



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 1014 OF 2014

FREDRICK OJODE.....CLAIMANT

VERSUS

KENYA POSTS AND TELECOMMUNICATION CORPORATIONS.....RESPONDENT

Mr. Agwala for Claimant

Mr. Otieno for Respondent

JUDGMENT

1. The Plaintiff relies on a Further Amended Plaintiff filed on 15th July, 2004. The suit was initially filed at the High Court via a Plaintiff dated 20th January, 1997 and Amended on 6th April, 1999.
2. The Plaintiff seeks payment of terminal dues and benefits comprising of,
 - i. Unpaid house allowance in the sum of Kshs.330,000
 - ii. Leave allowance in the sum of Kshs.33,000
 - iii. 3 months pay in lieu of notice Kshs.24,345
 - iv. Out and in-patient medical facility for family and self Ksh.132,000 and
 - v. Pension in the sum of Kshs.674,843.40
3. The Plaintiff was employed as a Postal Superintendent in October, 1972 on permanent and pensionable terms at a monthly salary of Kshs.8,115. The Plaintiff worked with dedication until he was summarily dismissed without payment of terminal benefits on 25th January, 1996.
4. The Claimant states that the dismissal was wrongful, unlawful and contrary to the terms and conditions of his employment.

Facts of the Case

5. The Plaintiff was posted to Suna area, Migori District from March, 1995. On 13th August, 1995 the Plaintiff attended a Postal Statistics course in Nairobi. On 14th August, 1995, at 4.00 p.m. the Plaintiff was called back to the office. He travelled back overnight and upon arrival, he was briefed by this reliever, Mrs. Redwila Butemi that the cash and stock in the office had been stolen while he was away. There was no breakage. The money was stolen from the operational offices and the cashier was in charge of the building and kept the keys to the cash office.

6. The claimant had handed over to Mrs. Butemi and did a hand-over statement but she did not see the cash and stock because the cashier had locked the same and was not at the office during the handing over.
7. There was a watchman on duty. The Claimant had earlier reported that the office had defective locks and doors vide a telegram but same had not been repaired.
8. The cashier, David Ochieng and Gateman, Mr. Ezekiel Obaso were charged with theft. The claimant was made a prosecutor, witness and was bonded.
9. On 17th August, 1995, the Claimant was interdicted from the office.
10. The Claimant got a notice to show cause on 16th August, 1995 and responded to the same in writing. The Claimant was accused of failing to hand-over property to Mrs. Butemi, in that he did not show her cash and stock in the office. The Claimant was also accused of holding excess cash in the office contrary to the Respondent's policy. The Plaintiff was aware that he was allowed to keep a maximum of Kshs.300,000 in the office.
11. The Plaintiff however was of the view that the sum was too little and would not meet public demand. There was no written circular on the matter. The Claimant states that it was therefore not practical to adhere to the maximum limit.
12. The claimant had served the Respondent for 23 years. He was summarily dismissed without terminal benefits. The Claimant states that he worked diligently and had a good record at work except in 1985, 10 years earlier when he had been warned for coming to the office under the influence of alcohol. The Claimant stopped drinking in 1985 and had no adverse record since then.
13. The Plaintiff submits that the dismissal was unlawful and unfair and he claims,
 - a. Terminal dues and benefits
 - b. Special damages Kshs.1,929,747
 - c. General damages for wrongful dismissal
 - d. Costs of the suit
 - e. Interest on (a), (b) and (c) above
14. The Plaintiff relies on list of documents filed on 16th October, 2009 set out in schedule, part one as 1 – 20.
15. From the letter of interdiction dated 15th August, 1995, the Plaintiff was placed on ½ salary for the period of interdiction until the date of dismissal by the letter dated 25th January, 1996. The letter of dismissal backdated the dismissal to 15th August, 1995, the date of interdiction.
16. The court has noted the letter dated 12th July, 1995 written by the Plaintiff to the RPM/Nyaga – Kisumu – reminding him of his earlier telegram – dated 24th March, 1995 requesting for urgent replacement of defective locks at Suna HPO. The telegram was acknowledged by a letter dated 19th April, 1995, however no action was taken hence the reminder by the letter of 12th July, 1995. It is the Plaintiff's case that this omission posed a great security risk to cash and stock in Suna HPO.
17. As at the time of dismissal, the Plaintiff was 44 years old and had eleven years to retirement.

