



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI

CAUSE NUMBER 516 OF 2019

BETWEEN

FREDRICK ODUOR LAMBA.....CLAIMANT

VERSUS

KENYA ELECTRICITY GENERATING COMPANY PLC.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Hashim & Lesaiqor Associates, Advocates for the Claimant

Triple OK Law, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th August 2019.
2. He states, he was employed by the Respondent State Company in 1998 as a Senior Transport Engineer. He was competitively recruited as the Administration Manager, effective from 1st May 2016. His last gross monthly salary was Kshs. 550,975.33.
3. He was issued, on 25th August 2017, a Notice to Show Cause, why he should not be disciplined, for misuse of Respondent’s vehicle. He replied denying misuse.
4. He was invited to a disciplinary hearing which took place on 14th September 2017. He was found to have been negligent in performance of duty; to have violated Transport Policy; and violated Respondent’s Policy on Employee Discipline. His contract was terminated through a letter dated 19th January 2018. He appealed internally against the decision. He was heard on Appeal, on 4th April 2018. The Appeals Committee upheld termination decision.
5. He faults termination procedure, and validity of the reasons given by the Respondent to justify termination.
6. He prays the Court to grant him Judgment, against the Respondent as follows: -
 - a. Declaration that termination was un-procedural, unfair, unlawful and unconstitutional.
 - b. The Respondent reinstates the Claimant, as Administration Manager forthwith.
 - c. Alternatively-

- i. Compensation for unfair termination at Kshs. 6,611,704.
- ii. 3 months' salary in lieu of notice at Kshs. 1,652,926.
- iii. 83 days of pending annual leave at Kshs. 1,524,365.
- iv. Unpaid salary adjustment effective 1st January 2017 at Kshs. 286,643.
- v. Defamation damages.
- vi. Punitive and aggravated damages.
- vii. Compensation for constitutional rights to be assessed.
- viii. Certificate of Service.
- ix. Interest from the date of filing the Claim.
- x. Costs.
- xi. Any other relief.

7. The Respondent filed its Statement of Response on 6th September 2019. It is agreed that the Claimant was employed by the Respondent, as the Administration Manager. He executed a contract of employment, and committed to discharge his duties in accordance with all relevant Workplace Policies. He earned monthly basic salary at Kshs. 271,162; house allowance at Kshs. 70,000; transport allowance at Kshs. 65,000; and other remunerative allowances at Kshs. 60,000. Prior to issuing notice to show cause on the Claimant, the Respondent investigated the use of its vehicle registration number KBL 869 G. It was found that the vehicle had hit and killed a pedestrian at Yala, Siaya County on 22nd July 2017. The vehicle had been released to the Driver to pick the Claimant at Kisumu Airport. The Claimant confirmed he was in Kisumu for private affairs, on the same date the vehicle hit and killed a pedestrian. Investigation Report by Respondent's Integrity Department recommended that disciplinary action is taken against the Claimant, for allowing Respondent's vehicle to operate during the weekend, on unofficial business of ferrying the Claimant and his family members from Kisumu Airport. The Claimant received Notice to Show Cause, replied and was heard by the Disciplinary Panel and the Appeals Panel. A decision to summarily dismiss him was made, and upheld on Appeal. He was found guilty of an act of gross misconduct under Section 44[4] of the Employment Act and clause 7.3.2 [g] of Respondent's Human Resource Manual. The Respondent commuted summary dismissal to normal termination.

8. Lastly, the Respondent states, it offered to pay to the Claimant notice of 3 months and pending leave, less his liabilities. This was subject to the Claimant completing the clearance form and handing over Respondent's property in his possession. The Claimant did not meet these requirements. His training and qualifications allow him to secure employment elsewhere. He was in a fiduciary position. He abused Respondent's trust and confidence. An order of reinstatement would not be reasonable. The Respondent urges the Court to dismiss the Claim with costs.

9. The Claim was heard in Open Court on 3rd December 2020, and 7th December 2020 when hearing closed. The Claimant gave evidence and called 3 other Witnesses – his Sister Nelly Achieng' Lamba, Siaya Farmer Joseph Onyango Awere, and Driver-craftsman Lazaro Ouma. Evidence for the Respondent, was tendered by its Chief Security Officer, Captain [retired] George Kazungu, and Human Relations Officer Martin Makallah.

Claimant's Evidence.

10. The Claimant adopted his Witness Statement, and Documents as listed on the record. The allegations communicated to him in the letter to show cause, differed from the reasons given in justifying termination. He was not given the opportunity to cross-examine Witnesses at the disciplinary hearing; to access relevant documents; and to clarify issues.

11. He did not fail in his role. He drafted transport policy and introduced work tickets. He implemented vehicle tracking system. The subject vehicle had GPS tracker.

12. The decision to terminate his contract shocked the Claimant. He pursued an Internal Appeal. The Respondent relied on the Report of its Chief Transport Engineer, Frederick Oloo. This Report is full of errors. The date and time of the accident is not consistent. Oloo states that the vehicle was in an accident, while on official duty, along Kisumu-Busia road. He, at the same time states, he was not aware that the vehicle was on Kisumu-Busia road. The Report should not have been relied upon by the Respondent.

13. Transport daily work ticket is the only official document, which captures vehicle movement. It shows whether a journey is authorized. The Claimant did not authorize the particular journey. He was not the Driver's immediate Supervisor. As the Administration Manager, the Claimant would work in excess of official hours. The Driver Ouma, communicated to the Claimant on the material day, in this context. The vehicle was not used to pick unauthorized persons. The Report generated by Respondent's Security and Integrity section is based on hearsay. It disregards documents such as the work ticket.

14. The Claimant did not admit any offence. Expression of remorse, was not the same as admission of offence. A pedestrian died. The Claimant expressed remorse and regret, as a Team Leader. He was charged with breach of conduct, whose penal consequence, was a

warning. The Claimant did not receive any warning. Dismissal could only be justified, after 1st, 2nd and 3rd warning.

15. The Claimant's foremost wish, is to be reinstated. The remedy is practicable and reasonable. The Respondent admits in the affidavit of Human Resource Officer Makallah, that reinstatement is viable. The Claimant retains amiable relationship with all his former Colleagues at the Respondent. He had worked for 26 years. He set off as a Management Engineering Trainee. He was 51 years on termination, and 54 years at the time he gave evidence in Court. He suffered immensely upon termination. He had loans with his Sacco, which were recovered from his Guarantors. He lost his medical cover. He cooperated fully with the Investigators. He did not receive terminal benefits. He expected to retire at the age of 60 years.

16. Cross-examined, the Claimant told the Court that he has since applied for alternative jobs, without success. He did not have a job application exhibited in Court. He holds a Bachelor of Science Degree in Agricultural Engineering. It is not the Respondent alone, who employs such graduates.

17. The Notice to Show Cause states that, the Driver Ouma, was instructed to pick the Claimant at Kisumu Airport. The Claimant replied to the Notice. He signed the reply letter. The Claimant was in Kisumu at the time of the incident. He had issues to resolve there. These were personal issues. It was a weekend. There was no official function. The Claimant conceded that he made a rash decision.

18. The Chief Transport Engineer, testified saying it was him, who instructed the Driver. Decision was made by Claimant's team member. The Claimant asked the Court to look at the incident holistically. He did not say in his reply to the Notice, that Ouma requested him. The Claimant had all the facts, to enable him respond. Before responding, the Claimant consulted his Supervisor and agreed that Ouma had requested him. The Claimant conceded there was a lapse, on his team as a unit. The matter was still under investigation at the time the Claimant made these concessions.

19. At page 41 of Respondent's Documents, is a memo issued by the Claimant to all Staff, asking them to abide by Respondent's Workplace Policies. The memos were periodical. Employees were to follow Workplace Policies. Drivers were to stick by the routes authorized in their work tickets.

20. It is correct that the Driver called the Claimant. Whenever the Claimant was called, he always conducted work of official nature. He was not a user on the particular date, with the user obligations captured at page 61, of Respondent's Documents. He went to Kisumu on his own means. He went to Kisumu Airport in the morning hours. It was a coincidence that his 2 sisters were at the Airport at the same time. There were allegations that the Claimant violated Transport Policy. Transport was required to be official and authorized.

21. There are several facilities of the Respondent in Kenya. Information on any one of them, is readily available. The Respondent was not bound to undertake benchmarking. The Claimant discussed benchmarking with Oloo. Oloo in his Statement, said he instructed Ouma to undertake the work. Oloo denied he discussed benchmarking with the Claimant. The Respondent was to set up a workshop at its plant in Sondu Miriu in Nyanza Region. There was a project at Kamburu plant [Eastern Region], but not same as the one intended for Sondu Miriu. The projects were different. Benchmarking was not a waste of resources. The fleet size, determined the requirements of the workshop.

22. The Claimant hails from East Gem. The accident occurred 4 kilometres away. The Claimant was informed by the driver immediately the accident occurred. The Claimant informed the Respondent the following Monday.

23. In his reply to the Notice to Show Cause, the Claimant regretted that there were commissions and omissions. He asked for clemency. He was taken through a disciplinary process. He was familiar with the Human Resource Manual. Major offences thereunder, warrant summary dismissal. There is a clause on misuse of Respondent's property. The Respondent would be justified in dismissing the Claimant if he misused its property. The Claimant went to Kisumu for benchmarking. He was paid special allowance to execute special duty. There was no communication with the Respondent, that the Claimant would go on benchmarking. There was information from Respondent's suppliers that they had installed similar equipment at other plants. The Claimant did not visit the scene of the accident.

24. Redirected, the Claimant told the Court that he has applied for alternative jobs without success. Openings at the same level he was in, at the Respondent, are scarce. Decision to dispatch the Driver was made by Oloo, Chief Transport Engineer. Report on the accident was not irregular. Report was made to the Respondent. The insurance was informed. The email dated 24th July 2017, confirms report was made. Only 2 people- the Claimant and the Driver, were interviewed by the Board. No one else was interviewed. The Chief Transport Officer, who supervised the Driver, was not interviewed. The email of 24th July 2017 is from Oloo to Mugo, the Insurance Officer. It was copied to the Claimant. Details of the accident are given. Oloo had tracking tools and could communicate on his tablet with the Driver, at the touch of a button. He could stop the vehicle. Oloo was dishonest in his Statement. The Claimant was not tried under any offence. He was not summarily dismissed. Driver-craftsman had instructions to benchmark.

25. Nelly Achieng' Lamba told the Court she was received by taxi- driver Jacob Ogeda at Kisumu Airport. His taxi was small and arranged for Nelly to be ferried in an alternative car, a Toyota Prado. She did not know that her brother, the Claimant herein, was in Kisumu. Cross-examined, she told the Court that she was accompanied by her Sister, and her Sister's Daughter from Nairobi to Kisumu. This was on 21st July 2017. She did not meet the Claimant on this day. She did not know if her Brother used an official vehicle to run his own errands.

26. Siaya farmer Joseph Onyango Awere was at Kisumu- Busia road on 22nd July 2017, when a vehicle knocked down a pedestrian. He assisted the victim. He later saw another vehicle. The Claimant was in the other vehicle. He was not there at the time the accident actually happened. Awere was later contacted by an Investigator from the Respondent, who told Awere, he would receive 'something good,' if Awere said in his Statement, that there was a short man, in the accident car [reference to the Claimant]. Awere declined to record a false statement. Cross-examined, Awere stated that the accident occurred approximately 50 metres from where he stood. He is familiar with the Claimant. The 2 are village-mates. Awere did not see the Claimant at the time of the accident. The Investigator from the Respondent called Awere. Awere did not report the attempted inducement by the Investigator to the Police. Awere told the Court he resides at Yala, and was at Yala, on the date indicated in his Witness Statement before the Court. He was not at Nairobi. He signed the Statement at Yala. Redirected, he clarified

that he signed the Statement at Yala. His Advocates are based at Nairobi. He did not deem it necessary to contact the Police after he declined the request from the Investigator.

27. The last Witness for the Claimant was Lazaro Ouma, who described himself as a Driver- craftsman. The subject vehicle had GPS tracking. The system was efficient and real time. It would relay Driver details to Supervisors. The vehicle would not start without the identity tag. The tag is like a pin code. Details would be relayed to Musa, Oloo and Korir. Korir was to track all vehicles. All these Management Staff had tablets. They could track specific vehicles real time. GPS also helped in fuel tracking. Ouma was a Driver from 2006. Tracking was introduced in 2015. GPS was introduced by the Claimant. Only authorized Drivers handle Respondent's fleet. They are all taken through AAA Kenya training.

28. The Chief Transport Engineer Oloo, did not withdraw instructions from Ouma to travel. He could if he so wished, withdraw instructions from Ouma, at the click of a button. The journey started at 4.00 p.m. Korir enforced tracking 24/7. Information from the system was retrievable. It was at the discretion of the Respondent to play back the system.

29. On cross-examination, Ouma told the Court he is currently 'hustling,' with no regular job. He was dismissed by the Respondent on flimsy grounds. He too has filed a Claim against the Respondent upon dismissal. He denied that he is aggrieved, and affirmed that he came to Court, to say the truth. He travelled on 21st July 2017. He left Nairobi at 4.00 p.m. arriving in Kisumu at about 11.00 p.m. He parked at Sondu Miriu Police Post. There was nobody manning the occurrence desk, at the Police Post. Ouma hails from Nyakach, 5 or 6 kilometres from Respondent's facility at Sondu. Oloo authorized the journey to Sondu Miriu. Ouma was to verify conditions at the workshop. There were other similar facilities, but building sizes were different. Ouma prepared Statement at page 17 to 19 of Claimant's Documents. It was roughly 7 days after his journey. He had all the relevant facts. He was somewhat traumatized, at the time of preparing the Statement. He did not say that he contacted the Claimant on benchmarking. He was harassed after the accident. He was aware that the Claimant would be in Kisumu, around 22nd July 2017. There was an installation at Kisumu Airport. Ouma knew this before he travelled. It was newly built. He did not know there was restriction on accessing the facility. It was his first benchmarking. He reached out to the Claimant because the Claimant was experienced and available all time, including outside official hours. The Claimant states he reached out to Ouma, to assist him move, from Kisumu Airport to town. This Statement is not correct. Ouma was paid one night out allowance. Sondu Miriu was smaller than Kamburu, with a smaller fleet. Oloo was Chief Transport Engineer. Ouma believed he was more experienced with motor vehicles, than Engineer Oloo. He informed the Claimant about the accident, immediately it took place. The Claimant did not come to the scene of the accident. Redirected, Ouma told the Court that his Statement was recorded by Respondent's Security Officer, George Kazungu. Kazungu asked Ouma to narrate what happened. The Statement does not capture what Ouma told Kazungu. Driver-craftsmen are normally given substantive instructions. Ouma was instructed to benchmark. He was dispatched to Sondu Miriu by Oloo as shown in the work ticket.

Respondent's Evidence.

30. Captain [retired] George Kazungu is Respondent's Chief Security and Integrity Officer, having joined the Respondent in 2015. He investigated matters in dispute. He recorded Statements from various Officers, including the Claimant. He recorded Further Statement from the Claimant also. The Claimant however did not sign Further Statement, saying he was not comfortable with its contents. It was in form of question and answer. In question number 8, the Claimant answered that he could not recall the events of 22nd July 2017, the date of the accident.

31. Kazungu questioned other Employees. Among them was Amos Otieno, who told Kazungu, that Ouma told him he needed to have the work ticket endorsed. Ouma told Amos he was traveling to Kisumu to pick the Claimant. Amos was an approved signatory. Kazungu confirmed with Respondent's Manager Okumu, that the vehicle had been to Kisumu Airport. It was confirmed that Nelly Lamba was in the flight from Nairobi to Kisumu.

32. Kazungu accessed the scene of the accident. He had contacted Police Officers on the ground. He engaged a lady at a Kiosk nearby, who said she had witnessed the accident. It involved a Ken Gen [Respondent's] vehicle. The vehicle hit a pedestrian. She also gave Kazungu the contact of another Witness. He called this contact on phone. The contact was cooperative initially, but later became uncooperative. Ouma did not mention his drive to the Airport, or benchmarking. The Claimant could benchmark, after necessary approvals.

33. Cross-examined, Kazungu told the Court, he previously worked with the Navy, and Military Police. He was an Investigator with the Military. He joined the Respondent in 2015. Vehicle control in the Military was more less like the Respondent's. The Respondent has an ICT department, headed by ICT Manager. The Claimant was an Administrative Manager. Page 41 of Respondent's Documents contains a memo issued by the Claimant. It helped in improvement of the Respondent's fleet. It helped Kazungu in his investigation. It was helpful to security department. Kazungu's Assistant, Simon, was present when Kazungu took Claimant's Further Statement. Kazungu was not aware that the Claimant's position, was that Further Statement was forged. Kazungu typed it and sent to Claimant's email. The Claimant printed it himself. Amos said he signed the work ticket because he knew the Claimant.

34. Kazungu examined the work ticket. It was authentic. It gave details of the journey. As per the ticket, the journey was authorized. Kazungu did not investigate vehicle tracking. Officers were given tablets. Yala is on Kisumu-Busia road. Ouma said he was in Yala benchmarking. Kazungu relied on Oloo's word that, there was no benchmarking. The vehicle could be in use after official hours, on authorized business. There was a meeting of the Administration department as shown in the minutes on record. 10 Officers attended. Kazungu did not use the minutes in his investigation. The Claimant mentioned about the meeting to Kazungu. Kazungu was not able to say if the minutes show whether detailed work was authorized. Kazungu stated that the Witnesses at Kisumu-Busia road described the passengers in the accident vehicle. They did not mention the Claimant. Kazungu deduced that a male passenger, described as being of medium height, must have been the Claimant. A letter from Kenya Airports Authority confirmed that the vehicle accessed the Airport. It did not disclose the registration number of the vehicle, the number of passengers, and the time it exited the Airport. It did not mention Nelly or Nancy Lamba. Ouma confirmed his immediate Supervisor was Musa Alukulem [Chief Transport Manager]. Respondent's Insurance was informed about the accident. Oloo sent the email to the Insurance. He stated that the vehicle was on official duty. Immediate boss instructed Drivers. Kazungu did not interview Musa, Ouma's immediate boss. Kazungu did not recommend that Oloo is prosecuted. Kazungu stated that Oloo was among the Officers at fault, in release of the vehicle. Kazungu stated that the vehicle was parked at unauthorized location. He did not consult GPS tracking. In Kazungu's view the Claimant asked for work ticket to defeat accountability. It was a ploy to defeat the system. The Claimant and

Ouma were the masterminds. Police abstract did not say there were 2 passengers at the time of the accident. The investigations diary did not mention the Claimant. Redirected, Kazungu affirmed that Claimant's Further Statement was recorded from the Claimant. It was not a forgery. There was no criminal complaint about forgery. The journey to Kisumu Airport, was not official. The Claimant indicated he had personal issues, and reached out to Ouma. Ouma recorded Statement with Kazungu about 6 days after the accident. He was not under any pressure. Kazungu did not recommend disciplinary action against Amos, because in his view, his endorsement of the work-ticket was genuine.

35. Martin Makallah, Respondent's Human Relations Officer, told the Court he is an Officer of the Court. He did not deal with the matters in dispute personally; he familiarized himself with the issues, from employment records.

36. The Claimant was issued Notice to Show Cause. He was said to have asked Respondent's Driver, to pick him from Kisumu Airport. He did not complain that allegations against him, were unclear. He conceded he had personal issues to attend to in Kisumu. He reached out to Respondent's Driver to assist him. He suggested there was a lapse. He was given an opportunity to defend himself at the disciplinary forum as shown in the minutes on record. There was no authorization to assist the Claimant from the Airport. He did not offer a proper explanation. Work ticket was signed, but from a broad perspective, there was no proper authorization. The signatory was told, that the Claimant was in Kisumu, and needed to be collected. It was established that a misconduct occurred. The Claimant did not clear with the Respondent, to access his terminal benefits. The Respondent is in the process of filling up Claimant's position. The Claimant is a Mechanical Engineer, and can secure alternative employment. He was a good Employee. Makallah told the Court it was in the Court's discretion, to determine if reinstatement is practicable.

37. Under cross-examination, Makallah told the Court that the Notice to Show Cause, gave the offence as misuse of office, under the Human Resource Manual. The facts and circumstances of the offence, were shown. Drafting was not done by an Advocate. Under Respondent's Rules and Regulations, there was the offence of breach of Code and Company Policies. Makallah did not agree that these were minor offences, not warranting summary dismissal. There was provision for 1st, 2nd and 3rd warning. The Claimant was not involved in minor breach, deserving warning. Makallah was not a member of the Disciplinary Committee. The Claimant had the opportunity to take on his accusers. The record does not show that he cross-examined Respondent's Witnesses. He did not sign the minutes, but would sign separate attendance register.

38. It was concluded that he failed to implement important Transport Control Policy. It is true that he authored memo on implementation of Transport Control Policy. No vehicle could leave the Workplace without a work ticket. There were controls in place. User details were in the work ticket. There was no record from the Claimant's Superiors, indicating his shortcomings. The installation at Sondu Miriu had challenges. The work ticket was endorsed. Oloo stated in his email that the accident occurred, while the vehicle was on official duty. There was no resolution of the Board, saying that the Respondent had lost trust in the Claimant. The Claimant served for 26 years. He was a good Employee, who was promoted severally. Makallah stated in his affidavit on record that reinstatement was viable. The Respondent is a big organization, with 23 departments and 2353 Employees. No Employee has filed a statement in Court, saying the Claimant is incompatible. Redirected, Makallah clarified that the Claimant was not summarily dismissed. His contract was regularly terminated, on account of misusing Respondent's property. The Respondent was lenient. The Claimant did not express his wish to cross-examine anyone. He was not barred from cross-examining. He was in a Senior position, and involved in misconduct.

39. The issues are: *whether termination was based on valid reason or reasons; whether it was executed fairly; and whether the Claimant merits the remedy of reinstatement, compensation/damages, and assorted terminal benefits.*

The Court Finds: -

40. The Claimant was first employed by the Respondent State Company as a Senior Engineer, in 1998. On 1st May 2016, he was appointed Administration Manager in the Human Resource & Administration Division. His remuneration is indicated in the letter of appointment to include basic salary at Kshs. 271,162; house allowance at Kshs. 70,000; transport allowance at Kshs. 65,000; and remunerative allowances at Kshs. 60,000.

41. On 25th August 2017, the Claimant received Notice to Show Cause, from the Respondent, under the banner 'Misuse of Office.' The allegations revolved around Respondent's vehicle registration number KBL 869 G driven by Ouma, which was involved in an accident in Yala, knocking down and killing a pedestrian.

42. The Respondent amplified the allegations against the Claimant as follows: -

- Ouma was assigned duties of benchmarking newly built stations in Kisumu and to assist Sondu Miriu team, in upgrading the Area motor vehicle workshop, by the Chief Transport Officer, with instructions from the Claimant.
- Ouma left for Sondu from Nairobi, on 21st July 2017 at around 16.38 hrs, after his work ticket was endorsed by Lucas Githinji, with instructions from the Claimant.
- Ouma engaged in a night trip, with the Claimant's knowledge contrary to Respondent's transport regulations.
- The Area Management was not aware of any critical exercise that would warrant overnight travel of staff from Nairobi to Sondu.
- On 22nd July 2017, Ouma travelled to Sondu Miriu Station, seeking endorsement of the work ticket by the Shift-In-Charge. Endorsement was made by Amos Otieno. Ouma told Otieno that he was headed to Kisumu Airport to pick the Claimant.
- The vehicle is recorded to have entered Kisumu Airport and picked 3 passengers.
- Ouma in his statement, said he went to Kisumu and Busia road for benchmarking, after getting the ticket endorsed.
- On the same day at around 17.00 hours, Ouma knocked down and killed a pedestrian at Kisumu- Busia road. Eyewitnesses said the vehicle had 2 occupants including the Claimant.
- The Claimant only reported the accident to Human Resource and Administration Director Serem, on 24th July 2017, when the news

was already trending in the social media.

43. The Claimant replied on 1st September 2017. His position was that there was a decision made by the Respondent, to upgrade the motor vehicle maintenance workshop at Sondu Miriu. There was delay in the upgrade. On 19th July 2017, the Claimant raised the issue with the Chief Transport Engineer, in a Performance Board meeting for the Administration Department. It was agreed there would be a follow-up. It was agreed that Driver-craftsman, Ouma, who had delivered the equipment at Sondu Miriu, would undertake the process of having the equipment installed at Sondu Miriu. Ouma was asked to raise a transport request with the Chief Transport Engineer. The Claimant learnt later that Ouma did not do this. He did not raise the transport request in the system.

44. The Claimant explained that he did not instruct Lucas Githinji to sign the work ticket to facilitate Ouma to travel from Nairobi to Sondu Miriu. The Claimant was however aware that Ouma would travel in the evening of 21st July 2017. The Claimant states in his reply that, *‘on my part, I wish to concede that the decision to dispatch the driver on a night trip, was rush [rash?] and not proper, even though we have waiver for use of the car after the hours.’*

45. The Claimant further explained that the Chief Transport Engineer, did not convey information on Ouma to the Area Management. Ouma obtained work ticket authorization without the Claimant’s Knowledge. The Claimant states if the authorizing officer had contacted him, the Claimant would have given his endorsement, because he was aware Ouma was on official business. The Claimant had advised that the Respondent need not have ‘reinvented the wheel,’ in upgrading Sondu Miriu. It would borrow from established facilities. The Respondent had installed equipment in petrol stations and other institutions. It was therefore decided that Ouma surveils facilities along Kisumu- Busia road.

46. Kisumu Airport is within Kisumu-Busia road. The Claimant explained that he had personal issues to attend to within Kisumu Town, and *‘I then reached out to the Craftsman [Ouma] to assist me from Kisumu Airport to Town.’* Unfortunately, Ouma had an accident at Yala. The Claimant states he was unable to reach the Director Serem, to report the accident at the time it took place. He states, report of the accident was already trending in social media, before he could reach Serem, and concedes, *‘this was a lapse on my part.’*

47. Lastly, the Claimant explained that the primary intention in Ouma’s journey, was to undertake company business. *‘I wish to express my sincere regret about the omissions and commissions cited, and I am truly remorseful on the misjudgements and apparent misuse of resources... my apologies for the issues surrounding this case and [I] plead for your clemency.’*

48. The Respondent was not satisfied with the explanation and did not grant the Claimant clemency. On 11th September 2017, the Respondent issued the Claimant a notice of disciplinary hearing, to take place on 14th December 2017. The Claimant was heard on this date, by a committee chaired by Abel Rotich, Geothermal Director.

49. The Claimant repeated what he had said earlier on notice to show cause, in defending himself at the disciplinary hearing. He acknowledged that, he had travelled to Kisumu on personal issues, and that he reached out to Ouma to pick him from Kisumu Airport to Town. The Claimant told the committee that he did not disclose his contact with Ouma during the internal investigation carried out by the Respondent. He stated that he was uncomfortable disclosing this to a junior. Ouma was in Kisumu on benchmarking. It had been decided at a Board meeting in Nairobi to have Sondu Miriu workshop urgently operationalized. Ouma was tasked with benchmarking, to meet this end. He was unfortunately, involved in an accident on 22nd July 2017, having knocked down and killed a pedestrian. The Claimant told the committee that he travelled to Kisumu from Nairobi by road, explaining that he had earlier told investigators, he had travelled by air. He was not consistent in answering what mode of transport he used to travel from Nairobi to Kisumu. He at one point said he travelled by Kenya Airways, but did not have a boarding pass or air ticket, explaining that he used what he called a ‘jam seat,’ availed to him by his Sister who worked for the airline. Pressed by the committee, the Claimant changed his story again, holding that he travelled by road in his Sister’s car. The Claimant again conceded at the disciplinary hearing that there were human errors, and pleaded for leniency.

50. The committee concluded that the Claimant violated Respondent’s Transport Policy by using the vehicle for unofficial, and unauthorized purposes. He used Ouma for personal and non-official purposes. The Claimant had the responsibility of ensuring that controls are in place, in respect to management of Respondent’s Transport Policy. It was recommended by the committee that the Respondent takes appropriate action against the Claimant, in accordance with its Employment Policy and Procedures.

51. The Respondent terminated Claimant’s contract through a letter dated 19th January 2018. The letter states:

‘The Management found your explanation unacceptable and found you to be negligent of duty and culpable of having violated the provisions in the Transport Management Policy No. 4.12 ... as well as section 7.3.2 [g] of the Procedure for Employee Discipline.’

52. The Respondent was satisfied that the Claimant was engaged in an act of gross misconduct warranting summary dismissal but *‘the Management has taken into account your years of service and disciplinary record, and has decided to reduce it to normal termination with immediate effect from 19th January 2018.’*

53. The Claimant was offered 3 months’ salary in lieu of notice and pending leave. He was advised to pursue his benefits under KenGen Retirement Benefit Scheme. He would be paid terminal benefits upon clearing with the Respondent.

54. The Claimant lodged an unsuccessful Appeal against termination decision, through his letter dated 5th April 2018.

55. The Court is satisfied that the Respondent had valid reason to terminate Claimant’s contract, as required under Sections 43 and 45 of the Employment Act.

56. The Claimant repeatedly conceded wrongdoing, from his reply to the notice to show cause, right through the disciplinary hearing. He constantly asked for leniency. His contact with Ouma at Kisumu Airport was not official. The Claimant was coy about his presence at the Airport. Did he fly to Kisumu or drive by road? He kept changing his explanation, creating the impression that he had something to hide. Was it coincident that his Sisters were at Kisumu Airport, at the same time as the Claimant? Did the Claimant fly to Kisumu or drive in one of his Sisters' vehicle? Why would he ask Ouma to pick him from the Airport, if he travelled by road? He was not able to show his boarding pass or air ticket to the disciplinary committee, saying he travelled on 'jam seat.' He then altered this explanation saying he travelled by road in his Sister's car. Nelly his Sister, told the Court she herself, was picked at the Airport by her regular Taxi Driver. The Respondent, in the absence of a clear explanation by the Claimant, would be justified in concluding that the Claimant used the Respondent's car, in running his personal errands, which included transportation of himself and family members around Kisumu and Yala. Benchmarking by Ouma was just a façade. Ouma conceded on cross-examination that the Respondent owns several facilities around the Country. Information on any of these facilities is readily available. The Area Management did not have advance information about Ouma's benchmarking. There is no Report on benchmarking shown to this Court by Ouma. Both he, and the Claimant seem to have been at their respective homes in the vicinity of Yala on private businesses, on Friday 21st July 2017 and Saturday 22nd July 2017. There were other facilities such as Kamburu, against which genuine benchmarking could take place. Tragically, the acts of the Claimant and Ouma, led to an accident where a life was lost, an event which however, blew off the lid on Claimant's misuse of Respondent's vehicle and violation of Respondent's Transport Policy. The Claimant appears to have been the architect of Respondent's Transport Control Policy, but in his travel to Kisumu, opted to disregard the Policy.

57. The Court is satisfied with the evidence given by Respondent's Witnesses, in particular the Investigating Officer Captain [retired] George Kazungu. He took Statements from the Claimant, which are self-explanatory, and which largely tally with the Claimant's evidence and concession of wrongdoing at the disciplinary hearing. There was no reason shown by the Claimant, why Kazungu, an Officer with a background in disciplined forces, would forge Claimant's Further Statement. Endorsement of the work ticket did not in itself make Ouma's foray to Sondu Miriu official or authorized. He travelled without Transport Service Request. He travelled in a rush on the evening of 21st July 2017. He states he parked the vehicle at Sondu Miriu Police Post that evening. The Officer Commanding that Post wrote to the Respondent's Security Officer on 2nd August 2017, denying that the vehicle was parked at the Post. The Claimant told Amos at Sondu Miriu to endorse the work ticket, to enable him pick the Claimant at Kisumu Airport. There were a lot of inconsistencies in the accounts given by the Claimant and Ouma, with respect to their travel to Kisumu and its environs, on 21st and 22nd July 2017. The Court does not think that the acts, or omissions of other relevant Officers, affected Claimant's culpability. It may well be that the vehicle had GPS tracking, and that Transport Officers at the control room were equipped with tablets which could disable the vehicle at the click of a button. The charge against the Claimant was not that he failed in issuing memos to staff on Transport Control Policy; it was that he violated that Policy. Relevant to this dispute, is that the vehicle was released from Nairobi, and converted into personal use by the Claimant. He contacted Ouma, and asked Ouma to assist him run personal errands. If other Officers failed to act, or acted in a manner which facilitated the misuse of the vehicle, it was in the discretion of the Respondent to take appropriate measures against the respective Officers.

58. Procedure was fair under Sections 41 and 45 of the Employment Act. The matter was investigated. Notice to show cause issued, and was responded to by the Claimant in detail. The Claimant was notified in good time, of the disciplinary meeting, which he attended. The minutes of the meeting show a fair hearing was accorded to the Claimant. The Claimant did not apply to bring his own Witnesses, or protest at the hearing, that he was dissuaded from cross-examining any Witness. It was correctly concluded that the Claimant was involved in misuse of a public asset, for his private purpose. He was found guilty of an act of gross misconduct, warranting summary dismissal. The Respondent took into account Claimant's disciplinary record and long years in service, and reduced summary dismissal to termination on notice. He exercised his right of appeal, which did not result in interference with termination decision. Procedure was fair, and met the minimum statutory standards of fairness, under Sections 41 and 45 of the Employment Act.

59. The Claimant was offered 3 months' salary in lieu of notice, and pending leave. He was advised to pursue his benefits under the relevant Retirement Benefits Scheme. He should pursue that offer. Certificate of Service is merited under section 51 of the Employment Act, and ought to be availed to the Claimant. Reinstatement is clearly not merited. Termination was substantively justified and procedurally fair. The Claimant's contract was not terminated because he was incompatible with other Employees. The Respondent acknowledges he was a good and long serving Employee. These qualities came into play, in commuting summary dismissal into regular termination.

60. There is no support for alternative prayers of damages for defamation, punitive and aggravated damages, and compensation for violation of constitutional rights.

IT IS ORDERED: -

a. The Claim, save for the prayer on release of the Certificate of Service, is declined.

b. The Claimant is at liberty to take up the offer of notice, pending leave days and benefits under the Retirement Scheme, made to him by the Respondent.

c. No order on the costs.

Dated, signed and released to the Parties electronically at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 15th day of January 2021.

James Rika

Judge