



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2406 OF 2017**

**KENNETH KIONGO NDUMBI.....CLAIMANT**

**VERSUS**

**KENOL KOBIL LIMITED.....RESPONDENT**

**JUDGMENT**

1. Kenol Kobi Limited, the Respondent in this case, is the precursor of Rubis Energie S.A.S. The Respondent's core business is importation, sale and distribution of petroleum products.

2. The Claimant, Kenneth Kiongo Ndumbi, was employed by the Respondent on 11<sup>th</sup> April 2002, in the position of Accounts Assistant, rising through the ranks to the position of Accounts Payable Accountant as at 4<sup>th</sup> August 2017, when his employment was terminated on account of gross misconduct.

3. The Claimant states his claim in a Statement of Claim dated and filed in court on 5<sup>th</sup> December 2017. The Respondent filed a Memorandum of Defence on 10<sup>th</sup> April 2018 to which the Claimant responded on 18<sup>th</sup> February 2020.

4. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Caroline Kamau. The parties further filed written submissions.

**The Claimant's Case**

5. The Claimant joined the Respondent's workforce in April 2002 initially in the position of Accounts Assistant. He rose through the ranks to the position of Accounts Payable Accountant effective 16<sup>th</sup> September 2014.

6. At the time of leaving the Respondent's employment, the Claimant earned a monthly salary of Kshs. 247,879.18.

7. The Claimant states that sometime in early 2017, he had a meeting with the Group Managing Director of the Respondent, David Ohana where he was ordered to proceed on his annual leave as from 30<sup>th</sup> May 2017.

8. The Claimant further states that upon applying for leave via the Company's online platform he realised that his credentials had been disabled. He adds that he was forced to use the Respondent's Human Resource Manager to apply for the leave on his behalf. The Claimant went on leave from 29<sup>th</sup> May 2017 until 11<sup>th</sup> July 2017.

9. The Claimant goes on to state that during the pendency of his leave, he realised that the Respondent had removed him and his family from its medical scheme and had further blocked his Kenol Kobil fuel card.

10. The Claimant claims that when his leave was about to end, the Respondent's Human Resource Manager called him and informed him not to return to work until 13<sup>th</sup> July 2017.

11. On 13<sup>th</sup> July 2017, there was no communication from the Respondent and the Claimant sent an email inquiring on which date he was expected to return to work. In response, the Claimant was informed of the extension of his annual leave.

12. The Claimant avers that at the beginning of the year 2017, the Company had initiated a scheme of getting rid of older and longer serving employees and replacing them with younger managers, who earned less than what the Company was spending on the senior long serving

employees, like the Claimant.

13. The Claimant returned to work on 24<sup>th</sup> July 2017, when he had a meeting with a committee made up of the Human Resource Manager, Internal Audit Manager and the Finance Manager. During this meeting, the committee read out some audit findings to the Claimant. The Claimant was asked not to report to work until he responded to the audit findings.

14. On 26<sup>th</sup> July 2017, the Claimant was issued with a notice to show cause that required him to attend a disciplinary meeting on 28<sup>th</sup> July 2017, to answer to alleged offences that the Claimant claims to have had no knowledge of and/or committed.

15. The Claimant responded to the show cause letter by his email dated 28<sup>th</sup> July 2017, denying any knowledge of the wrong doings alleged by the Respondent. By the same email, the Claimant requested to be granted access to the Respondent's Oracle System and further to be supplied with the documents relied upon by the Respondent in making a conclusion that he was culpable of the offences alleged in the show cause letter. The Claimant also asked for more time to peruse the documents before the hearing.

16. On 28<sup>th</sup> July 2017, the Claimant proceeded to the Respondent's office where he met the Human Resource Manager, who informed him that the committee would look into his request for documents and access to the Company's System and revert back to the Claimant.

17. On 2<sup>nd</sup> August 2017, the Respondent's Human Resource Manager, sent an email to the Claimant, asking him to attend a meeting on 4<sup>th</sup> August 2017, at the Respondent's offices.

18. The Claimant attended the meeting of 4<sup>th</sup> August 2017, when he met the Human Resource Manager who informed him that the Respondent's Chief Executive Officer had refused to share with the Claimant the documents relied upon to hold him negligent in his duties. The Claimant was also denied access to the Oracle System.

19. The Claimant avers that he was not given an opportunity to adequately defend himself as the Company refused to furnish him with the documents finding him culpable and he was not allowed access to the Company's Oracle System.

20. The Claimant further avers that his response to the allegations levelled against him was not considered and he was summarily dismissed on 4<sup>th</sup> August 2017. He adds that he was not given an opportunity to appeal against the decision.

21. The Claimant deems his dismissal as unfair and a blatant violation of his right to fair labour practices under Article 41(1) of the Constitution due to the following reasons:

- a. The Claimant was never at any time during his employment by the Respondent, informed of any fraudulent activities in the Accounts & Finance Department, prior to the show cause letter dated 25<sup>th</sup> July 2017;
- b. The Claimant was never given a valid reason for termination of his employment;
- c. The Claimant was never given a chance to defend himself on the allegations levelled against him;
- d. The Respondent did not issue the Claimant with a Certificate of Service;
- e. The Respondent has, since 2013, been engaging in unorthodox ways of cutting down on its costs by reducing the number of employees, mostly high salaried employees and managers.

22. The Respondent seeks the following remedies:

- a. A declaration that the termination of his employment conveyed by letter dated 4<sup>th</sup> August 2017, was wrongful and unfair;
- b. Aggravated damages for unfair termination of employment;
- c. Kshs. 2,974,550.16 being 12 months' salary in compensation for unfair termination;
- d. Kshs. 1,859,093.85 being severance pay for 15 years
- e. Kshs. 247,879.18 being 1 month's salary in lieu of notice;
- f. Kshs. 446,182,524 being leave pay for 36 days;
- g. Kshs. 247,879.18 being salary for the month of July 2017;
- h. Kshs. 41,643,702.24 being salary from date of termination to retirement;
- i. Certificate of Service;

j. Costs plus interest.

## **The Respondent's Case**

23. In its Memorandum of Defence dated 9<sup>th</sup> April 2018 and filed in court on 10<sup>th</sup> April 2018, the Respondent denies that the Claimant was unlawfully dismissed from employment and states as follows:

- a. The Claimant was lawfully terminated on grounds of misconduct arising from his negligent performance of duties and fraudulent conduct;
- b. The Claimant's dismissal was fair, procedural and was carried out in accordance with the applicable laws;
- c. The Claimant's termination on grounds of misconduct was justified and warranted in the circumstances.

24. The Respondent admits that the Claimant was employed as an Accounts Assistant on 11<sup>th</sup> April 2002. The Respondent further admits that the Claimant rose through the ranks to the position of Accounts Payable (AP) Accountant.

25. The Respondent states that as AP Accountant, the Claimant was required to review all invoices for appropriate documentation and approval prior to payment and ensuring that all reconciliations were done appropriately and in accordance with the Respondent's Financial Discipline and Accounting Policies.

26. The Respondent accuses the Claimant of wilfully breaching his fiduciary duty by failing to adhere to the Accounting Policies, which resulted in huge financial losses for the Respondent.

27. The Respondent states that in order to ascertain the veracity of the allegations levelled against the Claimant and to pave way for investigations, the Claimant was asked to go on leave from 29<sup>th</sup> May 2017 to 11<sup>th</sup> July 2017. The Respondent extended the Claimant's leave vide letter dated 14<sup>th</sup> July 2017 to allow for further investigations.

28. The Respondent avers that the investigations carried out revealed that the Claimant had engaged in various fraudulent activities to the Respondent's detriment. The Respondent outlines the said activities as follows:

### **a. Suspicious Issuance of Debit Notes:**

The Claimant, through Debit Note No. 200215775, made a debit of Kshs. 811,244.70 to a company known as Ragos Transport Limited instead of debiting the company known as Downstream Energy Limited. The posting caused the latter company to enjoy credit in its Accounts Receivable Account without being deducted on its transport AP invoice.

### **b. Double Payment to Belcah International Limited:**

The Claimant processed and made two payments of Kshs. 793,166.71 each to Belcah International Limited through Electronic Funds Transfers (EFT) on 3<sup>rd</sup> May 2017 and 11<sup>th</sup> May 2017. The payments were effected without following proper procedure, which required returned EFTs to be confirmed by the Respondent's Treasury Section (with proof of name of the supplier, amount and funds sighted in the Respondent's bank account) before any refund is made.

### **c. Un-reconciled Amounts in Account No. 2805 (AP Clearing Account) and Account No. 2855 (Stale Cheques Account):**

The Claimant failed to inform the Respondent's Management that the aforementioned accounts had long outstanding balances; the AP Clearing Account had funds dating back to 2003 whereas the Stale Cheques Account had funds dating back to 2015.

### **d. Cheque No. 2003639 Relating to Stale Cheque No. 39666 for Allan Waihumbu Njuguna- Kobil Bungoma Product Refund:**

In January 2015, a memo was done to pay the Landlord Kshs. 416,958 and debit Locan Itolondo-Co. Run. (This was effected and paid through Cheque No. 39666, which became stale).

In January 2017, further instructions were given and payment of Kshs. 317,139.80 was made. The physical cheque was cancelled as the Landlord refused to bank the cheque and asked to be paid by way of EFT or RTGS.

A similar amount of Kshs. 317,159.10 was an unexplained amount in AP (2804 and 2104). There was a high likelihood that the payment of Kshs. 317,139.80 made was the unexplained AP amount.

### **e. Transfer of AP Long Outstanding Balances from Account No. 2805 to Account No. 1403:**

In June 2015, the Claimant transferred a long outstanding balance of Kshs. 52,751,500 from Account No. 2895 to Account No. 1403 without prior approval from the Group Managing Director. As a result, the said transaction was not recorded in the Respondent's books for the 2015 financial year.

#### **f. Fraudulent Transactions in AP Accounts:**

The Claimant failed and/or neglected to report fraudulent transactions in the AP accounts despite performing reconciliations for the AP accounts on a monthly basis. The Respondent noted that there were amounts transferred from AP accounts to AR accounts and thereafter credit notes issued to customer accounts, i.e. Kilimanjaro Construction, MC Toet, Turitu Service Station and Tosha Petroleum, to facilitate unwarranted loading of product.

29. The Respondent goes on to state that based on the above findings, the Claimant was issued with a show cause letter dated 25<sup>th</sup> July 2017, inviting him to a disciplinary hearing on 28<sup>th</sup> July 2017, to show cause why disciplinary action should not be taken against him for gross misconduct.

30. According to the Respondent, the show cause letter set out in detail the allegations of misconduct and the Claimant was given adequate time to respond. The Respondent states that the Claimant failed to respond to each of the allegations made against him.

31. The Respondent further states that the Claimant attended the disciplinary hearing of 28<sup>th</sup> July 2017 but failed to provide any satisfactory reasons in defence of his conduct. The Respondent therefore concluded that there was sufficient reason to believe that the Claimant had neglected to perform his duties as required and that he had used his position to defraud the Respondent. As a result, the Respondent issued the Claimant with a termination letter on 4<sup>th</sup> August 2017.

32. The Respondent denies preventing the Claimant from obtaining information that the Claimant considered useful in his defence.

33. The Respondent reiterates that the decision to terminate the Claimant's employment was solely premised on his gross misconduct, which decision was justified and warranted in the circumstances.

34. The Respondent adds that the Claimant was adequately notified of the allegations raised against him vide the show cause letter dated 25<sup>th</sup> July 2017, which allegations were explained in detail at the disciplinary hearing held on 28<sup>th</sup> July 2017. According to the Respondent, the Claimant was given an opportunity to be heard but failed to satisfactorily defend himself.

35. The Respondent denies that the Claimant is entitled to damages, compensation or any other relief sought in the claim.

36. The Respondent states that the Claimant is at liberty to collect his Certificate of Service at the Respondent's offices.

#### **Findings and Determination**

37. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

#### **The Dismissal**

38. The Claimant's dismissal was communicated by letter dated 4<sup>th</sup> August 2017 stating thus:

"Dear Mr. Ndumbi,

#### **RE: Summary Dismissal**

Following your disciplinary hearing that took place on **28<sup>th</sup> July 2017** and where you did not defend yourself, KenolKobil Limited hereby summarily dismisses you from its employment on the following grounds: -

As the Accounts Payable Accountant of the company, you have the responsibility to review all invoices for appropriate documentation and approval prior to payment and ensuring that all reconciliations are done appropriately in accordance with the financial discipline and accounting policies and practices exercised in the company's offices relating to all the company's business.

Contrary to the above, investigations have revealed that you not only neglected to perform your duty to the company but indeed willfully breached your fiduciary duty to the company by failing to adhere to sound internal controls thereby leading to huge financial losses to the company. Investigations have further revealed that you violated laid down policies and procedures to the detriment of the company thereby occasioning the company substantial loss and damage.

The above is demonstrated by among others the following instances:

#### **1. Suspicious Issue of Debit Notes:**

This is evidenced through erroneous debit of Kshs. 811,244.70 to **Ragos Transport Ltd**, instead of debiting **Downstream**

**Energy Ltd** DN. 200215775 done to Ragos Transport Ltd and CN no; 206234449 to Downstream Ltd AR).

Erroneous posting of debit note to **Ragos Transport Ltd** caused Downstream Ltd to enjoy credit in their AR account without being deducted on their transport AP invoice.

## **2. Double payment to Belcah International Ltd**

You processed and made two payments to Belcah International Ltd in the month of May 2017. Both Payments of Kshs. 793,166.71 were done through EFT on 3<sup>rd</sup> May 2017 and 11<sup>th</sup> May 2017.

Proper procedure was not followed before the second payment was made. Procedure is that; returned **EFTs** should be confirmed by treasury section with **proof of name of supplier**, amount and funds sighted in our bank account before any refund is done.

## **3. Aged – Long unreconciled amounts in account 2805 (AP clearing account) and 2855 – stale cheques account.**

The account has funds that are dated back to 2015 for stale cheques and way back to 2003 for clearing account

Kshs. 1,100,000.00 – Funds received for sale of upper-hill plot-by Karimbux

Kshs. 3,252,196.79 – Cash receipt no; 290267375 for Sahamitr dated Sep 2016.

Management should be informed of long overdue amounts to advice how same should be treated in company books.

## **4. Cheque no; 2003639 Relating to stale cheque no; 39666 for ALLAN WAIHUMBU NJUGUNA – KOBIL BUNGOMA PRODUCT REFUND.**

In Jan 2015, a memo was done to pay Landlord Kshs. 416,958.00 and debit Locan Itolondo-Co Run. (This was effected, and paid through cheque No; 39666, which became stale).

In Jan 2017, another instruction was made and a payment was made of Kshs. 317,139.80. The physical cheque is held at A&F, cancelled since the landlord refused to bank the cheque and asked for a Direct payment i.e EFT of (sic) RTGS.

A similar amount of Kshs. 317,159.10 was an unexplained amount in AP (2804 and 2104), there is a high likelihood and or possibility the payment of Kshs. 317,139.80 done is the un-explained AP amount.

The amount was outstanding in bank and an audit Adjustment JV No; **201601287** was passed in Dec 2016 and reversed in May 2017 JV No; **201700398** since it was not meant to be.

## **5. Transfer of AP long outstanding balances from 2805 to 1403**

In June 2015, AP transferred long outstanding balance amounting to **Kshs. 52,751,500** from account 2805 to 1403 account. This was done without approval from the Group Managing Director as should be the case. The company books should have been adjusted accordingly in the financial year.

Further to the case above, there were fraudulent transactions in AP accounts where amounts were transferred from AP account to AR clearing and thereafter CNs issued to customer accounts to facilitate loading of product.

AP was performing reconciliations for the AP clearing accounts on a monthly basis and hence the movements to transfer monies from some accounts could not have gone unnoticed by the AP accountant.

Examples of such cases posted in 2015 include;

<b>Supplier</b>	<b>Date</b>	<b>Amount KSHS.</b>
<i>KILIMANJARO CONSTRUCTION</i>	<i>20-Apr-15</i>	<i>651,836</i>
<i>KILIMANJARO CONSTRUCTION</i>	<i>11-Mar-15</i>	<i>1,527,637</i>
<i>MC Toet</i>	<i>20-Apr-15</i>	<i>1,048,423</i>
<i>Turitu Service station</i>	<i>1-Feb-15</i>	<i>1,912,595</i>
<i>Tosha Petroleum</i>	<i>20-Jan-15</i>	<i>1,901,631</i>

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**In the circumstances, the company finds that you as the Accounts Payable Accountant not only neglected to perform your duties diligently but actively participated in defrauding the company through flouting of requisite policies, procedures and best practices in addition to breach of fiduciary duty. Your actions amount to abuse of office and gross misconduct as you took advantage of your position.**

**The company reserves the right to investigate the matter further and thereafter take such legal action as it may deem appropriate.**

**Effective 4<sup>th</sup> August 2017 you are required to hand in your Company I.D Card, the medical-card of yourself and your family; and any other company asset you may have to the Human Resources Office.**

**Please acknowledge receipt by signing and returning the duplicate of this letter for our records.**

**Yours Sincerely**

**(signed)**

**Catherine Chege**

**Human Resource Manager**

39. This letter was preceded by a show cause letter dated 25<sup>th</sup> July 2017, which also served as an invitation to a disciplinary hearing. Both letters accuse the Claimant of a catalogue of accounting misdeeds, ranging from suspicious issue of debit notes, double payments, unreconciled accounts to unauthorised transfer of balances.

40. Upon receipt of the show cause letter, the Claimant sent an email to [leah.macharia@ke.kenolkobil.com](mailto:leah.macharia@ke.kenolkobil.com) stating:

“Dear Leah/Catherine

I acknowledge receipt of Notice to show cause document and have gone through the document as required by yourselves. I’m (sic) coming to the office for disciplinary hearing. The accusations against me are on issues between year 2003 to date. However as I (sic) come I’m (sic) making a request that you allow me access to the company systems and documents and give me adequate time so that i (sic) may be able to defend my case since i (sic) don’t have knowledge on any of the listed and it will be very hard for me to remember the transactions offhead since in my line of duty I (sic) normally encounter very many transactions on a daily basis.

Regards

Kenneth K. Ndumbi”

41. The Court did not see any response to the Claimant’s request. Instead, Leah Macharia sent the following one liner to the Claimant:

“Good morning Ndumbi, kindly come on Friday 4<sup>th</sup> August 2017 at 2.30pm.”

42. In response, the Claimant wrote:

“Leah

I acknowledge receipt of your request and do commit to present myself at the exact time requested.”

43. The Claimant presented himself on 4<sup>th</sup> August 2017 but he claims that no hearing took place because he was not supplied with the documents he needed to mount his defence. The Respondent did not avail a record of the proceedings of 4<sup>th</sup> August 2017 and the Court thus missed the opportunity to make an assessment for legal efficacy thereof.

44. In its decision in **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** this Court stated the following:

**“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”**

45. This is in line with the procedural fairness edicts of Section 41 of the Employment Act which provides:

41. (1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor 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 the explanation.

(2) 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, if any, chosen by the employee within subsection (1) make.

46. In his final submissions, the Claimant made reference to the decision in *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd [2015] eKLR* where it was held that the procedural fairness requirements under Section 41 of the Employment Act are an essential part of the right to fair labour practices.

47. The Claimant further referred to the decision in *OI Pajeta Limited v David Wanjau Muhoro [2017] eKLR* where the Court of Appeal affirmed that an employee facing disciplinary action on account of audit findings ought to be supplied with the audit report so as to sufficiently prepare their defence.

48. It is the Claimant's case that he was not only denied access to crucial documents needed for his defence, but was locked out of the investigations leading to the audit report.

49. The Respondent's first witness, Caroline Kamau admitted in cross examination that it was not possible to respond to accounting queries without access to documents. The second witness, John Ndung'u who led the team that prepared the audit report, told the Court that an accountant, such as the Claimant, could depend on entries in the online system to defend themselves. Ndung'u further testified that the Claimant was not allowed access to the Respondent's Oracle System.

50. In re- examination, Ndung'u told the Court that the Claimant did not participate in the investigations and was not allowed access to the Oracle System, allegedly because he would frustrate the process.

51. This line of evidence reveals that the Respondent decided to violate the Claimant's right to fair hearing allegedly because he could not be trusted. The Claimant's position or perceived breaches cannot be a valid reason to deny him the right to be heard in his defence.

52. The Court had occasion to see letters issued to the Claimant, severally rating his performance as 'very good' and once as 'excellent'. In the appraisal period running from July 2015 to June 2016, the Claimant was rated 'very good'. Drawing from the definitions of performance categories contained in the Respondent's Human Resources Policy, the Claimant clearly exceeded his job requirements.

53. The question remains, what happened to this star performer? In its haste, the Respondent did not allow for an answer to this question to be found. The Respondent so short-circuited the disciplinary process that the final outcome was a sham. The charges against the Claimant were therefore not proved at the shop floor.

54. There is one more fault line in the process adopted by the Respondent and it is this; the Claimant was forced to take his annual leave, ostensibly to give way for investigations. Caroline Kamau confirmed that annual leave is not a disciplinary avenue in the Respondent's Human Resources Policy; neither is it a disciplinary avenue in law. The Respondent's action of forcing the Claimant to take his annual leave was therefore unprocedural and unlawful.

55. On the whole, I find and hold that the Claimant's dismissal was substantively and procedurally unfair.

## Remedies

56. Flowing from the foregoing, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service and documented good performance over the years. I have further factored in the Respondent's unlawful conduct in bringing the Claimant's employment to an end.

57. I further award the Claimant one (1) month's salary in lieu of notice plus salary for the month of July 2017.

58. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

59. No basis was laid for the claims for aggravated damages, severance pay and salary up to the date of retirement, which therefore fail and are disallowed.

60. In the end, I enter judgment in favour of the Claimant as follows:

- a. 12 months' salary in compensation.....Kshs. 2,974,550.16
- b. 1 month's salary in lieu of notice.....247,879.18
- c. Salary for July 2017.....247,879.18

d. Leave pay for 36 days (247,879.18/30\*36).....297,455.02

**Total.....3,767,763.54**

61. This amount will attract interest at court rates from the date of judgment until payment in full.

62. The Claimant is also entitled to a Certificate of Service plus costs of the case.

63. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Change for the Claimant

Miss Onyango for the Respondent