



**Achuchi v Kenya Power & Lighting Co Ltd (Cause 1982 of 2017)  
[2024] KEELRC 617 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 617 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1982 OF 2017  
JK GAKERI, J  
MARCH 13, 2024**

**BETWEEN**

**JOHN TABU ACHUCHI ..... CLAIMANT**

**AND**

**KENYA POWER & LIGHTING CO LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim alleging unlawful dismissal and being condemned unheard.
2. It is the Claimant's case that he was an employee of the Respondent from 1<sup>st</sup> August, 2008 to 5<sup>th</sup> July, 2017. That he held a Diploma in Building Construction from the Mombasa Polytechnic, 1990 and a Bachelor Degree in Quantity Surveying from Technical University of Kenya (TUK), 2016 and performed his duties diligently.
3. That his employment was terminated for failing to notice defective hydrogeological report and instructed a contractor to repair a borehole without authority, occasioning a bill of Kshs.559,396.00.
4. The Claimant avers that the Rabai borehole was necessitated by the unreliable and erratic water supply at the Rabai Transmission Station and the project required a Hydrogeological Survey, authority of the Water Resources Management Authority (herein after WARMA), sinking of the borehole, equipping, construction of elevated storage tank and installation of a reverse osmosis water purifier.
5. That Bill of Quantities were prepared, tender floated and Ms Ring Technical Services Ltd was appointed by the Tender Committee.
6. That M/s Ring Technical Services Ltd engaged a Hydrogeologist, Mr. W. Wakaranja who conducted the survey and prepared a Hydrogeological report which the company used for authorization from WARMA to sink the borehole.



7. It is the Claimant's case that the drilling process was carried out under the inspection of the Tender Processing Committee comprising the Claimant as Chair, Robert Macharia Secretary, Joseph Munene, Technical and Irene Cheron, Finance which made frequent inspection visits to the site and the borehole was sunk to a depth of 210 meters with a diameter of 213 mm.
8. The Claimant avers that when the borehole was tested for a period of 24 hours, the yield was 1.43/ hour and the contractor issued the pump testing report, chemical analysis report and completed the project and the supervisory team found the borehole working.
9. According to the Claimant, the contractor was obligated to avail certain documents to the Respondent.
10. It is the Claimant's case that any defects in Hydrogeological report ought to have been noticed by WARMA.
11. That the Claimant's request for written communication was not responded to.
12. The Claimant avers that the Rabai Borehole was completed and handed over to the Respondent in a perfect condition but admits that the water available was below the expected quantity and an investigation was conducted and he was thereafter dismissed after a disciplinary hearing.
13. The Claimant faults the dismissal on the premise that no reason was given and he was not accorded the right appeal.
14. The Claimant prays for;
  - i. The termination or dismissal of the Claimant was unlawful.
  - ii. Unpaid notice, Kshs.138,728.00.
  - iii. 12 months compensation, Kshs.1,664,736.00.
  - iv. Salary till retirement (10 years) Kshs.16,647,360.00.
  - v. Punitive and exemplary damages.
  - vi. Interest on (ii), (iii) and (iv) above from date of termination.
  - vii. Any other statutory entitlement.
  - viii. Costs of the cause and interest thereon.

### **Respondent's case**

15. In its response to the claim dated 22<sup>nd</sup> January 2018, the Respondent admits that the Claimant was its employee from 2008 to July 2017 as alleged.
16. It is the Respondent's case that an audit investigation conducted on the Rabai Borehole showed that the Claimant negligently failed to detect defects in the Hydrogeological Survey Report and supervised the project which occasioned unwarranted expenditure of Kshs.19,309,186/=.
17. That he procured the services to repair the Mbaraki borehole without approval, valued at Kshs.559,396/=, was issued with a notice to show cause on 22<sup>nd</sup> May, 2017, responded on even date and disciplinary proceedings were conducted on 2<sup>nd</sup> June, 2017 and the committee recommended summary dismissal for gross negligence of duty as the Project Manager as he raised interim certificate before inspection was conducted, drilling commenced before WARMA gave its authority, did not study the Hydrogeological Survey Report, processed payment before the 1<sup>st</sup> interim certificate of 24<sup>th</sup> April, 2017



was raised and signed and instructed a contractor to repair the work at Mbaraki and was dismissed from employment on 4<sup>th</sup> July, 2017.

18. The Respondent further avers that the Claimant had faced charges of negligence in 2016 for failure to prepare payment certificate No. 2 of Kshs.5,133,877.00 and was issued with a warning dated 6<sup>th</sup> December, 2016.
19. That the Respondent is unaware of any appeal by the Claimant.
20. It is the Respondent's case that the Claimant's dismissal was procedural and lawful.
21. That it paid the Claimant all his dues and he was indebted to the Respondent to the sum of Kshs.297,428.16.
22. The Respondent prays for dismissal of the suit with costs.
23. The Claimant responded to the Memorandum of response filed on 31<sup>st</sup> July, 2018 and avers that the Hydrogeological Survey Report was carried out by a qualified and registered Hydrogeologist and the Claimant was not a professional in Hydrogeological.
24. That due process was not followed in the dismissal as he was not given the necessary materials at the hearing.
25. That he was discriminated.

#### **Claimant's evidence**

26. On cross-examination, the Claimant confirmed that the dismissal letter contained his salary as he had no payslip, Kshs.104,240/= and house allowance of Kshs.34,488.00.
27. It was his testimony that he held a Diploma in Building and Construction and was transferred to Mombasa on 1<sup>st</sup> January, 2016 and was the supervisor of the drilling of the Rabai Borehole and was part of the Inspection and Acceptance Committee which was in charge of the supervision of the project.
28. He confirmed that their work was to inspect the project and prepare reports based on the milestones of the project but there were no specific timelines.
29. The witness confirmed that he was the supervisor on the ground and a member of the Tender Processing Committee.
30. That a Hydrogeological Survey was necessary and supervision was continuous during the life of the project and the Committee confirmed the stages.
31. The witness testified that he could not recall the date of completion as the borehole had not been completed by July 2017 and could not recall the last inspection of the project and it was his last engagement.
32. It was the Claimant's testimony that the hydrogeological survey was carried out by Mr. W. Wakaranja, a Qualified Hydrogeologist and WARMA authorised the drilling by letter dated 23<sup>rd</sup> October, 2014 but he could not recall when drilling commenced though he admitted that authority was given after work had commenced.
33. That it was not his duty to make any report as it was the duty of the committee and there was no instance when the contractor was paid before inspection.



34. As regards the Mbaraki Borehole, the Claimant confirmed that he did not instruct anyone to do any repairs but the contractor did the work.
35. The witness could not remember if he was part of the inspection committee for the Mbaraki Borehole and could not recall a previous disciplinary hearing.
36. The witness confirmed that he faced the charges read out by counsel and signed the minutes on 28<sup>th</sup> November, 2016 and recalled the warning dated 16<sup>th</sup> December, 2016.
37. On re-examination, the witness confirmed that his degree was in Quantity Survey not Hydrogeology and his duty was to prepare tender documents and forward the same.

### **Respondent's evidence**

38. RWI, M/s Catherine Njeru confirmed that the reasons for dismissal of the Claimant were those in the dismissal letter.
39. The witness admitted that the Hydrogeological Survey Report was prepared by a registered Hydrogeologist, Mr. W. Wakaranja and construction of the Borehole was approved by WARMA.
40. That she was not sure whether the Claimant was a trained Hydrogeologist.
41. The witness confirmed that the Claimant had only one warning letter.
42. That the Respondent did not have a copy of the Claimant's appeal letter dated 24<sup>th</sup> October 2017.
43. That the Claimant authorised repair of the Mbaraki Borehole without approval.
44. That the Claimant was the Project Manager of the Rabai Borehole project not only preparing the Bill of Quantities.
45. RWII, Mr. Benson Kioni confirmed that reasons for termination of the Claimant's employment were those in the letter of dismissal, he worked in audit and the Claimant was a building technician and had no skills in Hydrogeological matters.
46. The witness confirmed that WARMA authorises drilling of Boreholes.
47. That the payment made on 5<sup>th</sup> May, 2014 was made before inspection.
48. That WARMA did not lodge a complaint that the Hydrogeological Survey was defective.
49. That the Claimant authorised the Mbaraki repairs outside the Respondent's system.
50. That Munene Cheron and Macharia who were members of the inspection committee were not doing the same work as the Claimant and the witnesses' role at the disciplinary hearing was to clarify issues at hand.
51. RWII testified that the Claimant's work was approved by Mr. Dick Kwinga who was the supervisor and other members of the committee were not dismissed.
52. On re-examination, the witness admitted that the Hydrogeologist was conflicted because he was engaged by the contractor who paid for his services, that an independent professional would have been more objective on the viability of the project and the Claimant was supposed to advise on whether to proceed with the project or not.



53. The witness admitted that the project had not been finalized and became a white elephant and the Claimant used the same contract to repair the Mbaraki Borehole outside the provisions of the [Public Procurement and Asset Disposal Act](#), 2015.
54. The witness testified that the letter from WARMA was generated after the project had commenced and payment made before the committee had inspected the project.
55. That an independent Hydrogeologist reported that the Rabai borehole was not viable.
56. That the Claimant worked with Charles Nzioka and his work was to guide the committee.
57. RWIII, Mary Kaari confirmed that she was the immediate supervisor of the Claimant as the Manager Administration since 2015, taking over from Mr. Mathenge and she found an on-going project and was not privy to what was not approved and the Rabai documents were not handed over to her.
58. On re-examination, the witness explained that a project was initiated by a technician who drafted the specifications and scope and maintains a file at the regional office and was incharge of the day-to-day matters germane to the project.
59. That she attended the disciplinary hearing.

#### **Claimant's submissions**

60. Counsel for the Claimant submitted on dismissal, reliefs sought and legitimate expectation.
61. On dismissal, counsel relied on Section 41 of the [Employment Act](#) 2007 to urge that the Claimant lodged an appeal vide letter dated 17<sup>th</sup> July, 2017 but not afforded an opportunity to cross-examine witness or hearing of the appeal and procedural fairness was not guaranteed.
62. Counsel cited the sentiments of the court in *Geoffrey Gikonyo Mathu V Intex Construction Co. Ltd* (2017) eKLR to submit that the entire disciplinary hearing was a sham as the Claimant was not accorded any document to prepare for the hearing.
63. That in the absence of documents to support the allegations, the hearing was unfair.
64. Counsel cited the provisions of Section 43 of the [Employment Act](#), 2007 to submit that the Claimant was transferred to Mombasa on 1<sup>st</sup> January, 2016 long after completion of the Rabai Project and no evidence was provided by the Respondent to show that the report prepared by the Hydrogeologist was given to the Claimant for scrutiny and the same was approved by WARMA and authority to drill given on 24<sup>th</sup> October, 2017.
65. The reasons for the borehole not producing water had nothing to do with the Claimant.
66. On the repair of the Mbaraki borehole, counsel submitted that the Respondent had not produced any documentation to show that the Claimant authorised the repairs.
67. Counsel submitted that the reasons for dismissal relied upon by the Respondent had not been proved and cited *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.
68. On legitimate expectation, counsel submitted that the Respondent, had created a reasonable expectation in the Claimant's mind and cited the sentiments of *HWR Wade & CF Forsyth Administration Law* at page 449-450 on the essence of a reasonable and legitimate expectation.



69. Reliance was also made on the decision in *Communications Commission of Kenya & 5 others V Royal Media Services* to submit that the Respondent flagrantly frustrated the Claimant's expectation of employment until retirement.
70. Counsel finally submitted that the Claimant had proved that his dismissal was unfair as the Respondent had not proved that it had a valid reason to do so.

### **Respondent's submissions**

71. Counsel for the Respondent submitted on whether termination of the Claimant's employment was fair and legal and entitlement to the reliefs sought.
72. On the 1<sup>st</sup> issue, counsel submitted that the minutes of the disciplinary hearing revealed the Claimant's negligence which led to loss of funds.
73. That although the project was scheduled to end by 30<sup>th</sup> June, 2014, WARMA authorization was dated 23<sup>rd</sup> October, 2014 and the Claimant admitted that drilling commenced and payment was made before WARMA's authorization was given, which was irregular and which the Claimant appeared to justify.
74. That the Claimant avoided the question on the repair of the Mbaraki borehole.
75. Counsel invited the court to find and hold that the Respondent had a valid and fair reason to terminate the Claimant's employment and had proved the same on a balance of probabilities as held in *National Union of Mineworkers & others V Commission for Reconciliation, Mediation and Arbitration & 2 others* cited in *Joseph Otieno Kongo V Riley Services Ltd (2022)* eKLR on the standard of proof on the part of the employer.
76. Counsel argued that from the minutes of the disciplinary hearing, it was clear that the Claimant was negligent in the role he played in the Rabai borehole citing the decision in *Hosea Korir Serem V Moi Teaching & Referral Hospital (2017)* eKLR.
77. On procedure, counsel relied on Section 41 of the *Employment Act, 2007* and the sentiments of the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017)* eKLR to urge that the Respondent took all reasonable steps to accord the Claimant a fair opportunity to be heard and present his case and due process was observed.
78. That as held in *J.W.N V Teachers Service Commission (2014)* eKLR, the law only requires a fair hearing not a perfect one.
79. On the reliefs sought, counsel cited the sentiments of the court in *Hellen Mwanja Mule V Kenyatta University (2018)* eKLR on Section 47(5) of the *Employment Act, 2007* on the burden of proof of the employer and employee to urge that the Respondent had proved its case and the Claimant was not entitled to any of the reliefs sought.
80. Finally, counsel argued that the Respondent's case overwhelmed that of the Claimant.

### **Findings and determination**

81. It is common ground that the Claimant was an employee of the Respondent from 1<sup>st</sup> August, 2008 to 4<sup>th</sup> July, 2017 at a monthly gross salary of Kshs.138,728/= and was employed as a Building technician.
82. It is also not in contest that as regards the Rabai Borehole, the Claimant prepared the specifications while based at Nairobi and the project commenced while he was still in Nairobi, though he was the



- supervisor of the project, a fact he admitted on cross-examination and confirmed by RWIII, Mary Kaari.
83. It is also not in dispute that the Claimant was transferred to Mombasa effective 1<sup>st</sup> January, 2016 and on the Rabai Project, he worked with one Charles Nzioka.
84. The Claimant further admitted that he was a member of the Inspection and Acceptance Committee of the Rabai Borehole Project and regular inspections were carried out by the committee.
85. He also admitted that he and the Building Technician at the Coast inspected the project every fortnight but tendered no evidence of any inspection or visit by the two.
86. The issues for determination are;
- i. Whether termination of the Claimant's employment was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
87. On the 1<sup>st</sup> issue, counsels have adopted opposing positions as is typical in such cases with the Claimant's counsel maintaining that none of the reasons relied upon by the Respondent was proved. He also faulted the procedure employment. Counsel for the Respondent argued otherwise.
88. As counsels for both parties correctly submitted, the provisions of the *Employment Act*, 2007 lay it bare that for a termination of employment to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employment based on the conduct, capacity or compatibility of the employee or operational requirements of the employer and did so in accordance with fair procedure.
89. In other words, there must have been a substantive justification and procedural fairness as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.

### **Reason for termination**

90. The Claimant's dismissal letter dated 4<sup>th</sup> July, 2017 identified 2 reasons for the dismissal, namely;
1. Failure to notice a defective Hydrogeological report which led to the Respondent incurring unwarranted expenditure of Kshs.14,003,058.90.
  2. Instructed the contractor to repair the borehole at a cost of Kshs.559,396.60 without requisite authority.
91. On the 1<sup>st</sup> reason, it is common ground that owing to the unreliable water supply at the Rabai Transmission Station, the Respondent considered the possibility of sinking a borehole and the Claimant prepared the specifications.
92. It is essential to bear in mind that the Claimant held a Diploma in Building Construction as opposed to Hydrogeology.
93. The works required the carrying out of a Hydrogeological Survey to site the borehole, authority of the Water Resources Management Authority, sinking and casting, equipping the borehole, construction of elevated water tank and installation of a reverse osmosis water purifier. In addition, the Claimant prepared the Bill of Quantities and a restricted tender was floated and M/s Ring Technical Services Ltd won the tender.
94. The Claimant was the Chairman of the Tender Processing Inspection and Acceptance Committee which oversaw the project.



95. It is important to point out that the project was not properly thought out from the beginning as either the Procurement Department of the Respondent or whoever conceived the project by default or design, decided to combine the carrying out of the Hydrogeological Survey with the drilling of borehole
96. It would appear that it was for the company appointed to decide whether or not to proceed as it had to engage the Hydrogeologist whom it would pay for services rendered leading to a conflict of interest.
97. The Respondent had by so doing surrendered its decision making powers as it had no Hydrogeologist among its staff and did not seek independence advise on the viability of the project.
98. In sum, M/s Ring Technical Services Ltd engaged one Mr. W. Wakaranja, a qualified and registered Hydrogeologist to carry out the Hydrogeological Survey which he did and prepared a 43 page report dated 6<sup>th</sup> March, 2014.
99. The Hydrogeologist's conclusion was that the only viable option was to sink a borehole although there was no indication that there was water or it would be sufficient.
100. According to him, there was no "ground water exploration method that can be used to determine the Quantity and Quality of water before drilling".
101. The Hydrogeologist's recommendation meant that the borehole project was confirmed.
102. The Claimant, in his explanation dated 17<sup>th</sup> May, 2016 admitted on page 2 that the contractor supplied 6 documents including the Hydrogeological Report, Authorization by WARMA, Borehole Completion record, Borehole test report, Borehole recovery report and the chemical analysis test.
103. Being the Project Manager or Supervisor, it was incumbent upon the Claimant to inform its employer that as he had no expertise in Hydrogeology, there was need to subject the report to another professional in the particular field for decision making whether the advise was taken or not to protect himself.
104. On the contrary, having surrendered its decision making to M/s Ring Technical Services Ltd, the Claimant's role in the project was supervisory.
105. As adverted to elsewhere in this judgement, the Respondent employed the Claimant on the basis of a Diploma in Building Construction and it was not demonstrated that he had any training or experience in hydrogeology.
106. Similarly, from the manner in which the project was designed, there is no indication that it was the Claimant who would make the decision as to whether or not to proceed with the project.
107. As observed above, the Respondent surrendered its decision making on the viability of the project to M/s Ring Technical Services Ltd and was bound by its decision and could not later on when circumstances changed blame the Claimant for not having noticed that the Hydrogeological Survey Report was defective.
108. More significantly, and as the Claimant testified and his counsel submitted, the Hydrogeological Survey Report was submitted to WARMA and was approved and authorization to drill given by letter dated 23<sup>rd</sup> October, 2014, incidentally, long after the project had commenced and payment made.



109. Section 43(1) of the [Employment Act](#), 2007 provides that;
- “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
110. This provision requires the employer to demonstrate that it had a valid or valid reasons to terminate the employee’s employment.
111. For the foregoing reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that the Claimant failed to detect that the Hydrogeological Survey Report was defective.
112. On the second reason, the Claimant testified that he did not instruct the contractor to undertake the repair. This is a very serious allegation as it implicates the Claimant’s adherence to the law in Procurement. All procurements in the public service are governed by the [Public Procurement and Asset Disposal Act](#), 2015 and even where the variation is within the prescribed threshold, the variation must be recommended to and authorised by the organization’s Chief Executive Officer. In this case, this was not done and the procurement was an illegality.
113. Puzzlingly, in his explanation on the Audit Investigation Report No. 15-2016/2017 dated 22<sup>nd</sup> May, 2017, the Claimant stated that he never issued any instructions on the Mbaraki Borehole but added that the contractors agreed upon themselves and the invoice should be taken to Mbaraki Borehole Contractor but not the Respondent.
114. During the disciplinary hearing, the Claimant testified that the contractor did the work without instructions.
115. Asked how the contractor accessed the site without approval, the Claimant responded as follows;
- “There were many projects that were running at the same time. The Mbaraki contractor never did his work diligently.”
116. Implicitly, the Claimant was admitting that some repairs were necessary at the Mbaraki Borehole, but by reason of the many projects taking place at the same time, he could not recall who was instructed to do the repairs. Otherwise, if the contractors agreed amongst themselves, who brought them together? Who informed them the repairs were needed at the Mbaraki Borehole and who granted them access to the site?
117. Was the Mbaraki Borehole on-going at the same time or had been completed?
118. If indeed the Claimant was overwhelmed by the many projects with no support, how would he explain the preparation of interim certificates and inspection forms, commencement of the project and payment of the contractor before inspection and drilling authorization from WARMA as opposed to delaying payment owing to the heavy workload?
119. Needless to emphasize, the Claimant signed the minutes of the hearing unreservedly.
120. It was also the Claimant’s testimony at the hearing that there were many challenges such as the new constitution, lack of support from the Regional Office, Coast that time. “We could not do much until we got support from the then Chief Manager, Human Resource & Administration”, he stated.
121. Was the Claimant not justifying the alleged instructions to the contract to undertake the repairs?



122. In sum, the Claimant was far from candid on this issue and being the person on the ground in Mombasa, the buck stopped with him and could not free from blame.
123. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
124. This provision is clear that all that the employer is required to demonstrate is that it had reasonable grounds for the genuine belief and the standard of proof is on a balance of probabilities as held in *National Union of Mineworkers & others V The Commission for Conciliation and Mediation and 2 others* (Supra) cited by the Respondent’s counsel.
125. In *Kenya Revenue Authority V Reuvel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal was unambiguous that;
- “. . . It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek to prove beyond reasonable doubt as is in a criminal trial . . .
- The standard of proof is on a balance of probability not beyond reasonable doubt, and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee’s services. That is a partly subjective test . . .”
126. The foregoing reasoning, which this court is in agreement with comports with the “range of reasonable responses test” set out in the *Halsbury’s Law of England*, 4<sup>th</sup> Edition, Vol. 16(1B), paragraph 642 cited by the Lord Denning in *British Leyland UK Ltd V Swift* (1981) I.R.L.R 91 as follows;
- “. . . The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. It must be remembered that in all these cases, there is a band of reasonableness, within which one employer might take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonable keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”
127. In this case, it is evident that the Respondent’s Audit Department conducted an Audit of the Rabai Transmission Station at the instigation of the General Manager, Human Resource & Administration vide an internal memo to the Ag. General Manager Internal Audit dated 31<sup>st</sup> May, 2016.
128. The audit was carried out and a report was forwarded to the Ag. Managing Director & Chief Executive Officer on 13<sup>th</sup> April, 2017.
129. Shockingly, the audit found that although the contract between the Respondent and the Contractor, M/s Ring Technical Services Ltd was signed on 21<sup>st</sup> January, 2014 and the project completion schedule was 24 weeks, the project had neither been commissioned nor handed over to the Respondent by the date of the report.
130. The Claimant confirmed as much at the disciplinary hearing.



131. The audit found that the Claimant and one Charles Nzioka were in charge of the project and as mentioned elsewhere in this judgement, the Claimant was the Chairman of the Tender Evaluation, Negotiation, Inspection and Acceptance Committee.
132. On payments, the 1<sup>st</sup> interim certificate dated 24<sup>th</sup> April, 2014 was prepared by the Claimant at 34% of work done before inspection of the works as the Inspection and Acceptance Form was dated 5<sup>th</sup> May, 2014 and the system indicated that the 1<sup>st</sup> payment of Kshs.6,569,848.50 was made on 17<sup>th</sup> April, 2014 before the interim certificate was generated.
133. Second, the 2<sup>nd</sup> and 3<sup>rd</sup> interim certificate was dated 14<sup>th</sup> August, 2014 and the Inspection and Acceptance Forms were dated on even date suggesting that the inspection of the work took place on the same day and the 2<sup>nd</sup> payment of Kshs.7,433,210.40 was made on 23<sup>rd</sup> July, 2014 before the relevant forms were generated.
134. Third, the audit revealed that authorization to drill by WARMA was issued on 16<sup>th</sup> July, 2014 after the Inspection and Acceptance Form I dated 5<sup>th</sup> May, 2014 which suggests that inspection was carried out before authority to drill had been given and the 1<sup>st</sup> payment was also made.
135. Fourth, the Hydrogeological Survey Report missed out on key aspects such as test/measurement result data e.g soil boring logs Rabai geological map, rock formation details, aquifer discharge, among others.
136. Fifth, the contractor was demanding Kshs.559,396.00 for additional works at Mbaraki Borehole requested for by the Claimant procured directly contrary to the law.
137. Although the Claimant denied having requested for the works, he could not explain how the bill was incurred by a contractor who had no authority to access the site which was under his watch and render services which were unknown.
138. The most incriminating finding of the audit, which the Claimant did not address in his explanation dated 22<sup>nd</sup> May, 2017 was processing of the interim certificates 1, 2 and 3, Inspection and Acceptance Forms and actual payment as they were incongruous and payments were made before inspection of the work.
139. According to the audit, the Rabai Borehole Project was unsustainable and uneconomical due to the low yielding of water and a water bowser was a better option.
140. In the court's view, the Rabai Borehole Project was poorly conceived and implemented and was doomed to fail principally by the absence of a proper Hydrogeological Survey Report by an independently sourced hydrogeologist.
141. Thus, although it would be inequitable to blame the Claimant for all the failures, his contribution was enormous. He drafted the specifications and defined its scope, prepared the Bill of Quantities, he was the Project Supervisor and the Chair of the Tender Committee.
142. Although he testified that he and Nzioka made visits every fortnight and met the contractor, there is no evidence of the alleged inspection visits or meetings. He could not recall the last inspection though he admitted that supervision was continuous. Similarly, he could not recall when drilling began.
143. For the foregoing reasons, the court is satisfied that the Respondent has on a preponderance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant's employment.



## Procedure

144. As held in *Pius Machafu Isindu V Lavington Security Guard Ltd (Supra)*, the procedure prescribed by Section 41 of the *Employment Act*, 2007 is mandatory for a termination of employment to pass muster.
145. In *Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR*, the Court of Appeal itemised the requirements of Section 41 of the *Employment Act*, namely; explanation of the grounds in a language understood by the employee, reasons for which termination of employment is being considered, entitlement to the presence of a colleague during explanation and hearing and considering the representation, if any, by the employee or the colleague.
146. In the instant case, the Claimant admitted that the he was issued with a notice to show cause, responded, was invited for a hearing and attended the same, participated and signed the minutes unconditionally.
147. The Claimant admitted that the Notice to Show Cause set out the reasons for termination as did the invitation to the disciplinary hearing and they were explained by the Chairman of the Disciplinary Committee during the introduction.
148. He also admitted that he responded to the Audit Report and authenticated his response.
149. Contrary to the Claimant's counsel's submission that the Respondent adduced no evidence to prove that the Hydrogeological Survey Report was given to the Claimant, the Claimant's explanation to the Manager, Administration & Property dated 17<sup>th</sup> May, 2016 is unambiguous that the contractor provided a copy of the Hydrogeological Report.
150. To the submission that the Respondent did not avail documents at the hearing, the most relevant document was the Audit Report, in respect of which the Claimant tendered an explanation dated 22<sup>nd</sup> May, 2017.
151. As regards the appeal, counsel faulted the process in that the Claimant was not accorded the opportunity to appear and cross-examine witnesses.
152. In the court's view, since the appellate process is not expressly provided for by the *Employment Act*, 2007, its modalities are for the most part addressed by the Human Resource Policy and Procedures Manual and seldom involves hearing of witnesses by the appellate body, principally the Board of Directors or a committee of the board.
153. In this case, the Claimant adduced no evidence to show that the appellate process was not conducted in accordance with the Respondent's Human Resource Policy and Procedures Manual.
154. The Respondent's letter dated 24<sup>th</sup> October, 2017 informed the Claimant the outcome of the appellate process.
155. Finally, on composition of the disciplinary committee, Mr. Benson Kioni's presence was not unique as he had participated in the preparation of the Audit Report dated 13<sup>th</sup> April, 2017 and being the most relevant document in the process, his presence may have been necessary for purposes of clarifications.
156. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove on a preponderance of probabilities that his dismissal from employment by the Respondent was procedurally flawed and thus unfair.



## **Whether the Claimant is entitled to the reliefs sought**

### **i. Termination**

157. Having found that the Claimant has failed to prove that termination of his employment by the Respondent was unfair, a declaration to that effect is not merited and is declined.

### **ii. Pay in lieu of notice**

158. Having found as above, the prayer for pay in lieu of notice is not sustainable and is declined.

### **iii. 12 months compensation**

159. The Claimant prays for the maximum compensation for termination and as the court has found that it was not shown to have been unfair, the prayer is declined.

### **iv. Salary till retirement for at least 10 years**

160. As this Court and the Court of Appeal have consistently held, no employment is permanent and the *Employment Act*, 2007 does not use the phrase permanent and pensionable or otherwise.

161. Typically, employment contracts contain an exit clause which may be invoked by either party. The Claimant did not avail a copy of his employment contract.

162. More significantly, a claim for salary till retirement is a claim for anticipatory earnings and no legal anchorage has been provided in light of the earlier argument.

The prayer is declined.

### **v. Punitive and exemplary damages**

163. The Claimant neither adduced evidence nor demonstrated the circumstances which would entitle him to punitive and exemplary damages even if the termination was found to have been unfair.

The prayer lacks a factual basis and is declined.

164. Flowing from the foregoing, it is clear that the Claimant's suit against the Respondent is unsustainable and it is accordingly dismissed.

165. Parties shall bear own costs.

166. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF MARCH 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article



159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

