



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 312 OF 2010**

**FRED A. ODHIAMBO .....CLAIMANT**

**-VERSUS-**

**THE HONOURABLE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**POSTAL CORPORATION OF KENYA .....2<sup>ND</sup> RESPONDENT**

Mr. Andrew Muma for the Claimant.

Dr. Kenneth Kiplagat for the Respondent.

**JUDGMENT**

1. The Claimant was employed by the 2<sup>nd</sup> Respondent in the position of Postmaster General on 8<sup>th</sup> November, 2006 for a term of three (3) years.

2. The terms and conditions of service are contained in the letter of appointment written by the Minister for Information and Communications (The Minister) and duly accepted by the Claimant on 24<sup>th</sup> January, 2007. The letter is annexed to the Memorandum of Claim on page I.

3. In terms thereof, the Claimant reported to a Board of Directors and as the Chief Executive Officer was to be responsible for the implementation of the Board's decision in a results oriented and timely manner to achieve the Board's goals, objectives and agreed performance targets.

4. The specific duties are outlined in the said letter of appointment in paragraph 3(a) to 3(n). His performance was to be regularly reviewed and appraised and documented in the meetings of the Board.

In clause (5) titled "Duration" the Board reserved the right to terminate the contract prematurely depending on the performance.

The said contract has a renewal clause that required the Claimant to make a request for renewal at least six (6) months before expiry date of the contract.

5. The remuneration of the Claimant comprised of a basic monthly salary of Kshs.560,000/=, housing allowance of Kshs.80,000/= and other allowances at the maximum rate of Kshs.100,000/= per month for the period of the contract. These are enumerated in clauses 9 to 15 thereof, which include medical cover, overtime for extra hours worked, 30 days leave per calendar year, leave allowance, gratuity at the rate of

31% of the annual basic salary and refund of school fees expenses in respect of four (4) children upto a maximum of Kshs.200,000/= per child per year.

The gratuity was not to be paid in the event the separation was due to gross misconduct as provided in the Employment Act.

6. In terms of clause 29, titled “Termination of contract”, where the employee resigned, service gratuity was to be paid prorata but if the termination was by the employer prior to the expiry of the contract, the employee was to be paid gratuity for the full contract period calculated on the basis of the last salary.

7. The Claimant served the Respondent until the 25<sup>th</sup> May, 2009, when the Minister terminated his employment by a letter of the same date annexed to the Memorandum of Claim on page 9.

The letter reads thus;

*“The Postal Corporation of Kenya’s Board, in its deliberations, which you attended on Friday May 22<sup>nd</sup>, 2009 noted several instances of mismanagement on your part. In their view, you have lost credibility and therefore cannot be entrusted with the stewardship of the organization any more. I therefore, terminate your services as Postmaster General with immediate effect. Please hand over to the General Manager, Human Resource Management, Mrs. Ado Al Kama.”*

The letter is signed by the Minister Hon. Samuel L. Poghiso, EGH, MP.

8. In terms of the Memorandum of Claim, the Claimant avers that the said termination by the Minister was unlawful and accordingly illegal as the Minister had no power under the Postal Corporation of Kenya Act No. 3 of 1988 to terminate the services of the Claimant.

That in terms of the letter of appointment, such powers were vested in the Board of Directors of the 2<sup>nd</sup> Respondent. Accordingly the Minister’s action in terminating the Claimant’s services was a nullity and is therefore *void ab initio*.

9. The Claimant secondly avers that his performance was not reviewed, and/or appraised and documented prior to the termination of his employment as required under clause 4 of the letter of appointment.

10. That during his tenure as the Postmaster General, the performance of the Corporation improved considerably and the annual reports and accounts recorded a cumulative overall growth in revenue of 14% from Kshs.2,831 billion in 2005 to Kshs.3,229 billion in 2008. The Claimant produced the “Annual Report & Accounts for the year ended 30<sup>th</sup> June, 2008” in support of this assertion. This is page 10 of the Memorandum of Claim. The figures are depicted on page 16 of the Memorandum of Claim. This was inspite the tremendous strain placed on the Corporation by the post- election violence in December and January, 2008. During that period according to the Claimant on page 19, the Corporation’s ability to efficiently deliver services around the country was heavily inhibited and some of the outlets of the Corporation were attacked by arsonists.

11. The overall status of the Corporation was captured in the Claimant’s report for the period 2007/2008 as seen from page 19 to 21 of the Memorandum of Claim and the financial statements for the period ended 30<sup>th</sup> June, 2008 from page 26 to 41 of the Memorandum of Claim.

On 19<sup>th</sup> January, 2009, the Postal Corporation received a Certificate of excellence in performance in recognition for attaining “very good” status in performance during the financial year 2006/2007. The certificate was by the Rt. Hon. Raila A. Odinga, E.G.H, M.P. Prime Minister of the Republic of Kenya.

12. The Claimant avers that the Postal Corporation performed very well under his watch as evidenced above. The Claimant submits therefore that his service to the 2<sup>nd</sup> Respondent was exemplary and that he fully satisfied both his statutory responsibilities under Section 11 of the Postal Corporation of Kenya Act, No. 3 of 1998 and the duties spelt out under clause 3 of his letter of appointment.

13. In addressing the reasons preferred to justify the termination by the Minister, the Claimant states that the Minister purported to rely on a forensic audit of the Posta Pay EFT system which audit was undertaken by the firm of Delloite and Touche. The Claimant alleges that the said audit was not finalised and therefore the Minister relied on a draft report.

This report is annexed to the Memorandum of Claim as annexure 5 on page 43. And is clearly marked "Draft copy – 9" on the face of it.

Furthermore the Minister purports to have relied on one meeting of the Board on 22<sup>nd</sup> May, 2009, but the Claimant avers that such meeting of the Board did not occur but there was a meeting on 21<sup>st</sup> May, 2009.

14. In the meeting of 21<sup>st</sup> May, 2009, the Claimant adds that there was no discussion of his performance but the Claimant was instructed by the Board to distribute a comprehensive report stating his response to the contents of the said audit report. The said response was produced as annexure 6 to the Memorandum of Claim from page 128 to 135 of the said memorandum.

The Claimant offers a comprehensive point by point response to the allegations made on the performance of the Postal Corporation in the said Draft Audit Report and hoped that the said audit would be finalised upon the auditors receiving input from all stakeholders including himself and the Board of Directors.

15. To the extent that the 2<sup>nd</sup> Respondent proceeded to terminate his employment based on the draft report, the Claimant states that the termination of his employment was both in breach of contract and contrary to the provisions of **Sections 41** and **45** of the Employment Act No. 11 of 2007 which binds the Corporation in terms of **Section 3 (3)** therein.

The Claimant states further that as at the time of the termination, he had issued a request to renew the three (3) year contract under clause 6 of his letter of appointment which provided for a six (6) months' notice period and had legitimate expectation that his contract would be renewed upon completion of the initial contract on 31<sup>st</sup> October, 2009.

He was left with five (5) months more to serve the contract. As a result of the termination, the Claimant lost his remuneration comprising of expected salary and benefits outlined in the contract and has suffered loss and damage. He lost gravely in the court of public opinion as a senior public servant based on utterances and comments made by political leaders upon his termination. This injured his character and reputation.

16. The Claimant issued a statutory notice under **Section 13A** of the Government Proceedings Act but the 1<sup>st</sup> Respondent has refused and/or neglected to acknowledge liability and arrange for payment of the monies due to him.

17. The Claimant also issued the relevant notice upon the Corporation in terms of **Section 24** of the Postal Corporation Act, 1998 but the Respondent has refused and/or neglected to make good his claims.

The Claimant seeks;

- a. *Against the 1<sup>st</sup> Respondent a declaration that the decision of the Minister to terminate the Claimant's employment was null and void ab initio;*

- b. *Against the 1<sup>st</sup> Respondent a declaration that the termination of the Claimant's employment was unlawful and in breach of his contract of employment;*
- c. *Accordingly, against the 2<sup>nd</sup> Respondent payment of the equivalent of five (5) months salary to 31<sup>st</sup> October, 2009 in the sum of Kshs.3,700,000/=;*
- d. *Against the 2<sup>nd</sup> Respondent for the sum of Kshs.1,404,496/= in respect of agreed remuneration which remains due and owing to the Claimant made up as follows;*
  - i. *Balance of school fees allowance for the year 2009 Kshs.238,366/=.*
  - ii. *Annual subscription for club membership being Royal Nairobi Golf Club Kshs.33,680/=.*
  - iii. *Cost of special holiday for 2009 Kshs.1,032,480/= (being average cost expended in previous years).*
  - iv. *Telephone allowance to 31<sup>st</sup> October, 2009 at Kshs.20,000/= per month – Kshs.100,000/=.*
  - e. *Maximum compensation for unlawful dismissal in the sum of Kshs.8,880,000/=.*
  - f. *Costs of the suit.*

18. The 2<sup>nd</sup> Respondent filed a Statement of response dated 22<sup>nd</sup> September, 2010 on the same date wherein the 2<sup>nd</sup> Respondent admits the description of the parties and the particulars of employment as contained in the letter of appointment.

The 2<sup>nd</sup> Respondent states in the main that the Minister is vested with authority to employ and terminate the employment of the claimant subject only to consultation with the Board of Directors of the 2<sup>nd</sup> Respondent.

Furthermore, the Claimant has not sought to quash the decision of the Minister but only seeks declarations to the effect that the Minister's decision was null and void which declaration would not undo what the Minister has already done.

19. That the decision can only be quashed by way of a prerogative order of *certiorari* which should have been sort in the appropriate court and *a fortiori*, the Minister's decision remain lawful and valid.

The 2<sup>nd</sup> Respondent insists that the Claimant's employment was lawfully terminated and the Claimant was paid all his dues in terms of annexure (one) I to the Statement of response, which shows that a net total of Kshs.4,407,902/70 was paid to the claimant by a cheque dated 11<sup>th</sup> June, 2009.

The terminal benefits paid were tabulated as follows;

1. Contract gratitude of Kshs.6,249,000/=.
2. Terminal leave of Kshs.1,138,600/=.

Total Kshs.7,388,262/60.

Less statutory deduction of 30% 2,216,479.90 and car loan deductions of Kshs.763,884/= giving a net total payment aforesaid of Kshs.4,407,902/70.

20. The Respondent further states that the decision to terminate the employment of the Claimant was in the best interest of the 2<sup>nd</sup> Respondent as the Board was satisfied that there was a serious risk to the integrity and viability of the Corporation caused by the continued stay of the Claimant.

That this was evident from the draft forensic report done by Deloitte and Touche which constituted sufficient and adequate material necessary to justify the decision made by the directors of the 2<sup>nd</sup> Respondent.

21. That the allegations by the Claimant that the said report was still a draft is neither here nor there as there is no legal requirement that a draft report is insufficient for purposes of making a statutory decision by the Board of Directors.

That the decision was taken at the meeting of the Board on 21<sup>st</sup> May, 2009 at which the conduct and performance of the Claimant was discussed and a decision made to recommend to the Minister to terminate the Claimant's employment.

That charges were preferred against the Claimant as evidenced by the letter of the Minister on the said meeting produced as annexure two (2) to the Statement of response, and the Claimant was heard before the decision was made.

The 2<sup>nd</sup> Respondent, denies the relief sought by the Claimant in total and prays the court to dismiss the suit in its entirety.

22. The 1<sup>st</sup> Respondent the Honourable Attorney General filed a Memorandum of response dated 28<sup>th</sup> July, 2010 on 29<sup>th</sup> July, 2010.

The 1<sup>st</sup> Respondent admits the particulars of the parties and the terms of employment of the Claimant by the 2<sup>nd</sup> Respondent.

The 1<sup>st</sup> Respondent avers that the contract was performance based and renewal was dependent on the Claimant's performance.

That a Draft Forensic Audit Report revealed the procurement process of the Corporation's Posta Pay System to have; (a) been run counter to the stipulated procedure; (b) been undertaken short of best practice standards; (c) been implemented through questionable and irregular process per annexures to the Memorandum of Claim.

23. That the Claimant was given a show cause letter to which he had responded on 4<sup>th</sup> May, 2009 which is annexure 6 to the Memorandum of Claim.

That it was on that basis that the Corporation's Board on 25<sup>th</sup> May, 2009, after deliberations recommended stern disciplinary action to the Honourable Minister who proceeded to terminate the employment of the Claimant.

The Attorney General submits that the termination was lawful and was done following proper procedure; that the renewal of Claimant's contract was optional and not guaranteed; conclusion of initial contract was dependent on Claimant's performance and he had failed in that aspect; that contractual entitlements were conditional on the existence of the contract. Posta Pay EFT System collapsed due to mismanagement during the Claimant's watch and the alleged injury to character and repute is unfounded and that the suit is without basis and should be dismissed.

24. The parties adduced oral evidence in support of their respective positions as contained in the pleadings and relied on documentary evidence annexed thereof and in a list of documents filed by the Claimant on 18<sup>th</sup> October, 2010.

Upon close of the respective case, parties opted to file written submissions which they proceeded to do on separate dates and the matter was reserved for judgment on 30<sup>th</sup> July, 2010.

25. The court has flagged the following issues for determination;

1. Who between the Board of Directors and the Minister has authority to employ and terminate the employment of the Chief Executive Officer of the Posta Corporation, the Claimant in this case?
2. If the Minister has authority to terminate, was the termination for a valid and justifiable reason and was the termination done in terms of a fair procedure and;
3. What remedies if at all are available to the Claimant herein?

26. **Issue I**

The Claimant was employed by the Minister in terms of the letter of appointment produced before court. This issue is not in dispute. The appointment followed a recommendation by the Board of Directors. In terms of **Section 6 (1) (b)** of the Postal Corporation of Kenya Act, the Board of Directors shall consist of:-

**“The Postmaster General who shall be appointed by the Minister in consultation with the Board.”**

The Act under **Section 11 (1)** provides that, “the Postmaster General shall be the Chief Executive of the Corporation and shall, subject to the direction of the Board be responsible for the day to day management of the Corporation.”

The Postmaster General is an executive member of the Board but has no right to vote at any meeting of the Board.

27. In terms of **Section 51** of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya.

**“Whereby or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment.**

and in terms of subsection 2

**“Where the power or duty of a person under this section is exercisable only upon recommendation, or is subject to that approval or consent of another person, then the power shall, unless a contrary intention appears, be exercisable only upon that recommendation or subject to that approval or consent.”**

It is without hesitation that the court finds that on a proper reading of **Section 6 (1) b** of the Postal Corporation of Kenya Act, as read with **Section 51 (1) and (2)** of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya, it is the Minister who has the power to appoint and terminate the employment of the Postmaster General upon recommendation by the Board of Directors.

28. **Issue 2.**

Was the authority of the Minister to terminate exercised for a valid and justifiable reason and was it done in terms of a fair procedure?

This suit was filed on 24<sup>th</sup> March, 2010 pursuant to the Labour Institutions Act, No. 12, 2007.

At the time, **Section 12** of the said Act provided that, the Industrial court may review: -

**“(a) the performance or purported performance of any function provided for in any written law or any act or omission of any person or body in terms of any written law on any grounds that are permissive;**

**(b) any decision taken or any act performed by the state in its capacity as employer on such grounds as are permissible in law.”**

29. In exercise of its powers under **Section 12** aforesaid, the court was granted remedial powers in case of wrongful dismissal under **Section 15** as follows;

**“15. If the Industrial Court finds that a dismissal is unfair, the Industrial Court may order the employer to-**

- a. **reinstate the employee from any date not earlier than the date of dismissal; or**
- b. **re-engage the employee either in the work in which the employee was employed before the dismissal or in other reasonably suitable work or any terms and from any date not earlier than the date of dismissal; or**
- c. **pay compensation to the employee to a maximum of twelve months wages.”**

30. These provisions were repealed and replaced by the provisions of the Industrial Court Act, 2011 under **Section 12 (1)** which gives the Industrial Court, *“exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with **Article 162 (2)** of the Constitution and the provisions of this Act or any other written law which extends **jurisdiction** to the court relating to employment and labour relations.”*

For the avoidance of doubt, the term employer here includes, the Government and any public statutory body, like the Respondent in this matter, in its capacity as an employer.

Matters before the Industrial Court at the time this suit was filed, as now, are brought in terms of the Industrial Court (Procedure) Rules, 2010.

**Rule 4** provides that;

**“a party who wishes to refer a dispute to the court under any written law shall file a Statement of Claim setting out -”**

31. It is clear that the claim before court was properly filed before the right court and need not have been filed at the High Court by way of judicial review proceedings as alleged by the Respondent herein.

Justice Majanja in the case of **United States International University (USIU) vs. Attorney General and 2 others H.C. at Nairobi Petition No. 170 of 2012** stated this position clearly and same is no longer in doubt.

Having found that the matter is properly before me, I will now proceed to examine whether there was justification in terminating the employment of the Claimant and, whether the termination was done in accordance with a fair procedure.

32. **Facts.**

In his sworn testimony the Claimant brought out his credentials, experience, abilities and other relevant matters that made him suitable for the position of Postmaster General.

He told the court how he was lured with good terms of service by the Respondent to leave his employer, of eight (8) years standing, Barclays Bank (K) Ltd to apply for the said job leading to his

recruitment on a three (3) years contract, renewable upon giving a 6 months notice of willingness to renew.

He demonstrated his good performance at the Respondent's place for the period of two (2) years and seven (7) months he served the Respondent as its Chief Executive Officer.

33. He told the court that the financial statements for the period 2006/2007 and 2007/2008, spoke for themselves and were a clear demonstration of how he had improved the financial standing of the Postal Corporation for the short period he was at the helm.

There were several challenges which he had identified and was in the process of addressing, though the specific problems were insignificant in comparison with the overall performance of the Corporation at the time.

He told the court, which was not contested, that in the year 2005/2006, the Corporation's performance was rated, very good; in 2006/2007 very good and in 2007/2008 good.

34. The Corporation was certified by ISO during his tenure; he had introduced Performance Management Concept and Principles which were non-existent before at the Corporation; introduced staff incentive schemes to encourage staff to bring in ideas to make more profits and cut costs and general improvement of operations; and had also lodged corporate social responsibility programmes focusing on water, sanitation, health, education and environment.

35. **The problem.**

The Claimant told the court that, the Board of Directors and eventually the Minister, in total disregard of these remarkable achievements he had made in a short time, focused on a single product, called Posta Pay to bring him down.

The product was introduced on 26<sup>th</sup> February, 2006, long before the claimant was employed. It was alleged that the product was not profitable and that there were fraudulent transactions related to the Claimant.

The Claimant told the court that upon his appointment and interaction with his management team, he had realised;

- i. due diligence was not done before the lodge of the Posta Pay product and therefore posed risks of fraud as it was not controlled from within the Corporation;
- ii. the product development and implementation was not in line with best practice and controls were not in place; and
- iii. the contract favoured the strategic partner by the name of AFRI – PAYMENTS over the respondent.

Upon this realisation, the Claimant took a number of steps including;

1. recommending replacement of the person in charge of the product as she did not provide proactive leadership;
2. visited AFRI-PAYMENT offices in the United States of America and upon return wrote a letter of concern to the Board of Directors highlighting these gaps such as; lack of a business plan and recommended an audit of the system and renegotiation of the contract. The renegotiation was done from 1<sup>st</sup> January, 2008.

37. The Draft Report by Deloitte and Touche which was a product of his recommendation became his

bane or achilles heel as it were because rather than the Board focusing on addressing the systemic gaps he had identified, he was unjustifiably targeted for termination and was requested to show cause.

On 20<sup>th</sup> April, 2009, the Board had directed management to respond to the issues raised in the report within seven (7) days and on 30<sup>th</sup> April, 2009, the claimant was asked to show cause why his services should not be terminated. The Claimant responded to the requests on 4<sup>th</sup> May, 2009.

38. Of particular concern to the Board was a Postal Officer cashier who had misappropriated Kshs.300,630/= by the name of **Mr. Emmanuel John Odongo** but the Claimant had interceded with his father who had agreed to refund the amount which he proceeded to do but the staff was non the less dismissed from employment.

39. The Claimant defended himself gallantly against this charge stating that his focus was to save the Postal Corporations money and was the practice in many other incidents in the past, hence his concession to have Mr. Ogutu released in exchange of payment which happened but the employee was disciplined and dismissed from employment. He denied that his decision was made purely to help Mr. Emmanuel John Odongo because he was known to his father.

40. The Claimant also acknowledged that Kshs.2.4 million was lost through fraud by staff of Afri-Payments. The Claimant stated that, this was made possible by the independent manner in which the project was established under the contract and had initiated measures to rectify the situation though some of his recommendations were frustrated. The Claimant agreed that he had negotiated for refund of the amount with Afri-Payments rather than prefer criminal charges against the culprits.

The Claimant further told the court that, prior to accepting payment of Kshs.2.4 million in return of not instituting charges against those involved he had discussed the matter with the Chairman of the Board, **Mr. Kariuki**, who had given him a go ahead. He insisted that, it was not a good reason to dismiss him before giving him an opportunity to explain the circumstances under which it occurred. The Claimant said he had reported the matter to the Board subsequently and the Board members had agreed with the course of action he had taken and this was minuted. He wondered how the Board could have turned around and used the matter to terminate his services.

41. He explained that he was worried about the bad publicity the theft of 2.4million would have generated and was therefore focused on settling the matter out of court. This was especially because the Posta Pay product was a delicate one and negative publicity would have had dire consequences on its operations.

He insisted that he had nothing to gain from stopping the criminal action in favour of an out of court settlement, an action which was supported by the Respondent's practice and policy. He denied hiding fraudulent activities during his tenure and concluded that he was merely a victim.

42. The Claimant concluded by stating that Posta Pay had problems, which originated in the manner it was conceived prior to his employment.

That at the time of termination he was working towards rectifying those gaps to optimize its performance.

The Claimant states that the Board should have given him opportunity to conclude the corrective measures he had initiated after all the project was a viable one and was still making money inspite of its shortcomings.

43. The 2<sup>nd</sup> Respondent disagreed totally with the Claimants perspective of the matter and the Claimant was subjected to intense cross-examination by Dr. Kenneth Kiplagat for the 2<sup>nd</sup> Respondent.

The Claimant insisted that the Forensic Audit did not generate sufficient reasons to justify the

termination of his employment.

He said that new products often faced teething challenges and Post Pay was not an exception.

He denied he was familiar with the relationship between one **Mr. Ochieng** and Mr. Ogutu stating that Mr. Ochieng was an employee of the strategic partners Afri-Payments Plc whereas Mr. Ogutu was the General Manager in charge of ICT – Posta Pay. That at the time he went to the police at night to release somebody, he did not know who had been arrested.

He fingered the fact that Posta Pay Services were not resident at the Postal Corporation of Kenya but with the strategic partner Afri-Payments to have been the main weakness in the system because Postal Corporation could not exercise control over its operations adding that the Claimant was already addressing this issue. The Project Manager should be solely accountable for the shoddy due diligence at inception and not the Claimant, he told the court during the close cross-examination. He added that though he was the Chief Executive, blame should be apportioned where it lies especially on matters done prior to his employment.

45. The Claimant further insisted that the Draft Audit Report should have been subjected to scrutiny by management and various points of actions implemented to prop up the Posta Pay. This was his intention when he recommended the audit be done and was one of the measures he had taken to seal the gaps in the system.

The Claimant further stated that Posta Corporation had over the years experienced financial loss through fraud and other reasons. That these issues were addressed by taking suitable measures but for him as the Chief Executive Officer, he focused mainly on revenue collection and was satisfied that Posta Pay was generating reasonable revenue at the time.

The Claimant stated that he had recommended strong action against Mr. Ochieng though he was not an employee of the Respondent. He did not know him prior to the incident and had no reason to be suspicious of him. The withdrawal of fraud charges against Mr. Ochieng however contributed to his termination which to him was wrong for the Board to do as the matter was sanctioned by the Chairman of the Board and the Board itself prior to its turn around. The letter to release Mr. Ochieng was written at the police station and was agreed upon between the Claimant and one M/s. Caroline of Afri-payments.

46. He denied loss of Kshs.2.4 million, which in any event was to be reimbursed pursuant to the settlement would have caused public outrage adding that he had acted prudently in the circumstances, upon consultation with the Chairman.

He concluded by emphasizing that he was not given opportunity to explain himself before the Board as the Chief Executive Officer heading many products and not just Posta Pay. This audit could not therefore be an appraisal of his overall performance. The auditors merely presented a report to the Board partly in his absence and was then asked to show cause.

47. The Claimant pointed at the Criminal Investigations Department summons against him after his employment had been terminated as further evidence of harassment and victimisation by the 2<sup>nd</sup> Respondent. That the issues canvassed by the C.I.D were unrelated to the reasons cited for the termination of his employment.

48. The Respondent called one **Jacob Mutuku Mwangangi** in support of its case. He was the Manager Security and Investigations of the Postal Corporation of Kenya. He had served the Corporation in various capacities for over thirty (30) years, five (5) of which he was in the present capacity. He was a trained C.I.D Officer and had undertaken many courses in criminal investigations.

He told the court that he was familiar with the Posta Pay project which was a money transfer facility introduced in 2006.

That weaknesses were discovered in its implementation. That in April, 2007, **Mr. Romania Victor** had undertaken an audit sampling the systems of Posta Pay and had in the process identified fraudulent transactions that required further investigations.

49. Upon further investigations, many fraudulent transactions were discovered and the witness prepared a report to the Postmaster General on 9<sup>th</sup> May, 2007 which is annex seven (7) to the 2<sup>nd</sup> Respondent's response.

The witness detailed fraudulent activities in the report which originated from outside the Corporation. They were systemic originating frauds done by technical personnel knowledgeable with the system. They were mainly perpetrated from Afri-Payments, a partner of the Posta Pay project who hosted the server for the project.

50. The witness told the court, he impressed on the Claimant, the seriousness of the matter as the fraudulent transactions were very regular and almost done on daily basis.

The witness traced one **Karen Kinyua** who had received Kshs.300,000/= from various transactions. He summoned her to his office and reported the matter to the police. She was arrested. She was not an employee of the 2<sup>nd</sup> Respondent or Afri-Payments.

The lady identified one **Chris Ochieng**, an employee of Afri-Payments as the person transmitting the money to her. The witness had not met Chris Ochieng personally.

51. The witness led to the arrest of Chris Ochieng on 27<sup>th</sup> August, 2007 and it was established that he was the Chief Technical Officer of Afri-Payments and Caroline was his girlfriend. There were many other transactions done in the same manner and many more suspects needed to be pursued.

On 28<sup>th</sup> August, 2007, the witness prepared the docket at the police station by recording a statement and he also briefed the Claimant of the arrest of Mr. Ochieng and his girlfriend, Caroline.

52. The matter was ready to be taken to court on 29<sup>th</sup> August, 2007, and he retired home in the evening of 28<sup>th</sup> August, 2007. At about 7.00 p.m. the witness received a call from the Claimant requesting that he furnishes him with the amount lost. At the time, the witness had established loss of 2.4 million shillings but actual evidence related to 1.9 million. He gave the information to the Claimant at 8.00 p.m. The Claimant informed him that he was at the police station and he directed the witness not to proceed with the matter to court but report to his office in the morning. The Claimant further informed him that officers from Afri-Payments would bring a cheque of Kshs.2.4 million to the office.

53. The witness told the court that Mr. Chris Ochieng and his girlfriend were never charged and this was done without seeking advice from him. On 29<sup>th</sup> August, 2008, the witness expressed his disappointment to the Claimant because this was a system fraud that needed to be dealt with firmly.

That many players other than Ochieng and Karen were involved and they needed to be tracked and arrested. The extent of the fraud also needed to be established as it was perpetrated at national and international level.

54. In the view of this witness it was wrong and premature to withdraw Mr. Ochieng's case at this stage of the investigations. The witness went to the police station to enquire if he could proceed with the matter but the police stated that the Claimant had stopped its progress and therefore it could not proceed to court.

The witness told the court that he never received any further instructions on the matter and therefore conducted no further investigations on the Posta Pay fraud. He felt that this intervention by the Claimant was unusual and unnecessary as he was the technical person in-charge and knew the direction to take to save the Corporation from further frauds through Posta Pay. In his assessment, the intervention by the

claimant was bound to have disastrous consequences on Posta Pay. This demoralised the staff involved in the investigations. The Posta Pay staff were no longer sure of genuine and false transactions and the Posta Pay product declined and eventually died. Nobody was punished as a result of these losses.

55. The witness told the court that the Claimant poorly managed the Posta Pay project and did not take any remedial measures to fix the loopholes in the system. That this was public money and the Claimant should have taken greater care to safeguard it but he did not for reasons best known to himself.

56. The witness said he was aware of the investigations concerning the Claimant after he had left office.

The particular one he dealt with was to do with misuse of office truck to deliver building materials to a site in Nyanza where the Claimant had an interest. Employees recorded statements on the matter. The matter was referred to C.I.D as the Claimant had already left office and they could not deal with him internally though the Attorney General had recommended so in a letter dated 24<sup>th</sup> October, 2010.

57. The witness stated that he did not know if Mr. Ochieng was known to the claimant prior but Mr. Tom Ogutu was known to him.

The witness was subjected to very close cross-examination by the advocate for the Claimant, Mr. Muma.

The Respondent did not call any other witness and closed its case after a brief re-examination of the witness.

The parties filed written submissions and the matter was reserved for judgment on 30<sup>th</sup> July, 2013.

58. **Conclusions of fact and law.**

Upon a careful analysis of the evidence adduced by Mr. Fred Odhiambo, the Claimant and that represented by the Respondent through the testimony of Mr. Jacob Mutuku Mwangangi; and upon a careful analysis of the documentary evidence produced by both parties and having considered the written submissions by the parties carefully the court has arrived at the following conclusions of fact and law;

- a. The court is satisfied that the Claimant had served the Respondent for a period of two (2) years and (7) months and had only five (5) months left on his three (3) years contract;
- b. That in compliance with the renewal clause of the contract between the parties, the Claimant had issued a six (6) months notice of his intention to renew the contract;
- c. That on 25<sup>th</sup> May, 2009, the employment of the Claimant was terminated by the Hon. Minister Samuel L. Poghisi for specific reasons contained in the letter of termination as follows;
  - i. Several instances of mismanagement.
  - ii. Loss of credibility and therefore could not be trusted with the stewardship of the organisation.
- d. The recommendation to take serious disciplinary action against the Claimant was made by the Board of Directors at a meeting held on 21<sup>st</sup> May, 2009, held to receive an update of the Posta Pay EFT Forensic Audit.
- e. The Claimant had been requested by the Chairman of the Board by a letter dated 30<sup>th</sup> April, 2009 to respond to the Draft Forensic Report, make the necessary clarifications and show cause why disciplinary action should not be taken against him.
- f. The Claimant made a comprehensive response in writing dated 4<sup>th</sup> May, 2009 and this was the subject of consideration by the Board on 21<sup>st</sup> May, 2009.
- g. That the Board after considering the response by the Claimant made specific findings with regard to the Claimant found on page 4 of the minutes as follows;
  - i. The members felt there was a serious breach of trust and deliberate misrepresentation of issues.

- ii. There was a serious case of abuse of power attributed to the Postmaster General involving one Emmanuel John Odongo, PF. No. 24209, a Postal Officer in that the Postmaster General had intervened to have him released from custody despite the fact that he had stolen Kshs.300,630/= from Postal Corporation of Kenya. His father a former Director of Postal Corporation was to repay the money in 6 months. This action was said to be unprocedural and abdication of responsibility with a view of condoning corruption.

The Board further accused the Claimant of failure to implement directives from the Permanent Secretary, Information and Communication to stop all payments relating to international money transfers; reluctance to assist the forensic auditors in accessing information useful in the exercise including intimidating public officers in the conduct of their duties; and failure to implement audit findings on the Post Pay EFT system despite having been fully aware of the same.

The evidence produced before the court by the Respondent completely failed to demonstrate these accusations made by the Board of Directors against the Claimant. The only evidence adduced was with respect to one Mr. Chris Ochieng, an employee of Afri-Payments, a strategic partner of the Postal Corporation in respect of whom Afri-Payments reached settlement on recovery of Kshs.2.4 million, which was paid, in consideration of the Claimant not pursuing criminal charges against Mr. Ochieng.

Clearly, this is not the matter the Board took into account in recommending disciplinary action against the Claimant to the Minister.

- h. The court is satisfied that the Posta Pay project had systemic failure from inception.
- i. That the project was put in place prior to the recruitment of the Claimant.
- j. That the Claimant has demonstrated various steps he took and initiatives proposed to improve its performance and therefore could not be remotely associated with the glaring gaps in the system.
- k. The court is also satisfied that the Chairman of the Board was appraised of the move to recover the Kshs.2.4 million from Mr. Ochieng's father and thereby abandon the prosecution prior to the agreement done at the police station between the Postal Corporation and Afri-Payments.
- l. That the Claimant was right to pursue the settlement with full support of the Chairman of the Board who in any event was not called to refute the alleged concurrence.
- m. The court is also satisfied that between the years 2006 and 2008 during which period, the Postal Corporation was under the watch of the Claimant its financial performance had improved drastically as demonstrated by the financial statements produced by the Claimant before court.
- n. The court while commending the good work by the witness for the Respondent Mr. Jacob Mutuku Mwangangi, notes that his antagonistic approach towards his superior, the Postmaster General was inimical to the operations of the Respondent and ought not to have let the perceived frustrations derail the investigations he had initiated and conducted successfully.
- o. It is now history that the Posta Pay project went on downward spiral after the termination of the employment of the Claimant and quickly collapsed. It is apparent to the court that the action taken by the Board was not in the best interest of the Corporation as was alleged at the time of termination, and indeed their action was misconceived leading to the loss and detriment of the Claimant and the Respondent itself.
- p. The court has also noted the commendation given to the Claimant prior to his loss of employment by the Rt. Hon. the Prime Minister of the Republic of Kenya, for the good work he was doing at the Postal Corporation of Kenya at the time. Indeed the court accepts that the continued rate of "very good" for (2) years and "good" for one year during the period the Claimant was at the helm of the Corporation was well merited and ought not to have been taken for granted by the Board and the Minister in making a rushed decision to terminate the services of the Claimant.

## 59. **The Law and the procedure.**

**Section 45 (1)** of the Employment Act, No. 11 of 2007, provides;

**"No employer shall terminate the employment of an employee unfairly."**

In this regard, **Section 47 (5)** of the Act, provides;

**“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.”**

From this provision, it is clear that the employee has to establish a *prima facie* case that a wrongful or unfair termination has taken place and once that has been done, the evidential burden shifts to the employer to show on a balance of probability that the reason for termination was justified.

60. Indeed ILO Convention 158, concerning Termination of employment at the initiative of the Employer, 1982 provides under Article 4 as follows:

**“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”**

In the present case, the Respondent alleges both lack of capacity and misconduct without specific charges being made against the claimant.

With respect to capacity, no appraisal reports were put to the Claimant nor placed before court to show that the claimant had failed to perform as required by his letter of appointment and that he had failed to improve or rectify the situation in light of specific recommendations in the appraisal report.

It has not been demonstrated that any specific measures, and/or warnings were directed to the claimant to improve his performance. To the contrary the final reports show that the performance of the Postal Corporations got better every year from the time the Claimant assumed office.

61. Regarding misconduct, these matters were raised in a draft Audit report and the Claimant responded to the same blow by blow.

The Board did not proceed to constitute a disciplinary hearing to allow the Claimant explain any matters which the Board may have felt reflected on his capacity to perform or amounted to misconduct.

The minutes of the Board meeting of 21<sup>st</sup> May, 2009, do not indicate that, the Board framed any charges against the Claimant and that he was given opportunity to respond to the charges levelled against him.

The Claimant told the court, which evidence the court has no reason to doubt, that when the matters touching on his person were about to be discussed, he was asked to step out of the Board room, only to be surprised by a termination letter four (4) days later on 25<sup>th</sup> May, 2009.

In this regard, Article 7 of Convention 58 provides thus;

**“The employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he is provided an opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide this opportunity.”**

62. In the present case, though no disciplinary hearing was held, no excuse for the omission has been proffered. Instead, the Respondent equates a Board meeting constituted to receive an update of Posta Pay EFT Forensic Audit to a disciplinary hearing of the Claimant who was an ex-officio member of the Board and had not been notified that the Board meeting constituted a disciplinary process against him.

Convention No.158, has been duly ratified by Kenya and is now part of our national law by dint

of **Article 2 (6)** of the Constitution of Kenya, 2010 which provides;

**“Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this constitution.”**

63. This provision of our Constitution has effectively transformed Kenya from a dualistic state to a monistic state. To this end, the provisions cited above are binding on all employers in Kenya be they private or public in their capacity as employers.

Furthermore, the provisions of **Section 41, 43, 45** and **47**, though in different language embrace the principles contained in Article 4 and 7 of Convention 58.

64. It is clear therefore, that a termination of employment or dismissal must not only be for a valid reason but the termination or dismissal itself must be in terms of a fair procedure. This is clearly stated under **Section 41 (1)** of the Employment Act, 2007 which provides:

**“Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”**

**Subsection (2)** provides;

**“notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, chosen by the employee within subsection (1) make.”**

For the avoidance of doubt, the exception under **Section 42 (1)** relates to employees on probation.

65. Arguments are galore on what constitutes a hearing in terms for **Section 41** of the Employment Act.

From the wordings of the Section itself the components of a hearing include;

- a. an explanation of the grounds of termination in a language understood by the employee;
- b. the reason for which the employer is considering termination;
- c. entitlement of an employee to a representative who may be a fellow employee or a shop floor union official to be present during the session; and
- d. hear and consider any representations by the employee on the grounds and reason for termination.

This interpretation of what the court regards as minimum requirements of a fair hearing find support in the Article of Convention 158 relied upon.

I must hasten to add that it is prudent that disciplinary proceedings are recorded, unless it is not reasonably possible in view of the burden of proof placed on the employer by the law.

66. It is the court's considered view that in the suit in *casu* the employer, Postal Corporation of Kenya failed not only the substantive test but also the procedural one.

The Respondent has failed to show on a balance of probability that the termination of the Claimant

was for a valid and just reason and has also failed to demonstrate that the termination was done in terms of a fair procedure.

67. **Remedy.**

The court has already found that the Minister was the competent authority to terminate the employment of the Claimant but he had exercised this authority in an unlawful and unfair manner within the meaning of **Section 45** of the Employment Act.

68. The Claimant was denied five (5) months service and remuneration to the completion of the contract he was serving and seeks the court to grant him full remuneration from date of termination upto 31<sup>st</sup> October, 2009 in the sum of Kshs.3,700,000/=.

Furthermore, he claims a sum of Kshs.1,404,496/- in respect of other components of the agreed remuneration as follows: -

- i. Balance of school fees allowance for the year 2009, in the sum of Kshs.238,336/=-;
- ii. Annual subscription for club membership being Royal Nairobi Golf Club Kshs.33,680/=-;
- iii. Cost of special holiday for 2009 Kshs.1,032,480/= being average cost expended in previous years; and
- iv. Telephone allowance to 31<sup>st</sup> October, 2009 at Kshs.20,000/= per month, totaling Kshs.100,000/=.

The Claimant also seeks 12 months salary being maximum compensation for the unlawful dismissal in the sum of Kshs.8,880,000/=.

Finally, the Claimant seeks interest on the total award and costs of the suit.

69. The court notes that, upon termination, the Claimant was paid terminal benefits in the sum of Kshs.7,388,266/60 comprising of gratuity and terminal leave. These were subjected to statutory and other deductions as seen earlier. This is a credit to the Respondent though it was also an entitlement to the Claimant.

70. No evidence was tendered by the Claimant with regard to the claims for school fees allowance, annual subscription to Nairobi club and costs of special holiday and the court reject the claims outright for want of prove.

71. With regard to telephone allowance, this is given to facilitate work, and courts will ordinarily not award this allowance after termination of employment. This claim is also rejected by the court.

72. In terms of **Section 49 (1) C** of the Employment Act, the remedy for wrongful and unfair termination contrary to the Employment Act, as the court has found herein, is;

**“the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”**

The court notes that gross salary includes all allowances earned by the employee.

In the present case this includes, a basic salary of Ksh.560,000/=-, housing allowance of Kshs.80,000 and other remunerative allowances at the maxim rate of Kshs.100,000/= per month in terms of the contract of employment.

73. The court finds that, this is the appropriate remedy to be granted to the Claimant considering the circumstances of the case including but not limited to the fact that he

- i. had 5 months left to completion of the contract;
- ii. unlawfully and unfairly lost means of livelihood and support;
- iii. held a high public position and it was not easy to get equivalent position;
- iv. had left a prosperous career with Barclays Bank, and had lost prospects in that regard with the hope of long service in public sector;
- v. was given reasonable gratuity upon termination;
- vi. had reasonably mitigated his loss by venturing into private business though was without regular income for considerable period.

74. Accordingly the court awards him 10 months gross salary at the time of termination at the rate of Kshs.740,000/= per month totaling Kshs.7,400,000/= plus interest at court rates from date of filing this suit to date of payment.

The Respondent is also to pay the costs of the suit.

For the avoidance of doubt all other claims by the Claimant have not been successful.

It is so ordered.

*Dated and delivered at Nairobi this 25<sup>th</sup> day of October, 2013.*

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**