



**REPUBLIC OF KENYA**

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

**CAUSE NO.793 OF 2014**

**HAMPHREY KUSESI NASHOMBE ..... CLAIMANT**

**VERSUS**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**JUDGEMENT**

1. On 18<sup>th</sup> May 1979, the Claimant was employed by the Respondent as a Prevention Officer and rose through the ranks to become Revenue Officer III which he held until 25<sup>th</sup> June 2011 when he was terminated through letter of summary dismissal. The Claimant had diligently served for 32 years and was aged 57 years old. He was due to retire in 2014 at 60 years.

2. The claim is that the dismissal was unfair, unlawful and malicious on the grounds that; the allegations made against the Claimant were false; at the disciplinary hearing the Claimant was not allowed to question the investigator or witnesses; the dismissal was effected despite a recommendation that the Claimant be reinstated; the Respondent failed to appreciate that the Claimant role was to verify the delivery of vehicles to Uganda Revenue Authority officers; the Respondent failed to identify that the cigarettes recovered in Eldoret were the same one which had been verified at Malaba border when the vehicle was received on Uganda side; the Respondent failed to note that the subject vehicle had crossed over to Uganda and received by the Uganda Revenue Authority and the was no evidence of re-entry with the same cargo into Kenya; and that the summary dismissal of the Claimant as a result was not justified.

3. The claim is also that the Claimant suffered punitive measures at the hands of the respondent. On 12<sup>th</sup> July 2010 the Claimant was interdicted from duty receiving only house allowance which was subsequently stopped upon dismissal. He remained on suspension until 25<sup>th</sup> June 2011 when he was dismissed. An appeal was filed on 6<sup>th</sup> July 2011 but was dismissed on 12<sup>th</sup> September 2013.

4. That the whole process leading to dismissal was unfair and illegal. The allegations made were false and there was no chance for hearing. The Respondent failed to follow the constitution, the law and its own Code of Conduct and Regulations. The Claimant had no previous record of misconduct to warrant the harsh treatment against him. The available options of punishment were ignored and the Respondent took the harshest punishment of summary dismissal instead of a reprimand. Deferment of salary increase, reduction in rank or retirements of public interest.

5. At the time of dismissal, the Claimant was earning Kshs.119, 118.00. He is seeking;

*(a) unpaid salaries for the period of suspension for 12 months all at kshs.1,044,000.00;*

*(b) 3 month in lieu of notice at Kshs.357,354.00;*

(c) Pay in lieu of untaken leave Kshs.119,118.00;

(d) Payment of full pension benefits including own and Respondent contributions;

(e) Monthly retirement pension upon retirement under a normal retirement;

(f) Compensation for 12 months;

(g) Pay for loss of employment and earnings for the 3 years before retirement; and

(h) Costs of the suit.

(f) The Claimant also testified in support of his claim. Upon employment by the Respondent in 1979 he served diligently until summary dismissal on 12<sup>th</sup> July 2010 on allegations that he had abetted dumping of export goods into the local market. The notice also served as a suspension and notice to show cause.

7. While the Claimant was based at Malaba Border station, cigarettes were alleged to have been dumped in the local market instead of going to the destination of South Sudan in Juba. The Claimant responded to the show cause and then he was called for a hearing to defend himself at the head office of the respondent. That the evidence against him was not clear as he was only told that he had abetted the dumping of export goods. There was no witness to confirm the particulars of the offence. The panel posed questions and he answered. There was no witness called for his cross-examination. There was no verdict arrived at to warrant the conclusion of summary dismissal.

8. After the disciplinary hearing held on 25<sup>th</sup> June 2011, there was no communication from the Respondent until the Claimant wrote seeking to know his fate. He was kept for a long period under suspension and without communication.

9. The Claimant also testified that as the Verification officer at the Kenya border with Uganda, he had to verify all goods together with his counterpart in Uganda Revenue Authority which was done in this case. Where the goods involved are certified as sensitive, an account is given for further verification and a team from KRA and URA has to be present for site verification and placing of seals.

10. That upon receipt of the show cause notice the Claimant replied to all the allegations made against him and noting that when he was assigned duties at the joint verification office in URA, vehicle Registration No.KBG 833A/ZD0558 and container No.ZC SU820231 – 1 and KBG 282R/ZD 071 arrived at the Uganda border and URA officer Draku and the Claimant jointly sighted the two trucks and followed all set procedures. URA cleared the goods and the agent responsible was issued with the bond for the goods. The goods were endorsed with URA seals and allowed to proceed to Juba as the destination.

11. That similar goods found at Shiv go down in Eldoret cannot be from the same consignment sighted and verified by the Claimant unless URA mishandled the same through negligence. That when the Claimant made an omission of marks and numbers ZCSU820231-1 was not intentional on his part since all other details of the consignment were correctly captured. The Claimant handled several vehicles and consignments on the same date and sighted goods and verified with URA officers upon following all set procedures. The allegations of falsification of verification and sighting accounts does not arise.

12. The Claimant also testified that by inputting his verification account in the *Simba system* using Rambaya's profile was not intentional. When the Claimant realised his mistake, he immediately corrected the error. This sharing of profiles may have also resulted from the fact that the border staff shared computers and files; the Claimant remained at work for long hours; there was excessive workload; there was network interruptions and power fluctuations; and that the stipulated time for inputting reports in the system also created a lot of pressure on the staff. The work environment is not conducive and workers are made to commit errors, mistakes and such are not intentional.

13. The Claimant also testified that while on duty on 22<sup>nd</sup> August 2009, he was allocated more than 50 entries and in one such case, there was a consignment of 2100 cartons loaded on 2 trucks for Haraka Clearing and Forwarding Co. Ltd – truck No.KBG 202R/ZD 0721 and KBG 833A/ZD00558. That the respondent's allegations that the goods in these vehicles were found at Shiv Go-downs in Eldoret was never verified and there was no connection to the Claimant and the investigations conducted did not find him culpable. That when the Claimant was asked by his supervisor, Reuben Odundo to confirm the details with regard to the 2 subject vehicles and consignment and on allegations that the 2 trucks had returned back to Kenya and dumped the goods in Eldoret, the Claimant could not confirm as he had done his part and ensured that the goods were released and moved to the Uganda URA and the appropriate seals put in place. This was confirmed by the URA officer, Francis Otyoma that the subject trucks were verified by Draku William of URA who had worked with the claimant.

14. Therefore, the allegations made against the Claimant were not true. He is entitled to the remedies sought.

## **Defence**

15. In response, the respondent's case is that they employed the Claimant but he was dismissed for reasons that were justified, procedural and on good basis. There was no malice and the law was followed.

16. On 22<sup>nd</sup> August 2009, the Claimant and the URA officer, William Draku, jointly raised a falsified verification and sighting account of consignment aboard 2 trucks KBG 883G and KGB 288R carrying containers no. ZCSU 820231-1 & 2009 NRB 1527017 both from Mlolongo to Juba, South Sudan through Malaba border station. The trucks had 2100 cartons of supermatch cigarettes from Mastermind Tobacco (K) destined for export to Juba with a tax implication of Kshs.31, 416,480.00 on excise and VAT duty.

17. The Claimant went ahead and inputted the same verification account in the *Simba system* using the profile of Mr Timmose Rambaya, a fellow verification officer at Malaba. The trucks did not arrive at Malaba nor cross to Uganda as expected. Investigations revealed that the consignment was offloaded at Shiv go-down in Eldoret and seized on 18<sup>th</sup> September 2009. The investigations further revealed that 2 lorries KBG 833A and KBG 282R involved in the dumping of the goods were loaded at Mastermind Tobacco factory and escorted by Duplex Kitivi, a customs officer, to Mlolongo weighbridge. On 20<sup>th</sup> August 2009 they left the control point under the escort of Wilfrida Hagondi with a memo and arrived at Nakuru on equal date.

