



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 686 OF 2011

BETWEEN

CHARLES APUT OTIENO.....
CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Tom Wachakana instructed by Wachakana & Company Advocates for the Claimant

Mr. Munyu instructed by Iseme, Kamau & Maema Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 6th May 2011. The Respondent filed its Statement of Reply on 12th August 2011. The Claimant gave evidence on 1st September 2011 and on 22nd November 2011 when his case closed. The Parties then entered into negotiations which did not yield settlement. On 27th March 2013 the Respondent's Internal Investigator Christopher Kandie and its Human Resource Manager Stella Ndirangu gave evidence for the Respondent. The hearing closed on 13th June 2013 with the evidence of Francis Matu, a Technician working for the Respondent. The dispute was last mentioned on 12th July 2013, when Parties confirmed the filing of their Final Submissions and were advised Award would be read on notice.

2. The Claimant told the Court he was employed by the Respondent's predecessor Kenya Posts and Telecommunications Corporation, as a Technician Trainee, on 19th January 1983. He was absorbed by the Respondent when the predecessor Employer became defunct, went up the ladder, obtaining several promotions, the highest and last position being that of a Sectional Engineer. His contract was terminated by the Respondent on 8th June 2010, on the ground that he was involved in the illegal dumping of international traffic at the Milimani Exchange and leaked information to others who were involved, when the investigations of the dumping commenced. At the point of termination, he earned a monthly salary of

Kshs. 49,760. He states that the areas where dumping took place were not under his administrative jurisdiction. He did not leak any information about the investigations. The Respondent's decision against the Claimant was arbitrary, unfair and unlawful. He asks the Court to grant him:-

[a] A declaration that termination was unfair, unlawful and reason given in justifying termination invalid.

[b] The Respondent pays to the Claimant-

- I. A sum of Kshs. 49,760 x 12 = Kshs. 597,120 a requirement under the Labour Institutions Act.
- II. A further sum of Kshs. 49,760 x 27 years = Kshs. 1,343,520 as special damages.
- III. In the alternative the Court orders reinstatement of the Claimant.
- IV. Costs of the Claim

3. Mr. Otieno testified he was the Team Leader in charge of the Switches Section of the Respondent at Nairobi. His salary on the date of termination was Kshs. 49,760. He was dismissed on the allegations of dumping international traffic [calls], in the Respondent's network. An Internal Investigation into the allegations was carried out by the Fraud Management Unit; there was no evidence of the Claimant's involvement. The Report concluded there was no tangible evidence of the Claimant's involvement. Where calls fail to pass through one international switch, Telkom would lose revenue. The Report stated the Investigations could not narrow down on any person. There was a recommendation there be another round of Investigations. Instead, the Claimant was summarily dismissed without the benefit of a second round of Investigations. The Claimant had worked for 27 years, having joined in 1983, was promoted to a variety of positions, and never had 'pink' [warning] letters. The Claimant testified that it was true international calls were being dumped in the Respondent's network, but that he had in fact, acted to thwart such dumping in conjunction with France Telkoms.

4. Milimani and Toll 2 were some of the affected Switches. The Fraud Management Unit carried out Forensic Investigations at Toll 2. The Report exonerated the Claimant, concluding Investigations could not narrow down on the person responsible for the dumping. The Claimant appealed the dismissal decision. The Fraud Management Unit was advised to undertake fresh Investigation. There would be a second Appeal after this. The Claimant was not given the benefit of a second Appeal, and fresh Investigations did not involve him. He did not leak any information to compromise the Investigations. He had blocked dumping of international calls in the Respondent's network and saved the Respondent money. Otieno described himself as the hunter who became the hunted. He prays the Court to find his dismissal to have been unfair and grant him compensation or reinstatement as prayed.

5. Cross-examined by Mr. Munyu, the Claimant testified he is a trained Technician specialized in switches. He could serve in any location where there were switches. He was in charge of the Nairobi Region. The reason for termination was illegal dumping of international calls. It meant calls were sneaked from international destinations without payment of what was due to the Respondent. It is possible to do this without local assistance, and do so for a month without alerting the local office. Investigations were carried out to find out who was responsible for the dumping. Otieno testified he was not aware that dumping stopped once the Investigations commenced. The Head of the IT, the Functional Head of Operations, and the Investigator all knew about the ongoing Investigations. At Milimani Exchange, no one else knew. The Dumpers would only have been alerted by the persons who were carrying out the Investigations. The Investigations Report states that the mentioned Staff knew about the dumping. It was no true that the Claimant took no action after the illegal dumping was reported. He blocked 23 such calls. It was not only the Claimant who could leak information. One needed not be at Milimani to leak the information. Redirected, the Claimant stated the Investigations Report was not conclusive. There was no other Report made. There was no evidence the Claimant leaked information.

6. The Respondent admits having employed the Claimant on the terms and conditions given in the Statement of Claim. He was in charge of the Nairobi Area Switches, including the ones at Milimani Exchange. On or about 8th April 2010, the Respondent discovered there was illegal international traffic, originated from Milimani Exchange being dumped in the Respondent's network through its Nairobi Toll 2 at Extelcoms House. The Respondent informed the Claimant who was the Controlling Officer at

Milimani Exchange. He did not take any action, or carry out any investigations. He instead leaked out information to the persons who were involved in the dumping, frustrating the investigations. The Respondent's Investigations concluded the Claimant was an active participant, or colluded with others to undermine investigations. He acted in breach of his statutory and contractual obligation. He occasioned the Respondent loss and damage. He was asked to show reason why disciplinary action should not be taken. He gave his explanation, which was considered by the Respondent, before a decision was made on 8th June 2010, dismissing the Claimant. He appealed and was heard in accordance with the Respondent's Human Resource Policy Manual and Guidelines. The Appeal was rejected. Termination was fair, and based on valid reason. The Claim has no merit, and the Respondent asks the Court to decline the prayers sought.

7. Christopher Kandie carried out the Internal Investigations on the dumping and prepared the Report dated 15th April 2010. The Investigations centred on illegal traffic originating from Milimani Exchange through Toll 2 Extelcoms House, to Safaricom subscribers. Kandie went to the place where the incident took place. He confirmed from the Technician Mr. Matu, that there were illegal international calls dumped upon the Respondent's network. The International Switch is at Extelcoms House. Kandie enquired if the Technician had informed Mr. Otieno. It was confirmed Otieno was informed. Kandie consulted the Claimant, who told him he had taken action. The Claimant stated he had visited Milimani Exchange in the company of a Mr. Onyango, expert in the field of International Call Switches. They were able to check, and expected to programme the calls and know their source. The second time, the Claimant visited Milimani Exchange in the absence of Mr. Onyango. When the pair went later together, they did not find any calls dumped. The calls ceased after the lone visit made by Otieno. He was in charge of the Nairobi Region. Something must have been done at Milimani to stop the calls. It was only Mr. Otieno and Mr. Onyango who visited Milimani Exchange before the calls ceased. Kandie recommended the enhancement of Respondent's equipment to detect such calls. He concluded that the Claimant, and the Officer in charge of programming Christopher Buttuk, should explain the illegal dumping to the Management. Both of them were dismissed from employment.

8. Responding to questions in cross-examination, Kandie stated he was not aware if the Claimant had blocked any illegal dumping. His Report was that investigations were not conclusive. It was the basis of the dismissal. Kandie did not know if the Appeals Committee recommended further investigations be carried out. Redirected, Kandie stated that the list of blocked illegal calls should have been prepared through a chain of Management Officers. It did not conform to this mode, and was never copied to the Investigator.

9. Stella Ndirangu confirmed Otieno was an employee of the Respondent as explained in his evidence and that of Kandie. The Investigations Report implicated Otieno and Buttuk in the illegal dumping. The Claimant was invited to show reason why he should not be disciplined, in a letter dated 12th May 2010. He replied on 20th May 2010. His defence was not accepted, and he was summarily dismissed in a letter dated 8th June 2010. He appealed against dismissal on 10th June 2010, which was heard by the Appeals Committee on 2nd August 2010 and rejected. He was represented by his Trade Union on Appeal. Termination followed due process. Responding to questions from Mr. Wachakana, the Witness told the Court the Investigations Report was the basis of the disciplinary action. The Report states investigations could not narrow down on any suspects. The decision by the Respondent was based on evidence. Further investigations were carried out but Ndirangu did not have the Report arising from the further investigations. She was not aware that Otieno was exonerated by the Report, or that he blocked several illegal calls. He was in charge at Milimani. There were Officers under his supervision. Ndirangu could not recall how much the Claimant earned in salary. In redirection, Ndirangu clarified that a letter dated 1st October 2010, written by Jane Karuku, the Chairperson of the Appeals Committee to the General Secretary of the Claimant's Trade Union, alluded to the further investigations carried out. It captures the questions that the Appeals Committee wished to be investigated further, and gives the findings to these questions, advising in the end that the Appeal was closed, and termination upheld. The Respondent prays the Court to uphold its decision and reject this Claim.

10. Francis Matu is a Technician. He had 25 years of experience in this position, as of the date he

testified. In 2010, he was manning the Telephone National Exchange. On 5th March 2010, he repaired a link to Safaricom. He was accompanied by a Technician from Safaricom. He heard a call come through the Link which they were repairing. It was a call from America. Recipient was here in Kenya. It was irregular. All international calls come through the International switch gateway. Matu investigated and found the call came through Milimani Exchange. The International Switch is based at Extelcoms House, as is the National Switch. He continued monitoring, and discovered many calls were dumped through Milimani Exchange. He notified the Claimant and Mr. Buttuk. The calls stopped once the Claimant was assigned the duty to investigate by Respondent's Management.

The Court Finds and Awards:-

11. Charles Aput Otieno was employed by the Kenya Posts and Telecommunications Corporation, the predecessor of the Respondent, as a Technician Trainee, on 19th January 1983. He was absorbed into the employment of the Respondent, rising through the ranks to become Sectional Engineer, earning a salary of Kshs. 49,760 per month. He was in charge of the Nairobi Area Switches, which included the Milimani Exchange. It is agreed by both Parties that in March 2010, the Respondent detected illegal international traffic [calls], originating from the Milimani Exchange through Toll 2, Extelcoms House, to Safaricom Subscribers. Investigations carried out by the Respondent's Internal Investigator were not conclusive on who exactly was behind the dumping, but pointed a finger of suspicion at the Claimant and the Programmer Christopher Buttuk. Both Suspects were taken through a disciplinary process, and dismissed. The questions raised by this Claim are these:-

- a. Whether the Claimant's contract was terminated for valid reason or reasons as demanded by Section 43 and 45 of the Employment Act 2007;
- b. Whether the Claimant was accorded fair procedure in the process, as demanded by Section 41 and 45 of the Employment Act; and
- c. Whether the Claimant is entitled to compensation and special damages, or an order for reinstatement.

12. The Claimant was in charge of the Nairobi Area Switches which included Milimani. As a result of the dumping, the Respondent alleged it lost Millions of Shillings. The Claimant does not deny there was dumping, or that the Respondent lost revenue, or that he was in charge of the Nairobi Area Switches, the conduit through which revenue was lost. He did not act to prevent the dumping, and even when alerted, appears to have gone to Milimani Exchange and leaked information on the investigations to the authors of the dumping, and the activity ceased without uncovering the masterminds. The Claimant, either alerted the actual persons behind the dumping, or was himself part of the syndicate of dumpers, otherwise there would be no plausible explanation why dumping ceased shortly after his solo visit to the Milimani Facility. In either case the Respondent would have reason to conclude that the Claimant had committed Employment Offences under Section 44 [4] [c] and [g] of the Employment Act 2007 by neglecting to perform his duty, or performing his duty carelessly and improperly; or committed, or on reasonable and sufficient grounds was suspected of having committed a criminal offence against, or to the substantial detriment of his employer, or employer's property. These would form valid grounds justifying the termination decision.

13. Mr. Otieno stated he had managed to block 23 international calls illegally dumped in the Respondent's Network in the past, with the aid of France Telkoms. The Court does not think this was in issue, the dumping subject matter of his disciplinary case, having arisen from the dumping detected in March 2010. He does not seem to have raised the defence of 23 illegal calls blocked, anywhere in his answer to the letter to show cause, or in his defence at the disciplinary hearings and appeal. It was not in his Statement of Claim either. The Claimant did not offer any material to the Court, to show that he discharged his duty properly and carefully, or that the Respondent had no reasonable or sufficient ground to hold him responsible for the dumping. The evidence of Francis Matu was clear and unchallenged on the discovery of the illegal dumping, the information given to the Claimant, and on how the calls ceased. In terms of validity of termination reason, the decision of the Respondent was fair.

14. Like most termination processes this Court has adjudicated involving the Respondent in the past, the Court finds the procedure was in conformity to the minimum statutory disciplinary procedure. There were investigations carried out, a report prepared recommending the Claimant and Mr. Buttuk be called to explain the dumping. The Claimant was informed of the specific allegations against him; he was called to respond; responded; was given a hearing; a decision made; and was given the opportunity to appeal, appealed and was heard, and appeal dismissed. The Appeals Committee was thorough and fair, and even recommended further investigations. There is reason to believe further investigations took place as suggested by the Respondent's annexure TKL7. The procedure was slow, methodical, and fair. The Claimant was called to show cause in May 2010. The Appeals were only considered closed 5 months later in October 2010. The Respondent, unlike a sizable number of employers in Kenya, did not rush industrial justice. The result was that the process was fair, and termination was fair on account of procedure. In the end, the Court finds termination was fair. There were valid grounds, to justify termination. The decision was arrived at following a fair procedure. ***The Claim is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 22nd day of January 2014

James Rika

Judge