had a clean record of service and he was a first offender. He stated, **"That I be forgiven for the non intentional work related anomalies and be reinstated to continue working for the organisation."** The claimant wrote the appeal letter addressed to the respondent's chairman dated 06.11.2012 and raising the same grounds of appeal. He also wrote the remainder on appeal addressed to the chairman dated 05.12.2012 and stating in part, **"In my letter, I not only explained the circumstances that lead to the occurrence of the regrettable travel charge that remained after all other charges were dropped but also offered my sincere apologies for the same and requested for a lenient review of the matter as I felt the punishment meted was excessive being a first offender and the fact that I had already been out on interdiction for 15 months."**

By the letter dated 02.10.2012 addressed to the Postmaster General, the claimant admitted that he had belatedly refunded per diem and further admitted that there had been some irregularities whereby members of staff collected money on behalf of others. He pleaded for forgiveness and requested to be given a second chance.

The letter dated 09.07.2013 conveyed that the Board had considered the claimant's appeal at the meeting of 26.06.2013 where his oral and written representations had been considered but the decision to retire him in public interest had been upheld and the Board had closed the matter.

To answer the **1<sup>st</sup> issue** for determination the Court returns that the termination of the claimant's employment was not unfair. First it has been established that the respondent complied with the due procedure of a notice and hearing as provided in section 41 of the Employment Act, 2007. Second, the claimant had admitted the reasons for termination as set out in the termination or retirement letter. The Court returns that the reasons were valid or genuine as per section 43 of the Act.

To answer the **2<sup>nd</sup> issue** for determination the Court returns that the termination by way of retirement in the public interest did not amount to excessive punishment. In particular the retirement was a balanced decision in comparison to dismissal which the respondent was anyway entitled to impose. The claimant was paid the leave days due, a month's pay in lieu of notice and was entitled to pension per the contractual provisions. The Court has considered the respondent's power of disciplinary control over its employees such as the claimant and returns that in the present case, the claimant has not established reasonable grounds to show that the retirement in public interest was not a proportionate decision. The claimant urged that other employees who had failed to account for per diem or subsistence allowance had been warned or reprimanded. The record of disciplinary proceedings and rank of those officers was not exhibited. What was on record was that the claimant was a regional manager in-charge of the Northern region and in the opinion of the Court the respondent was entitled to impose and expect highest integrity on the claimant's part as the regional team leader and manager. The claimant has been shown and has admitted the shortcomings as was stated in the retirement letter and the Court returns that retirement in public interest was a proportionate decision in the circumstances of the case.

To answer the **3<sup>rd</sup> issue** for determination, the Court returns that the prayers made for the claimant were premised on the finding by the Court that the termination by way of retirement in the public interest was unfair. The Court has found that the termination was not unfair and the prayers as claimed will fail.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the statement of claim with costs.

**Signed, dated and delivered in court at Nairobi this Friday 15<sup>th</sup> March, 2019.**

**BYRAM ONGAYA**

**JUDGE**