



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 341 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JANE MUTUHA WASILWA.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent in 1987 and rose through the ranks to the position of Regional Manager Nyanza Province. Vide letter dated 29th November 2012, she was interdicted for failing in her duties which led to the fraudulent loss of Kshs.18,217,204.40.

She was thereafter sent on suspension and subjected to a disciplinary procedure which culminated into the termination of her employment on 27th September 2013. She filed this claim challenging the termination of her employment and sought the following reliefs-

a. A declaration that the interdiction and dismissal was wrongful,

unfair and discriminatory and the Respondent be restrained from having the Claimant replaced by any other person as its regional manager.

b. The interdiction and dismissal of the Claimant by the Respondent be set aside and the Claimant be reinstated back to her duties as a Respondent's regional manager.

c. Full payment of salary during the illegal interdiction period of and up to when she is reinstated.

And/or

d. The terminal benefits tabulated as below from 26th September 2013 to retirement date which would have been 3rd July 2024-

1. Salary for 11 years and 8 months using progression method as per the Respondent's current circular No. 3 of 2012 Distribution A JMW 10.

i. October 2013 (1-month x 180,500) in the sum of Kshs.180,500.00.

ii. November 2013 to October 2014 (12 months x 192,500) amounting to Kshs. 2,310,00.00 (sic).

iii. November 2014 to October 2015 (12 months x 204,500) amounting to Kshs.2,454,000.00.

iv. November 2015 to October 2016 (12 months x 216,500) amounting to Kshs.2,598,000.00.

v. November 2016 to October 2017 (12 months x 228,500) amounting to Kshs.2,742,000.00.

vi. November 2017 to October 2018 (12 months x 240,500) amounting to Kshs.2,886,000.00.

vii. November 2018 to October 2019 (12 months x 252,500) amounting to Kshs.3,030,00.00 (sic).

viii. November 2019 to October 2020 (12 months x 264,500) amounting to Kshs.3,174,000.00.

- ix. November 2020 to October 2021 (12 months x 276,500) amounting to Kshs.3,318, 000.00.
 - x. November 2022 (sic) to October 2022 (12 months x 288,500) amounting to Kshs.3,462,000.00.
 - xi. November 2023 (sic) to October 2023 (12 months x 300,500) amounting to Kshs.3,606,000.00.
 - xii. November 2018 (sic) to July 2024 (9 months x 312,500) Kshs.2,812,500.00.
2. Allowances from October 2013 to July 3rd 2024
- i. Rental House Allowance, Kshs.55,000 x 130 months amounting to Kshs.7,150,000.00.
 - ii. Entertainment Allowance Kshs.9,000 x 130 months amounting to Kshs.1,170,000.00.
 - iii. Transport Allowance Kshs.32,500 x 130 months amounting to Kshs.4,225,000.00.
 - iv. Domestic/Servants Allowance Kshs.10,000 x 130 months amounting to Kshs.1,300,000.00.
 - v. Gas/Electricity Allowance Kshs.5,000 x 130 months amounting to Kshs.650,000.00.
 - vi. Telephone Allowance Kshs.7500 x 130 months amounting to Kshs. 975,000.00.
3. Leave allowance from 2013 to 2024 (11 years x 15,600) amounting to Kshs.171,600.00.
4. 30 years of service due on 2016/2017 which is 2 months basic salary (Kshs.216,000 x 2 months) amounting to Kshs.432,000.00.
5. Medical Entitlement
- i. In patient for self and immediate family members (Kshs.600,000 x 11 years) amounting to Kshs.6,600,000.00.
 - ii. Outpatient for self and immediate family members (Kshs.40,000 per year x 11 years) amounting to Kshs.440,000.00.
6. NSSF Remittances
- Employer's monthly contribution of Kshs.200 (11 years x 12 months) + 8 months x 200) amounting to Kshs.28,000.00.
7. Pension
- Employer's contribution [(11 years x 12 months) + 8 months = 140 months; Kshs.7,362,502 x 12% x 115 months] amounting to Kshs.883,500.00.
8. Per diem Allowance while attending disciplinary committee meeting
- 2 x Kshs.14,000 amounting to Kshs.28,000.00.
 - Kisumu – Nairobi – Kisumu at Kshs. 2,700.00.
9. Luggage Allowance from Kisumu to Nairobi upon wrongful dismissal from service (Kshs.180,500 x 12 x 1/16) amounting to Kshs.135,375.00.
10. Certificate of Service.

The Claimant avers that she was interdicted and issued with a letter to show cause why disciplinary action should not be taken against her on 10th May 2013.

The Claimant states that the Respondent did not adhere to the principles of natural justice, the law, Postal Code, Human Resource Circulars on staff discipline and the Postal Corruption Prevention Policy as she was interdicted before being invited to show cause. She avers that she provided a substantive and elaborate explanation in response to the charges levelled against her, vide her letter dated 20th May 2013.

She further states that though she was not involved in the transactions leading to the alleged loss, she was presumed responsible and disciplinary action taken against her. It is her view that the Respondent ought to have held the postmaster and the officers who remitted the payments liable for the fraud. Further, that the Respondent failed to appreciate that the fraud should have been prevented by the Regional Accountant, the Head Post Master, the Cash Accounts Office at the Finance & Accounts Headquarters.

It is also her averment that the Respondent failed to appreciate the risk management measures she put in place for the purpose of preventing

fraud. It is her case that it became difficult to detect the fraud because she was by-passed and payments made to the postmaster without notifying her.

It is the Claimant's case that her disciplinary hearing was before an ad hoc committee instead of the full board. She avers that the ad hoc committee did not give her ample time to prepare, did not notify her of her rights to counsel or provide her with the case to answer. She further avers that on 25th October 2013, she appealed against the termination decision but the appeal decision had not been communicated to her at the time of filing suit.

At the time of termination, she was earning a salary of Kshs.292,000.00.

The Respondent filed its Response on 30th May 2014. It states that it lost Kshs.18,217,204.40 at its Ugunja Post Office in Nyanza. The Respondent contends that as the Nyanza Regional Postal Manager, the Ugunja Post Office was under the management and oversight of the Claimant and that the loss occurred because she and the regional management team did not undertake their duties diligently.

The Respondent avers that its investigation team discovered that the Ugunja Post Office had not been inspected since November 2010 yet it was the Claimant's responsibility to ensure that proper and timely inspections were carried out. Further, that Ugunja Post Office was holding cash of Kshs.17,385,108.58 which was beyond the authorized maximum cash limit of Kshs.200,000.00.

The Respondent contends that on 29th November 2013, the Postmaster General informed the Claimant that based on the final audit and investigations report, she had been interdicted to pave way for investigations. The Respondent contends that the relevant laws, rules of natural justice and the Respondent's rules and regulations were adhered to during the entire disciplinary process.

The Respondent further contends that having no access to the accounts did not minimize the claimant's responsibilities and that she has not proved how lack of submission of bank reconciliation reports to her would have contributed to the loss. The Respondent further contends that the Claimant ought to have ensured that inspections were done properly, the set cash limits were not exceeded and where they were exceeded, there was follow up to avoid any loss.

In response to the claimant's averments that the approval of remittances was not done at regional headquarters, the Respondent contends that the emails to follow up on monies where remittances were not ratified by Regional Managers, were sent to all regional managers. The Respondent avers that the Claimant was in the habit of deflecting responsibility and pointing fingers at others without stating the actions she took to avoid or mitigate the loss.

The Respondent contends that investigation reports revealed that the Claimant was notified of the remittances which were dispatched to Postmaster Ugunja between 9th June 2012 and 27th October 2012, and she approved the last three remittances.

The Respondent's response to the claimant's averment that there was no observance of accounting instructions by Treasury Manager and Inspectorate was that the Claimant was tasked with coordinating regional functions and supervising staff that fell under her, make follow ups and ensure that financial and official circulars were enforced which duties she failed to discharge.

The Respondent's response to the claimant's averment that at her position she was entitled to a hearing by the full Board is that the question regarding legitimacy is misleading as the Code of Conduct only refers to a board, and in the Claimant's instance, the case was heard by the Board Human Resource Committee.

It is the Respondent's contention that the Claimant was notified of the charges made against her vide the show cause letter of 10th May 2013, given an opportunity to respond and to be heard. The Respondent avers that due to miscommunication, the Claimant's appeal could not be heard on 8th May 2014 and the Claimant is yet to respond to the Respondent's letter requiring her to indicate the date which was suitable for her.

The Claimant filed a rejoinder to the respondent's response on 10th June 2014, contending that she always ensured that offices were inspected and audited but could not inspect them all as the budget was drastically cut.

It is her further contention that her lack of knowledge of the excessive cash holdings by the Postmaster Ugunja, was because the officers in Kisumu Regional Cash Account Office and Siaya Mails and Survey Office failed to inform her of the irregularities in the accounts for timely mitigation.

She avers that some members of the Special Disciplinary Committee, which deliberated the Claimant's case, were not impartial because they had contributed to the loss of the funds. Further, that she was cleared of any fault in the findings of the Special Management Committee but those findings were rejected because they cleared her of any wrongdoing.

The Claimant contends that Section L of the Postcode was amended and approved by the Board on 26th June 2013 hence does not apply to her case. It is her position that the minutes provided are not comprehensive or authenticated. Lastly, that the findings of the investigations were not brought before the Human Resource Committee of the Board for consideration.

During cross-examination, the Claimant testified that the responsibilities outlined at paragraph 3 of page 2 of her claim were her own and only she had the authority to handle them. It was her testimony that she was in charge of inspection and had supervisory powers over the postmaster. She admitted that no inspections were done in Ugunja but confirmed that Head Post Master gave her daily cash reports from Ugunja. She stated that she was aware that the cash limit for Ugunja was Kshs.200,000.00.

The Claimant denied knowledge of the letter sent to her Advocates inviting her to an appeal hearing. She denied ever receiving a warning letter or being rated poorly and contended that the least rating she ever got was fair. Upon re-examination, she stated that she was never informed that money was being received beyond the limit.

During cross-examination of RW1, TERESA KEMUNTO NYASIMI, the respondent's Manager Treasury, outlined her responsibility as managing cash flows. She explained that once they got a requisition for funding from a Post Master, they would check the cash on hand and cash at bank and if the balance was below the cash limit, they would release funds to the office. She testified that the work of the regional manager was to endorse requisitions and to ensure that money had been received.

RW2, STEPHEN WANJIRU, an Assistant General Manager of the respondent testified that at the time material to the suit he was the Head of Audit. He stated that the Postmaster General appointed a team of three to investigate, prepare a report and recommend solutions to avoid occurrences similar to that at Ugunja Post Office. He was part of the investigation team and it was their finding that though the Claimant did not authorize the remittances, she was informed of all remittances via email.

It was his testimony that the regional manager was supposed to ensure that the cash on hand on the form was in tandem with that in the office. He stated that the Nyanza Regional Accountant and the Postmasters for Ugunja and Siaya were dismissed from employment as was the claimant.

During cross examination, he admitted that his role was not to make recommendations to have the Claimant dismissed but that the Human Resource had the discretion to decide on which reports to use during the disciplinary procedure.

RW3, NANCY MATHENGE, the respondent's Manager Human Resource, testified that at the time of the Claimant's termination she was the Manager of employee relations in charge of the discipline docket. She stated that the Claimant was paid her dues hence had no claim against the Respondent. On cross examination, she stated that she had no knowledge of the report regarding the investigations carried out by Mr. Nganyi and his team, or the recommendations therein.

RW4, JACOB MUTUKU MWANGANGI, testified that he was the Manager in charge of investigations and security at the time material to this suit. His duty was to oversee security and investigations in the country, review and submit investigations reports. It was his testimony that the recommendations of the report relating to the claimant were based on negligence of key officers in Nyanza region. His position was that investigation reports were not final and were used to review and ensure all areas of concern had been dealt with.

On cross examination, he acknowledged that the regional investigations officer was Mr. Nganyi. He stated that he had read the report by Mr. Nganyi and discovered that there were omissions which he rectified. It was his testimony that he made recommendations to have the Claimant charged as she was in charge of the region and in the best position to prevent the fraud.

Submissions by the Parties

The Claimant filed her submissions on 14th March 2019 where she submits that the Respondent has deliberately failed to communicate the outcome of her appeal. By the time she was lodging this cause on 7th March 2014, the appeal had not been heard. The Claimant further submits that the Respondent ought to have communicated the decision to her appeal within 5 days, as required by paragraph 3.7.6 of the Postal Code.

The Claimant submitted that she was dismissed in total disregard of

the report by Mr. Nganyi. She submitted that those who sat in the Special Disciplinary Committee ought to have been investigated instead of presiding over the disciplinary proceedings.

It was her submission that RW4 relied on the same report that found RW1 and RW2 culpable, yet came up with the recommendation to have her charged for negligence. She also submitted that during trial, RW4 confirmed that he sat in the Special Disciplinary Committee.

The Claimant submits that the disciplinary process was conducted contrary to the provisions of section 41 of the Employment Act. It is her position that she was not given the opportunity to call a witness or appear before the Board, in the company of a colleague or a shop floor assistant. She relied on the case of *Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco [2014] eKLR* and the case of *CMC Aviation Limited vs. Captain Mohammed Noor [2015] eKLR*.

In its submissions filed on 11th June 2019, the Respondent submits that the Claimant was dismissed for being negligent in conducting her duties thereby constructively providing opportunity for orchestration of the misappropriation and loss. This justified the summary dismissal of the Claimant under section 44 of the Employment Act.

The Respondent has relied on the case of *Jacob Oriando Ochanda vs. Kenya Hospital Association Limited t/a Nairobi Hospital [2019] eKLR* which outlined some of the instances in which an employee may be deemed negligent.

The Respondent submits that the right disciplinary procedure as envisioned in sections 41 and 44 of the Employment Act and as provided for in the Postal Code, was followed.

The Respondent submits that the Claimant was interdicted to pave way for investigations because she was in a position to interact with employees thereby compromising the investigations.

Once the investigations were concluded, the Claimant was issued with a notice to show cause which provided the particulars of the report and the investigations results. The Claimant responded to the allegations wherein she shifted blame to her juniors and other officers. The Respondent reviewed the defense, found the reasons given not to be sufficient to vindicate and found her guilty of gross misconduct and therefore terminated her employment.

The Respondent submits that the Claimant declined to appear before the board for her appeal hearing due to the manner in which the information was conveyed and because the matter was subject to litigation. As such, she is estopped from denying that she was not afforded a fair hearing. The Respondent relies on the case of *Ndolo Njeka vs. Lavage Dry Cleaners Limited* [2013] eKLR and *Mathew Lucy Cherusa vs. Poverelle Sisters of Belgamo T/A Blessed Louis Palazzalo Health Centre* [2013] eKLR.

The Respondent submits that reinstatement, being a remedy of specific performance ought not to be ordered except in very special circumstances, which have not been demonstrated by the Claimant. The Respondent posits that the Claimant is undeserving of the orders sought since she came to this Court with unclean hands. It relies on the cases of *Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike* [2017] eKLR and *Sotik Highlands Tea Estates Limited vs. Kenya Plantation and Agricultural Workers Union* [2017] eKLR.

The Respondent further submits that this Court ought to balance the interests of the employer vis-à-vis that of an employee and consider that the Respondent is a public body. That reinstating the Claimant would tarnish the Respondent's reputation in the eyes of the public and disrupt its administrative operations. Further that it has been 6 years since the Claimant was dismissed from employment, as such, her reinstatement is time barred.

Analysis and Determination

After considering the pleadings filed and analyzing the evidence and submissions by the parties, I find the issues for determination are as follows-

- a. Whether the termination of Claimant's employment was lawful and fair; and
- b. Whether she is entitled to the reliefs sought.

Reason for Termination

Section 45(2)(a) and (b) provides that-

A termination of employment by an employer 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 employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer;

The Claimant's key responsibilities as outlined in the job description referenced JD/M&C/14/2010, included-

- a. Ensure proper inspections and investigations are done in the region.
- b. Ensure quality audit work.

Pursuant to the investigation report by J.M. Mangangi that found the Claimant negligent in performing her duties, the Claimant was issued with a show cause letter dated 10th May 2013, to show cause why disciplinary action should not be taken against her. The offences against her were set out as follows-

- a. Failure to ensure that Postmasters maintain cash holdings authorized maximum limits and enforce financial circulars and other strategies to avoid losses.
- b. Failure to detail responsible officers such as Postmasters and Regional Accountants who receive account documents and bank statements to ensure effective financial risk management.
- c. Failure to ensure Head Postmasters who are responsible for inspecting departmental payments carried out impromptu inspections by examining cash account records.
- d. Failure to implement financial circulars and other guidelines as analyzed in risk management circular S&I/HQ/151/OMG/2012 and Financial Circular No. 6 of 2009/2010 in respect of cash holdings.

The Claimant responded vide her letter of 20th May 2013 where she explained what her duties entailed, what she had achieved so far,

explained the reason the above failures occurred and, in some instances, apportioned blame to other officers, departments and even the Respondent.

At the hearing before the Special Disciplinary Committee on 13th September 2013, the Claimant denied responsibility and again shifted blame to other officers and her juniors. As a result, the Committee resolved to have her services dismissed. Her employment was therefore terminated on 27th September 2013 (page 22 of the Respondent's bundle). The reasons for such termination were outlined as follows-

“This is to advise you that the reasons you advanced in your defence and verbal presentation to the Board were carefully considered but found unacceptable. In accordance with the Employment Act 2007 and Posta Code regulations, the Board has therefore approved your dismissal from service of the Corporation on grounds of gross negligence of duty. The dismissal is effective from 27th September 2013.”

Regional managers were reminded to ensure that the maximum limits were not exceeded. (Financial Circulars at 56 and 70 of the Respondent's Bundle). RW3 testified that the Claimant did not have viewing rights of the cash flows, but she was privy to the emails that informed regional managers of any remittances made. In my view, this was sufficient information to prompt her to act where necessary.

