



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 239 OF 2013

LAWRENCE TIROP YATOR

CLAIMANT

v

POSTAL CORPORATION OF KENYA

RESPONDENT

consolidated with

CAUSE NO. 240 OF 2013

MONICA CHEPKEMOI NJOROGE.

CLAIMANT

v

POSTAL CORPORATION OF KENYA.

RESPONDENT

JUDGMENT

1. The 2 Causes herein were consolidated by Ongaya J on 17 March 2014 after hearing submissions from the parties.
2. In this regard, the Court will refer to Lawrence Tirop Yator as 1st Claimant and Monica Chepkemoi Njoroge as 2nd Claimant.
3. The consolidated Cause was heard on 27 January 2016 and 21 March 2016.
4. The Respondent applied to Court to have its witness testimonies in Cause No. 239 of 2013 adopted in Cause No. 240 of 2013 on the ground that the facts and circumstances were the same.
5. The Court acceded to the request.
6. After the close of oral testimonies, the Claimants filed written submissions on 13 April 2013, while the Respondent's submissions which ought to have been filed by 20 May 2016 were filed on 27 May 2016.
7. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissals of the Claimants were unlawful and whether the Claimants are entitled to the reliefs sought.*
8. Before examining the issues, the Court wishes to note that the Claimants pleadings were anchored on redundancy (section 40 of the Employment Act, 2007, while in fact the cause of action was not one of

redundancy (as emerged in the evidence).

9. The Court also wishes to note that the statutory scheme in place currently envisages distinct causes of action based on *unfair termination* of employment and *wrongful dismissal* with similar remedies, though practitioners and the Courts often use the terms interchangeably, although strictly they have different legal foundations (statutory and common law).

Whether dismissals were unlawful

Procedural fairness

10. Both Claimants contested the dismissals on the ground that they were not accorded hearings.

11. The 1st Claimant was issued with a show cause notice dated 11 October 2012 which set out the particulars of the charges and he was requested to make representations within 7 days. He responded in writing through a letter dated 19 October 2012.

12. The dismissal came on 19 June 2013 and the 1st Claimant was advised of a right of appeal in terms of the Respondent's Code.

13. As for the 2nd Claimant, she was issued with a show cause notice dated 11 October 2012 setting out the allegations and she was given 7 days to respond. She responded through a letter dated 19 October 2012.

14. The Respondent found the explanations unacceptable and the 2nd Claimant was dismissed through a letter dated 19 June 2013. The dismissal letter also informed the Claimant of a right of appeal within 4 weeks.

15. A right to a hearing can either have a statutory or contractual foundation.

16. In this case, the Claimants did not demonstrate any contractual right to a hearing and therefore the Court will fall back on the statutory right as envisaged under section 41 of the Employment Act, 2007.

17. In the instant case, the Claimants were informed of the allegations to confront and they were requested to make representations in writing which they did.

18. Section 41 of the Employment Act, 2007 does not expressly call for a face to face or oral hearing and the Courts in this jurisdiction have accepted that the hearing can be conducted through a written process (*Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR).

19. The Court is satisfied that the Respondent was in substantial compliance with the statutory requirements of procedural fairness.

Substantive fairness

20. A dismissal is open to challenge not only on grounds of procedural fairness but also on the validity and fairness of the reasons.

21. And it is the obligation of an employer to prove the reasons (section 43 of the Employment Act, 2007) and that the reasons are valid and fair (section 45 of the Act). Of course the Court must not lose sight of the evidential requirements of section 47(5) of the Employment Act, 2007.

22. The reason(s) advanced against the Claimants were misuse of official motor vehicle by ferrying unauthorised goods (charcoal).

23. It is the Respondent's second witness who testified as to the validity and fairness of the reasons as he is the one who carried out investigations and he produced a copy of the investigations report in Court.

24. The Claimants in their written responses to the show cause notices and in Court appeared to accept that the Respondent's vehicles were used to ferry charcoal for staff from Kabarnet (where charcoal was cheaper), and that this practice had the blessings of the Respondent's Senior Officers on the ground (Head Postmaster and Motor Transport Officer).

25. The testimony by the Claimants in Court was that a meeting had been held where it had been agreed to an arrangement to carry charcoal for staff. The meeting was attended by the 2 senior officers.

26. The testimony found support in the narration given by the Claimant's second witness Tom Simiyu who was a security guard at the material time.

27. Now, it is clear that the Respondent had written policies prohibiting the ferrying of unauthorised goods and persons and because such goods were carried, the Respondent had valid reasons to dismiss the Claimants.

28. However validity and fairness do not always sleep in the same basket. An employer may have valid reasons to dismiss an employee but such dismissal may be unfair. Fairness goes beyond validity or lawfulness.

29. One such scenario would be where dismissal as a sanction or penalty is too severe so as not to be fair especially where other less severe sanctions would have been adequate to deal with the transgression.

30. In determining such scenarios, the Court ought also to be alert to the realities of the employment environment in this country. That is one reason why this Court is a specialist Court and why the predecessor Court sat with lay assessors who were more in touch with the realities of the shop floor or factory work environment.

31. After considering all the evidence and circumstances obtaining here, the Court is of the view that the Respondent had valid reasons to dismiss the Claimants, but the dismissal itself was not fair as it had other options including surcharge and warning provided for in its Code (which regrettably was referred to but not produced).

32. The Court reaches the conclusion that the dismissals were therefore unfair.

Respondent's Counter-Claim

33. The Counter-claim was not proved and is for dismissal.

Appropriate remedies

Pay in lieu of notice

34. Because the Claimants were taken through a process which met statutory muster, the Court would decline to award pay in lieu of notice.

Wages for June 2013

35. The Claimants are entitled to wages up to 19 June 2013 as pleaded.

Service benefits

36. The Claimants were contributors to the National Social Security Fund and in terms of section 35(5) & (6) of the Employment Act, 2007 are not entitled to service benefits in terms of the Act.

37. If the service benefits were anchored on contract, the same was not proved.

Commuter allowance

38. This head of claim was not proved and it is declined.

Compensation

39. The 1st Claimant served for nearly 10 years while the 2nd Claimant served for nearly 20 years.

40. Considering the length of service, the Court is of the view that the maximum equivalent of 12 months gross wages compensation to each Claimant would be appropriate and fair (1st Claimant's gross wage for May 2013 was Kshs 40,475/- while the 2nd Claimant's gross wages for May 2013 was Kshs 74,590/-).

Conclusion and Orders

41. The Court finds and holds that though the Respondent had valid reasons to dismiss the Claimants, the dismissals were not fair and awards the Claimants and orders the Respondent to pay them

1st Claimant

(a) June 2013 wages	Kshs 21,673/-
(b) Compensation	Kshs 485,700/-
TOTAL	Kshs 507,373/-

2nd Claimant

(a) June 2013 wages	Kshs 57,376/-
(b) Compensation	Kshs 895,080/-
TOTAL	Kshs 952,456/-

42. Claimants to have costs.

Delivered, dated and signed in Nakuru on this 2nd day of September 2016.

Radido Stephen

Judge

Appearances

For Claimants Mr. Onyancha instructed by Chepkwony & Co. Advocates

For Respondent Mr. Kiprono instructed by Kwengu & Co. Advocates

Court Assistant Nixon