



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.2167 OF 2014**

**THEURI MWANGI.....CLAIMANT**

**- VERSUS -**

**KENYA AIRWAYS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> October, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.12.2014 through Kitheka & Company Advocates and prayed for judgment against the respondent for:

- a) General damages for wrongful termination.
- b) Terminal benefits.
- c) Further or other incidental dues subject to company policy and practice commensurate with the claimant's terms of employment.
- d) Costs of the cause.

The reply to the claim was filed for the respondent on 06.05.2015 through Gikera & Vadgama Advocates. The respondent prayed that the claimant's suit be dismissed with costs and judgment be entered for the respondent against the claimant for:

- a) General damages.
- b) Costs of the suit.
- c) Interest.
- d) Any other relief that the Court deems fit to grant.

There is no dispute that the respondent employed the claimant as a Team Leader – Electrical Power Supply effective 04.01.2010. On 28.08.2014 the respondent served the claimant with the show-cause letter dated the same 28.08.2014. The letter stated that on 15.11.2013 the claimant was required to replace the old cable connecting Block E to the main distribution board with a new 95mm 4-core armoured cable. It further stated that the claimant confirmed to his manager that the meggar test on the cable he had installed showed 1000Mohms which meant that the cable was okay for use. The letter stated that it had been established that no new cable had been installed and the claimant was required to show- cause why disciplinary action should not be taken against him for failing to install a new cable. He was to do so in a written response delivered to the respondent by 5.00pm on 29.08.2014 failing action would be taken as per the provisions of the collective bargaining agreement, staff rules and regulations and the labour laws.

Prior to the show-cause letter the respondent had investigated the allegations and a report submitted on 22.05.2014 and whose findings were that the claimant and one Moses Owino had not replaced the cable as had been assigned.

On 01.09.2014 the claimant wrote requesting for more time to reply to the show-cause letter. He eventually replied by his letter dated 02.09.2014. The response was that the old cable had been replaced with the new cable on the evening of 13.11.2013 as had been assigned. The claimant's case was that the replacement work started at about 1800 hours – the cable having been delivered at the main gate near

reception that evening.

By the letter dated 08.09.2014 the claimant was invited to a disciplinary hearing to be held on 11.09.2014 at 9.00am at the Head Office Block A in the HR offices. He was advised that he was at liberty to be accompanied with a serving officer of his choice. The hearing appears to have been adjourned to 16.09.2014. The hearing panel was informed that the claimant had failed to install a new cable as was assigned and a report by Kenya Bureau of Standards (KEBS) dated 09.06.2014 had found that the cable in place was in fact old. The supplier had been summoned, he admitted to a defective cable having been supplied and said a new cable would be installed at no extra cost to the respondent. The supplier had informed the respondent that the cable that had been installed had the manufacturer's defect.

At the hearing the trade union representative took the view that calling the respondent's security team to investigate the matter was not necessary because the issue was technical and the presence of the security investigator was wrong.

The respondent's position is that in view of the report by KEBS, no new cable was installed because the finding by KEBS were not that there had been a manufacturer's defect but that the cable in place was old or used. Further the supplier had not collected the questionable cable for testing so as to validly say the cable had manufacturer's defect. In any event, the respondent's further position was that the supplied cable was 128 metres but only 100 metres was to be used and the claimant had failed to account for the extra 28 metres if at all the same was installed. On the material date of alleged installation, the check in register showed that the claimant reported at work at 07.07am and left at the main gate at 05.14pm as there was no any other entry to the head office – so that the respondent's further case was that no installation works took place. In any event, when the new cable was eventually done, it took 7 days so that no such cable could have been laid by the claimant on the evening of 15.11.2013 and as alleged by the claimant. The Court observes that in his written response to the show-cause letter, the claimant had erroneously referred to 13.11.2013 as the date on which he had allegedly installed the cable.

The claimant was finally dismissed by the letter of summary dismissal dated 08.10.2014 and subject to clearing with the respondent, he would be paid salary and allowances up to 08.10.2014; accrued leave days as at 08.10.2014; and provident fund benefits in accordance with the fund rules. The certificate of service dated 08.10.2014 was issued accordingly.

The **1<sup>st</sup> issue** for determination is whether the respondent complied with the requirement of a fair process in terminating the claimant. The evidence is clear that the claimant received the show-cause notice and was accorded a disciplinary hearing in presence of his trade union representatives. The Court returns that the respondent complied with the due process of a notice and a hearing as per the provisions of section 41 of the Employment Act, 2007. The Court further returns that the claimant has failed to show any contractual procedure that may have been breached by the respondent. The Court finds that the claimant was accorded due process.

The **2<sup>nd</sup> issue** is whether the reason for termination was fair. The reason for termination was that the claimant had failed to install a new cable contrary to his assertion that he had done so. The evidence is that the claimant did not install a new cable as he alleged to have done. The evidence is that the cable was not delivered by the supplier on 15.11.2013; the installation works were detailed and could not have been completed on the evening of 15.11.2013 as was alleged by the claimant; on the material day the claimant had checked out from duty at 05.14pm; and the findings by KEBS were that the old cable had been in place all along. The Court has considered the respondent's evidence and returns that there is no reason to doubt that the old cable had remained in place without a replacement, the purported new cable had not been delivered at all, and the claimant had indeed failed to install the new cable as he alleged to have done. The Court's finding is that as at the time of termination, the respondent has established that there was a valid reason for terminating the employment of the claimant and as envisaged in section 43 as read with section 47(5) of the Act. As per section 45 of the Act the reason for termination was valid and fair because it related to the claimant's conduct and related to the respondent's operational requirements including honesty and trust on the part of the claimant.

To answer the **3<sup>rd</sup> issue** for determination the Court returns that the termination having been found not to have been unfair, the claimant is not entitled to any of the remedies as prayed for. The Court has considered that the respondent had suspended the claimant and later lifted the suspension (erroneously suggesting to the claimant that the matter had been overtaken) and in view of that mitigating factor, each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's suit and each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 19<sup>th</sup> October, 2018.**

**BYRAM ONGAYA**

**JUDGE**