



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT NAIROBI
CAUSE NO. 853 OF 2010

KEN ALUOCH CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA LTD. RESPONDENT

Mr. Ogonji for claimant

M/S Kihumba for respondent

JUDGMENT

1. The suit is premised on an amended memorandum of claim filed on 6th October 2011, seeking;

- a. a declaration that the dismissal was unfair;
- b. Kshs. 3,600,000/= being gratuity at the rate of 25% of the salary earned for three years;
- c. twelve months compensation for unfair termination;
- d. damages for breach of contract;
- e. general and aggravated damages including punitive damages;
- f. three months' notice pay at Kshs.400,000/=;
- g. interest on a., b, c, d, e and f at court rates;
- h. costs of this suit;
- i. any other relief that the court may deem fit and just.

2. The claimant testified in support of the pleadings and the salient facts of the case are as follows;

The claimant was employed by the respondent on a three year contract in the position of general manager, customer service commencing on 1st October 2003 until 30th September 2006.

The claimant earned a monthly salary of Kshs.400,000.

3. From March 2006 to September 2006, a period of six (6) months, the claimant was appointed the acting

Post Master General.

On or about the 30th April 2009, the claimant was sent on compulsory leave to pave way for investigations on alleged impropriety arising from procurement in the respondent's organization.

4. The claimant was vide a letter dated 2nd July 2009, charged with;

a. breach of procurement procedure;

b. failure to undertake due diligence on Afri-payment/(K) Ltd.

5. The claimant was called upon to show cause why his employment should not be terminated.

6. The claimant was entitled to 25% gratuity on basic salary upon expiry of contract. The contract was renewable. The claimant was entitled to thirty (30) days annual leave.

7. The claimant responded to the allegations against him in writing stating that there was a specific criteria to evaluate the tender which was followed to the letter. The claimant did not breach any of the procurement procedure in relation to the tender award to Afri-payment (K) Ltd.

8. With regard to the 2nd charge the claimant states that he was not a member of the due diligence committee that went to United States of America to do due diligence on Posta pay system. The team comprised the chairman of the Board, Major General Rtd Kariuki, Mr. Osiemo, a director Mr. Shigoli, Company Secretary, Mr. Ngari, General Manager Finance and Accounts. Mr. Ogutu, head of IT. It was therefore false to accuse the claimant of not having done due diligence when he was not part of the team at all. Furthermore, procurement docket fell under General Manager Finance and Accounts.

9. The audit report by Deloitte and touch asked the respondent to seek a legal opinion on the procurement. This ought to have come from the National Procurement Authority but this was not done. The claimant argues therefore, there was no basis to fault the procedure followed.

10. That none of the thirteen (13) bidders who responded to the tender lodged a complaint or filed a suit on any irregularity, bias or breach of regulations. Any aggrieved party is supposed in terms of sections 41 and 42 of the Exchequer and Audit (Public Procurement) Regulation, 2001 to appeal to the Procurement Complaints, Review and Appeals Board. There was no such appeal.

11. That Auditors found after only two years of its implementation the Posta Pay Electronic Funds Transfer (EFT) system was more profitable than Western union the world leader in EFT business. It was more profitable than Money Gram, the second-ranked world leader in the same business.

12. On due diligence process the consultants concluded under section 6.2.15 of the Draft Report, that the information provided by Afri-payment (K) Ltd. during evaluation process was accurate and the Afri-payment (K) Ltd. had the business and technical capability to meet present, or any future money transfer business.

13. The claimant submits that the Board had no basis whatsoever to purport four (4) years later in 2009 that a breach of procurement procedures had occurred after it had accepted the due diligence report and sanctioned the award of the tender by signing off the contract on the 21st January 2004.

14. That the minutes of the Human Resource Committee or the Board held on 7th August 2001 recommended that six (6) senior officers of Postal Corporation of Kenya be dismissed – five (5) of them for gross misconduct except the claimant who was only cited for misconduct. However, the letter of dismissal dated 22nd July 2009, says that claimant was dismissed for gross misconduct.

15. The claimant who had been invited to the hearing on 17th July 2009, was not given opportunity to

give his side of the story but was only asked whether he had anything new to add to his letter of defence dated 12th July 2009. The Board refused to accept any questions seeking clarification and the session lasted less than five minutes. The minutes clearly show this.

16. That the decision of the court confirms the claimant's submissions in the case of **Andrew Tanui –vs- Postal Corporation case No. 606 of 2009 and Fred Odhiambo –vs- Postal Corporation Cause No. 312 of 2010.**

17. Furthermore, Ms Cecelia Ngetich sat in the Board meetings illegally having tendered her resignation to Postal Corporation of Kenya Board on 21st August 2008 to seek political office yet she chaired Human Resource Committee meetings of the Board which led to the dismissal of the claimant. The resignation is well recorded in the Board minutes.

18. The claimant prays for;

- a. a declaration that the dismissal was unfair;
- b. payment of Kshs.3,600,000 being gratuity at the rate of 23% of the salary earned for three years.
- c. twelve (12) months compensation for unlawful dismissal;
- d. three months' salary in lieu of notice Kshs.1,200,000;
- e. interest;
- f. costs

Defence

19. The respondent filed its amended response to the statement of claim on 17th February 2011.

20. The respondent called Zacharia Ondegi to testify on its behalf as RW1. RW1 relied on a witness statement filed on 18th August 2016 which was adopted with few additions.

21. The nub of the defence is as follows;

Respondent admits all particulars of employment. States that by a letter dated 2nd July 2009, it asked the claimant to show cause why disciplinary action should not be taken against the claimant on the two aforesaid charges. That the claimant was summoned before the Human Resource Committee of the Board to make oral representations and he appeared on 27th July 2009.

22. The claimant was dismissed for gross misconduct on 22nd July 2009.

23. Issues for determination

The issues for determination are:

- a. whether the claimant was dismissed from employment of the respondent for a valid reason and in terms of a fair procedure;
- b. whether the claimant is entitled to the reliefs sought.

24. Issue a

From the facts of the case, it is apparent that all the bidders for the Posta Pay system were satisfied with

the outcome of the bid and the procurement process leading to the award of the tender the subject of this suit. None of the bidders appealed the process.

25. The audit report reveals that the Posta Pay system was working well and made more profits than Western union and Money gram. It is also true that known individuals, not the claimant, were involved in fraudulent activities leading to the loss of money by the respondent. The claimant was not associated with the fraudulent activities and was not charged or questioned about that. There is no evidence at all that the claimant failed to follow duly laid procedure in the procurement of Posta Pay system. This could not, and can't be a valid reason to dismiss the claimant. No gross misconduct has been established in this respect.

26. With regard to the 2nd charge of failing to do due diligence on the Afripayment (K) Ltd., the court is satisfied that the claimant was not part of the due diligence team that visited the United States of America to establish suitability of Posta Pay system before it was acquired by the respondent. The team mandated to do the due diligence, chaired by Major General (Rtd) Kariuki has been named in this Judgment hereinbefore.

27. There is no iota of evidence tendered by the respondent to indicate that at any given time the claimant was tasked with this activity. Particulars of any failings in this respect are not valid at all. The claimant has shown on a balance of probability that the charges made against him were not valid.

28. The claimant has also demonstrated that at the sitting of the Human Resource Committee of the Board, he was prevented from making his presentations in his own defence. The minutes of the sitting reflects this omission.

29. It is not sufficient to simply ask the claimant if he had anything more to add to his previously submitted written answer to the notices to show cause. The Human Resource Manual of the respondent provides that an employee charged with misconduct be given a hearing by the disciplinary committee. A mere semblance of a hearing does not suffice. The claimant has therefore equally proved on a balance of probability that the process leading to his dismissal was not fair.

30. The answer to the question in issue (a) is in the negative therefore. The court declares that the dismissal of the claimant was unlawful and unfair and in violation of section 45 (1) and (2) of the Employment Act, 2007.

31. Following the decision in **Andrew Tanui –Vs- Postal Corporation of Kenya, Industrial Court Cause number 600 of 2009**, although the claimant has claimed, damage for breach of contract; general and aggravated damages, the court finds that, it is wrong to seek multiple remedies for the same breach.

32. In this case, the court having found that the claimant was dismissed unlawfully and unfairly contrary to section 45 of the Employment Act, 2007, the court finds that the claimant is entitled to compensation in terms of section 49 (1) (c) as read with 49 (4) of the Act.

Issue b

Compensation

33. From the facts of the case, the claimant was General Manager, customer service infrastructure. He was first employed on 23rd September 2003 on three years contract.

34. He served diligently and the contract was renewed for a further three (3) years with effect from 1st October 2006. The contract was due to end on 30th September 2009. The claimant had about two months left to serve the contract, but the same was renewable. The claimant did not only lose the remaining term but also lost opportunity for renewal of his term. Due to bad publicity, the claimant lost a mortgage facility he was concluding at the time for Kshs.7 million and in the process lost the deposit of

Kshs.700,000 he had paid as deposit and Kshs.22,000 valuation fees.

35. Following the award of the court in **Industrial Cause number 312 of 2010, Fred Odhiambo –vs- Postal Corporation of Kenya**, in which the claimant was dismissed in similar circumstances as the present case, the court awards the claimant ten (10) months salary as compensation for the dismissal. The court has considered that the claimant lost a highly paid job and was unlikely to get a similar job. The claimant did not contribute to the dismissal but was rather a victim of the prevailing circumstances in the corporation. The claimant, unlike Fred Odhiambo his General Manager was not paid gratuity upon dismissal. He was thus discriminated against.

Gratuity

36. The claimant seeks payment of gratuity at the rate of 25% of the salary earned for the three years served. It is clear that the claimant had about two (2) months left to completion of the three year contract which commenced on 1st October 2006. The claimant testified that Fred Odhiambo, had six (6) months left on his three year contract but was paid full, thirty six (36) months gratuity. The claimant testified he was discriminated upon and seeks thirty six (36) months salary as claimed.

37. The terms of the contract of the claimant is for payment of 25% gratuity based on the basic salary for the entire term of the contract. The claimant was serving the last year of contract when the same was unlawfully and unfairly terminated. The claimant is entitled as of right to gratuity for the period served.

38. The court awards the claimant gratuity for the served term of thirty four (34) months and twenty two (22) days in the sum of Kshs.3,473,333.

Notice pay

39. In terms of the contract of service, the claimant is entitled to payment in lieu of three months' notice by virtue of the finding that the dismissal was unlawful and unfair in the sum of Kshs.1,200,000.

40. Judgment is entered in favour of the claimant against the respondent as follows;

- a. Kshs.4,000,000 compensation equivalent to ten (10) months salary;**
- b. Kshs.1,200,000 in lieu of three months notice;**
- c. Kshs.3,473,333 gratuity for the served term of the contract at 25%;**

Total award Kshs.8,673,333.

d. Interest at court rates from date of filing suit till payment in full in respect of (b) & (c) above and from date of Judgment with respect to (a) above.

e. Costs of the suit.

Dated and delivered at Nairobi this 9th day of December 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE