



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 33B OF 2014**

**TIRUS KARIUKI MUNGAI.....CLAIMANT**

**VS**

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

**AWARD**

**Introduction**

1. Tirus Kariuki Mungai worked for the Postal Corporation of Kenya for over two decades. He brought this action seeking relief for wrongful dismissal. At the trial, the Claimant testified on his own behalf and thereafter called a Clinical Officer based at Tigon District Hospital, James Kabue. In its defence, the Respondent called its Acting Assistant Manager-Security and Compliance, David Mukolwe Makanga.

**The Claimant's Case**

2. The Claimant states that he was employed by the Respondent in the year 1988 in the position of Postal Assistant. He was a member of the Communication Workers Union (COWU-K). On 7th July 2010, the Claimant was suspended on allegations of desertion of duty. By his letter dated 7th October 2010, the Claimant responded to a show cause letter issued to him, stating that during the period he was absent from work, he was unwell. The Claimant was subsequently dismissed by letter 19th January 2011 which backdated the dismissal to 28th June 2010.

3. The Claimant appealed against the dismissal by letter dated 4th August 2011 restating that during the time of his absence from work, he was unwell. By its letter of 18th August 2011, the Respondent declined the Claimant's appeal.

4. It is the Claimant's case that in dismissing him, the Respondent ignored the disciplinary procedure set out in law and the obtaining Collective Bargaining Agreement. Specifically, there was no valid reason for his dismissal and he was not afforded an opportunity to be heard prior to the dismissal.

5. The Claimant's claim is as follows:

- a. A declaration that he was unfairly, wrongfully and unlawfully dismissed;
- b. A declaration that the dismissal letter dated 18th August 2011 was wrongful and unlawful and should therefore be expunged from the record;
- c. Salary from date of dismissal up to retirement age.....Kshs.2,934,900
- d. Loss of earnings compensation .....1,000,000

- e. Incorporeal loss compensation..... 195,660
- f. General damages
- g. Costs plus interest

## **The Respondent's Case**

6. In its Statement of Response filed on 12th June 2014, the Respondent states that the Claimant was initially employed on casual basis in 1988 and was thereafter absorbed as a permanent employee on 31st October 1990. Between 28th June 2010 and 7th July 2010, the Claimant absented himself from duty without permission.

7. The Respondent states that it took reasonable measures to confirm the whereabouts of the Claimant but its efforts did not bear fruit. The Claimant was consequently suspended by letter dated 7th July 2010 and was thereby invited to make representations on his absence from duty. The suspension letter notified the Claimant that in the absence of proper cause for the absence, he would be dismissed from service with effect from 28th June 2010.

8. With regard to the appeal, the Respondent states that the Claimant lodged his appeal on 4th August 2011, more than six months after the letter of dismissal dated 19th January 2011. By virtue of Clauses 6.4 and 6.5 of the *Posta Code*, the Claimant's appeal was inadmissible. At any rate, the appeal did not raise any new grounds.

9. The Respondent further states that the disciplinary procedure contained in its Human Resource circular dated 27th August 2009 provides that unauthorised absenteeism is a serious offence punishable by summary dismissal. In countering the Claimant's claim that he was not heard, the Respondent states that the Claimant failed to take up two opportunities for fair hearing availed to him.

## **Findings and Determination**

10. There are three issues for determination in this case:

- a. Whether the Claimant deserted duty;
- b. Whether the termination of the Claimant's employment was justifiable and fair;
- c. Whether the Claimant is entitled to the remedies sought.

### **Desertion of Duty or Unlawful Dismissal?**

11. It is not in dispute that the Claimant was not at work from 28th June 2010. What is in contest is whether this amounts to desertion of duty. The Claimant justifies his absence on the ground of ill health, an assertion that the Respondent controverts.

12. On 7th July 2010, the Respondent wrote to the Claimant as follows:

*“7th July 2010*

*Mr. Tirus K. Mungai*

**Postal Assistant**

*Thro' **HPMR/Ngara***

**RE: SUSPENSION FROM DUTY ON VACATION OF OFFICE**

*It has been reported that you have remained absent from duty without permission or explanation since 28th June 2010. Accordingly, under the provision of Posta Code J9(iii),*

*it is proposed to regard you as having vacated your office and to dismiss you from service.*

*However, before this action is taken, you are invited to submit for consideration any proper and reasonable cause for your absence. If your explanation is accepted, you will be allowed to resume duty. Conversely, if your absence is not due to any proper cause, you will be dismissed from the service on grounds of vacation of office with effect from 28th June, 2010.*

*In the event of not being allowed to resume duty immediately, you should furnish your Controlling Officer with your contact address and keep her/him advised of any change in your address while you are under suspension.*

*Please acknowledge receipt of this letter by signature and date on the duplicate attached.*

*P.K. Muatha*

*FOR: **RM/NAIROBI***

*C.C.1. HPMR/Ngara - Please deliver this letter and return the noted copy together with the officer's defence (if any). He should not be allowed to resume duty unless prior authority is sought from this office.*

*C.C. GM/HR & Dev. - For information."*

13. The Claimant did not respond to this letter until 7th October 2010. He told the Court that on 28th June 2010 he did not report for duty because he had family problems and on 8th July 2010, he sought medical attention at Tigoni District Hospital. He recovered on 5th October 2010 and when he reported to Limuru Post Office, the Postmaster referred him to Ngara Post Office where the Postmaster issued him with the letter of suspension dated 7th July 2010.

14. In his written response, the Claimant explained that he had experienced domestic problems that had caused him ill health and attached his sick sheets. By this letter, the Claimant requested for lifting of his suspension. On the same day, a Mr. Sevu M.C wrote to the RM, Nairobi as follows:

***"7TH OCTOBER, 2010***

***THE RM***

***NAIROBI***

***RE: T.K. MUNGAI PF:30977***

*This officer has been working under HPMR Westlands. His work was satisfactory but as early as May this year he developed a characteristic which we later realized came about due to his domestic issues.*

*He is sorting himself out and requires some counseling by our department. He is among the officers I had recommended for counseling but unfortunately fell ill and failed to report his condition to the office since there was no one to immediately report about his sickness. This is when I raised the issue of vacation of office.*

*You may see whether we may give him another chance to mend his ways but I would recommend counseling. Some conditions require some human face.*

***SEVU M.C***

**FOR HPMR NGARA”**

15. The Claimant told the Court and the Respondent's witness, David Mukolwe Makanga confirmed that Sevu was the Claimant's Controlling Officer. It would appear that both the Claimant's and Sevu's letters did not reach City Square Post Office and for some reason which was not explained to the Court, Sevu who is still in the Respondent's employment, was not called to testify.

16. At any rate, it is clear from the evidence on record that the Claimant's Controlling Officer became aware of the Claimant's medical condition before the dismissal letter was issued on 19th January 2011. If this information was not brought to the attention of the Regional Disciplinary Committee that recommended the Claimant's dismissal, then the Claimant is not to blame. What is important is that the Claimant notified his Controlling Officer of his medical condition as soon as he was able to do so. On his part, the Controlling Officer recommended emotional support to the Claimant. At no time did he recommend dismissal.

17. The Claimant's medical condition was confirmed by a report by a Clinical Officer at Tigoni District Hospital, J.M Kabue dated 25th April 2014. According to this report, the Claimant was attended at Tigoni Hospital on 8th July 2010 and was thereafter managed for depression disorders. He was followed up with antidepressants and counseling. He was discharged on 5th October 2010. Kabue confirmed this report on oath and the Court believed his testimony.

18. The dismissal letter dated 19th January 2011 states as follows:

*“19th January 2011*

***Mr. Tirus Kariuki Mungai***

***Postal Assistant***

***Thro' HPMR/Ngara***

***DISMISSAL FROM SERVICE***

*This is to inform you that your absence from duty without permission or explanation has exceeded the period within which your explanation if submitted would have received consideration, approval has been obtained from the Postmaster General to dismiss you from service on grounds of vacation of office with effect from the date you deserted office i.e 28th June 2010.*

*You will be entitled to your Provident Fund contributions for the period you were in service. This will be processed by Posta Pensions Scheme in accordance with the regulations in force.*

*Please surrender your employment card together with any other official property in your possession to your Controlling Officer. Should you fail to surrender and same is misused you will be liable.*

*Please acknowledge receipt of this letter by date and signature on the associated copy and return the duplicate.*

*T.S. Sakuda*

***FOR: POSTMASTER GENERAL***

19. From this letter, the reason for the Claimant's dismissal was desertion of duty. Black's Law

Dictionary (Ninth Edition) defines desertion as:

***“The willful and unjustified abandonment of a person's duties or obligations.”***

20. There is adequate evidence on record to persuade the Court to reach the conclusion that the Claimant was indeed too ill to report for work and that as soon as he was able to do so he reported to his Controlling Officer. Such an employee cannot be said to be guilty of desertion as defined in law.

21. Even assuming that the Respondent was not aware of the Claimant's medical condition at the time the decision to dismiss him was made, the Court was unable to understand why this was not taken into account at the appeal stage. In declining the Claimant's appeal, the Respondent simply stated:

*“Appropriate consideration was accorded to your Appeal and all facts you advanced weighed against the case, regrettably the same was found inadmissible, hence unsuccessful.”*

22. The Respondent, both in its *viva voce* evidence and written submissions laid emphasis on the deadlines contained in the Posta Code and the Disciplinary Rules dated 27th August 2009 that the Claimant failed to meet. With much respect, to take this line is to miss the point. While deadlines are important in the management of institutions, they are not cast in stone and where the case demands, flexibility must be exercised.

23. Makanga told the Court that attempts to get in touch with the Claimant were made but he could not be traced. However, no details were provided and the Court was unable to gauge the efficacy of any efforts made in this regard. At the very least, the Respondent ought to have notified the Claimant's Trade Union that they were considering dismissal on grounds of desertion. No such attempt was made and the Court therefore finds that the Respondent had no valid reason for dismissing the Claimant and that in effecting the dismissal, the procedural fairness mark was missed.

## **Remedies**

24. In light of the foregoing, I award the Claimant twelve (12) months salary in compensation for unlawful and unfair dismissal. In making this award, I have taken into account the Claimant's long service with the Respondent as well as the Respondent's conduct in the dismissal transaction.

25. I further award the Claimant one (1) month's salary in lieu of notice. Additionally, I award him full salary from the date of suspension up to the date the dismissal letter was issued.

26. Finally, I make an award in favour of the Claimant in the following terms:

- a. 12 months' salary in compensation for unlawful dismissal...Kshs.322,620
- b. 1 month's salary in lieu of notice.....26,885
- c. Salary from date of suspension to date of dismissal (5 months & 19 days)  
.....151,452

**Total.....500,957**

27. The award amount will attract interest at court rates from the date of the award until payment in full. The Claimant will have the costs of this case.

28. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS**

**18TH DAY OF MARCH 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Onyony for the Claimant

Miss Gikunju for the Respondent