



**REPUBLIC OF KENYA**

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

**CAUSE NO.1359 OF 2013**

**SAMMY KIPYEGO BARCHOK.....1<sup>ST</sup> CLAIMANT**

**MWONGELA JEPHITHER IKIAO.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

Issue in dispute – unlawful dismissal and failure to pay terminal dues.

1. The 1<sup>st</sup> claimant was employed by the respondent on 25<sup>th</sup> January, 1993 and was dismissed from his employment on 7<sup>th</sup> November, 2012 following alleged gross negligence and dishonesty leading to an alleged loss of money. The claimant was alleged to have inconsistently checked payments vouchers which occasioned the respondent a loss of Kshs.3, 570,900.00.

2. The 1<sup>st</sup> claimant was earning Kshs.40, 475.00 as his gross monthly wage.

3. The 2<sup>nd</sup> claimant was employed by the respondent on 9<sup>th</sup> December, 1992 and was dismissed from his employment on alleged gross negligence and dishonesty leading to the loss of money on 7<sup>th</sup> November, 2012. The claimant was earning a gross monthly wage of Kshs.29, 190.00. The claimant received PMYI's fully authorised from Corporate Communications Department. The PMYI serves as an authority to process payment voucher which met all the respondent voucher processing standards.

4. The receipt attached to on the invoices or PMYIs were fully certified, correct and with PF numbers and rubberstamps. When the claimants got these documents and were satisfied that they met the regulations, the claimants prepared them for onward checking and authorisation by senior officer. Had such payment vouchers not been authentic, the authorising officer should have reflected the same.

5. The termination of the claimants was without notice and the defence given was not put into account. The officers who authorised the challenged payments are still in the employment of the respondent.

The 1<sup>st</sup> claimant is seeking

a) Untaken leave for one year Kshs.40,475.00

b) Unpaid salary for November, 2012 Kshs.40,475.00

c) 3 months' salary in notice Kshs.121,425.00

d) Compensation Kshs.485,700.00

e) Good performance bonus Kshs.825.00

The 2<sup>nd</sup> claimant is seeking

a) Untaken leave Kshs.29,190.00

b) Unpaid November salary Kshs.29,190.00

c) Salary in lieu of notice 3 months Kshs.87,570.00

d) Compensation

e) Good performance bonus Kshs.825.00

6. The claimants are also seeking their costs in filing the suit and their dues be paid with interest.

7. The claimants testified in support of their claims.

8. The 1<sup>st</sup> claimant testified that upon his employment by the respondent he worked diligently in the Finance department as the Internal Auditor Assistant. He was promoted to Accounts Assistant.

9. The claimant was accused of fraudulently using voucher payments from 2010 to 2012. The practice was for any employee to get cash and the requests came from the 7 different departments. An imprest would be presented for travel allowances upon which authority to incur express would be processed. Upon payments the employee would submit receipts. All steps had internal controls through the various senior officers who approved.

10. The claimants were alleged to have fraudulently paid over Kshs.3.7 million but the particulars and or details were not set out. Each department had senior officers for budget controls and for vouchers to reach the claimants all procedures should have been followed. Other officers in the chain were not subjected to any disciplinary hearing save for the claimant.

11. This was followed with dismissal without hearing or a chance to give any defence. Had the claimant been given a chance for a hearing he would have demonstrated that all vouchers paid had consistent signatures. There was no set specimen for his sue for verification and having been approved at the department level, there was no chance for the claimant to know whether they were fraudulent or not. Upon dismissal the claimant was denied the right of appeal.

12. The 2<sup>nd</sup> claimant testified that his main duty was to prepare payment vouchers and the procedure was to receive authorised receipts and he did the payments. On the certified receipts he had to tally the figures and proceed by signing which then went for payment.

13. The claimant was accused of incurring losses through negligence. He did his written defence as he had followed the laid down procedures in payments. He was not called for hearing and eventually he was issued with a letter of dismissal from his employment.

Defence

14. In defence, the respondent's case is that the 1<sup>st</sup> claimant was employed as accounts Assistant with the duty to detect and prevent fraudulent payment transactions. He was required to personally verify the wordings and authorising signatures of payment vouchers and related documents to confirm their validity

and amounts before payment so as to prevent fraud.

15. The 2<sup>nd</sup> claimant was an Assistant Clerk with the duty to detect and prevent fraudulent payment transactions. He was required to verify the authorising signatures before preparing payment vouchers in order to prevent fraudulent payments.

16. The claimants were preparing and checking officer for some suspicious payment vouchers and due to their gross negligence caused the loss of Kshs.3, 570,900.00 by the respondent. By their conduct, the claimants committed a fundamental breach of their employment contracts. The claimants were subjected to the necessary disciplinary process and thereafter summarily dismissed in accordance with the Employment Act, 2007.

17. Following internal investigations on the claimants conduct the respondent found fraudulent payments by the claimants. These transactions were committed between January, 2011 to March, 2012. The payments fraudulently made were all traced to Patrick Angoya and Yusuf Olenyo. This was done when the claimants received fraudulent PYMI's and PD73's from unknown sources payable to Angoya and Olenyo both in Corporate Communications Department. Such payments were with respect to replenishment of cash imprest and subsistence allowance claimants. Such payments were not accompanied by the register and or delivery book.

18. The 2<sup>nd</sup> claimant was found to have negligently prepared and signed vouchers and passed term to the 1<sup>st</sup> claimant who in turn negligently signed all of them as the checking officer. Both claimants failed to verify the signatures of the authorising officers which grossly differed and were clearly inconsistent. The claimants also failed to question the glaring inconsistencies evident in the authorising signatures on the PYMIs and PD73s. the claimants further failed to confirm availability of funds in the areas from where payments were to be drawn from.

19. The claimants' conduct in failing to detect and prevent fraud amounted to gross misconduct and violated the trust that the respondent had bestowed upon them and the dismissal was thus justified and lawful. The claimants were taken through internal disciplinary procedures. On 21<sup>st</sup> August, 2012 the respondent wrote to each claimant elaborating the accusations against them. The claimants were to show cause why severe disciplinary action should not be taken against them. The claimants responded in writing. The claimants did not give satisfactory responses to explain why they failed to verify the authoring signatures and other details in the payment vouchers. The respondent reviewed the responses and found he claimants culpable for gross negligence.

20. The claimants lodged appeals against their dismissal and such were considered and rejected. The decision to terminate the claimants' employment was confirmed.

21. Both Patrick Angoya and Yusuf Olenyo were also dismissed following their role in the fraudulent payment transactions which are the subject of this suit.

22. The claimants are to be paid their pension contributions in accordance with the rules and regulations applicable for the same. The claims made are not due and should be dismissed with costs.

23. In evidence, the respondent witness was Zacharia Orori Odenyi, the Employee Relations Manager for the respondent. He testified that when the respondent got report of cash fraud through processing of payments, two officers were charged invited to undertake the disciplinary process. The claimant made their responses in writing to which the respondent gave consideration and found them unsatisfactory and a decision was taken to dismiss the claimants.

24. Both parties filed written submissions.

Determination

25. The claimants were terminated from their employment with the respondent by summary dismissal vide letters dated 7<sup>th</sup> November, 2012. The respondent has justified the summary dismissal on the grounds that the claimants were found to be in breach of fundamental provisions of their employment contracts and also the acts of gross misconduct following their approval of fraudulent payments amounted to a ground for the same under the provisions of section 44(3) and (4) of the Employment Act, 2007.

26. The claimants have challenged their summary dismissal on the basis that upon being accused of gross misconduct, there followed an investigation, they were issued with show cause notice and later letter of summary dismissal. They lodged appeals but were never invited for the hearing.

27. The terms of section 41(2) of the Employment Act, 2007 are that;

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make*

28. On the one part the employer is required before terminating the employment of an employee due to breach of contract or through gross misconduct to hear and consider any explanations which the employee may have. In this case the claimants admit they were issued with notices setting out allegations against them and also directed to show cause why they should not be dismissed.

29. The other part of the law in my view is that present at the time of the employee making his explanations, he should be allowed to have presented another employee of his choice. Whether the employee is to choose to make a written response to accusations against him or not, the right to have another employee of his choice present is a right that should not be negated by whatever procedure is adopted by the employer. The employer should ensure that the employee is given an explanation as to the existence of this right in terms of section 41(1) of the Employment Act, 2007.

30. In this case, the respondent interrogated the written responses made by the claimants and found them not satisfactory. The respondent proceeded to issue the letters of summary dismissal. At that point did the claimants have their right to have present another employee of their choice guaranteed? I find a fundamental flaw in the disciplinary process.

31. From the evidence before court, save for the procedure adopted by the respondent I find glaring acts of misconduct on the part of the claimant. In assessing the evidence it was evident that they failed to undertake their work with diligence.

32. It is the duty of every employee to perform his duties with diligence, care and attention. It is an act of gross negligence and gross misconduct for an employee to undertake their duties carelessly and then give the defence that he was not the only one in the production chain and so all others should be put to account. Work performance is individual and where an employee is put to task to explain their non-performance or failure to undertake allocated duties carefully, the employee must individually give an account.

33. In the analysis of the various signature, when the claimants were put to task to explain where the approving signatures to the PMYIs and PD373s, particularly the 1<sup>st</sup> claimant was hesitant. He was not categorical and forthright in his answers. The defence approach taken in his cross-examination did not speak well of the claimant. As an account officer, due care and attention to details relating to all payments that passed through his hand was required. It is not correct that since all other officers in the hierarchy had approved, then the claimant had no role in verification of the same. To the contrary, his role required him to undertake his work with due care and attention as he was responsible for any fraudulent activity.

34. The 1<sup>st</sup> claimant put to cross-examination on the payment vouchers he used to make payments admitted that the signature were different. He testified as follows;

*....I did not check the signatures I needed to check the recipes and to if they were done correctly. At the time I did not recognise the signature similarities. A specimen signature would have helped me. Seeing the documents now, I note the differences. ...*

35. Save for the lapse in procedure, I find their were substantive and justifiable grounds leading to the dismissal of the claimants. In addressing the remedies due, the court is required to put such into account and further apply the provisions of section 45(5) of the Employment Act, 2007. Where the employer addressed similar malpractices by discharging Mr Angoya and Olenyo, the culpability of the claimants put into account, to make any award of compensation would be to reward misconduct at the workplace.

36. The other remedies sought are notice pay. On the finding that there was a substantive ground for summary dismissal, notice pay is not due in law. For work in November, 2012, the claimants were dismissed on 7<sup>th</sup> November, 2012 and the only pay due is for the 7 days where such is not paid. The 1<sup>st</sup> claimant is entitled to a sum of Kshs.9, 445.00 and the 2<sup>nd</sup> claimant kshs.6, 811.00.

37. The claim for good performance bonus has not been gone into in evidence of submissions. This is not a right in law and I take it was discretionary upon the respondent's prerogative. The claim is not justified and thus declined.

**Accordingly, the claims are hereby dismissed save for the salaries unpaid t 7 days in November, 2012 if such have not been paid. Each party to bear own costs.**

Delivered in open court at Nairobi this 7<sup>th</sup> day of November, 2017.

**M M.BARU JUDGE**

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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