



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1932 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th October, 2019)

DAVID GACHATHI THUO.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimant, David Gachathi Thuo filed a Memorandum of Claim on 30/10/2015 for wrongful dismissal and non-payment of dues against the Respondent, Postal Corporation of Kenya.
2. He avers that he was employed by the Respondent as a Clerical Officer –Scale 10 through an appointment letter dated 29/11/2005 and rose through the ranks to the management position of Compliance Officer –Scale 6. That he was at all times hardworking and maintained high work standards and that he was never issued with a warning letter nor faced any disciplinary sanctions for misconduct.
3. That on 23/03/2010, the Posta Pay Electronic Funds Transfer (EFT) managers at the ICT department alleged that fraudulent transactions in the posta pay system on 22/03/2010 had been made through the compliance office and he was arrested by CID officers. That he was inhumanely dragged by the said officers to the CID headquarters yet the internal Posta Investigations Branch Managers had not conducted any internal investigations.
4. That on 09/04/2010 he was charged at the Makadara Law Courts with two counts of stealing in *Criminal Case No. 1378 of 2010* but was released on bond and attended trial while performing his duties faithfully at the Respondent Corporation and that he received his full salary and benefits for April 2010.
5. That on 16/04/2010, he was suspended from duty by the Respondent for allegations that Kshs. 311,400/= had been lost through the compliance office and was not paid any salary during the entire suspension period. That while the court proceedings were ongoing, he was summarily dismissed from employment on 31/08/2012 for negligence of duty leading to loss of funds but that he only received the dismissal letter on 25/09/2012.
6. Further, that he lodged an appeal against the decision by a letter dated 04/10/2012 giving a detailed response to all the allegations levelled against him. That in November 2012, the Respondent called him for a disciplinary meeting which lasted only three minutes with the chair of the meeting communicating to him that his appeal could not be heard until the criminal case had been heard and determined.
7. That the criminal case was finally decided on 23/10/2014 wherein he was acquitted of all charges against him and he wrote to the Respondent an email on 14/01/2015 enquiring about the fate of his appeal in view of his acquittal. That the Respondent only responded to the email on 19/06/2015 dismissing his appeal and he contends that his Appeal was never heard.
8. He denies being involved in stealing or defrauding the Respondent and avers that he and his family suffered great loss and pain for the lost income and the inability to access the medical benefits provided by the Respondent.
9. The Claimant continues to aver that the Respondent never presented him with the Charges against him and that while in the suspension letter the allegation was **Fraudulent Activities**, in the letter of summary dismissal the allegation changed to **Negligence of Duty** while in the criminal case it was **Stealing**.
10. That he was therefore not allowed to respond appropriately to these charges as he was denied the opportunity to defend himself and that the Respondent only responded to the appeal after 3 years. That neither the State nor the Respondent has appealed the decision in Criminal

Case No. 1378/2010 hence the decision of his acquittal stands.

11. That the reasons for summary dismissal are false and unfair as they were not proved and do not thus warrant his summary dismissal and that he was discriminated against, wrongfully victimized, humiliated and denied justice in contravention of his fundamental rights and freedoms under the Constitution. He tabulates the accrued salary at *paragraph 35 of the Memorandum of Claim*. He prays for an award against the Respondent for orders:

a) A declaration that the Respondent violated the Claimant's rights in Articles 27, 28 and 29 of the Constitution and that the Claimant's suspension (without pay) and subsequent dismissal was unprocedural and unfair.

b) General damages for violation of constitutional rights.

c) Reinstatement to the position of Compliance officer, backdated to 16th April 2010.

d) Payment of Kshs. 3,966,300/- being salary, house allowance and benefits due during the period of suspension (16/04/2010 – 31/08/2012) and those due during summary dismissal until judgment is delivered (taking due regard to an annual salary increment of Kshs. 1,000/- and an annual leave allowance of Kshs. 10,265/-

e) Payment of Kshs. 304,830/- accrued leave at the rate of 27 days for each year worked for the period being 16/04/2010 to 31/08/2012 and further from 31/08/2012 until the date of reinstatement.

f) Costs of the suit.

12. The Respondent filed Memorandum of Response dated 05/04/2016 averring that the Claimant was at the time of termination entitled to a monthly pay of Kshs. 53,000/= and that his appointment letter as a compliance officer dated 21/07/2008 stipulated the expectations of the Respondent and maintained the applicability of other terms and conditions of employment that he was bound.

13. That with regards to the fraudulent transactions, it did do and conclude internal investigations and denies that it suspended the Claimant for any malicious allegations. That it followed the laid down disciplinary procedure as stipulated in the Posta Code Regulations during the Claimant's period of suspension and that he was dismissed in accordance with the Employment Act on grounds of misconduct and negligence of duty among others duties stated in his dismissal letter.

14. That the Claimant received the said dismissal letter on the same day it was promptly dispatched and that he was afforded a fair hearing during the time when he had all the opportunity to show cause and appeal. That the Claimant's appeal was dismissed because it was time barred and that him being a compliance officer he was under obligation to observe diligence.

15. That it was not its duty to charge the Claimant as he was already investigated by the police, arraigned in court and charged. That the Claimant's failure to disclose he was given an opportunity during the disciplinary proceedings but failed to submit his representations is unscrupulous and that he is misleading this Court. That he was only dismissed after being investigated and subjected to a fair hearing and denies any discrimination, wrongful victimization, humiliation and denial of justice upon the Claimant.

16. That the Claimant was found unfit to serve it and that his contractual relationship with it could not continue and was thus terminated. That the Claimant's failure to observe due diligence while serving it made it to suffer a loss of Kshs. 138,700/= and that he is therefore not entitled to any of the prayers sought which should be dismissed with costs.

Evidence

17. The Claimant testified that when he left employment he was earning Kshs. 53,950/= gross, was paid a leave allowance of Kshs. 10,625/= in December and that he was entitled to 27 days leave. He denied causing the loss of Kshs. 138,000/= and stated that all their figures kept changing and that he does not know how much was stolen.

18. That his duty as a compliance officer was to provide reports from the system and that computation of payments was done by the supervisor at the office level. He also stated that he no longer wished to be reinstated.

19. RW1, the Respondent's Assistant Manager Employee Relations testified that the Claimant while at the call centre had the privilege to activate and deactivate the payment centre and that he activated a payment for Mosochi Post Office which did not exist.

20. That he made three payments amounting to Kshs. 82,000/= and that someone called from Kisumu asking about the fraudulent payments. That after investigations they received the report which they used to press charges and that the case was also reported to the police.

21. That when an officer is on suspension he is not entitled to any pay and which is government policy. In cross-examination, RW1 could not pinpoint the Claimant in Court stating that it had been long. In re-examination, he stated that the dismissal letter showed the Respondent lost Kshs. 311,400/- cumulatively.

Claimant's Submissions

22. The Claimant submits that he was denied the fundamental and basic principles of natural justice expected of any public institution such as the Respondent and which is the essence of fair adjudication. He cites the case of **Onyango Oloo v Attorney General (1986-1989) EA 456**

where the Court held that denial of the right to be heard renders any decision made null and void *ab initio*. That the Court of Appeal in **Standard Group Limited v Jenny Luesby [2018] eKLR** affirmed that the right to hearing in an employment relationship is what amounts to meeting the true tenets of natural justice.

23. That it should also not be lost about the conduct of the Respondent during the hearing of this suit when it hoodwinked him and the Court that they were intending to settle this matter but not a single proposal was ever received. That the feeble defence presented before this court by the Respondent is an affirmation of his assertions that the Respondent cooked evidence holding him as a scapegoat while the real culprits walked away.

24. That the Respondent did not present a competent witness or file any documentary evidence to support their misguided assertions and that his dismissal was also unfair under **Section 43 of the Employment Act** because the Respondent failed to prove the reason for the termination.

25. He submits that he has satisfied the burden of proof required of him throughout the trial process and prays that judgment is entered in his favour. That his assertions and submissions are backed by this court's findings as to legitimate expectations of an employee accused of a misconduct and eventually suspended and while relying on the case of **Alex Semutwa v Kenya Seed Company Limited [2014] eKLR**. He concludes that this court should render very harsh punitive measures against the Respondent for gross violations of his rights and freedoms.

Respondent's Submissions

26. The Respondent submits that **Section 45(2) of the Employment Act** provides for unfair termination and that this was fortified by this Court in case law including **Walter Ogal Anure –v- Teachers Service Commission [2013] eKLR** where the court stated that “...for termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

27. That it is not disputed the losses and fraudulent transactions took place under the watch of the Claimant, as the in-charge of the compliance office and that pursuant to **Section 44(4) (c) of the Employment Act**, wilful failure to perform one's duties or neglect thereof is one of the grounds for summary dismissal.

28. That it is the Claimant who declined to honour the invitation for hearing and prompted it to conduct the disciplinary hearing in his absence. That the Respondent's witness adduced evidence that upon conclusion of internal investigations the Claimant was found guilty of the said fraud, which upon conclusion of the disciplinary process resulted in termination.

29. That involvement in fraudulent transactions is no doubt a substantive justification which in the eyes of a reasonable employer would warrant dismissal from service and so in this case the Claimant was substantively dismissed.

30. That it has also proved it terminated the Claimant's employment through fair procedure as under **Section 41 of the Employment Act**. That the Claimant in the letter dated 04/10/2012 marked **DGT-7** in the Claimant's bundle of documents admits receiving the invitation for hearing and cited the then ongoing criminal case as the reason for his failure to attend.

31. That it discharged its statutory obligation of affording him an opportunity to be heard and that this statutory duty does not rise beyond the opportunity. That it even advised him on his right to appeal the decision to terminate him in the termination letter marked **DGT-6** and it relies on the case of **Robert Mofat Odhiambo –v- Harambee Sacco Limited [2018] eKLR** where the court in finding that the claimant had been given an opportunity to be heard at a disciplinary hearing but did not present himself stated:-

“... What an employer is obliged to do is to give the employee the opportunity to be heard. If the employee decides not to take up the opportunity, the employer is under no obligation to wait for the employee until the time he chooses to present himself.”

32. It submits that the Court should not interfere with the sanction imposed by the Respondent as held in the South African case of **Nampak Corrugated Wadeville v Khoza** reaffirmed in **Iyego Farmers Co-operative Sacco v Kenya Union of Commercial Food & Allied Workers (supra)** where the Labour Appeal Court stated that such interference would only be unless the employer acted unfairly in imposing the transaction.

33. That it has discharged the burden of proving valid and fair reasons for terminating the Claimant's employment and that this court should therefore not interfere with its decision to dismiss the Claimant. It invites this court to find in its favour and find that the termination was neither unlawful nor unfair.

34. It is submitted by the Respondent that the Claimant has not tabled before this court any evidence to prove that the Respondent breached, violated or threatened his rights under Articles 27, 28 and 29 of the Constitution. It relies on the expressions of the three-judge bench at paragraph 299 in the case of **EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2019] eKLR** on there being no basis at all upon which the court can uphold any of the alleged violations of constitutional rights.

35. That it at no point breached the said constitutional rights of the Claimant and that the prayers on the same should thus fail. On reinstatement, it submits that **Section 12(3) (viii) of the Employment & Labour Relations Act** empowers this court to make an order for reinstatement of any employee within 3 years of dismissal and that since three years have lapsed from 31/08/2012, this prayer should thus be dismissed.

36. I have examined all the evidence and submissions of both Parties. I note that the Claimant was dismissed from employment vide a letter

dated 31/8/2012 and received by the Claimant on 14/9/2012. Going by this letter, the Claimant should have filed this Claimant within 3 years of dismissal as envisaged under Section 90 of the Employment Act which states as follows:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted un less it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”.

37. The 3 years ended by 14.9.2015 going by the day the dismissal letter was served upon the Claimant. The Claimant however filed this claim on 30/10/2015. This was after the claim was time barred.

38. The Respondent had raised a Preliminary Objection on this issue before this Court but the Preliminary Objection was dismissed. I am however of the view that this court had misdirected itself by finding that the cause of action arose after communication of the appeal results in 2015 which is not the correct position.

39. I review that position and find that indeed this claim was filed after time and is therefore time barred. I therefore find it not necessary to go into merits or otherwise of the Claim.

40. I dismiss the entire claim accordingly with no order as to costs.

Dated and delivered in open Court this 28th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mukua for Claimant

No appearance for Respondent