18. Though the escorting officer stated that the trucks arrived at the Malaba border and received by Mr Molenje on 21<sup>st</sup> August 2009, the 22<sup>nd</sup> August 2009 verification done by KRA and URA does not show the crossing of these trucks to Uganda. The consignments are not captured in the reports of KRA and URA officer Onduso and Otyoma respectively.

19. The defence is also that, upon investigations by the respondent, **the driver of KBG 282R** and the escorting officer offloaded the cargo at Shiv go-down in Eldoret and left for Congo via Busia on 22<sup>nd</sup> August 2009 and an empty manifest confirmed this details at Busia and Uganda boarder points. On 16<sup>th</sup> September 2009, the driver was intercepted by URA officials on suspicion of dumping consignment in Uganda. He showed the URA officers where the dumping was done and this information was passed to KRA who seized 1020 cartons of cigarettes.

20. The driver of KBG 833A with the agent of exporter dumped the consignment at Shiv go-down in Eldoret. The go-down is leased to Moses Mwaura. The driver then proceeded to Arthi River Bamburi Cement factory to load cement destined for South Sudan. The lorry was intercepted at Malaba by URA officers and upon interrogation he confirmed information of dumping and the cigarette consignment never crossed to Uganda border. The escorting officer presented memo containing 12 trucks that passed through Malaba but the two subject trucks were not presented to the BOC as required. This showed an intention to abet, conceal the diversion of the consignment.

21. Upon the dumping of the consignment, the Claimant and William Draku of URA raised falsified verification and sighting accounts. The Claimant entered the same verification account in the *Simba system* using the profile of Mr Rambaya a fellow verification officer at Malaba knowing the same to be dishonest, lacking integrity and rendered him liable to disciplinary action. This amounted to gross misconduct in accordance with KRA Code of Conduct.

22. On 12<sup>th</sup> July 2010 the Claimant was suspended in line with the Code of Conduct and he was invited to respond to the allegations made against him. On 21<sup>st</sup> July 2010 the Claimant submitted his responses and a disciplinary hearing was held on 4<sup>th</sup> November 2010 where the Claimant made his oral defence.

23. Based on the investigations conducted by Mr Too the disciplinary committee presented its report and finding that the Claimant was guilty and should be dismissed. the committee found that the claimant's verification that the 2 trucks KBG 282R and KBG 833A crossed to Uganda was not true as on this same day, 22<sup>nd</sup> August 2009, truck KBG 282R crossed Busia boarder and KBG 833A was loading cement at Bamburi Cement Factory.

24. That the Claimant deliberately used Mr Rambaya's profile in the *Simba system* on 24<sup>th</sup> August 2009 to conceal the events of the consignment and it took the intervention of the Head of station to have him correct the anomaly after 2 months from the date the wrong entry was done. This followed Mr Rambaya complaint that his profile had been used. The information from the Claimant was therefore not true that he had been forced to use the colleague's profile due to network interruptions.

25. That memo 97 was stamped unprocedurally by the Claimant who was the verification officer as he was expected to acknowledge receipt vide a register. The trucks carrying the cigarettes were KBG 282R and KBG 833A were contained in memo 97 to create an impression that the trucks arrived at malaba.

26. The disciplinary committee, based on the evidence before it, the submissions and hearing of the Claimant found him guilty and the summary dismissal was justified.

On 9<sup>th</sup> June 2011, the Claimant was issued with letter of summary dismissal. Due process was followed. The Respondent relied on the provisions of the Employment Act and its Code of Conduct. The investigations report by Mr Too revealed serious cases of gross misconduct on the part of the claimant. The Claimant was found to have falsified verification of the two trucks while knowing that such vehicles never appeared before him at Malaba border or crossed into Uganda through his station point. Being a verification officer, the Claimant was supposed to have acknowledged receipt vide a register. The rucks with cigarettes contained memo 97 which the Claimant made to create an impression that the rucks arrived at Malaba and the stamp was therefore done unprocedurally.

27. The defence is also that the Claimant was suspended in accordance with the internal rules of the respondent. He was given a chance to be heard and make his defence and submissions. The disciplinary committee made a finding for dismissal of the claimant. The appeal lodged was placed and given consideration by the Commissioner General rejected it as no new grounds had been set out to warrant the change of the dismissal.

28. The Claimant is not entitled to the remedies sought. His case should be dismissed with costs.

29. In evidence, the Respondent called Stanley Molenje Indimuli, a Revenue Collection officer with the respondent. On 20<sup>th</sup> August 2009 to 30<sup>th</sup> August 2009 he was at Malaba border where he was working with the claimant, as Assistant Revenue Officer. He was receiving goods under escort as a Border Control Officer (BCO) he had to confirm the arrival of trucks and then release them and take note in a register. As the BOC he had to get the memo escorting the goods and use the register to taken record of the same. Each truck would be recorded per the memo. The office on duty would sign for each truck.

30. That memo 96 and 07 was supposed to be signed against the truck, note the date of arrival and he last person to receive the trucks would sign at the end of the register and stamp. On 28<sup>th</sup> August 2009 the

witness signed the register and upon being satisfied that the memo No.96 on all vehicles had been received and he was the last person to see such vehicle before placing the stamp.

31. That memo No.97 was not done by him. The practice was to have the BOC receive and confirm before a stamp. Memo No.97 was not stamped by him as the BOC. The BOC was supposed to have received the memo before any other officer. Memo No.96 has 12 entries, no lines are skipped and as a sensitive record, correct records had to be done.

32. Mr Molenje also testified that he did not receive memo No.97. He did not sign it or put a stamp. Cigarettes have a specific register, same for batteries. The verification officers were supposed to record upon sighting goods from both side of the border. To confirm the record, a verification officer such as the Claimant had to use the record in the *Simba system*.

33. Memo No. 97 has a stamp from Arthi River and malaba. The stamp at Malaba indicates the verifying officer sighted the goods. The records on memo 97 are not clear as they were overwritten. To confirm sighting goods, a verification officer can use the *Simba system* or a manual check. The records cannot confirm if the two subject trucks arrived at malaba.

34. The 2<sup>nd</sup> witness was Mr Elijah Too, Investigator Internal Affairs with the respondent. Mr Too testified that he investigated this case on the diversion to cigarettes. An investigation was done between KRA and URA which revealed that 2 trucks KBG 282R and KBG 833A with export cigarettes for South Sudan did not cross at Malaba as supposed to but the cargo was offloaded at Shiv go-down in Eldoret. That such a consignment with sensitive goods is supposed to be escorted with a memo and such should be registered at each point. The BOC at each point must confirm the memo and record on the register upon receipt of such sensitive goods. In this case, the verification officer signed against the goods and confirmed the register without following the laid down procedures. Upon interview with the URA staff, the bond that had been used to clear the goods had lapsed after use for 8 days. That the BOC, Mr Odundo initiated the verification but there was no evidence that the goods had crossed to Uganda. The records exchanged between KRA and URA, there was nothing to confirm good moved from Kenya to Uganda.

35. Mr Too also testified that from the records that he got based on investigations, the sighting of goods via the *Simba system* confirmed no goods arrived. The Claimant had done the sighting using the profile of another officer, Mr Mulanya. An interview of the truck drivers confirmed the findings that the cigarettes never crossed over to Uganda as alleged by the Claimant as driver of KBG 282R offloaded goods in Eldoret and proceeded to Congo with empty truck. The driver to KBG 833A offloaded goods in Eldoret and proceeded to Bamburi Cement Factory for loading of cement for South Sudan. The cigarettes were seized in Eldoret in a go-down or Mr Mwaura.

36. Based on investigations, Mr Too recommended disciplinary action against the Claimant on the grounds that;

There was usage of 2 stamps different stamps appearing on memo No.96 and 97 at Malaba yet the trucks KBG 282R and KBG 833A were alleged to have arrived on the same date;

Custodian of stamps be established at room No.1;

Failure to follow procedure in using the memo and register;

Two consignments on memo No.97 were not recorded. The Claimant used the memo without using the register.

37. That based his investigations, he established the claimant's verification accounts were false. The work allocation was not done per vehicle and the entries were allocated to confirm document entry arrived at malaba. URA confirmed though the Claimant and Draku recorded verification, there was no crossing of the subject trucks to Uganda side. In the joint KRA and URA investigations, there were differences between the documentation and physical exit of the trucks. URA had not received all the necessary

documents from KRA over the trucks and consignment.

38. The 3<sup>rd</sup> witness for the Respondent was Evelyn Mutende from the Respondent human resource office, Disciplinary Department. That in this case, the Respondent followed due process and found the Claimant had a case to answer. A show cause was issued and he was suspended. A disciplinary hearing was conducted on 4<sup>th</sup> November 2010 where the Claimant attended and gave his statement and defence. A decision was taken to dismiss the Claimant based on the finding of gross misconduct.

### **Submissions**

39. In submissions, the claimant reiterated the evidence and maintained that this is a case of unfair dismissal.

40. The respondent submit that before the claimant was dismissed, there were investigations from multiple sources. The terms and conditions of employment between the parties were clear with regard to factors that were committed, the employee was subject to sanction as held in **KRA versus Menginya Salim Murgani**.

The claimant was afforded a fair hearing both in writing and oral and the Respondent's

Code of Conduct was applied in its terms. The dismissal was justified and the claim should be dismissed with costs.

### **Determination**

41. The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act. The section provide that

*For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

42. The employee must prove that the termination of employment was unfair and demonstrate that there was no due process or the reasons given were not genuine. The Court will therefore go into the procedures followed by the employer in effecting the termination or dismissal of an employee to see if notice was issued in accordance with section 35(1) of the Employment Act; if the employee was afforded a hearing as required under section 41; and reasons given based on a justified and valid ground of misconduct or gross misconduct. The reasons for termination can be varied based on the applicable law, the terms and conditions of the employment contract or that the employee has fundamentally breached the contract of employment.

43. On the side of the employer, apart from the requirement in section 47(5) of the Employment Act to must justify the grounds of termination, section 43 demand that the employer prove the reasons for the termination, while section 45(2) (a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons. In a case of summary dismissal, the employer must comply with section 41(2) of the Employment Act, which obliges the employer to hear and consider any representations which the employee may wish to make.

44. In this case, the Claimant was summarily dismissed on 9<sup>th</sup> June 2011 on the grounds that following a disciplinary committee hearing on 27<sup>th</sup> April 2011, he was found to be in breach of section 7.9 of the KRA Code of Conduct. The letter states;

*... The Authority has therefore decided to separate with you on grounds of gross misconduct.*

*Accordingly, and pursuant to the provisions of section 7.9 of the KRA Code of Conduct, you are hereby dismissed from the service of the Authority with effect from the date of this letter.*

45. Section 7.9 of the Respondent Code of Conduct relate to *Dismissal*. The reason(s) for the dismissal is not stated. In the disciplinary committee proceedings of 27<sup>th</sup> April 2011, the recommendation was that the Claimant was *guilty of the charges he was accused of*. Accordingly, the DISC recommended that Mr Nashombe be dismissed from the services of the Authority.

46. The Claimant faced a set of 4 allegations against him;

(a) that he was involved in a conspiracy to dump export goods in the local market and the evidence against him was that on 22<sup>nd</sup> August 2009 he entered records that he had verified 2 trucks with such goods cross over to Uganda whereas these trucks KBG 282R and KBG 833A were traced to Busia and Bamburi Cement on this date carrying out different business other than the one confirmed by the claimant;

(b) that the verification account he entered for the trucks did not indicate the containers ferried by the trucks and the evidence was that these 2 trucks never crossed to Uganda;

(c) that on 22<sup>nd</sup> August 2009 the Claimant and his counterpart in URA Mr Draku jointly raised and falsified verification and the evidence was that the Claimant stamped memo No.97 unprocedurally as the verification officer as he was expected to acknowledge receipt vide a register and by the Claimant stamping memo No.97 was to create the impression that the 2 trucks arrived at Malaba and he sighted the goods; and

(d) the Claimant was also accused of entering the verification account into the *Simba system* using the profile of Mr Rambaya and the evidence against the Claimant was that while he alleged that he used Rambaya's profile due to heavy workload and network interruptions it took Mr Rambaya to complain about the use of his profile for the Claimant to make changes.

47. From the proceedings, the Claimant was issued with a show cause notice, he was suspended while investigations were being conducted at Malaba, in Uganda and various points where vehicles KBG 282R and KBG 833A carried cargo and dumped in Eldoret, the movements to Busia and Congo and the movements from Eldoret to Bamburi Cement Factory. The Claimant also confirmed that he was called for a disciplinary hearing following his written responses to the show cause notice.

48. The Claimant on his part testified that on 22<sup>nd</sup> August 2009 the two subject trucks came and he sighted the good in the presence of all the stakeholders and placed seals and therefore he did his part well and had no control of the vehicles once they crossed over to Uganda; that he endorsed the back of the entry form C632009NBI 527017 signifying the verification findings of the two trucks and the same were rotated into KRA system register and URA inward register; and that the forwarding agent from Haraka Clearing was bonded for the consignment of the goods for juba, South Sudan.

49. Were these conflicting findings verified at the disciplinary hearing?

50. Part of the findings by the investigations team that did ground fact finding in Malaba on 23<sup>rd</sup> and 24<sup>th</sup> July 2012, long after the events of 22<sup>nd</sup> August 2009 found out that;

*The border between Busia and Malaba is porous with Alupe being notorious for cigarette smuggling and Adungosi posing a major challenge. The number for the enforcement function are not adequate.*

...

*The lower gate is not visible from the main building where the document facilitation centre is*

located.

*There are incidents where cargo is said to have been exported to Kenya but the truck has not been seen. The converse was also witnessed when a lorry was intercepted at the Kenya gate with fake documents from Uganda having bypassed the Customs controls.*

51. Were these factors put into account by the disciplinary committee when making findings against the claimant? This is highly unlikely as the Respondent disciplinary committee minutes submitted in Court are not in full. Some parts obliterated.

52. Where indeed the transit point between the subject border points were found to be porous and the Respondent officers investigating indeed witnessed goods being moved by trucks from one end to the other without proper documents, Court this have been the case for the Claimant who was placed at a point where he could not observe

what was happening at the lower and upper gates at the same time at the Malaba station?

53. What comes out of the proceedings is that there is a problem at the Malaba border point. This is obviously not the doing of the Claimant alone. The Respondent as an employer is equally responsible and this comes out in the report of Mr Too and the *Disciplinary Committee Tour of Malaba and Busia Border Stations*.

54. On the issue of using a colleagues profile instead of his own, The Claimant admit that he erroneously used the verification account in the *Simba system* using his colleague's profile, Mr Rambaya. That the sharing of profiles was not allowed. The Claimant made effort to justify his mistake on the grounds that he was overworked, he had a lot of duties and that his work environment was not conducive. On 21<sup>st</sup> July 2010, in reply to the show cause, the claimant stated that;

*The inputting of my verification account in the simba system using Rambaya's profile was not intentional. When I realised the mistake, I immediately corrected the anomaly. Factors that may have also contributed to this error include:-*

*a. Sharing of computers and files among staff*

*b. Long working hours*

*c. Excessive interruptions and serious fluctuation of power failures could keep the window hanging in the system even when one thinks he or she has logged out*

*d. The stipulated time for inputting reports in the system also creates a lot of pressure on staff.*

55. That said, the Claimant has admitted to a malpractice. He used a colleague's *Simba system* profile and lied about it and only acted on the mistake after the colleague lodged a complaint against him. Such conduct is sufficient for sanction as this is a case of concealing material facts and a diligent officer should have taken all due diligence to correct the same even without being prompted. Where the Claimant was an innocent bystander as he would want the Court to believe, when the internet and systems interruption stopped, he should have corrected his error or mistake immediately. this was not the case. in his evidence-in-chief, the claimant testified that;

*... I used a fellow officer's account without my knowledge. It was not intentional.*

*It was a common thing as he same officer used my password without my knowledge. When it came out I had used Rambaya's profile, I went to the in-charge to bring this information to my account and I discarded online the former account and put it on under my profile. This was in September 2009. This was during the investigations. The error does not input ill-motive. ...*

56. In reply to the show cause notice, the Claimant response with regard to the use of Mr Rambaya's *Simba system* profile is a mere shifting of blame and responsibility. This is not what a responsible employee should do. Shifting blame to the work environment does not change the fact of concealment of information under a colleague's profile of work account and failing to tell the truth. I take it such accounts and profiles are given so as to track the work of each employee. Even where all else was not adequately proved at the disciplinary hearing, this misconduct on its own is sufficient to warrant a sanction.

57. As held in **George Onyango Akuti versus G4S Security Services Kenya Ltd [2013] eKLR**, The Respondent had commitments with its clients to meet. Where the Claimant as the employee was required to undertake his duties and log in data that was going to affect other processes, employees and service to the public, and he failed to undertake such duties with diligence and cheated, overall he compromised service delivery for the Respondent clients. See **Ismail Hassan Abdullahi versus Kenya Ports Authority [2013] eKLR**. such are matters established on the shop floor and do not require the respondent to prove beyond reasonable doubt as in criminal cases. The standard of proof in such a situation is on a balance of probabilities and I find sufficient cause existed on the evidence of this charge to warrant the dismissal.

58. Ultimately, noting the factors that the Respondent failed to take into account at the disciplinary hearing, the sanction against the Claimant of summary dismissal with regard to the charge of the claimant's use of a colleagues, Mr Rambaya's *simba*

*system* Account/profile, the concealment of the fact until moved, the dismissal was justified. Due process in arriving at this sanction was also lawful.

### **Remedies**

59. On the finding that the Claimant committed an act of misconduct by using a colleague's *Simba system* profile and that his dismissal was justified and lawful no damages or compensation is due. However, all salaries due during the full tenure of employment and covering the period of suspension should be paid. Such pay is due as the Claimant remained the employee of the Respondent until he was terminated. The policy not to pay an employee on suspension his dues and *the same to take effect from the date of interdiction/suspension* as set out under clause 7.9 of the respondent's Code of Conduct is Na unfair labour practice. The dues not paid during the suspension period are owing to the claimant.

60. The remedy sought of conversion of the dismissal to retirement does not arise. Where an employee fails to undertaken their duties and responsibilities diligently, such is subject to termination and not retirement. The Claimant shall be paid all lawful dues that go up to the termination.

61. The Claimant is seeking for pension dues at own contribution and the respondents contributions. Pensions are regulated under specific regulations and putting into account the provisions of section 35 of the Employment Act, and in terms of the Dismissal letter, such dues owing to the Claimant with regard to pension shall be computed putting into account a termination and not summary dismissal and in accordance to any set regulation in the management of such a pension scheme. Such a pension is only payable in terms and a termination and not on the basis of retirement.

62. Leave due and earned is payable as noted in the letter of summary dismissal and pursuant to the provisions of section 28 of he Employment Act.

**In conclusion, judgement is hereby entered for the Claimant against the Respondent in the following terms;**

**(a) Salary due during the suspension period July 2010 to june 2011 awarded at Kshs.1,044,000.00;**

**(b) Leave due Kshs.119,118.00;**

**(c) Pension due shall be paid in accordance with terms of a termination and upon the Claimant compliance with set regulations for the management of such pension;**

**(d) The Claimant is awarded 50% of his costs herein.**

Delivered in open Court at Nairobi this 25<sup>th</sup> day of November 2016.

**M. MBARU JUDGE**

In the presence of:

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