



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 259 OF 2015**

**JANE JEROTICH SIRMA**

**CLAIMANT**

v

**POSTAL CORPORATION OF KENYA**

**RESPONDENT**

**JUDGMENT**

1. In a Statement of Claim lodged with the Court on 15 September 2015, Jane Jerotich Sirma (Claimant) alleged that the Postal Corporation of Kenya (Respondent) unfairly terminated her contract of employment on 11 July 2013.
2. The Respondent, in a Memorandum of Response filed on 19 November 2015 contended that the Claimant was lawfully/fairly dismissed and prayed that the Cause be dismissed.
3. The Claimant filed a Rejoinder on 5 January 2016.
4. The parties filed documents in support of their cases and *Agreed Issues* on 29 February 2016 and witnesses testified on 17 January 2017, 29 March 2017 and 18 July 2017.
5. The Claimant filed her written submissions on 30 August 2017, while the Respondent filed its submissions on 2 October 2017.
6. The Court has considered the pleadings, evidence and submissions and will outline the relevant facts while examining the *Issues in Dispute* as presented by the parties.

**Whether suspension of the Claimant was lawful**

7. The Claimant was suspended from duty without pay/privileges through a letter dated 3 November 2009 following allegations of gross negligence. The suspension letter informed the Claimant that specific allegations would be provided after completion of investigations.
8. Suspension of an employee, within the employment relationship, generally under the common law must have a contractual basis. Without the contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract (see *McKenzie v Smith* (1976) IRLR 345 and *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR).
9. In other words, for a suspension of an employee to pass legal muster, it should have either a contractual or statutory anchor otherwise it would be unlawful.
10. The Respondent had a Code of Conduct, an extract of which was produced in Court.

11. The Court has keenly perused the Code and nowhere is there provision for *suspension* with or without salary.

12. However, section K3 of the Code provides for *Interdiction* on half salary for not more than 3 months pending investigations where gross misconduct is suspected.

13. In so far as the Respondent *suspended* the Claimant without pay instead of *interdicting* her on half salary, the Court is of the view that that action not being supported by contractual agreement was unlawful.

**Whether Respondent was entitled to follow its disciplinary process or was bound by outcome of Kapsabet Principal Magistrate's Court Criminal Case No. 4450 of 2009.**

14. The Claimant was charged before the Magistrate's Court with stealing by servant (Kshs 1,429,999/30 from 23 April 2009 to 28 October 2009) contrary to section 281 of the Penal Code, and making false documents (cash account summary) contrary to section 347(a) of the Penal Code.

15. The trial Court acquitted her of the charges under section 215 of the Criminal Procedure Code on 28 September 2012.

16. On the other hand, the Respondent issued a show cause notice to the Claimant on 30 March 2010 and the allegation was failure to declare a shortage of Kshs 2,700/-.

17. On the face of it, the disciplinary charge against the Claimant was much narrow and specific to a shortage of Kshs 2,700/- while the criminal charge was in respect of a series of shortages spread over several months. It is apparent there were material differences as to the allegations in both processes.

18. Further, in my view, a criminal process and disciplinary process within the employment relationship have different purposes and objectives as well as outcomes.

19. Even the legal thresholds to be met are distinct. An employer conducting a disciplinary process is not expected to hold a mini-court.

20. The criminal process on the other hand is clothed in an environment where strict compliance with processes meant to protect the accused's rights and ensure justice is done are a *sine qua non*.

21. Therefore, unless there is express provision or agreement (in writing, in law or where it can be so implied in law), an employer is not bound by the outcome of a criminal process in taking disciplinary action against an employee.

22. This is more so because section 41 of the Employment Act, 2007 envisage a mandatory process which the employer may not delegate to the criminal justice system or Court.

23. The Claimant in the instant case did not disclose any legal provision or bring forth any material to demonstrate that the Respondent had undertaken to abide by the outcome of the criminal trial.

**Whether the Claimant was dismissed by the Respondent on 11.7.2013 or on 17.6.2015**

24. The letter dismissing the Claimant was dated 11 July 2013 but it indicated that the dismissal was backdated to 3 November 2009, when the Claimant was suspended.

25. The Claimant appealed and appeared before a Panel on 27 November 2014 and on 17 June 2015, she was informed that the appeal was unsuccessful.

26. The Claimant contends that the effective date of dismissal therefore is the date the Respondent communicated the dismissal of the appeal.

27. In my humble view, the contention by the Claimant is erroneous. A dismissal is effective the date it is communicated (or such date as advised in the letter) and unless there is express provision to the contrary, the fact that an appeal has been preferred does not stay the dismissal or restore the employment relationship.

28. If any party to the contract wishes to assert breach of contract in such cases, the cause of action would arise with the dismissal, and not at point of determination of the appeal.

### **Whether the Claimant's dismissal was fair**

#### **Procedural fairness**

##### *Statutory fairness*

29. The Claimant was issued with a show cause notice dated 30 March 2010 and the notice requested her to make representations within 7 days.

30. In response to the notice, the Claimant wrote to the Respondent on 24 May 2010. The dismissal decision was then conveyed through a letter dated 11 July 2013.

31. The Claimant then unsuccessfully appealed but the notification of decision of appeal was not made within 5 days as envisaged by section 3.7.6 of the Code.

32. The Court is satisfied that the Respondent substantially complied with the requirements of procedural fairness as contemplated by section 41 of the Employment Act, 2007 despite not giving a notification on the appeal within 5 days.

##### *Contractual requirements*

33. The Respondent had an elaborate Code governing the employment relationship with its employees, including discipline.

34. However, only extracts from the Code were placed before Court.

35. The Code envisages disciplinary organs at various levels (Regional Disciplinary Committee, Head Quarter Disciplinary Committee, an Appeals Committee and a Board Human Resource Committee).

36. The existence of the Committees suggest a contractual expectation of an oral hearing.

37. The Claimant testified that she was not called before any Disciplinary Committee for a hearing except for the hearing of the appeal in Nairobi on 27 November 2014.

38. The Respondent's second witness, an Investigator in his testimony stated that the Claimant was afforded an opportunity to be heard but did not disclose *When* the hearing was conducted or *Who* was in the panel.

39. The Court can therefore conclude that the Respondent did not comply in any substantial way with the procedural fairness requirements in its own Code (contractual provisions) and, therefore find that the dismissal of the Claimant was procedurally unfair for failure to comply with internal disciplinary mechanisms.

#### **Appropriate remedies**

##### ***3 months' pay in lieu of notice***

40. The letter dated 28 June 1987 promoting the Claimant from semi-skilled to pensionable terms

provided for her to give 3 months' notice or 1 month pay in lieu of the notice.

41. However, it is silent on notice by the Respondent.

42. The Code at section K 3.4 provides for 1 month notice of termination for probationary contracts but is also silent on notice after completion of probation.

43. Section 35(1)(c) of the Employment Act, 2007 contemplate a minimum of at least 28 days' notice.

44. With the material on record, the Court is of the view that the Claimant is entitled to at least 1 month pay in lieu of notice.

#### ***Unpaid salary/allowances 1 November 2015 to June 2015***

45. The contract having been determined effective 11 July 2013, the Court can find no basis for the Claimant to be paid salaries and allowances post the dismissal.

46. However, with the finding that the suspension of the Claimant was unlawful, the Court is of the view that the Claimant is entitled to the salaries and house allowance from 3 November 2009 (date of suspension) to 11 July 2013 (date of dismissal).

47. The Respondent should compute the same and file an appropriate affidavit detailing the same within the next 14 days.

#### ***Untaken leave 2009 to 2014 and pro rata leave***

48. The Claimant did not effectively work during the period of unlawful suspension and therefore in the circumstances of this case, the Court is of the view that an award in respect of the untaken leave or commutation thereof is not appropriate.

49. The Court will consider this factor in awarding compensation.

#### ***Service pay/gratuity***

50. The Claimant was a member of a pension scheme and is therefore not entitled to service pay in terms of section 35(5) and (6) of the Employment Act, 2007.

51. However, she is entitled to her pension up to effective date of dismissal.

#### ***Compensation***

52. The Claimant served the Respondent for about 30 years and considering the length of service, the Court would award the equivalent of 10 months gross wages as compensation (last gross salary was Kshs 35,255/-).

#### **Conclusion and Orders**

53. The Court finds and holds that the dismissal of the Claimant was procedurally unfair for failure to comply with internal disciplinary procedures and awards the Claimant and orders the Respondent to pay her

(a) salaries/allowance during suspension (to be computed and included in award as hereunder).

(b) Pay in lieu of Notice                      Kshs 21,255/-

(b) Compensation                              Kshs. 352,550/-

TOTAL

**Kshs 373,805**

54. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 17<sup>th</sup> day of November 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant      Mr. Konosi instructed by Konosi & Co. Advocates

For Respondent    Mr. Githiru instructed by Githiru & Co. Advocates

Court Assistants   Nixon/Martin