



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1696 OF 2012

BETWEEN

MWENDWA MALULI CLAIMANT

VERSUS

THE KENYA POWER AND LIGHTING

COMPANY LIMITED..... RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Wangila instructed by A.S. Kuloba & Wangila Advocates for the Claimant

Ms. Gladwell Mumia Advocate instructed by the Federation of Kenya Employers [F.K.E.] for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Mr. Mwendwa Maluli filed his Statement of Claim on 21st September 2012. The Respondent State Company, Kenya Power and Lighting Company, filed its Statement of Response on 5th February 2013 and a Supplementary List of Documents on 12th February 2013.
2. Maluli testified, and closed his case on 22nd March 2013. On the same date, the Respondent called its Supervisor John Wanjohi, Safety Engineer Raymond Ochieng' Ogotu, and Human Resource Manager Brenda Abwavo. The last Witness for the Respondent, Artisan Mate, Patricia Musili gave evidence on 23rd April 2013 when the hearing closed. Parties filed their Final Arguments subsequently, which their Respective Advocates highlighted in Court on 18th September 2013. The Court advised Award would be read on notice.
3. The Claimant's position is that he was employed by the Respondent as a Craftsman, on 4th June 1986.

His contract was terminated by the Respondent in circumstances he considers unfair and unlawful, on 19th April 2011. He last earned a monthly salary of Kshs. 54,488, house rent allowance of Kshs. 20,741 and Electricity Bill Allowance of Kshs. 2,000.

4. He seeks Orders for:-

- a. Reinstatement;
- b. Back pay from the date of termination to the date of reinstatement;
- c. 12 months' gross salary at Kshs. 926,748 in compensation;
- d. Interest on [b] and [c] from the date of termination until payment in full; and
- e. Costs.

5. The letter terminating the Claimant's contract of employment alleged he was negligent in the performance of his duty. He denied being negligent, and termed the decision by his former Employer as un-informed and malicious. He wrote to the Respondent demanding the Respondent concedes its decision was unfair and unlawful; the Respondent did not concede, making it necessary for the Claimant to file this Claim seeking primarily to be reinstated.

6. Maluli told the Court he worked as a Team Leader. He worked in the maintenance of Lines. He was stationed in the Mount Kenya Town of Meru. It was alleged by the Respondent that the Claimant instructed a Day Worker who was assigned to the Claimant's Team, to mount an electricity pole, without adhering to the safety procedures. The Worker was Dennis Muchangi.

7. The Claimant's Team was allocated duties by the Supervisor John Wanjohi. Meru County Employees had felled some trees within the Town. This was on the 25th February 2011. The trees fell on the Power Lines, causing breakdown of supply. Three poles and the conductor were damaged. His Supervisor asked the Claimant and his Team to join him at the scene. The Claimant proceeded to the scene in the company of his Team Members who included Dennis Muchangi, Patricia Musili, Stanley Mwarania, Francis Muthuri and Peter Maina.

8. At the scene, the Claimant was instructed by his Supervisor to carry out a line patrol. He did so in the company of Mwarania, Maina and Muthuri. Muchangi and Musili remained at the scene with the Supervisor Wanjohi. The Claimant went with his three Colleagues on line patrol, up to a Kilometre away from the scene.

9. While on patrol, the Claimant and his Colleagues were told by the Members of the Public that one of the Team Members was hanging under a Transformer. The Team rushed back to the scene. They found the Supervisor in the car. Musili was not there. Muchangi was hanging near the Transformer.

10. The termination letter stated that the Claimant had instructed Muchangi to climb the pole and break jumpers without following due safety procedures, leading to his death. The Claimant explained that he was a Kilometre away, and could therefore not have instructed Muchangi to do this. The Claimant recorded a Statement on 26th February 2011 and was subsequently suspended.

11. The recommended mode of communication for the Respondent's Employees when they are working on the Lines is through the VHF radio. All involved Parties are able to hear communication passing between among their colleagues, and act accordingly. At the time of the incident, the Employees were using Mobile Phone, which could only serve the caller and the recipient of the call. The power that was supplied to the Line Muchangi was working on, came from the Meru Substation, 3 ½ Kilometres from the scene. The deceased had worked for slightly over a year.

12. The Claimant was not granted a hearing before the termination. He did not attend any disciplinary hearing. On 17th March 2011, the Respondent lifted the suspension and wrote to the Claimant asking him to show cause why disciplinary action should not be taken against him. He wrote on 23rd March 2011, explaining that he was not to blame for the accident. He never instructed Muchangi. He was on class 8

authority only. The Claimant attached call records from the service provider Safaricom, showing the sequence of the communications that passed between him, control office and the Supervisor. The Human Resource Officer commented on the Claimant's letter:

“It is unlikely that the Employee went up the pole without the instructions from the team leader and he is to blame for the death. Employee should be terminated.”

There was no certainty.

13. Maluli was not supplied any evidence by the Respondent, showing he instructed the deceased to climb up the pole. He was not shown any statement made by his colleagues, indicating he gave the instructions to the deceased. The incident was investigated by the Respondent's Safety Engineer, Raymond Ochieng' Ogutu. He interviewed the Claimant and visited the scene. The Claimant had no idea where the assertion that he instructed the deceased to climb the pole was sourced. The Claimant had been instructed by his Supervisor to split his team into two groups; he was in the group that went for line patrol. He was not at the scene when Muchangi climbed the pole and met his death. The Claimant was paid 4 months' salary in lieu of notice at Kshs. 168,000, and paid pension from his Scheme.

14. The Claimant testified on cross-examination that the Employees of the Respondent use System Fault Reporting/Switching Logs, to record what happens in the course of their duties. The Log Sheets for 25th February 2011 showed the Claimant was at Switch Number YO26. At 1551 he was recorded as having asked the substation to switch off, because somebody had been electrocuted. At 1557 he reported the person was unconscious. His Supervisor was there all the time. In his Statement, the Claimant reported that his Supervisor had left for YO24. The Claimant denied that he was contradicting himself on the whereabouts of Wanjohi. He had worked for 24 years for the Respondent, 11 of them in Meru.

15. Emergencies such as occurred on 25th February 2011 with respect to the damaged cables are common. Maluli had done maintenance work at such scenes frequently. From 2007 to 2011, the Respondent's VHF system had broken down, and Employees were restricted to mobile phone communication. The Substation was manned by Security Officers. An Officer was always at the Control Centre on shift. The Claimant was not given a chance to appear before the Disciplinary Committee.

16. He testified he received the letter from the Respondent dated 29th March 2011, asking him to see the Human Resources and Administration Officer Mt. Kenya North on Thursday 31st March 2011. He attended the meeting as instructed and was informed by the Human Resources Officer that a Committee had sat, and determined that his contract of employment be terminated. Day Workers could not work without the supervision of the Team Leader. The Claimant was the Team Leader. He did not know if Muchangi was instructed to climb the pole or not. It was not true that Wanjohi instructed the Claimant to wait at the scene, and not to patrol the lines. The Claimant was interviewed and made a statement, but was not given a chance to be heard. He only received four months' salary as notice pay.

17. Redirected, the Claimant stated YO56 was 1.2 Kilometres from the scene of the accident. The power was supplied from one position, the Substation. The System Controller coordinated the Employees from Control Centre at Kiganjo. The accident may have resulted from the problem with communication. VHF radio communication had broken down, and the Employees were using mobile phone. VHF communication could be heard by all the involved Employees, while mobile phone communications could not. The Claimant did not instruct the deceased to climb the pole. Maluli was instructed by the Supervisor Wanjohi, to go on line patrol. Wanjohi, Patricia and Muchangi were left at the scene, while the Claimant and his team went on line patrol. The meeting convened by the Human Resources Officer took place on 17th March 2011, while the letter inviting the Claimant stated meeting would be on 31st March 2011. Maluli prays the Court to uphold the Claim.

18. John Wanjohi testified he worked as the Supervisor at Meru. The Claimant was a Team Leader, and Wanjohi his Supervisor. Muchangi was under the supervision of the Claimant. On the material day the group was to isolate the scene of the accident. Wanjohi left the Claimant and his team at the scene. He

went to secure the place of work, at around 2 kilometres from the scene. The team was instructed by Wanjohi to wait for him at the scene. Wanjohi was not there when the accident occurred. When he returned, he found the Claimant at the scene. Muchangi could not have climbed the pole without the instructions of the Claimant. No other person could tell Muchangi to go up the pole. Wanjohi testified it was not true that he had remained behind with Patricia and Muchangi on the date of the accident. Maluli had not been instructed to do line patrol, because the group had already identified the cause of the accident.

19. Cross-examined, the Witness testified he supervised different teams. Each team had its own leader. Wanjohi was supervising all the teams. Team leaders were under him. When Workers climbed a pole, they had to be supervised by a Team Leader. It was not true that the Witness requested to work with Patricia and Muchangi. No other person, other than the Claimant, could have told Muchangi to climb the pole. Wanjohi did not see Maluli instruct Muchangi to climb the pole. He reached the conclusion it must have been the Claimant who gave the instructions to the deceased, because the Claimant was deceased's Supervisor. The Employees used mobile phones, instead of VHF radios. The phones were also effective. The radios were meant to be kept by the Operators, not by the Team Leaders. Wanjohi conceded he was in charge of the whole Team, but had not issued the Team permit to commence work of the broken down lines. He denied that he was testifying to merely protect his own position. Yusuf Galgalo was at the Substation, and communicating with the System Controller. Only Galgalo would know what he did on that day. Wanjohi did not know how long the Claimant had served. Muchangi would not have worked on the line if he was aware it was live. Wanjohi emphasized on redirection that he did not take the lead role. The Claimant knew Muchangi had to have a written permit to work on the lines. Maluli should have waited for Wanjohi at the scene. Other Employees could not have issued instructions to the deceased.

20. Raymond Ochieng' Ogotu is the Safety Engineer with 10 years experience, overseeing the entire Mt. Kenya Region. He investigated the accident and prepared a report, appendix 2 of the Statement of Response. He described the accident as unfortunate, as he knew the Claimant as an experienced Employee, who also represented the other Employees, as a Shop floor trade Union representative.

21. According to Ogotu, Muchangi took instructions from the Claimant, not from Wanjohi. Patricia had left Muchangi with the Claimant at the scene. Immediately she left them, Muchangi climbed the pole. Ogotu interviewed Patricia, who gave this information. Secondly, Ogotu interviewed a Cobbler who was near the scene of the occurrence. The Cobbler corroborated the information given by Patricia. The deceased could not have gone up the pole without the instructions of the Claimant, or without instructions at all. Before any work is done, there has to be consent from the Control Centre at Kiganjo. This would be preceded by the confirmation that power supply had been cut off, tested, isolated and earthed. Even if it was to be switched on unexpectedly, no one would be hurt. The Claimant was aware of these procedures, and had 5 levels of competencies. One sat before a Panel, was interviewed and authorized. Ogotu interviewed the Claimant and found out that the Claimant intended to have a second Employee climb another pole and operate without a permit. The result would have been worse. The Claimant's evidence of the occurrence was incorporated in the report prepared by Ogotu.

22. Answering questions from the Advocate for the Claimant, Ogotu testified he was not at Meru when the accident occurred. He did not see or hear the Claimant instruct Muchangi to climb the pole. Ogotu respected the Claimant. The Claimant had proven himself over time, and was experienced. Only the Claimant, could explain why he acted the way he did on 25th February 2011. It would be baffling if the deceased climbed the pole without authorization. It is a happening that could nonetheless not be ruled out altogether. All the Team Members recorded statements. Only the Controller at Kiganjo could give authority for commencement of work. Power was reconnected before authorization. The Officer who turned on the power was also to blame for the death. The Team Members told Ogotu the Claimant was about to instruct another Employee to climb another pole when the accident occurred. His own statement says he was about to apply CME –Circuit Main Earth, when he heard the explosion. Another Employee was about to climb another pole. Ogotu found that Wanjohi was away from the scene when this event unfolded. The log sheets were factual. They were prepared by the System Controller. VHF radios were not functional. The power line was off at 13.05. The Team was aware the power was off, but this could not be taken to mean the line was safe. Redirected, the Witness explained that one was not supposed to

work on the lines simply because the power supply had been turned off. Permit must be given. The Claimant was about to engage in a second illegal operation. He did not have the permit in either case. He did not have authority to apply CME. Yusuf Galgalo was also sacked.

23. Brenda Abwavo holds a degree in Human Resource Management, and was at the material time, the Human Resource and Administration Officer responsible for Mt. Kenya Region. There was an electrocution at Meru. The Respondent instigated disciplinary processes, and the culpable Employees had their contracts terminated. The Claimant was suspended on 28th February 2011. Suspension was lifted to enable the Respondent continue with the disciplinary process. His supervisor was supposed to make recommendations before a decision could be taken. The Employee was invited to a disciplinary hearing. Hearing was on 31st March 2011. The Claimant appeared in the company of a Trade Union Representative of his choice. The hearing took place and resulted in recommendations. The Claimant was paid 4 months' salary. His contract was terminated. He was not dismissed. The Committee concluded the Management made a good decision. Termination was fair, and fair procedure was adopted. There was lawful cause. Another Employee lost his life.

24. In cross-examination, Abwavo testified she wrote to the Claimant on 29th March 2011, requiring him to attend the hearing on 31st March 2011. There were two sessions, with one session held on 17th March 2011, in which the Union participated. The Claimant attended on 31st March 2011. The Management was satisfied the grounds for termination were valid. Claimant's culpability was established by witness testimony. Investigations were carried out. The Witness was not able to say in the absence of the personnel file, whether the Claimant had other disciplinary issues. Abwavo clarified upon redirection that there were 2 hearing sessions. The first was on 17th March 2011, where the Claimant was represented by the Union. On the second hearing he was in attendance, accompanied by three or four Trade Union representatives. The decision of the Respondent to terminate was based on the report of the investigation and on the hearings. Lifting of the suspension simply meant investigation was complete. He was the Team Leader. It was established he was culpable. Fair procedure was followed in the process.

25. Patricia Musili testified that Maluli received instructions on the material day that, a tree had fallen on high voltage cables. He led his Team to the scene. He asked the Team to isolate the scene. The Team did so at two places. Maluli explained to the Employees what they were supposed to do. They were to disconnect three jumpers. This would entail one of the Employees climbing up the pole. Muchangi was instructed to climb the pole by the Claimant. The Employees did not ask the Claimant about the permit. Before climbing, the Employees were supposed to test the cables and place the CME- Circuit Main Earth. Maluli carried out the tests, and it was after this that Muchangi climbed the pole. The Claimant had left the scene after he gave the instructions. Patricia was to assist the deceased. She did not know where Wanjohi the Supervisor was. He was not there when the Team made the initial arrival. Day Workers such as Patricia and Muchangi took instructions from their Team Leader. In this case the Claimant was the Team Leader. Muchangi had worked on high voltage cables before.

26. Patricia stated in cross-examination that she had worked for the Respondent for 5 years, as at the date of her testimony. There were businesses near the scene of the electrocution. She did not witness bystanders nearby. There was no maize roaster or shoemaker nearby. She could receive instructions from Wanjohi. She was there when the accident occurred. She did not know where the investigation report originated from or where Wanjohi was at the time the accident took place. She was not left behind with Wanjohi. She denied that she had been promised anything to come and testify. She restated on redirection that she was interviewed by Engineer Ogutu. She recorded her statement the day after the accident. Maluli, and not Wanjohi, instructed the deceased. She had gone to rest at a photocopier shop. Her role was to dig holes. Wanjohi could only reach the Employees through the Claimant. The Respondent prays the Court to dismiss the Claim.

The Court Finds and Orders:-

27. It is confirmed by the Certificate of Service, issued by the Respondent to the Claimant on 19th June 2012, that the Claimant worked for the Respondent from 4th June 1986 up to 29th April 2011. He worked

as a Craftsman 1, with a monthly basic salary of Kshs. 58,408, and Owner Occupier House Rent Allowance of Kshs. 20,741. He last worked at the Meru Branch of the Respondent, Mt. Kenya Sub-region. The Claimant's contract was terminated on 19th April 2011, under clause 27 of the Collective Bargaining Agreement in force between his Trade Union and the Respondent. He disputes the validity of the reason given by the Respondent in justifying termination, and avers that fair procedure was not followed.

28. The issues arising from the dispute are whether the Respondent had a valid reason to terminate the Claimant's contract; whether fair procedure was followed; and whether the Claimant merits reinstatement, back pay, 12 months' salary in compensation, interest and costs.

29. On the first question, the Respondent justified its decision to terminate the Claimant's contract on the ground that the Claimant had '*instructed a Day Worker to climb a pole and break jumpers without following the due safety procedures leading to his death through electrocution.*' Was this statement factually correct, and did it afford the Respondent valid ground for termination?

30. The Claimant denies that he gave instructions to Dennis Muchangi to climb the pole and break jumpers contrary to the safety regulations, resulting in the death of Muchangi. He testified he was instructed by his Supervisor Wanjohi to carry out line patrol. He went away to do this with part of the Team he was leading. Those who went with him were Mwarania, Maina and Muthuri. Patricia, the deceased Muchangi, and the Supervisor remained behind at the scene where the actual accident occurred. He was about 1 kilometre away when Muchangi climbed the pole and was electrocuted. He did not instruct Muchangi to climb the pole.

31. The Claimant is contradicted in this by three of the Witnesses for the Respondent- Patricia, Ogutu and Wanjohi. Patricia in particular was emphatic that it was their Team Leader the Claimant, who led Employees at the scene, instructed them to isolate the scene, explained to the Employees what they were to do, and instructed Muchangi to climb up the pole.

32. Ogutu, the Safety Engineer who carried out investigation, confirmed it was the Claimant who instructed Muchangi to climb the pole. Ogutu also found that the Claimant was about to carry more tests and instruct another Employee to climb a second pole when the accident occurred. The Claimant conceded in his statement on investigation, that he carried out the test, and was about to carry out the second test, when he heard a loud bang. "We agreed that we apply CME and come back" he states, explaining that his Supervisor Wanjohi had gone to YO24, and was to call the Claimant for CME and testing consent. This statement from the Claimant is given weight by the evidence of Patricia who stated before any Employee climbed the pole to disconnect the jumpers, the there was supposed to be carried out a test, and CME applied. Patricia stated it was the Claimant who carried out the test.

33. In his subsequent Appeals to the Managing Director of the Respondent against the termination decision, the Claimant stated he was not authorized to apply CME. This was correct going by the certificate of authorization [class 8, 13, 15 -17] held by the Claimant, which is issued by the Respondent to various Employees. The evidence from the Claimant's own statement under investigation, and from Patricia in particular, suggest that the Claimant carried out tests. The scope of the Claimant's authorization, did not allow him to carry out these tests. No permit had issued to him to undertake the tasks he performed in the absence of his Supervisor. Consent had not issued as instructed by the Supervisor.

34. The Claimant as the Team Leader had obligations under Section 44[4] of the Employment Act 2007, which he may not have discharged as would have been expected. He was expected to supervise his Team Members, and perform his role carefully and properly, adhering to the safety procedure put in place by the Respondent, given the high risk functions that are the daily work of the Respondent. He was aware of the command, control and safety structures. The Control Centre was based at Kiganjo. He was told by Wanjohi to wait for his call, so that the requisite consent on testing would issue. Against these instructions, the Claimant went ahead and carried out the tests he was not authorized to carry out. His conduct, even without considering the contentious issue whether it was the Claimant who issued

Muchangi instructions to climb the pole, has elements of an Employee who acted contrary to the lawful instructions of a person placed in authority over him, and that of an Employee who performed his role carelessly and improperly. Both are employment offences under Section 44 [4] of the Employment Act 2007, and would be valid reasons for termination.

35. The Claimant seems to have throughout his evidence, shifted blame from himself to his Supervisor Wanjohi. He says he was instructed by Wanjohi to go on line patrol, and left Wanjohi, Patricia and Muchangi at the scene of the accident. He was not there at the accident, and could not have given Muchangi instructions to climb the pole. He however in his statement on the investigation placed the Supervisor out the scene of the accident, saying “ My Supervisor also left to YO24 and he was to call me for CME and testing consent.” In other words, the Team Leader was left in charge of his Team, or one would presume so, until the consent and permit arrived from the Supervisor to go on with the work. Furthermore, the System Reporting/ Switching Log Sheets place Maluli at scene of the accident at the material times. He was there at 15.51 hours, when he circulated the information that someone had been electrocuted, and power supply at the Meru Substation should therefore be urgently switched off. It was not his Supervisor who first entered the information in the control system, of Muchangi’s electrocution; it was Maluli who did this at 15.51 hours.

36. The Court does not see this as a dispute where liability is to be apportioned for the unfortunate death of Dennis Muchangi. The narrow issue is whether the Respondent had justifiable ground in terminating the Claimant’s contract. Apportionment of liability would entail another forum. The preliminary view of this Court however, is that there was institutional failure where Employees were left to communicate by the Respondent using cell phones in a situation best suited and recommended for use of VHF radios; there were other Members of Staff including Wanjohi and Galgalo [they quarreled in the course of their work] who may like the Claimant, not have performed their duties as carefully and properly as the situation demanded; and the deceased may also have climbed the pole without sufficiently questioning whoever told him it was safe to climb the pole, for although he was a Day Worker, he had done the sort of work before, and was familiar with the safety procedures. It may also be that Muchangi, trusting in the tests carried out by the Claimant, climbed the pole without the instructions of any of the supervisors. All these are probable causes of the electrocution. But as cautioned above, this dispute is not an exercise in apportionment of liability on the death of Dennis Muchangi; it is about questions formulated under paragraph 28 above. The Court is satisfied that the Claimant was the Team Leader and did not act according to the safety procedures at the workplace. He failed in his role as the Team Leader, and given that a Member of his Team lost his life, the Respondent would have justifiable ground in terminating the Claimant’s contract of Employment. Maluli may have done more, as the Team Leader, to provide leadership and perhaps, perhaps Muchangi would not have climbed that pole. There were safety regulations which were to be followed before any work went on at the stricken facility. The Team Leader did not honour these regulations, in particular with regard to consent and permit to initiate the restoration work on the facility.

37. The Respondent in any event treated the Claimant’s exit as a regular termination under Clause 27 of the CBA, with the result that the Claimant was paid 4 months’ salary in lieu of notice, having worked for more than 20 years for the Respondent. He was also offered salary up to and including the 28th April 2011 and 64 days of accrued annual leave. In so far as substantive justification is concerned, the Claimant was given valid reason for termination.

38. The Claimant was suspended on 28th February 2011. The Management of the Respondent and Claimant Trade Union’s 3 Representatives met and deliberated on the accident, on 17th March 2011. The Claimant is not shown to have been in attendance. It was the same date when the suspension was lifted, and Claimant asked to show cause why disciplinary action should not be taken against him. He did this in his letter of 23rd March 2011, adopting the statement he had recorded on investigation. The Human Resource Office commented on the Claimant’s replying letter: “*it is unlikely that the Employee went up a pole without the instructions of the Team Leader and he is to blame for the death. Employee should be terminated.*” The Claimant was invited to a disciplinary hearing on 29th March 2011, to take place on 31st March 2011. There is no record of the disciplinary proceedings of 31st March 2011, but the Human

Resources and Administration Officer Brenda Abwavo, prepared a Report for Chief Manager and Human Resource Administration of the Respondent, rehashing the contents of the Report made by Ogutu, recommending that the Claimant's contract be terminated. Termination followed on 19th April 2011. The Claimant thereafter made several unsuccessful appeals to the Managing Director of the Respondent. The Trade Union also took up the matter with the Management after termination, and the Joint Dispute Resolution Committee of the Respondent and the Trade Union met on 18th October 2011, and recommended that the two Employees whose contracts had already been terminated- the Claimant and Galgalo- be transferred to other areas to continue with their duties; be deployed to other departments; or be de-authorized but continue serving the Respondent. Surprisingly, John Wanjohi who was part of the failures that led to the death of Muchangi represented the Management. The recommendations of the Dispute Resolution Committee were not adopted.

39. The termination procedure did not conform entirely to the statutory minimum disciplinary procedure contemplated under Section 41 and 45 of the Employment Act 2007. There are no clearly recorded minutes of the disciplinary proceedings of 31st March 2011. The Respondent seems to have made up its mind that Maluli caused the death of Muchangi, and should therefore have his contract of employment terminated. This is captured succinctly through the comments of the Human Resource Office appearing of the Claimant's reply to the letter to show cause. Abwavo appeared to testify, if the Court recorded her correctly, that it was for the Supervisor of the affected Employee to make comments on receipt of the reply to the letter to show cause. The comments in the case of the Claimant would have been made by Wanjohi, a key suspect and witness in the accident of 25th February 2011. He should not have been allowed to comment on the guilt of the Claimant, if indeed he is the Supervisor whose comments appear in the Claimant's reply to the letter to show cause. Section 45 (4) (b) of the Employment Act 2007 requires the Employer to act with justice and equity. This would have removed Wanjohi from the investigation and the disciplinary hearing, except in his role as a witness in the matter under enquiry. The Employment Act 2007 under Section 41 [1] and 41 [2] do not envisage disciplinary hearing on paper; disciplinary hearing entails the physical hearing of the affected Employee, in the presence of his Co-employee or shop floor Trade Union Representative. This is physical participation, not paper representations. It is not possible that there is a hearing, in which the Employee and his Representative participate, without appearing at the disciplinary forum in their physical bodies. The physical presence of the Employee and his Representative are part of the minimum statutory disciplinary procedure, and anything short of a physical appearance would be in violation of minimum employment standards. The Respondent's submission, that hearing need not be oral at all times, is against Section 41 of the Employment Act, for there would be no distinguishing letters to show cause and disciplinary hearings. This argument seems to have been adopted by the Respondent in filling the defect caused by non-availability of any record of the disciplinary hearing said to have been accorded the Claimant on 31st March 2011. The Report prepared by Abwavo on 1st April 2011 referred to the letter to show cause, but said nothing of a disciplinary hearing that ought to have taken place only a day back. In sum, termination fell short of the fair procedure test, and the Claimant is entitled to compensation. There is no ground to warrant the grant of reinstatement, considering the findings of the Court on substantive justification of the termination. IT IS ORDERED:-

[a] The Claimant's contract was terminated on valid ground, but was not fairly carried out;

[b] The Respondent shall pay the Claimant 6 months' gross salary in compensation at Kshs. 474,894;

[c] The Respondent shall also pay the Claimant the terminal dues shown in the termination letter dated 19th April 2011; and

[d] No order on the costs.

Dated and delivered at Nairobi this 7th day of March 2014

James Rika

Judge