



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 606 [N] OF 2009

BETWEEN

ANDREW K. TANUI CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA..... RESPONDENT

Rika J

CC. Mr. Kidemi

Ms. Guserwa instructed by J.A. Guserwa & Company Advocates for the Claimant

Mr. Maruti instructed by Simba & Simba Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 16th October 2009. The Respondent filed its Statement of Response on 19th January 2010 and a Bundle of Documents on 22nd July 2010.
2. The Claimant testified on 8th September 2010, 5th May 2011, 16th May 2011, 22nd July 2011, and 30th November 2011 when he closed his case.
3. The Respondent State Company testified through its Manager in Charge of Planning and Resources Mr. John Kipyegon Tonui, and Its Rift Valley Regional Manager Mr. Muktar Abdullahi. They gave evidence on 30th January 2013, 22nd February 2013 and 28th June 2013. The Court ordered the proceedings closed on 26th July 2013. The dispute was last mentioned on 2nd December 2013 when the Parties confirmed the filing of their Final Submissions and were advised Award would be delivered on notice.

The Claim

4. The Claimant states he was employed by the Respondent on 2nd October 2007, as the General Manager Finance and Strategy. He was placed on a three year contract, ending 31st September 2010. He earned a

monthly gross salary of Kshs. 355,500.

5. He did not serve out the full term. He was sent on compulsory leave on 30th April 2009. On 2nd July 2009, the Respondent communicated its reasons for sending Mr. Tanui on compulsory leave, in a detailed letter calling on him to show cause why disciplinary action should not be taken against him. These reasons may be summarized as follows:-

- a) The Claimant failed to inform the Respondent's Management and Board of Directors, on the likely impact of amendment of the contract between the Respondent and Afripayment [K] Limited on the resources of the Respondent;
- b) Failure to ensure the Respondent gets reimbursement for International Monetary Transfer;
- c) Doing business with a firm Afripayment [K] Limited with doubtful financial stability;
- d) Failure to take action to ensure the Respondent does not suffer losses through EFT System;
- e) Poor maintenance of records for PostaPay;
- f) Failure to maintain accurate debtor balance;
- g) Failure to explain debtor balance of Kshs. 44 million; and
- h) Failure to do regular bank reconciliation for central accounts.

6. The Claimant answered the allegations in his letter of 10th July 2009. The Respondent wrote to the Claimant on 22nd July 2009, dismissing him from service. He was found guilty of Negligence of Duty and Mismanagement of PostaPay Product, which offences amounted to gross misconduct. The Claimant states the decision of his former Employer was unfair and unlawful, and seeks the following Orders:-

- a) Reinstatement to his previous position without loss of benefits;
- b) Salary arrears for the entire period the Claimant has been out of employment;
- c) Damages for wrongful and / or unfair termination;
- d) In the alternative he is paid terminal benefits comprising 3 months' salary in lieu of notice at Kshs. 1,066,500, Pay in lieu of leave of 39.15 days at Kshs. 279,252, Gratuity for 3 years at Kshs. 1,953,000, salary for the period 23rd July 2009 to 11th November 2010 at Kshs. 355,500 per month amounting to Kshs. 5,566,059- total Kshs. 8,864,811;
- e) Maximum compensation of 12 months' salary for wrongful dismissal; and
- f) Costs with interest.

7. Tanui testified he is an Accountant by Profession and Certified Public Secretary. He was serving as a Lecturer and Consultant at the time of his giving evidence. He applied for the position of Manager Internal Audit, after the Respondent called for applications in an Advertisement made in May 2007. The Claimant was interviewed for the position of General Manager, Finance and Strategy. He was offered a written contract of employment, in a letter dated 2nd October 2007. His appointment was effective from 3rd October 2007. He reported on 12th November 2007.

8. His duties under clause 3 of the contract were given as below:-

- a) To provide powerful leadership in the area of finance and strategy;

- b) Sensitize and guide the Management on revenue targets that should be achieved through marketing and sales strategies;
- c) Formulate financial resources mobilization strategies that are necessary to implement corporate goals;
- d) Develop an appropriate costing model to ascertain the cost of service delivery;
- e) Prepare financial statements to ensure that financial benchmarks are being met;
- f) Coordinate budgetary preparations and ensure that financial benchmarks are being met;
- g) Forecasting, planning, budgeting and control;
- h) Develop and implement a prudent financial investment policy in line with Board approvals;
- i) Observance of recognized financial and accounting standards;
- j) Compliance with audit recommendations, procurement policies and procedures;
- k) Developing and monitoring implementation of corporate business strategy;
- l) Monitoring and reporting on compliance with the Universal Postal Obligations; and
- m) Any other duties assigned by the Postmaster General.

9. He worked diligently. In his first performance review for the financial year 2007/ 2008 he was rated 'very good'. Subsequent reviews were highly commendable. He was sent on compulsory leave on 30th April 2009 after some Forensic Auditors visited the Respondent's Offices.

10. The Claimant gave specific answers to the questions raised in the letter to show cause why disciplinary action should not be taken.

§ Prejudicial amendment of the Contract : In response to the first accusation [see paragraph 5 [a] above] the Claimant explained that the Board of Directors had resolved on 11th April 2008 that Afripayments LLC should take full responsibility for international marketing, while the Respondent takes full responsibility for local marketing, excluding provision of send/ receive forms related to stationery. The Board indicated the effective date of the revised contract be 1st January 2008, subject to any outstanding/ accrued rights and obligations by the Parties. The Claimant did his analysis of the impact of the overall amendment on the marketing expenditure. The Board and the Management were aware both Parties to the contract had existing rights and obligations, as were the Parties themselves. The Claimant had written a Memo to the Postmaster General and the Management on 7th March 2008, advising that Afripayments be required to make good their 50% contribution towards the planned advertisements, and settle the outstanding amount of Kshs. 16.7 million as at 7th March 2008. The Board and the Management were given the full financial information by the Claimant.

§ Failure to get reimbursement for International Money Transfer: After he joined the Respondent, the Claimant convened a meeting between the Respondent and Afripayments on 15th November 2007. It was established Afripayments owed the Respondent Kshs. 39,503,462 as of 31st October 2007 in form of international float. It was agreed this be paid immediately. Subsequently, the Claimant wrote various demand letters from 2007 to 2009 pursuing outstanding sums from Afripayments. He at the same time wrote to Afripayments threatening the contract would be revoked if the money was not paid; wrote to the Respondent's Management seeking support to have Afripayments comply; and wrote to the Board advising on the outstanding amounts. Most of these actions by the Claimant yielded results and the bulk of the debt was paid.

§ Doing business with Afripayments, a firm with doubtful financial stability: By the time the Claimant was employed by the Respondent, the contract with Afripayments was 22 months old. On 2nd September 2008, the Claimant had written to the Postmaster General, advising “*the Management seriously evaluates the performance of the Company with a view to having outstanding amounts settled.*” He advised that the Respondent obtains the financial records of the Company to establish its going concern status.

§ Action to ensure the Respondent suffered no losses through EFT System: The accusation was unjustifiable. The Respondent alleged that cases of questionable EFT transactions resurfaced from March 2007. The Claimant was not there in March 2007. He was not aware of fraudsters. The Claimant had requested that his Office be facilitated in examining this System.

§ Poor maintenance of records for PostaPay: Under paragraph [e], the Respondent charged that the Claimant had failed to use the correct software for accounting EFT transactions. The System had errors. The Claimant acknowledged the Manual Accounting System had errors. He pointed out the Respondent did not have an IT department in the Finance Department. There was no software. The Claimant initiated the automation of the accounting function, and was working on it in conjunction with PricewaterhouseCoopers firm, by the time he left employment.

§ On accurate Debtor Balance: The Respondent alleged that in the year ending 2007, a debtor balance of Kshs. 8.9 million was reflected. In the year ending June 2008, the debtor balance in the final statement showed a debtor balance of nil. Before November 2007, the Claimant was not in employment. By end of June 2008, he had worked for 7 months. By the time he was employed, the financial year had closed. The debtor balance was confirmed by Afripayments as at 30th June 2007 at Kshs. 15.5 million, not Kshs. 8.9 million. The debtor balance as at 30th June 2008 was Kshs. 114.4 million, and was disclosed in the 2007/2008 Accounts audited by the Controller and Auditor General.

§ Un-explained Debtor Balance of Kshs. 44 million: The allegation was that the Claimant had failed in the proper maintenance of books of account and reconciliation, which left a debtor balance of Kshs. 44.7 million unaccounted for. The Claimant explained that as of 30th June 2008, the financial statements indicated the Public owed the Respondent a total of Kshs. 114.4 million. Of this, Kshs. 66.6 million was owed by Afripayments. Unknown Debtor would owe the Respondent Kshs. 44.7 million. The Claimant advised that the Unknown Debtor could as well be attributed to money lost through PostaPay and mis-posting errors by Postal Clerks in their daily summaries. He recommended internal audits be carried throughout all postal outlets; the Head Postmasters and Postmasters to undertake daily reconciliation and investigate any variances; and they, and other Regional Managers be given full access to PostaPay Reports.

§ Failure to do regular Bank Reconciliation: The Claimant was said to have failed to offer leadership in this aspect. Only two accounts had been prepared in two years, which constituted gross negligence of duty. The Claimant explained that the Respondent did not operate a separate Bank Account as required under the contract. This was an oversight at the implementation of the contract. The Respondent operated PostaPay Product like the Money Order Product whose proceeds were accounted together with sundry product and services. Banking was done into one Post Office Account. This was a full banking facility, allowing for deposits and withdrawals. It was not possible therefore to do reconciliation of PostaPay product on a regular basis. However, the Respondent continuously carried out Bank Reconciliation on all operational Bank Accounts as confirmed by the letters from the External Auditors with respect to the Audit Reports for 2007/2008 and 2008/2009. Forensic Auditors similarly referred to two bank reconciliations. All Post Offices operated like individual banks, doing individual reconciliation. Before the year closed however, there was a consolidated reconciliation carried out by the Claimant’s Office.

11. Having received these answers from the Claimant, the Respondent invited the Claimant to the Board for a hearing. He availed himself. He took about two minutes with the Board. He was told, “*We have received your details. Do you have anything to add or subtract?*” The Claimant expected questions from the Board on specific issues raised in the charges and answers to those charges. He was released and told he would be recalled if the Board needed any clarifications. He received the letter of dismissal dated

22nd July 2009, on 31st July 2009. The dismissal was highly publicized in the local media.

12. Tanui was not issued notice of termination, and was not given a hearing. He was not given a valid reason or reasons for termination. He testified he is entitled to the prayers enumerated under paragraph 6 of this Award.

13. He was not aware of any negligent performance of his role. Appraisals had rated his performance 'very good.' He was not given a copy of the Forensic Audit Report that was alleged to have implicated him. He saw this Report here in Court for the first time. He was not asked to comment on the audit, notwithstanding that this was a Financial Audit. There was not a single section of the Report that adversely mentioned the Claimant. His name only appeared in the introduction. The Forensic Report at page 14 referred to failure by the Claimant's Office to maintain internal controls, keep proper accounting records, and explain discrepancies in movements and debtor balances. The Claimant testified his answer to this was as given in paragraph 10 of this Award.

14. Only the Claimant as Head of his section was dismissed. Six other Top Management Officers from other Departments were dismissed. The Afripayments - Respondent's relationship, from the Forensic Report, started in 2006. The Claimant was not in employment then.

15. The Claimant stated he was 37 years old at the date of his testimony. He had not been able to secure alternative employment. He had applied for jobs, but always discredited when it came to references. He had been turned down by potential Employers on account of his association with the Respondent. He testified he has no issue with the Management of the Respondent and is ready to continue serving.

16. Cross-examined for three days by Learned Counsel for the Respondent Mr. Maruti, Tanui confirmed he applied for the job, and attached supportive certificates and testimonials. He was previously employed by another State Company Kenya Pipeline as a Senior Auditor. The position of General Manager Finance was more senior. He was skilled for the position he applied for. Competence entails knowledge, skills, experience and attitude. Kenya Pipeline had a higher turnover than the Postal Corporation. He wrote his MBA thesis on corporate governance.

17. He would sit with the CEO of the Respondent and advise the CEO in the Claimant's area of competence. The Responsibilities were different. The Claimant did not take responsibility, for the advice he gave to the CEO. He agreed he would assume responsibility if he misadvised the CEO. He entered employment on 12th November 2007 and exited on 22nd July 2009.

18. There were allegations during his tenure that the Respondent lost money through the PostaPay EFT System. He did not know how much was stolen or who stole. There were allegations the Respondent was losing money. The Claimant did not have any reason to doubt this. He did not write back to the Respondent on being sent on compulsory leave, to say he did not believe in the information supplied that the Respondent was losing money. He could not judge if the Postal Corporation had weak financial systems. It is correct to say State Companies have lower governance levels than Private Companies. He expected the Respondent to have a comparatively weak governance structure. Other Officers in Management were dismissed. The Claimant was answerable to the CEO.

19. The Claimant understood his performance rating to mean he was doing very well. The review alluded to his lack of teamwork at business and personal level. The CEO Mr. Odhiambo was also dismissed. The Claimant denied knowledge of the circumstances of the CEO's departure. The Claimant stated he knew the firm of Deloitte Touché. It was a reputable Audit firm. Tanui started auditing in the 1990s and would place Deloitte Touché on the same pedestal as his fictional Tanui & Associates, Auditors.

20. Except as reported to him, he was not aware of money lost by the Respondent. He appeared before the Board to defend the allegations stacked against him. He gave a detailed response. His appearance before the Board was for at most, 5 minutes. He was merely asked to say if he had anything to add or subtract. He could say he was given a chance by the Board, but no clarification was sought arising from his answers.

21. He conceded it was his responsibility to advise the Respondent on the implication of its engagement with Afripayments. Impact, Tanui agreed, is the bottom-line in every contract. He gave professional advice to the Respondent on the revenue sharing ratio with Afripayments at 80: 20. He advised that the Competitors Western Union and Moneygram did not charge access fee, but did not mention the Competitors' revenue sharing ratios. He did not know if the PostaPay EFT Brand Competitors had revenue sharing ratios. Tanui's advice was not relevant to the contract amendment. He advised the Respondent to retain the ratio it had with Afripayments.

22. In defending the charge of prejudicial amendment of the contract, Tanui mentioned that there was an omission of marketing expense. He attended the meeting of Finance and Technical Committee of 29th April 2008. He was not called upon to advise on the marketing expenses. This was not a responsibility given to him. He conceded his letter of appointment included marketing. There was loss attributed to marketing. It was said there was a loss of Kshs. 17.3 million from marketing. Tanui was not convinced there was such a loss. He did not know if the money was lost. He did not make this statement in his answer to the letter asking him to defend the charges. Loss was said to have occurred while the Claimant was still in employment.

23. The CEO Fred Odhiambo wrote to Dalmas Menya General Manager Afripayments on 20th December 2007 demanding among others, payment of marketing expenses of Kshs. 12 million. These were outstanding obligations being followed. On 2nd September 2008, the CEO again wrote to Afripayments demanding for payment of Kshs. 17.3 million on marketing expenditure. The Claimant used to draft these demand letters for the CEO. He was convinced the contents were accurate. The Claimant's reply to the allegations against him came 9 months after the letter dated 21st October 2008 to Dalmas Menya from Odhiambo, a letter drafted by the Claimant for his CEO. A year down the road, Afripayments had not paid the marketing expenditure back to the Respondent.

24. The Claimant was aware of this outstanding obligation, but stated it was not a loss, just an unpaid obligation. It used to take Afripayments some time to meet its obligations to the Respondent. The Claimant testified he chaired several meetings between the Respondent and Afripayments. He always raised the subject of settlement of the debt. As of June 2008, the amount stood at Kshs. 26 million and Kshs. 84 million as of 18th April 2009. Revenue targets were affected by this trend. One of the accusations against the Claimant's Office was that it had accepted a personal cheque of Kshs. 23 million from one Ephraim Maina [a politician] paid on behalf of Afripayments. The cheque went through.

25. The Claimant testified further on cross-examination that he found Afripayments already in contract with the Respondent when he was employed. At the time, Afripayments owed the Respondent Kshs. 34 million. By June 2008, the amount had risen by about Kshs. 18 million. By the time the Claimant was dismissed, the sum was still outstanding. There was no time Afripayments cleared its obligation to the Respondent. Due to the erratic nature of these payments, there was ground to conclude Afripayments was unstable. A cheque returned unpaid confirmed this malady.

26. Tanui acknowledged he exchanged e-mail communication with Joseph Kiptoo and B. Murerwa on 29th / 30th April 2008. Kiptoo was the Manager Treasury and Murerwa in Charge of Management Accounts. Kiptoo wrote, *'this is good analysis of PostaPay impact on PCK financial position.....it needs someone like CS to explain what is the consideration PCK receives to give away 25% of its revenue commission realized from its own brand PostaPay, to Afripayments LLC, yet the company who is the supplier of the software is enjoying good revenue from access fees. I would find it difficult to explain this to anyone querying the same.'* The Claimant conceded the sharing ratio was not good business, but he was still settling down, and appreciating what was going on. He conceded what Kiptoo stated would be valid to-date.

27. The Claimant maintained he gave the Respondent proper financial advice. He gave written advice on the marketing expenses and commission. Advice was in the form of a Board Paper. The Paper did not reveal its addressee. Kiptoo and Murerwa were referring to the advice given by the Claimant in the e-mail exchange of 29th / 30th April 2008. He attended the meeting of the Finance and Technical Committee of

29th April 2008. He did not discuss the written advice with the Committee at this session. His terms of service involved provision of leadership. This entailed advising.

28. If debt from Afripayments was paid late, the Respondent would have been making loss. Marketing was shared 50-50. The records showed the debt continued to grow. Somebody slept on his job. The Claimant denied it was him who did so. Afripayments had two streams of earnings- 25% commission and access fees. Afripayments managed the platform. In terms of the software, only Afripayments would verify the commissions. The Claimant advised there was need for independent verification, and followed up on the advice. He wrote e-mails on the issue of system access. He was not part of the Respondent's Treasury, but agreed it was his responsibility to ensure PCK was not shortchanged.

29. The agenda in most of the meetings was about settlement of the Afripayments debt. The Legal Department was not in most of the meetings. Tanui sat in the Committee which engaged the audit services of Deloitte Touché. The Auditors interviewed Tanui.

30. The Audit Report concluded the internal controls were weak. There was evidence the Respondent lost money. The Claimant could not confirm that money was lost during his tenure. He could only confirm this happened prior to 27th November 2007. In his tenure, there were cases of money not being accounted for. There was a complaint that Kshs. 44.8 million could not be accounted for. Inadequate control was factual. In layman's language it was correct to say money was missing. The Claimant conceded accounting records were not maintained using proper accounting software. When he joined the Respondent, accounting was done manually. He initiated the remedying of the accounting records. It took time, because of the tendering procedures to have this done. The process started after PricewaterhouseCoopers was appointed.

31. Reconciliation of Bank Accounts was done every month, for each Post Office. Deloitte erred in its Report by reference to Bank Reconciliation from 30th June 2007 to 30th June 2008. The Consolidated Reconciliation was carried out at once for the whole year. All products were banked together. Reconciliation could not be done for each product. The Claimant did not make a recommendation for specific account for each product. Specific banking for each product might have assisted the Respondent in securing the Kshs. 44.8 million which was attributed to unknown debtors. Data base records were in the ICT department, not in Finance. At the Post Office, what happened was operational function, not accounting function. Accounting was done later at the Head Office at the end of the year. If accounting was done quarterly, there would have been an indication that there were problems. He was not answerable for the Branches. The unaccounted for Kshs. 44.8 million was from the Branches countrywide. 3600 transactions at the Branches could not be captured before the end of the year global accounting exercise. The Claimant did not agree that he was grossly negligent, and properly dismissed from employment.

32. Redirected by Ms. Guserwa, the Claimant testified that he had given his credentials to the Respondent, and all were accurate personal information. His skills were sufficient for the role. He was answerable to the CEO. He advised the CEO who would give directions. The Claimant never acted without authority. He joined Postal Corporation when PostaPay was 14 months old. It was an ongoing project. When he joined, he was advised by the CEO there were issues with the PostaPay product. As of 31st October 2007, Kshs. 39 million was owed to the Respondent. The Claimant spearheaded the initiative for debt collection and as of 18th April 2009, the Respondent had collected Kshs. 619.7 million, against a total amount due of Kshs. 704.3 million.

33. The Claimant participated in drawing the terms of reference for Deloitte Touché. He only saw the Audit Report in the Statement of Response. It did not implicate him at all. It only had his name twice. His performance for the 17 ½ months served was exceptional. He was given a rating of very good performance in the appraisal. He was not negligent. He was not given any document to show he failed in his duties. The allegations against the Claimant were false. There was no accounting software at the time he joined. Tanui prays the Court to uphold his Claim.

The Response

34. The Respondent's position is that the contract concluded between the Parties allowed either Party to terminate the contract by issue of a three month notice, or payment of the equivalent of one month basic salary in lieu of such notice. The Respondent was entitled to terminate the Claimant's contract if his performance was unsatisfactory. He presented Curriculum Vitae and Testimonials suggesting he was highly qualified for the Finance Docket; he performed the role incompetently and negligently. The Claimant conceded there were management failures, but sought to shift the blame to other Managers. He was correctly dismissed. The Respondent urges the Court to dismiss the Claim.

35. John Kipyegon Tonui testified that Andrew Tanui served as the Chief Manager, Finance and Strategy from 12th November 2007. He was in Executive Management, reporting directly to the Postmaster General. He had applied for the position of Manager Internal Audit and Investigations. He had previously worked with Kenya Pipeline Corporation. He had joined Kenya Pipeline as a Graduate Trainee, and left as Senior Internal Auditor. He had accounting experience from 1994. He had studied up to the level of MBA, and researched on Internal Auditing in State Corporations. He was in 2005 awarded commendation for the best Internal Auditor of Kenya Pipeline. He was offered the position of General Manager Finance and Strategy based on his stellar background. He was to provide powerful leadership in Finance and Strategy. He was to assume full responsibility for his docket; it was not for the CEO to take responsibility for Technical Officers. Tanui was to prepare Financial Statements and ensure benchmarks were met.

36. His appointment was for three years. The contract was renewable. It could be terminated prematurely by notice or notice pay. It could also be terminated if the Respondent was not satisfied with the Claimant's performance. The Claimant would be paid gratuity of 25% basic salary upon successful completion of the three years. It was not payable to someone who left on gross misconduct. He was appraised by the Postmaster General. Appraisal would be ratified by the Board. The Postmaster General was Fred Odhiambo, who also left as a result of the PostaPay Audit. The Deloitte Touche Report recommended certain Officers needed to step aside. Among them was the Postmaster General. He left because the Organization was not happy with his performance. Part of his duties involved the supervision of Mr. Tanui. Tanui left based on the same Audit Report which sent away his Supervisor Fred Odhiambo.

37. The Claimant was charged with negligence of duty and mismanagement of the PostaPay Product. He responded. He was invited to appear before the Board for a hearing in accordance with the contract of employment and the law. He was given an opportunity to be heard. Due process was followed. The Board heard him, deliberated and dismissed him. The letter of dismissal is comprehensive. Reasons for dismissal were given. There was no malice in the process. Tonui was not aware that the Claimant was humiliated by the Respondent. He was not aware that any person was feeding the media with information on Tanui's dismissal to cause Tanui humiliation. The Claimant would not be entitled to notice or notice pay, as he was dismissed for gross misconduct. Tonui was not aware of any outstanding annual leave days, owed the Claimant. If any were found due, the Respondent would pay. Dismissal process was valid and fair.

38. On cross-examination, Tonui testified that the Claimant's qualifications met the standards required by the Respondent for the position filled by the Claimant. Tanui was senior to Tonui. The Claimant was appraised by the CEO. Tonui would not appraise him. Tonui told the Court he holds a BA degree, Diploma in Human Resources Management, and MBA in Human Resources Management. The Board was satisfied Tanui was the person it was seeking to fill the position of General Manager, Finance and Strategy. There was no reason to doubt the Claimant's ability.

39. PostaPay was already operational by the time the Claimant joined. Tonui had worked for 14 years by the time Tanui joined the Respondent. PostaPay was introduced in 2003, 3 years before Tanui was employed. He took over from a Mr. Ngare. The project was implemented in phases. The Respondent found the project viable. The project was working well when Tanui joined.

40. Deloitte Touche was commissioned to audit the project. It was discovered there were anomalies beginning 2006-2007. The audit stretched to the period before Tanui was employed. Tonui confirmed money was lost before Tanui was employed.

41. Tanui was given a job description on recruitment. He was to provide powerful leadership in finance. His appraisal showed he was on track. There was no accusation in any of the appraisals that he lost money. He was appraised in February 2009, and suspended 20th April 2009. Forensic Audit had already been carried out. Tonui was unable to say if Tanui had been availed a copy of the Audit Report. He was asked to proceed on leave to allow for further investigations. He was issued the letter to show cause why disciplinary action should not issue. He was not recalled to the Office or given the Audit Report.

42. The Claimant was alleged to have failed to collect reimbursements from international partners. He made available correspondences showing he had made demands for payment. Money owed was about Kshs. 117 million. He found PostaPay in operation but had the duty to ensure there were no continued losses. He stated it was his team which discovered Kshs. 44.7 million could not be accounted for as a result of weakness in the reconciliation processes. His response was elaborate. He appeared before the Board. Tonui ushered him before the Board, but did not know what transpired in the meeting. The Claimant was issued the letter of dismissal. The letter stated he was dismissed for gross misconduct. From the Audit Report, the Claimant did not steal money. Money was lost. He was negligent. There were no other grounds other than what was contained in the letter to show cause. Tanui testified that the Respondent would pay to the Claimant what the Court directs to be paid. He did not agree that the Claimant was unfairly dismissed.

43. Redirected, Tonui testified the CEO Fred Odhiambo carried out the evaluation of the Claimant's performance. He was himself dismissed by the Respondent on account of the same issues raised by the Audit Report. The dispute herein is not about the Claimant's qualifications; it is about his performance. He did not sign the contract with the Afripayments; his duties however, entailed how the contract was performed. It was about how the contract affected the organization. The anomalies uncovered by Deloitte Touche related to the Claimant's duties.

44. The Debtor Balance of Kshs. 44.7 million related to the year ending 30th June 2008. Tanui was in employment at the time. He was not sent on compulsory leave alone. General Managers were sent on leave, including the CEO who gave the Claimant favourable appraisal in February 2009. His role entailed giving the Respondent financial advice. He should have given advice whether the contract should be terminated. He was negligent.

45. The letter of dismissal dated 22nd July 2009 gave reasons why the decision against the Claimant was taken. His explanation was considered and found unacceptable. He was found to have neglected his duty, and mismanaged PostaPay Product. He was not charged with stealing. There was no mention of theft. His contract was to lapse in November 2010. He left about 16 months before the contract lapsed. Tonui did not know if Kshs. 44.7 million was recovered.

46. Muktar Abdullahi holds a B.Com degree and CPA. He joined the Respondent in 1994. Tanui was his senior when Abdullahi worked as an Internal Auditor. The two were not in the same department. Abdullahi was in the Internal Audit Department, which was independent and reported to the CEO. Abdullahi was conversant with the PostaPay Product. His duty, and that of the Claimant, was to implement the product effectively and advise on anomalies. Irregularities were detected in February/March 2007. There were extensive investigations carried out. Abdullahi investigated Post Offices in the Rift Valley Region. Certain transactions were purported to be in the system, but the Respondent had not received any money.

