



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 3 OF 2016

(Before Hon. Justice Mathews N. Nduma)

ELLY MURENGA OWINO.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

J U D G M E N T

1. The Claimant filed suit on 13th January, 2016 vide Memorandum of Claim seeking damages for wrongful dismissal, payment of one month salary and severance pay for 25 years served.
2. The Claimant was employed by the Respondent on 3rd May, 1990 as a postal officer III. He rose through the ranks and served various stations until 2nd August, 2013 whilst serving as postal officer in charge of Karungu post office he was suspended from work. The suspension was without pay.
3. At the time the Claimant earned a monthly salary of Kshs.32,775. The suspension followed a visit by an inspection team to the Karungu Post office and upon inspection, the team alleged that there were irregularities and shortages at the station. According to the Claimant, upon suspension, he was asked to hand over to one Mr. William Cheres. The Claimant found the post office lock changed the following day and so he went home to Segi to await for their communication. The Claimant told court that he had left his postal address and telephone number with the team but he received no further communication from them.
4. The Claimant testified that he then instructed his lawyer to follow the matter. He was never called to a disciplinary hearing and was not charged before a court of law with any offence. The Claimant states that he was not given notice of dismissal nor was he paid severance pay upon suspension. The Claimant prays for the reliefs sought for wrongful dismissal, severance pay and payment in lieu of notice.

Response and Counter Claim

5. The Respondent filed a statement of response and counter claim on 22nd April, 2016 in which it admits particulars of employment. The Respondent further states it lawfully suspended the Claimant from duty by a letter dated 2nd August, 2013 which letter the Claimant collected on 5th August, 2013.
6. The Respondent states that upon receipt of the letter of suspension, the Claimant absconded office and could not be reached to allow a disciplinary hearing to take place and on 9th June 2014, the Claimant was dismissed from the employment of the Respondent for absconding work.
7. Respondent further states that in terms of the Respondents Human Resources Manual, an employee who absents himself from duty without leave or excuse for more than 48 consecutive hours, is regarded as having vacated office. The Claimant was supposed to be paid salary up to the first full day of absence, but the Respondent paid the Claimant the entire salary for the month of July, 2013.
8. The Respondent states that by the time the Claimant collected the letter of suspension at the work place on 5th August 2013, he had been absent from his work place without leave since 26th July, 2013.
9. The letter of suspension required the Claimant to furnish his controlling officer with information as and when required to do so but he deliberately refused to do so and went into hiding.
10. The Respondent prepared a show cause letter dated 20th January, 2014 addressed to the Claimant seeking the Claimant to explain the cause of his absconding office after embezzlement of office funds totaling Kshs.401,505.60 found to be missing by the inspection team.

11. The show cause letter could not be served upon the Claimant since his whereabouts were unknown having vacated from duty and had not furnished his full contacts, address and/or telephone number to the Respondent as earlier instructed in the suspension letter.

12. On 9th June, 2014 upon failure to reach the Respondent, the Respondent dismissed the Claimant from service with effect from 26th July, 2013 being the date the Claimant absented himself from duty without lawful or justifiable cause.

13. The claim by the Claimant is totally denied by the Respondent and instead, the Respondent counter claims from the Respondent Kshs.401,505.60 stolen by the Claimant from the post office, at Karungu. App. '6' is a copy of the Internal Audit Report dated 21st July, 2013 covering the period 2nd January, 2013 and 26th July, 2017 which clearly demonstrates the loss of money in the sum of Kshs.401,505.60 under the watch of the Claimant with respect to counter balance book Kshs.344,330.60; Senior Counter Kshs.4,000; Junior counter Kshs.45, and understated amount in account Kshs.112, Kshs.53,130.

14. The Respondent states that the matter was reported to Nyatike Police Station but no arrest was effected since the Claimant was in hiding.

15. The Respondent prays that the Claimants suit be dismissed and the court awards the Respondent Kshs.401,505.60 with interest and costs.

16. RW 1 Raymond Kimutai the Human Resource Officer, Nyanza Region testified extensively in support of the Respondent case and he withstood close cross examination by counsel for the Claimant Mr. M. M. Omondi. Mr. Wachira represented the Respondent.

17. The Respondent further called RW 2, George Kinala, internal officer of the Respondent an officer who visited Karungu Post Office with others and conducted an internal audit that detected the loss incurred by the Karungu Post Office under the watch of the Claimant. He confirmed that the Claimant absconded immediately the team reported to the station for inspection on 24th July, 2013 only briefly came back on 26th July, 2013 and on 5th August, 2013 to collect the letter of suspension and did not come back again. RW 2 testified that the loss covered the period 26th July, 2013.

18. The witness was candid and his credibility was not dented by the fierce cross examination by counsel for the Claimant.

19. The Respondent prays that the Claimant's suit be dismissed and that counter claim be allowed with interest and costs.

Determination

20. The issues for determination are:-

- (a) Whether the claimant's dismissal was for a valid and justifiable reason.
- (b) Whether the Claimant is entitled to the reliefs sought.
- (c) Whether the Respondent is entitled to the Counter claim.

Issue (a)

21. The court upon a careful evaluation of the testimony by the Claimant vis a vis the testimony by RW 1 and RW 2 and the documentary evidence tabled by the Respondent is satisfied that the Claimant absconded from Karungu Post Office on 2nd August, 2013 when the audit team visited the station and discovered loss of funds from the station under the watch of the Claimant.

22. The court is satisfied that the Claimant collected the letter of suspension on 5th August, 2013 and went to hiding. That the Claimant was not available to receive and answer the charges of absconding and theft levelled against him in the show cause letter.

23. The court is satisfied that the Respondent was justified to summarily dismiss the Claimant from employment with effect from 26th July, 2013 being the date the Claimant absented himself from office without any lawful cause. The court is satisfied that the Respondent was unable to reach the Respondent to conduct a disciplinary hearing in terms of section 41 of the Employment Act, 2007. The Respondent was justified to summarily dismiss the Claimant in terms of section 44 of the Employment Act.

24. The Claimant was paid his pension contribution for the period he served the Respondent and is not entitled to severance pay as claimed or at all since he was not retrenched from service.

25. Furthermore, since the summary dismissal was justified, the claimant is not entitled to payment in lieu of notice.

26. The summary dismissal was lawful and the claim for payment of damages lacks merit and is dismissed.

Counter Claim

27. The court was satisfied by the testimony by RW 2 George Kinala, that Karungu Post Office was manned only by the Claimant and on 26th July, 2013 he inspected the junior counter and it had a loss of Kshs.45. the 2nd counter had a loss of Kshs.4,000 and the safe had a shortage of Kshs.344,330.60 which according to the records ought to have been in the safe. RW 2 further testified that on 17th July, 2013,

the Claimant had received Kshs.50,000 and it was not captured in the account documents and Kshs.3,130 in respect of stamps was missing. RW 2 testified that the total loss by the Claimant was Kshs.401,505.60. The Claimant was unable to rebut this evidence. The Respondent has proved the counter claim on a balance of probabilities and the court awards the Respondent as against the Claimant Kshs.401,505.60.

28. In the final analysis, judgment is entered in favour of the Respondent as against the Claimant in the sum of Kshs.401,505.10. The Claimant's suit is dismissed in its entirety. Each party to bear their own costs of the suit.

Dated, Delivered and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. M. M. Omondi for the Claimant

Mr. Kipkenda for the Respondent

Chrispo – Court Clerk