The Claimant in her pleadings and even in her defence during the disciplinary process argued that there were parties who were liable for the loss occasioned to the Respondent. This might have been true, but it did not negate the duty she owed to the Respondent to perform her duties with due diligence. The other officers actions, were a different issue altogether.

The Claimant testified that she was the one who instructed Mr. Nganyi's team to conduct investigations. The Respondent denied having knowledge of the Report by Mr. Nganyi. Consequently, it is possible that the Respondent had no knowledge of it. The report was not brought to the attention of the Respondent during the disciplinary process, hence the Respondent was not bound to adopt it.

From the reports the Respondent was issued with regarding the Nyanza region, being, the report by A.D. Otieno (page 166-170 of the Respondent's bundle), Interim Investigation Report (page 151-165) among others; and the various reminders that the regional managers were issued to ensure the maximum limits were not exceeded, the respondent's concerns were justified and not driven by malice or discrimination against the claimant.

Further, the Claimant admitted not conducting inspections as was required of her and as had been recommended in the interim report, yet that was one of her key duties.

I find that indeed the Claimant breached her obligations under the contract. Section 43 (2) of the Employment Act provides that the reasons for termination are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. I find the Respondent's reasons for terminating the employment of the claimant valid and fair as the Claimant's negligence indeed occasioned the respondent a loss of Kshs.18,217,204.40/=.

Due Procedure

Section 41(2) of the Employment Act requires an employer who intends to summarily dismiss an employee on the ground of gross misconduct, to hear and consider the employee's representations in the presence of another employee or a shop floor union representative of his choice. This procedure is mandatory and cannot be overlooked as was held in the case of *Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR*.

The Respondent explained that the reason for the Claimant's interdiction was to pave way for investigations as she was in a position to influence the investigations. She was interdicted on half pay, as was provided in the terms and conditions of employment applicable to her.

The Claimant has admitted and the Respondent adduced evidence that she was heard. She complained that the Committee as constituted was partial as they were implicated in the fraud. I find these allegations to have no basis as they were never raised during the proceedings or in the appeal. Further, the Claimant was invited for the appeal hearing but opted not to attend challenging the mode of communication and alleging that the matter was the subject of litigation before this Court (Claimant's Advocates letter dated 28th April 2014 at page 40 of the Respondent's bundle). I also find that the allegations raised by the Claimant that she was not allowed to be accompanied by an employee or call witness to be untrue as the same did not form the basis of her appeal. If indeed she was aggrieved as averred, the same should have been stated in her appeal.

As such, I am of the view that the Claimant has failed to discharge the burden of proving that the termination of her employment was unfair as required under section 47 (5) of the Employment Act.

Reliefs Sought

The Claimant is not entitled to any of the reliefs sought. The interdiction cannot be set aside as it did not breach procedure. Her prayer to be paid her full salary during the period of her interdiction until reinstatement does not succeed for reason that an interdicted employee was only entitled to half salary and she was not absolved of the charges against her. Further, she is no longer under interdiction as she was dismissed. The relief of reinstatement cannot be granted as it is only available for an employee whose termination is found to be unfair and only within 3 years from the date of termination. Both conditions do not apply to the claimant as the court has found the termination of her employment fair and more than 3 years have lapsed since the termination.

The terminal benefits from September 2013 to July 2024 are untenable. The special damages sought are anticipatory and related to the period up to the time Claimant would have retired. Additionally, RW3 testified that the Claimant had been paid all her dues a fact that was not

denied by the claimant. As such, she is not entitled to any other payment. The Court in *D.K. Njagi Marete v Teachers Service Commission [2013] eKLR* relied on the case of *High Court Civil Case No. 1139 of 2002* between *Menginya Salim Murgani v. Kenya Revenue Authority, Hon Justice Ojwang'* where the court observed as follows-

“... it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational engagement outside the defendant’s employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration. The Claimant has moved on, and that he is serving as a Judge, attests to his sharp intellect, professionalism and high level of employability. The question whether he is likely to find occupational engagement outside the TSC Outfit, is spent. The High Court observed that the breach of the employment contract coalesced into one broad damage, and went on to award damages under one head. This High Court decision, agrees with the decision of this Court in the case of Maria Kagai Ligaga, where the Court upheld the principle of fair go all round; refused to grant anticipatory salaries and allowances; and declined to award multiple damages.”

For the foregoing reasons the entire claim collapses and is accordingly dismissed with orders that each party bears its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE