



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

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 50 OF 2012**

**JOHN KENNEDY ONGADI .....CLAIMANT**

**VERSUS**

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

T. O K'opere for the Claimant

Moleje Raimond for Respondent

**JUDGMENT**

1. This suit was commenced vide a Memorandum of Claim dated 12<sup>th</sup> January, 2012 and filed on 17<sup>th</sup> January, 2012 seeking;

- a. a declaration that the Claimant's termination was unlawful and unfair
- b. an order for reinstatement to his previous job or re-engagement to an equivalent job without loss of benefits

In the alternative,

- c. payment of damages for unlawful and unfair termination including payment of salary and allowances from date of termination until the age of retirement
- d. costs and interest

2. **Premise**

The suit is based on the following facts;

That the Claimant was employed in 1986 by the Respondent as a Trainee Technician and rose through the ranks over a period of 25 years.

3. At the time of termination by a letter dated 18<sup>th</sup> July, 2011 and received on 22<sup>nd</sup> July, 2011, he held the position of Acting Chief Engineer, Customer Service, Coast Region, stationed at Mombasa.

4. At the time, his gross salary was Ksh.240,603.19 per month.

5. The Respondent filed a Memorandum of Defence dated 21<sup>st</sup> May, 2012 in which it set out the

circumstances leading to the termination of the Claimant's employment and sought the claim to be dismissed with costs because the employment of the Claimant was for a valid reason and that it was done in terms of a fair procedure.

6. The Respondent in a Notice to Show Cause alleged that investigations carried out in February, 2011 revealed that the claimant had demanded a bribe of Ksh.350,000.00 from a customer M/s Sapore SRN No. 3426365-01 in order to waive debited amount in respect of an electricity bill in the sum of Ksh.1,397,470.00.

7. The Claimant was informed in the notice that this was in violation of the Code of Conduct and Ethics Clause 6(b) and could lead to summary dismissal.

8. He was asked to make a detailed explanation why disciplinary action should not be taken against him including a detailed report of the methods the Claimant had applied to arrive at the stated debit of Ksh.1,397,470.00. The response was needed in 72 hours.

9. On 6<sup>th</sup> June, 2011, the Claimant received a 2<sup>nd</sup> Notice to Show Cause why disciplinary action should not be taken against him in respect of three days and four days absence on 5<sup>th</sup> April, 2011 and 23<sup>rd</sup> May, 2011 upon application of emergency leave but left station before the requisite approval had been granted. He was accused of neglect of duty which was a serious offence and he was to respond within 72 hours. The Notice was from the Chief Manager Commercial Services.

10. The Notice to Show Cause followed a recommendation dated 23<sup>rd</sup> March, 2011, for disciplinary action from the immediate supervisor of the Claimant, Mr. J. Mkomba, Regional Manager Coast. The recommendation related to the aforesaid case of bribery demand and a previous case, where the Claimant was alleged to have wrongfully disconnected electricity supply at Sai Rock Hotel Mombasa with a view to solicit for a bribe.

#### 11. **Explanation**

The Claimant wrote a letter of explanation dated 2<sup>nd</sup> May, 2011 in which he stated that M/s Sapore met him in a café, and attempted to bribe him with Ksh.200,000.00 in order for the Claimant to assist him clear his account. That he advised the customer to pay the money to his electricity account and then do a letter of complaint if he had issues with the debited amount. The Claimant reconnected the account on 27<sup>th</sup> May, 2011 upon payment of Ksh.200,000.00 and on condition that the balance of Ksh.400,000.00 was paid within two weeks thereafter. The customer did not pay the Ksh.400,000.00 within two weeks and the Claimant ordered disconnection of his account.

12. He denied having solicited a bribe of Ksh.350,000.00 from the customer. The claimant stated that the customer was dishonest since he was caught on direct supply, refused to pay for the lost units and sued the Claimant for wrongful disconnection but lost the case. He was granted credit extension but did not honour the agreement. That he set up the Claimant to meet him at a restaurant and took photos of the meeting with a view to blackmail the Claimant.

13. The Claimant explained that he did not capture the debited amount as that was done by a Technician by the name of Edward Kugo and calculation was done by a Senior Technician David Wambugu and checked by one Titus Kieti. Other officers were involved in the approval of the first Ksh.100,000.00. The Claimant did the final approval after the technician assured him that they had used the phase currents captured during bypass and only partially used the history in ICS. That ICS does not give current analysis of theft for by-pass cases and thus the practical currents found on site vis-a-vis the connected load gives the best picture.

14. In summary, the Claimant explained that only David Wambugu could give the requested analysis.

15. The Claimant attached an email showing requested credit by the customer, instructions from the

legal department and the minutes of the meeting at the Malindi Office warning staff about the alleged attempted bribe by M/s Sapore, the customer.

16. The Claimant added that he had never been accused of bribery or dishonesty for over 20 years he had served the Respondent and had not been subjected to any warning or any disciplinary action.

17. He said that he was now well advanced in his career and age to start engaging in such vices.

18. He reminded the Respondent that he had in the past made a well-known fraudulent customer pay the Respondent over Kenya Shillings Fifty Million (Ksh.50,000,000.00). The court has perused the attached document referred to by the Claimant.

19. A report by the Internal Audit Manager dated 31<sup>st</sup> May, 2011 relating to Journal Voucher (JVs) cancelled by Mr. Kennedy Ongandi was produced. These were described as suspicious transactions by the Auditors. They included;

- **2.1.1 Journal Voucher No. 597252 SRN 443142-04** valued at Ksh.3,229,045.20. The customer had an illegal direct connection. Customer had accepted liability on 31<sup>st</sup> January, 2011, the Journal Voucher was generated by KPL07028 and cancelled on 1<sup>st</sup> February, 2011 by the claimant KPL03920.
- **2.2. Journal Voucher No. 652329 SRN 337875-01**

Journal Voucher valued at Ksh.708,130.15 was generated on 24<sup>th</sup> November, 2010 by KPL14807 after a site visit by three technicians who found that the customer had by-passed his meter. Supply was disconnected. On 3<sup>rd</sup> December, 2010, the Journal Voucher was cancelled by the Claimant.

20. The Auditors concluded upon interviewing the technicians involved that there were many complaints against the Claimant touching on corruption/personal integrity including Sai Rock Hotel, a case pending in court for willful disconnection by the Claimant following soliciting of a bribe and the case of M/s Sapore Enterprises Ltd based in Malindi. These two cases were not subjected to detailed investigation in the report.

## 21. **Recommendation**

The Auditors recommended that the Chief Manager, Human Resources and Administration in liaison with the Chief Manager, Commercial Services and Regional Manager, Coast should ensure that stern disciplinary action is taken against the Claimant *inter alia*.

22. The Claimant received a Notice to Show Cause dated 8<sup>th</sup> June, 2011 to explain the matters raised in the Audit Report regarding;

- a. **Journal Voucher. No. 652329 for SRN 337875** amounting to Ksh.708,130.15 cancelled on 31<sup>st</sup> December, 2010; by the Claimant and
- b. **Journal Voucher No. 59252 for SRN 443142-04** for Ksh.3,229,045.20 canceled on 1<sup>st</sup> February, 2011 by the Claimant. He was required to respond within 72 hours.

23. On 17<sup>th</sup> June, 2011 the Claimant wrote an explanation of the two matters in a detailed letter produced by the Respondent as "App7."

24. The Claimant denied that he had cancelled the two Journal Vouchers fraudulently. To the contrary he said that the action he took was for the benefit of the company in SRN337875. The Claimant further explained that the Technician had not followed procedure in that he did not involve a security officer upon detecting the alleged bypass. The customer had complained to the Claimant that they were harassed

by a technician who was soliciting for a bribe and threatened to take drastic action if the bribe was not paid. The Technician Mr. Maiyo was well aware of the procedure as he had been involved in similar incidents in the past.

25. The Claimant explained that, he had sent an independent person to verify the claim by Mr. Maiyo and no punctured cable was detected. Mr. Maiyo did not produce a photo of the cable. The Claimant cancelled the debit upon careful investigation.

26. **SRN 443142-04**

With regard to this account, the Claimant explained that he had personally visited the site and asked for investigation of direct connection. The technicians investigated and debited the customer. The Claimant found the debit erroneous and suspended it pending consumption analysis. The monitoring shows that the bill of Ksh.3,229,045.20 was way beyond the consumption by the customer. He explained that as a Manager he had to make immediate decisions to safeguard the Respondent and customer. The Claimant denied acting dishonestly or in bad faith.

27. Furthermore, on 15<sup>th</sup> June, 2011 the Claimant wrote a response to a Notice to Show Cause for taking an emergency leave and then leaving the station (twice) before the leave was approved.

28. The Claimant read personal vendetta in the matter by his immediate supervisor, Regional Manager Coast. He explained that on 1<sup>st</sup> April, 2011, he had approached the Regional Manager in the presence of IT Engineer Christopher Kamanza at around 4.30 p.m. after having dispatched a request earlier on email.

29. With respect to the 2<sup>nd</sup> leave, the Claimant explained that it was very urgent following a near fatal accident of the Claimant's son. He was to take the son to Nairobi urgently to see a Neuro Surgeon. He had sent his supervisor an email and left, since he was out of the office. He had to take a flight and could not wait longer. The Claimant stated that he could not comprehend the insensitivity of his immediate supervisor on the matter.

30. The Claimant added that the conduct by his supervisor depicted malice and bad faith against him by the Regional Manager which eventually resulted in the termination.

31. The Claimant attached emails to the Memorandum of Claim showing the circumstances under which the Claimant had taken emergency leave twice as alleged. Notwithstanding the explanation, the Claimant was served a warning letter by the Chief Manager, Commercial Services dated 6<sup>th</sup> July, 2011. His explanation for the two incidents was said to have been unacceptable by management.

32. One week later on 18<sup>th</sup> July, 2011, the Claimant received a letter of termination from the Chief Manager, Commercial Services, Eng. Rosemary Gitonga.

The letter partly read;

*“Further to our explanation letter to you dated 8<sup>th</sup> June, 2011 and your response dated 17<sup>th</sup> June, 2011 this is to advise you that your explanation has been found unacceptable on the following grounds;*

- 1. An Audit Investigation report dated 30<sup>th</sup> May, 2011 revealed that you cancelled a Journal Voucher Number 597252 amounting to Ksh.3,229,045.30 without any justifiable explanation.*
- 2. There was a complaint of irregular debits and corruption deals by M/s Sapore Enterprises Ltd SRN 3426465-01 in which you were found to be negligent of your duties as you failed to follow right procedure to re-examine the debit.*
- 3. It is also noted that you have a pending legal suit on irregular disconnection of electricity supply to Sai Rock Hotel, an issue that has tarnished the reputation of the company*

4. *You have also been applying for leave of absence and leaving your duty station without proper authority from your supervisor.*

*Note that your actions have created avenues leading to loss of revenue of approximately Ksh.3,229,045.20 to the company. You have also contravened KPLC provisions of Code of Conduct Clause 6(b) and 6(d) and this is viewed as an abuse of office as well as an act of dishonesty.*

*As a result you have therefore been terminated from the company services with effect from 20<sup>th</sup> July, 2011 under Clause 13 of your Employment Agreement. Under the said Clause, you are entitled to three months' notice of termination of service or three months' pay in lieu of notice.....”*

33. The Respondent's case is that the foregoing comprised valid reasons to terminate the employment of the Claimant and that the Respondent followed a fair procedure in effecting the termination and the suit be dismissed with costs.

#### 34. **Determination**

The Claimant and several witnesses testified in support of the respective cases of the Claimant and that by the Respondent.

35. The court has carefully analysed all the papers filed on record and the *viva voce* evidence led in court and has come to the following conclusions of fact;

1. The Claimant was not called to a disciplinary hearing to defend himself against the various allegations made against him in the various Notices to Show Cause.
2. The termination was limited to the allegations made against the Claimant in the Notice to Show Cause dated 8<sup>th</sup> June, 2011 and responded to in writing by the Claimant in a letter dated 17<sup>th</sup> June, 2011.
3. It was explained by the Claimant to the satisfaction of the court that the Respondent did not lose Ksh.3,229,045.20 or any money at all in respect of Journal Voucher Number 597252. Indeed the customer was credited for amounts paid by him in excess of what the customer owed the Respondent.
4. The pending legal suit by M/s Sai Rock Hotel on allegation of irregular disconnection of electricity supply by the claimant at Malindi court was determined in favour of the Respondent and therefore the action by the Claimant was vindicated.
5. The Claimant had very reasonable explanation as to why on the two occasions he had abruptly left on emergency leave upon application on email but before approval by his immediate supervisor. The Respondent had acted in a highhanded manner especially with regard to a matter of life and death regarding the son of the claimant who had been involved in a near fatal; accident and required immediate service of a Neuro surgeon at Nairobi and the Claimant and the son had to catch an immediate flight to Nairobi.
6. It was wrong for the Respondent to issue a letter warning the claimant in respect of the leave issue and a week later purported to use it as a reason to terminate the employment of the Claimant.
7. The Claimant had served the Respondent in various positions for a period of about 25 years and had no adverse record until the matters that led to his termination were raised following complaints by his subordinates which complaint received full support of the Regional Manager.
8. The relationship between the Claimant and his immediate supervisor, the Regional Manager was

sour and the court has warned itself of this fact in evaluating the veracity of the evidence by the Regional Manager and the circumstances leading to the termination of the Claimant.

### 36. **Issues for Determination**

1. Was the Claimant's employment terminated for a valid reason?
2. Was the termination done following a fair procedure?
3. What remedy, if at all, is available to the Claimant?

### 37. **Issue 1**

#### **Section 43(1) provides**

***“In any claim arising out of termination of 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.”***

38. It follows therefore the employer must demonstrate that the matters that the employer at the time of termination believed existed and which caused the employee's services to be terminated are valid matters. This must be done by the employer on a balance of probabilities. Failure to do so, the termination is deemed unlawful and unfair in terms of **Section 45 (1)** as read with **Section 45(2)(a)**.

39. Furthermore, **Section 47(5)** enjoins the employee to demonstrate on *prima facie* basis, that an unfair termination of employment took place and at that point, the burden shifts to the employer to justify the reasons for the termination of services and to demonstrate that the termination was done in terms of a fair procedure.

40. Regarding the procedure to be followed, **Section 41 (1) & (2)**; mandates the employer to before terminating the employment of an employee on the grounds of misconduct or poor performance, as in this case;

- a) explain to the employee in a language the employee understands, the reason for which the employer is considering termination
- b) avail the employee opportunity to have another employee or a union representative (where applicable) of his choice present during this explanation
- c) hear the matter in the presence of the employee and the representative and consider any representations made by the employee concerning misconduct or poor performance.

41. Failure by the employer to follow the procedure automatically renders the procedure followed by the employer in terminating the services of an employee, unfair as provided under **Section 45 2(a) and (c)** of the **Employment Act**. A plain reading of the provisions of **Section 41** shows that opportunity for the employee to make a written representation is not a substitute for a disciplinary hearing. The employer must convene an actual hearing of the matter in respect of which he contemplates a termination of employment or dismissal of an employee.

42. Having considered all the circumstances of the case, the court finds that the termination of the services of the Claimant was not for a valid reason and the termination was not done in terms of a fair procedure.

### 43. **Issue 3 – Remedy**

The Remedies available to an employee whose services have been terminated by an employer are

provided under Section 12 of the **Employment and Labour Relations Act**, as read with **Section 49 and 50** of the **Employment Act, 2007**.

44. In this regard, **Section 12(3)(vii)** provides that reinstatement of an employee is only available within three (3) years from the date of termination.

45. The Claimant's employment was terminated on 23<sup>rd</sup> July, 2011, and more than three years have expired since the termination. The provision does not have a proviso and one wonders whether the employee should be punished for delays not of his/her own making.

46. Other considerations are set out under **Section 49(4)** of the **Employment Act, 2007** and include;

“a) *the wishes of the employee*

b) *the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;*

c) *the practicability of recommending reinstatement or re-engagement;*

d) *The common law principle that there should be no order for specific performance in a contract for services except in very exceptional circumstances;*

e) *the reasonable expectations of the employee as to the length of time for which his employment with that employer might have continued but for the termination;*

f) *the opportunities available to the employee for securing comparable or suitable employment with another employer;*

g) *the value of any severance payable by law;*

h) *the right to press claims or any unpaid wages, expenses or other claims owing to the employee;*

i) *any expenses reasonably incurred by the employee as a consequence of the termination;*

j) *any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and*

k) *any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”*

47. In this regard, the Claimant is by law entitled to claim terminal benefits due and owing by fact of the contract of employment which include three (3) months' salary in lieu of notice, pension and 12 months' salary maximum compensation for the unlawful termination.

48. The employer already offered the Claimant payment of three months' salary in lieu of Notice in the sum of Ksh.240,603.19 x 3 = Ksh.721,809.57.

49. The Claimant was still to serve 14 years, to retirement which he lost by fact of termination.

50. The Claimant also owed the company Ksh.713,038.18 as car loan, car insurance, fridge and cooker loan, sales ledger and electricity bill which liability was directly deductible from his terminal benefits.

51. The Claimant was therefore entitled to a net balance of Ksh.8,771.39 plus pension payable upon reaching retirement age.

52. This was a sorry state of affairs for an officer who had served diligently for 25 years until events leading to his termination arose.

53. The court has already found that the Claimant's employment was unlawfully and unfairly terminated and considering all the aforesaid circumstances, award him Ten(10) months' salary being compensation in respect thereof in the sum of Ksh.2,406,031.90.

Total award to the Claimant is Ksh.3,127,841.47

Less the amount owed to the Respondent in the sum of Ksh.715,038.18

Net award is Ksh.2,414,803.29

54. The amount is payable with interest at court rates from date of Judgment till payment in full.

55. The Respondent is also to pay the costs of the suit.

**Dated and Delivered at Nairobi this 25<sup>th</sup> day of February, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**