47. Around December 2007, serious issues were raised. Abdullahi was at the time in Nairobi, and assisted the Audit Manager in meetings relating to Afripayments and PostaPay. It was suggested the Kenya National Audit Office be involved. This Office advised the Respondent to commission an independent Audit Firm, and Deloitte Touche was engaged. Senior Managers were implicated in the resultant Audit. They were suspended.

48. There was EFT System failure. There was no proper due diligence done preceding the contract with Afripayments. The contract was clear primary server would be located at the Respondent. This was not done. Most of the Afripayments' rights were abused. Server was hosted by Afripayments. The Claimant

joined in November 2007. The PostaPay System was already in place.

49. Between 2007 and 2009, the Respondent was losing money. There were false entries made in the system. Tanui was dismissed on 22nd July 2009. The affected Senior Managers were asked to defend themselves. Abdullahi did not know what they said in defending themselves. In accounting terms, 'unexplained sum' meant the sum was not supported by documents. 'Unexplained Debtor Balance' meant the debt in the ledger could not be explained. Abdullahi could not say clearly who was responsible. The Claimant was responsible for preparation of Books of Account. The Witness was not able to say if this happened during the Claimant's tenure. The Internal Audit team got little support from the CEO. Abdullahi did not come to find if the losses were ever recovered.

50. He never worked under Tanui, Abdullahi testified on cross-examination. Tanui was heading a parallel Department. Audit advises Management on the effectiveness of the Systems. This is done depending on what is planned at the beginning of the financial year. High risk areas are audited twice a year. Audit liaised with all other departments. PostaPay was initiated in 2006. Due diligence was taken. A team visited Afripayments LLC. There were important issues such as hosting. The Afripayments hosted the primary server. There was supposed to be in place back-up server at KDN and Posta. Abdullahi was unable to say if the back-up server was put in place.

51. The Internal Auditors detected a fictitious transaction of Kshs. 5.6 million payable to a firm in Belgium in February 2007. Abdullahi detected similar fraud in Eldoret of Kshs. 400,000 and a similar amount in Lanet, in March 2007. Internal Auditors were required to audit all the Branches and came up with a Report in April 2007. This formed the basis for the forensic audit. Abdullahi was unable to say if the report of the Internal Auditors was availed to the Court. He conceded however that by the time Tanui entered the scene, the Respondent was already bleeding.

52. Abdullahi did not know if Tanui made any recovery of funds for the Respondent. The server system was put off by the time the Senior Managers were dismissed. No final audit was carried out. Tanui was not responsible for setting up of PostaPay. He may not have been the person responsible for the transaction. The forensic audit stated it could not guarantee the accuracy or the completeness of the financial information. Abdullahi did not know if the unexplained loss of Kshs. 44.7 million was captured in the Account Books.

53. Internal Audit, Abdullahi testified on redirection, advised the entire Senior Management of which Tanui was a member. Management was not bound by the advice of the Internal Audit Office; it had the final say. Afripayments' contract continued running from 2006, and the Respondent continued to bleed. Afripayments was stopped only after the Senior Managers left. Abdullahi never saw any piece of Advice from the Senior Managers to terminate Afripayments' contract. Finance was under the Claimant, as was Strategy. There were problems when Tanui joined. Abdullahi however was not aware of any recoveries made by Tanui. Deloitte Touche carried out audit in two phases. The Report was one of the phases. As a Senior Manager, Tanui was expected to know if the System was effective. There was no denial made by the Claimant that a loss of Kshs. 44.7 million occurred. The Respondent prays for dismissal of the Claim.

The Court Finds and Awards:-

54. The Claimant was employed by the Respondent State Company effective from 3rd October 2007, as the General Manager, Finance and Strategy. He was employed on a 3 year contract, which was due to lapse on 31st September 2010. The contract was renewable. The Claimant did not serve his full term. He was charged on 2nd July 2009 with Negligence of Duty and Mismanagement of the PostaPay Product. He was called before the Respondent's Board of Directors on 17th July 2009 for a disciplinary hearing. He was summarily dismissed on 22nd July 2009, for gross misconduct. Dismissal took place 15 months before the lapse of the 3 year contract. He had served for 21 months. The Claimant earned a monthly gross salary of Kshs. 355,500 as of the time of dismissal. He questions the validity of the reason or reasons given by the Respondent in justifying its decision, and the fairness of the procedure. He seeks the alternative remedies captured under paragraph 6 of this Award.

Substantive Justification

55. Sections 43 and 45 of the Employment Act 2007 require the Employer to show valid reason or reasons in justifying the termination of the contract of employment. The Respondent revealed its reasons for dismissal of the Claimant, in the letter of dismissal from service, dated 22nd July 2009. These may be restated to be: **Negligence of duty and Mismanagement of PostaPay Product**. The two offences were deemed to constitute gross misconduct, warranting dismissal from service.

56. The details of Negligence of duty and Mismanagement of PostaPay Product are captured in the letter from the Respondent to the Claimant dated, 2nd July 2009, discussed in paragraph 5 of this Award. The first ground was that the Claimant never informed the Respondent of the prejudice the Respondent would suffer, in amending the contract between the Respondent and Afripayments. Amendment was done on 21st May 2008, and effective date backdated to 1st January 2008. This resulted in loss of Kshs. 17.3 million to the Respondent.

57. The Court is persuaded the Claimant gave adequate response to this accusation. The Respondent's Management and the Board were aware, that at the point when amendment was done, both Parties had accrued rights and obligations. The Board met and approved the effective date of the revised contract to 1st January 2008, subject to any accrued rights and obligations. The Claimant went on to write demands to Afripayments after the contract was amended. It does not look to this Court that the Claimant neglected his duty, or mismanaged PostaPay Product by failing to advise the Respondent on the effect of amending the Afripayments contract. Furthermore, the original Money Transfer Services Agreement was concluded on 26th January 2006 between the Respondent and Afripayments. It was first varied on 16th January 2007. The Claimant was not in employment on these dates. There were problems with the contract right from the beginning, and the Respondent constantly sought to renegotiate. Other Deeds of Variation were made on 6th May 2008 and on 21st May 2008. The Respondent could not validly lay blame on the Claimant for failure to advise on the impact of the amendments. These amendments had been going on even before the Claimant was employed. At the time amendment was carried out during his tenure, he gave advice, and made a follow up of the Respondents accrued rights under the contract.

58. The second ground on the Claimant's failure to ensure PCK got reimbursement for International Money Transfer was not shown by the Respondent to constitute a valid termination ground. The Claimant was employed on 12th November 2007. He found the Respondent already owed money by Afripayments. There is evidence on the record to show that Tanui called a meeting with Afripayments a few days after he was employed and established the level of Afripayments' indebtedness to the Respondent. He subsequently wrote letters of demand to Afripayments to pay up. He persistently wrote these demands between December 2007 and April 2009. Besides the letters to Afripayments, Tanui sought the Management's intervention and advised the Board. If Afripayments failed to pay settlement with regard to International Money Transfer, the failure could not in the approximation of this Court be laid at the Claimant's doorstep; failure could probably be attributed to the design of the contract and institutional failures on the part of the Respondent and its Partner Afripayments.

59. It is perhaps sad, if not a little bit unnerving, for the Respondent Corporation, to charge the Claimant with the offence of *'doing business with a firm, Afripayments [K] Limited, with doubtful financial stability.'* The Afripayments' contract was concluded between two corporate entities- Afripayments LLC [Localized as [K] Ltd.] and Postal Corporation of Kenya. The Respondent, not the Claimant opted to do business with Afripayments. The Claimant was not there in 2004 when the Respondent generated the Expression of Interest looking for a suitable technology partner to operate the Electronic Money Transfer Service. The Respondent shortlisted Bidders, settled on Afripayments, carried out what was billed as high level due diligence which included visits to Afripayments LLC offices in the USA, and freely concluded a contract with the Afripayments. The choice to do business with Afripayments was made by the Respondent. The record shows the Claimant was not even there when the choice of a Business Partner was made. The Respondent ought to have known if its Partner was of doubtful financial stability through the high level due diligence exercise. The Employee did not make any choice to do business with Afripayments. Furthermore, there was no financial data shown to this Court, to conclude that

Afripayments was of doubtful financial stability. The Claimant did what a reasonable General Manager Finance and Strategy would do, when he wrote to the Management on 2nd September 2008, that the Respondent evaluates the financial status of Afripayments by examining their Audited Accounts for the past two years to establish their going concern status, and their ability to meet future obligations. What more did the Employer expect of the Claimant? This accusation against the Claimant was hollow.

60. The charges under paragraph [d] and [e] of the letter to show cause are like most of the previous charges, anchored on the contract between the Respondent and Afripayments. The Respondent complained about questionable EFT Transactions which began surfacing from March 2007. Notably, the Claimant joined the Respondent in November 2007. From the time the Claimant joined in November 2007, he gallantly worked to stop the Respondent from losing money. He asked the ICT, Financial Services Managers, to facilitate auditors in doing their work; he advocated for Respondent's Finance and Audit Staff to be granted access to Afripayments records; he wrote to all Regional Accountants calling on them to forward to the Head Office PostaPay reconciliation statements; and even advised Management that Afripayments should not have overriding interests over the Respondent's System as this exposed the Respondent. On the poor maintenance of accounting records, the Claimant acknowledged this was a problem, but not a failure on his part. He had pointed out that the Respondent entered into Afripayments' contract without adopting suitable accounting software. He had initiated the automation of the accounting function and engaged PricewaterhouseCoopers. The Respondent did not discount these explanations. The Board of Directors of the Respondent had as early as 27th September 2007 met and observed.....''*PostaPay continues to pose many challenges like any new product in the market...when the contract was signed, a number of assumptions were made that have not been fulfilled due to key market fundamentals e.g. automated system/ lack of it....our system cannot allow us to deliver instant reconciliation as demanded by our customers/ partners....*'' This position did not change even after the Claimant joined the Respondent. It is hard to see why the Respondent would charge him with offences which resulted from the Respondent making certain assumptions under the contract. The explanation by the Claimant that the Respondent entered into the Afripayments' contract without the corresponding accounting software, is supported by the Board's position expressed in the meeting of 27th September 2007. The Respondent had no justifiable reason to blame the Claimant for these institutional weaknesses. Even when fraud was discovered involving the Employees of Afripayments and the Respondent with respect to the Respondent's Kshs. 2.4, the Respondent Top Management preferred to have criminal charges dropped against the suspect, and instead pursued refund from Afripayments. What again would the Claimant be expected to do if the Top Management decided to compromise the Respondent's position under such suspicious and informal arrangements?

61. The Claimant came out across as an honest and truthful Witness, who conceded when he made mistakes, and gave clear evidence on the actions he took in remedying such mistakes. On the e-mails exchanged amongst the Claimant, Mr. Kiptoo and Mr. Murerwa on the sharing of the revenue commission, the Claimant indicates he had raised the issue with the Board. He at the same time acknowledged he was just settling down, having been about 4 months old in the position of General Manager Finance and Strategy. The Forensic Audit carried out by Deloitte Touché, did not personally blame the Claimant as stated in his evidence, for failure in the PostaPay EFT Product. His Office was nonetheless mentioned, but he was not availed the Report when he was called upon to defend himself. He explained to the Court he saw the Report for the first time in the Statement of Response, filed by the Respondent in this dispute. The Respondent appears to have relied entirely on the Forensic Report, even without taking into consideration that the Auditors cautioned '' *we cannot guarantee the accuracy or completeness of the financial information.*'' There were missing records of the PostaPay EFT system data base which made data integrity questionable. There was need for the Respondent to interrogate the Forensic Audit, before relying on it entirely, to take action against the Claimant. At the very least, the Claimant ought to have been availed the Audit Report at the earliest opportunity, before being called on to defend the charges, and given adequate opportunity to study and challenge the incomplete information contained in the Forensic Audit Report. Although the Report suggests there could have been responsibility on the part of 'Financial Services Top Management' for certain shortcomings in the PostaPay Product, it is noted that some of the critical system weaknesses and anomalies were highlighted to the Respondent's Management as early as 6 months into the operation of the system. It is doubtful that the Claimant could have, within the period of about 21 months he served, rectified the critical weaknesses

and anomalies; created a system of financial controls without the requisite investment in accounting software; and established the financial stability of Afripayments. The Forensic Audit Report further raised issues of conflict of interest, calling for investigations of some of the Board of Directors and Managers who may have compromised the position of the Respondent in the Afripayments contract. The Claimant was not one of those mentioned for investigations, but if it was true that there were Board Members and Managers with conflicting interest, this would in the view of this Court only have made the Claimant's work much more difficult, and perhaps even made of him a pawn in a transaction he had little to do with. His performance had been appraised favourably by the CEO over the 21 months he worked. The CEO was sacked over the PostaPay EFT Product, and the Respondent appears to suggest that the dismissal of the CEO compromised the integrity of the appraisal. The Claimant reported to the CEO. There was no one else to appraise his performance. It has not been suggested that he was over-rated, or that the former CEO had reason to over-rate the Claimant. The Court notes that in a case for unfair dismissal brought by the former CEO against the Respondent in the **Industrial Court Cause Number 312 of 2010 between Fred Odhiambo v. the Postal Corporation & the Attorney General [2013] e-KLR**, the Court (Nderi Nduma J) found the Respondent herein had failed to establish its accusations against the former Postmaster General. The former Postmaster General was found to have been unfairly dismissed, and awarded Kshs. 7.4 million in compensation. There is nothing to suggest this decision has been overturned on Appeal or reviewed, so that in the finding of the Court in the present dispute, the sacking of the former CEO cannot be the basis for challenging the former CEO's performance appraisal of Tanui.

62. The allegation that the Claimant failed to maintain accurate debtor balance was not backed by irrefutable financial data. The figures given by the Respondent in its charges against the Claimant were shown to be inaccurate. The Claimant gave a history of the accounts, which was not discredited by the Respondent in its evidence. The debtor balance was confirmed by Afripayments at Kshs. 15.5 million as of 30th June 2007 and disclosed in the 2007/2008 accounts audited by the Controller and Auditor General at Kshs. 114.4 million. The only inaccuracy shown in the debtor account could be the amount of Kshs. 8.9 million as of 30th June 2007 which was contained in statements prepared before the Claimant was employed.

63. The assertion that the Claimant failed to do regular bank reconciliation for central accounts was not shown by the Respondent to be factually correct and a valid ground for dismissal. The Court understood this failure to fall within the same bracket of the challenges faced by the Respondent in updating its accounting systems. The Respondent was required to operate a separate Bank Account for PostaPay Product under the contract. This was not done, and the Respondent lumped the PostaPay Product together with other products like, Money Orders and Stamps, meaning there was one Post Office Account. It was not possible for the Claimant to do regular reconciliation. There was evidence however, that reconciliation was carried out regularly on all operational bank accounts. The explanation by the Claimant on this charge was reasonable. This was not a factually correct or valid ground to justify dismissal.

64. The Claimant conceded that reconciliation was done, and variance of Kshs. 44.7 million established. He explained that the unknown debtor of Kshs. 44.7 million was probably occasioned by misreporting and posting errors by Postal Clerks in their daily summaries. He recommended internal audits be carried out throughout the Postal Outlets; and Local Postal Managers be directed to do daily reconciliation. Although this accusation against the Claimant related to his docket directly, and was not an inherited loss or failure, the Respondent still cannot be said to have established this as an accurate and valid ground to justify dismissal. The Respondent did not dispute that variance could have been occasioned by the relationship between accounting at the Postal Outlets and Reconciliation by the Finance Department at the Head Office. The unexplained Kshs. 44.7 million related to the Respondent's countrywide Branch Network. The Respondent seems not to have established proper accounting systems at the Branch level. This was a weakness, acknowledged by the Claimant, and for which he proceeded to give guidance and leadership on its correction. In assessing the accuracy of the possible loss, the Court has considered that in his evidence on cross-examination, Muktar Abdullahi was not able to say if Kshs. 44.7 million was reflected as having been lost, in any of the Respondent's Books of Account. The loss was not shown to be an actual loss or book loss, and is perhaps symptomatic of the general malaise afflicting the entire Postal Corporation Accounting System, of which the Claimant had offered useful initiatives in redressing. Notably, it was the Claimant's Office which detected the existence of the unexplained debt. This is not

consistent with the conduct of a guilty or negligent Accountant, one bent on hiding or manipulating the figures, to secure his employment. The detection and revelation was a measure of the Claimant's honesty.

65. The Court is convinced the allegations against the Claimant were adequately answered by him in his comprehensive letter of 10th July 2009. The Minutes of various Board Meetings support most of the answers contained in this reply. The contract concluded between the Postal Corporation and Afripayments had fundamental flaws that became more visible as it was implemented. There were decisions made by the Respondent with regard to that contract, which gave certain outcomes, which could not be attributed to the Claimant. The accusations made against Tanui appear to this Court to have been calling on him to undo the contract with Afripayments. The Claimant could not rewrite the contract, re-do a due diligence, or rescind the contract. The only person, who could rescind that contract, and take contractual responsibility, was the Postal Corporation of Kenya. Secondly, there were underlying systemic failures. The Respondent did not have the accounting software to run PostaPay EFT Product. The Claimant, to his credit, spearheaded efforts at automation. The primary server was retained by Afripayments, making independent verification of commissions impossible.

66. The Court does not think that the Claimant sold himself to the Respondent for what he was not. He is a highly qualified and competent Finance and Accounting Professional. He presented his credentials, was appointed on the strength of those credentials, and given a job, with a job description. It would be wrong for the Court or the Respondent however, to expect that even with these high qualifications, the Claimant could undo all the problems underlying the contract with Afripayments. The Respondent acknowledged even before the Claimant entered the scene, that there were deep-seated problems with Afripayments. The Court's role is not to look at the job description and the qualifications of the Claimant for that job, in isolation. To determine if the Claimant was negligent in performance of his duty, and in stewarding PostaPay EFT Product, the Court must look at the whole process of the making and implementation of Afripayments contract. The Claimant found the contract signed and dusted. His ability to influence the implementation of the Afripayments' contract was limited. He gave advice within certain demonstrable constraints. It was not the Claimant who concluded the contract with Afripayments, or who could rescind the contract. The Respondent seemed to suggest that the Claimant neglected his duty and leadership role, because he failed to influence the course of the Afripayments contract in these ways. Quite clearly, the Respondent stretched its understanding of the Claimant's job description too far, in thinking the Claimant could correct a bad bargain. The Respondent did not show valid reason or reasons for dismissal of the Claimant from service.

67. The Respondent appears to have moved against the entire Management Team led by Fred Odhiambo, and in which the Claimant served as General Manager Finance and Strategy, following the letter dated 3rd September 2008 from the Permanent Secretary in the Parent Ministry of Information Dr. Bitange Ndemo, calling for answers over the PostaPay malpractices. The Respondent's Board wrote a panicky response on 26th September 2008, commissioned the Forensic Audit and thereafter went about dismantling the entire Management Team, without due regard to the role played by the Respondent as an Institution, and the role of the respective Officers within their individual dockets, in the creation and implementation of PostaPay EFT Product. The intervention of the Ministry was done to safeguard public interest. The Respondent reacted to the Ministry's intervention by dismembering the Management Team, and in doing so, disregarding the substantive and procedural protections guaranteed to the Claimant by the Employment Act 2007.

Procedural Fairness

68. Was the dismissal procedure fair? The record on procedure is that the Claimant was sent on compulsory leave on 30th April 2009 to allow the Respondent undertake investigations. The Investigations had been carried out in the form of a Forensic Audit. The Claimant was not given reasons at the time of being sent on compulsory leave. The Claimant was given serialized accusations in the letter to show cause why disciplinary action should not issue, dated 2nd July 2009. The Claimant answered point by point in his response of 10th July 2009. He gave comprehensive answers. He however had not as

yet, been availed the Forensic Audit Report, which formed the backbone of the charges against him. He was invited for an oral hearing before the Board on 17th July 2009. It is not clear from the record when invitation issued, and if the Claimant was advised on his right to be accompanied by an Employee of his choice in terms of Section 41 of the Employment Act 2007. He appeared, and according to him, was just asked by the Board Members if he had anything to add or subtract from his letter responding to the letter to show cause. He was in the Boardroom for about 5 minutes. He was advised he would be recalled if the Board needed any clarifications. He was not recalled; instead, he received the letter of summary dismissal dated 22nd July 2009.

69. This procedure was flawed. It does not show that the Claimant was advised of his right to be accompanied to the Board hearing. No significant hearing took place. An Employer should not merely recite the grounds listed in a letter to show cause and then ask the Employee if there is anything to add or subtract; the Employer must make an effort to explain the charges to the Employee at the hearing, call evidence in showing the truthfulness of those allegations, and if there are Witnesses, allow the Claimant the opportunity to question the Employers' Witnesses. Evidence contained in documents must be produced. The Forensic Audit should have been supplied to the Claimant before the hearing date, and should have prominently featured at the hearing. Conversely, the Employee must be allowed the opportunity to adduce evidence and call Witnesses. The hearing process is different from the letter to show cause. If these were the same processes, there would be no need of a formal hearing. The hearing itself is not a mere technical appearance before a Disciplinary Panel; the opportunity to be heard means much more than being asked to add, or subtract, any answers that may have been given in responding to the letter to show cause. The Respondent failed the procedural test on these grounds. Ultimately, the Court is satisfied that the Claimant's dismissal from service was lacking in substantive justification and was procedurally unfair. The Respondent did not follow the fair termination law laid down under Section 41, 43, and 45 of the Employment Act 2007. Termination was unfair.

Remedies

70. The Claimant has prayed for reinstatement. The Court has noted he was employed on a fixed-term contract, which was to lapse on 31st September 2010. This is now close to 4 years ago. He had served over half the period, in his 3 year contract. Dismissal was on 22nd July 2009. There were 15 months left of the tenure. Reinstatement is not practicable or reasonable. It would not make sense for the Claimant to return as an Employee of the Respondent for a period of 15 months. Although the Claimant was dismissed when Part 3 of the Labour Institutions Act was in force, and there was no specific time limit placed on the Court in considering reinstatement, the nearly 5 years that have passed since the Claimant was dismissed, is too long for the employment relationship to be reconstructed on the basis of mutual trust and confidence. Reinstatement under other circumstances would have been an ideal remedy in restoring to the Claimant what he lost. Time and the nature of his employment contract however, persuade the Court to decline this remedy.

71. The termination clause provided either Party could end the contract by giving the other 3 months' notice before termination, or pay the equivalent of 1 month basic salary in lieu of such notice. The Respondent did not give the Claimant such notice or pay 1 month basic salary in lieu of notice. This was on the understanding by the Respondent, that termination was occasioned by the Claimant's acts of gross misconduct. The Court has found there was no gross misconduct, and the Respondent would therefore be liable to pay to the Claimant 1 month basic salary in lieu of notice. The Claimant seeks 3 months' salary in lieu of notice. ***The Court grants him 1 month basic salary in lieu of notice at Kshs. 217,000.***

72. On annual leave days, the evidence of John Kipyegon Tonui was that '*I am not aware of any unpaid leave days.... If in our records it is there....it will be paid.*' The Claimant seeks 39.15 annual leave days. The Court finds that the Respondent should have availed proper leave records of Mr. Tanui on this item. It is not enough to say that if the records show there are outstanding leave days, payment will be made. These records should have been made available to the Court. ***The Claimant is allowed Kshs. 279,252 in outstanding annual leave days as prayed.***

73. The contract provided that the Claimant would be entitled to one-off gratuity at the rate of 25% of the

total basic salary during the period served. The payment was subject to successful completion of the contract, and to separation from service other than through gross misconduct. The Court has concluded that the Claimant does not merit reinstatement, and by implication, would not merit the salaries for the period left in his contract which was prematurely terminated by the Respondent. It has also been found that the conclusion by the Respondent, that the Claimant was guilty of gross misconduct, was a wrong conclusion. The effect is that it would be wrong for the Court to interpret the gratuity clause to mean that the Claimant left employment for gross misconduct. The condition that he completes the contractual period successfully to earn gratuity, cannot also be held against him. He was not the cause of the premature termination of the contract. The Court has denied him the salary that he would have earned to the end of the contract in September 2010. It was not because of his fault, that he did not complete the 3 years. He should not be denied the gratuity proportional to the months successfully completed in service. **He is granted gratuity for the 21 months served, at 25% of the total basic pay = Kshs.1,139,250.**

74. The Court holds the position that the claim for anticipatory salary for the period between the date of termination and the expected date of the lapse of the contract in September 2010, would not constitute fair remuneration. It is not money the Claimant would have worked for. While the Court must uphold his claim based on the time actually served, and for work done, it must be slow in acceding to granting the Claimant unearned salaries. The Court has suggested in its past Awards that grant of anticipatory salaries would amount to unjust enrichment of a Party, and violate the principle of a *fair go all round*. The claim for anticipatory salaries is declined. **(See Industrial Court Cause Number 611(N) of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited) (UR).**

75. The prayer for salary arrears for the entire period out of employment presupposes that the Court would make orders for reinstatement. The Court has explained above why reinstatement is inadvisable, unreasonable and impracticable. The order for back salaries is not available in the absence of an order for reinstatement, and is declined.

76. The Claimant prays for damages for wrongful and /or unlawful termination, as well as maximum compensation of 12 months' salary for wrongful dismissal. The first of these is based on the assumption that the Claimant's contract was wrongfully terminated, and damages are in the nature of contractual reparation, which is a common law remedy. The second remedy of compensation is based on statutory breach and is reparation under the law of fair/unfair termination contained in the Employment Act and Part 3 of the Labour Institutions Act [and presently the Industrial Court Act]. This Court has held in its past decisions that it would again offend the principle of a *fair go all round*, if the Court encourages Employee to replicate injuries and claim multiple remedies, for what is essentially the same wrong. There is hardly any contractual breach in the employment relationship, which would be found to be fair under the law of fair/unfair termination. Essentially, general damages and statutory compensation redress the same economic injury occasioned to the Employee for the singular act of dismissal. Unless an Employee shows exceptional circumstances warranting redress under contract and under the statute, one form of remedy is sufficient.

77. The Court finds that the Claimant merits the remedy of compensation under Section 15 of the repealed Part 3 of the Labour Institutions Act 2007, and Section 49 of the Employment Act 2007. To grant contractual damages on top of statutory compensation would be disproportionate to the injury occasioned by the Employer. The Court does not in any way trivialize the gravity of the economic injury sustained by Mr. Tanui. He was not able to meet his financial obligations after dismissal. He has found it difficult getting another job, as a result of his association with the PostaPay scam. He was about to secure employment with the Interim Boundaries Commission, but could not get the clearance of the Anti-Corruption Commission. His employability suffered, and the Court cannot ignore that. He is confined to teaching and consulting. The dismantling of the Postal Corporation Management was done in the full glare of the Media. The favourable findings in this Award may go some distance in restoring some degree of employability to Mr. Tanui. Termination, was unfair both on substantive and procedural grounds. **The Claimant is granted 12 months' gross salary at Kshs. 355,500 x 12 = 4,266,000 in compensation.**

IN SUM, THE COURT ORDERS:-

[a] The Dismissal of the Claimant from Employment was unfair;

[b] The Respondent shall pay to the Claimant 12 months' gross salary in compensation at Kshs. 4,266,000; gratuity pay for 21 months at 25% of the basic pay at Kshs. 1,139,250; Kshs. 279,252 in annual leave pay; and 1 month basic salary in notice pay at Kshs. 217,000- total Kshs. 5,901,502 ;

[c] This amount shall be paid within 30 days of the delivery of this Award; and,

[d] No order on the costs and interest.

Dated and delivered at Nairobi this 31st day of March 2014

James Rika

Judge