Statement of Defence

18. The Respondent filed a Statement of Defence dated 3rd March, 1997 and did not respond to the Amended Plaintiff and Further Amended Plaintiff. The Respondent had however filed a Preliminary Objection dated 6th August, 2010 to the Fully Amended Plaintiff on the ground that it introduced issues beyond the leave granted in a ruling by Hon. Justice Khamoni to amend the Plaintiff. This matter however was not ventilated at the High Court nor was it canvassed again before this court.
19. In the Statement of Defence filed on 3rd March, 1997, the Defendant admits the employment of the Plaintiff but denies that the Plaintiff served the Defendant with dedication.
20. The Defendant states that the Plaintiff was charged with misconduct, was given opportunity to defend himself and his explanation was found wanting, hence the summary dismissal. The Defendant therefore denies that the Plaintiff is entitled to payment of any terminal benefits, special damages or general damages as claimed, or at all and puts the Plaintiff to strict proof thereof. The Defendant prays that the suit be dismissed with costs.

Determination

21. The parties filed Statement of Issues on 15th April, 1992 as follows,
- i. Was the Plaintiff responsible for loss of revenue to the Kenya Posts and Telecommunications Corporation as alleged by the Defendant, citing insubordination?
 - ii. Was the dismissal of the Plaintiff from service by the Defendant lawful and if so, did the Plaintiff suffer damages and loss?
 - iii. Is the Plaintiff entitled to general damages?
 - iv. Was any notice of intention to sue issued to the Managing Director of the Defendant Corporation in accordance with provision of Section 109 of Kenya Posts and Telecommunications Corporation of the laws of Kenya.
22. The court will deal with the issues together as follows;
23. The Plaintiff testified at length in chief and under cross-examination on the circumstances leading to his dismissal already canvassed herein before.
24. The Respondent called RW1, Zachariah Oroni Odenyo, as Assistant Manager in charge of employee relations for the Respondent. RW1 served the Respondent for 20 years and in 1995, when the incident leading to the dismissal of the Plaintiff happened he was still employed by the Respondent.
25. RW1 explained the duties of a Post Master, the position held by the Plaintiff at the time of dismissal. He told the court that the Post Master was in charge of the staff, funds and stock at the station and area he/she is in charge of. That the Post Master was obliged to follow the maximum cash holding and the Post Master received training on all the accounting functions. That it was a strict policy for the Post Master not to hold cash exceeding the stated limit. RW1 denied the allegations by the Plaintiff that the general practice was for stations to hold cash sufficient to serve the customers, hence it was not always possible to stick to the cash holding limit.
26. The Plaintiff was accused of holding Kshs.1,939,130.80 cash between 10th August, 1995 and 12th August, 1995 while he was supposed to hold a maximum limit of Kshs.300,000.
27. This was said to be a deliberate failure to implement clear and explained circular which amounts to gross insubordination which led to loss of the Corporation's revenue.
28. RW1 told the court that if the Plaintiff required more cash holding than the Kshs.300,000 at any one time, he should have applied for the increase of the limit.

29. Furthermore the Plaintiff had failed to properly hand-over staff, cash and stock and sign a hand-over statement. The Plaintiff should have reported to the Police, if the cashier did not avail cash to him for handing-over purposes, before he left for training to Nairobi. The Plaintiff should have ensured that the excess cash was banked daily. That the Plaintiff should have been more careful to secure the office and ensure that the locks were replaced. The Plaintiff had also failed to properly reconcile cash at hand.
30. RW1 stated that the explanation by the Claimant was not satisfactory hence the dismissal. The Plaintiff, appealed the decision to dismiss him and the Appeal was rejected.
31. RW1 told the court that the pension scheme was noncontributory then hence the Plaintiff was not entitled to pension upon summary dismissal in terms of Section 4(11) of the Kenya Posts and Telecommunications Corporation Code.
32. RW1 further stated that the Plaintiff was not entitled to the medical claims since the system was based on reimbursements for outpatient and direct payment to hospitals upon admission. The Plaintiff did not submit any reimbursable outpatient bills nor was any of his dependents admitted in hospital before his dismissal.
33. RW1 added that the dismissal was with loss of all benefits, including pension. That house allowance was paid together with the basic salary and this was not payable upon summary dismissal of the Plaintiff. Furthermore, the Plaintiff would have been entitled to three (3) months salary in lieu of notice if the employment was normally terminated. He was summarily dismissed without notice.
34. Under the cross-examination, RW1 stated that, the cashier kept the money in a strong room and the same is not given to the Post Master to keep. The two were however responsible for the security of the money since the Plaintiff was over all in charge.
35. RW1 admitted that it was not possible for the Plaintiff to hand-over the cash in the absence of the cashier who held the key to the strong room. RW1 admitted that the Plaintiff had handed over staff and stock status before he left. RW1 stated that if the cashier was absent and the reliever came late after 4.00 p.m. then the Plaintiff should not have left for Nairobi to attend the training.
36. The theft took place on a weekend while the Plaintiff was away and it was discovered on a Monday. RW1 admitted that the Plaintiff had complained of the defective locks and wanted them replaced but that had not happened.
37. RW1 testified also that the Plaintiff was not linked to the theft. RW1 did not know the outcome of the criminal charges against the cashier and his colleagues.
38. RW1 denied that in rural areas, Post offices were allowed to keep excess cash. He added that the Plaintiff was a very experienced officer and knew all the policy, regulations and procedures of the Post Office, having gone through the ranks and was therefore validly found guilty of the three omissions being failure to hand-over property, failure to make proper reconciliation and insubordination by keeping excess cash limits contrary to clear directions in postal circulars.
39. Upon a careful consideration of the evidence by the Plaintiff, vis a vis that by the Defendant the court has arrived at the following conclusion of facts;
 - i. The Plaintiff served the Defendant with a relatively clear record from 1972 up to 1995, a period of 23 years
 - ii. That the Plaintiff rose through the ranks to the position of Post Master at the time of dismissal. This is testimony of his good work record
 - iii. The Plaintiff found the Suna Post Office in shambles when he was transferred in that the records were not in good order, reconciliations had not been done for a long period and the offices were in disrepair in that the locks to the offices were defective and needed

replacement

- iv. The Claimant had written two letters to the Regional head office, Kisumu, to get the locks replaced but this did not happen
 - v. That the Plaintiff was selected to attend a training in Nairobi and a reliever was sent from Regional head office. The reliever arrived late after 4.00 p.m. and the cashier disappeared from the office and therefore the Plaintiff handed over the staff and stocks but was unable to physically hand over cash in the strong room because the key was held by the cashier who had disappeared from the office
 - vi. That while the Plaintiff was away, cash was stolen from the strong room and there was no evidence of a break in
 - vii. That the cashier and his Assistant were charged with the theft of the cash but the outcome of the case was not given to the court
 - viii. The Defendant had deliberately set up the Plaintiff for failure by refusing to replace defective locks; sending him away from office to attend training and brought a reliever late on the day the Plaintiff was set to leave for the training.
40. It is the court's finding that the Defendant failed to facilitate the Plaintiff to secure the Post Office and the cash and also failed to facilitate a smooth handover by sending his reliever late.
41. The court was not told how much money was stolen, but it is the court's considered view that, theft of the cash would not have been prevented by adherence to the cash holding limit of Kshs.300,000. Kshs.300,000 is a substantial amount and it was the responsibility of the Defendant to ensure that the Post Office was secure by providing proper locks.
42. It is evident that the theft was an inside job and circumstances of the case in the court's view points to collusion between the office of the cashier and the Kisumu Regional office. The timing of the theft was not just a coincidence given the late coming of the reliever and the disappearance of the cashier and the failure by the Regional office to replace the locks.
43. It is the court's finding that the Plaintiff was made a scapegoat after being sent on training in a grand plan to steal money from the Post Office.
44. The Plaintiff has proved on a balance of probability that he was a victim of circumstances and his dismissal was wrongful and not for a valid reason especially in view of his 23 years of service to the Defendant.
45. The Plaintiff was dismissed without notice and lost benefits accrued over many years, including pension due to occurrence that took place while he was away from duty.
46. The action by the Defendant is not justified and equitable taking all the circumstances of the cases into account.
47. The Plaintiff suffered humiliation, loss of income, loss of job prospects, loss of earned pension and has suffered loss and damage.
48. At the time of his dismissal, the Employment Act, Cap. 236 of the laws of Kenya was operational. The Act provided for reinstatement without loss of salary and benefits and for twelve (12) months compensation for the unlawful dismissal.
49. The Plaintiff seeks payment of lost income from date of dismissal to the date of retirement and payment of terminal benefits set out in the Further Amended Statement of Claim.
50. The Respondent did not file an amended statement of response thereafter. The amounts set out in the Further Amended Plaintiff have not been controverted therefore and the court finds the amounts set out thereof to be representative of the terminal benefits due to the Plaintiff as follows;

The Plaintiff was 44 years at the time of dismissal and had 11 years to go to the date of retirement.

The Plaintiff seeks and the court awards him as follows;

- i. 3 months' salary in lieu of notice (8,115 x 3) Kshs.24,245
- ii. Loss of pension at the age of 55 years (5,112.45 x 11 x 12) Kshs.674,843.4
- iii. Twelve months' salary as compensation for the unlawful and unfair dismissal in the sum of Ksh.97,380
- iv. Payment of ½ salary for the period of interdiction to the date of dismissal (17th August, 1995 to 25th July, 1996) Kshs(8,115 x 6 x ½) Kshs.24,345

The court does not find it appropriate to award the anticipated income for the unserved period of 11 years to the date of retirement.

Accordingly, the final award to the Plaintiff as against the Respondent is Ksh.820,913.

- v. The award is payable with interest at court rates from date of the filing suit to payment in full
- vi. The Respondent to pay the costs of the suit at the High Court and in this court.

Dated and delivered in Nairobi this 1st day of April, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE