



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 734 OF 2010

BETWEEN

BEN PANHILL SIFUNA
..... CLAIMANT

VERSUS

KENYA URBAN ROADS AUTHORITY
..... RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Wangila instructed by A.S.Kuloba & Wangila Advocates for the Claimant

Mr. Munge instructed by Muriu, Mungai & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Mr. Ben Panhill Sifuna filed his Statement of Claim on 25th June 2010. This was subsequently amended in a Statement filed on 27th June 2013. He also filed Statements responding to the Respondent's Statement of Response on 22nd July 2010 and in answer to the Amended Statement of Response, on 16th September 2013.
2. The Respondent filed its Statement of Response on 13th July 2010 and an Amended Statement of Response on 28th June 2013. The Respondent filed an additional Bundle of Documents on the 3rd March 2011.
3. Sifuna gave evidence on 18th September 2013 and 4th February 2014 when he closed his case. The Respondent gave evidence on 4th February 2014 through its Manager Legal Affairs Carolyn Ngang'a and its Manager Human Resources and Administration Francesca Cherotich Boen. The hearing closed on the 4th February 2014. The Parties confirmed the filing of their Closing Submission at the last Mention on 4th March 2014, and were advised Award would be delivered on notice.

4. The Claimant's position is that he was employed by the Respondent State Corporation as a Human Resources Manager commencing 1st February 2009. The Respondent is established under the Kenya Roads Act 2007, created as the Lead Government Agency in the development of urban roads in Kenya.

5. The Claimant's appointment letter is dated 21st January 2009. Employment was for 3 years, commencing 1st February 2009. He was entitled to a monthly basic salary of Kshs. 134,500; house rent allowance of Kshs. 48,000; remunerative allowances of Kshs. 21,000; leave allowance of Kshs. 50,000; and gratuity at 31% of the annual basic salary at Kshs. 523,032.

6. Sifuna states that his monthly entitlements were subsequently increased from June 2010. The increments however, were not made effective, and remained unpaid. The basic salary was raised to Kshs. 140,600; house rent allowance to Kshs. 60,000; transport allowance offered at Kshs. 35,000; security allowance at Kshs. 15,000; utility and entertainment allowance at Kshs. 50,000; and telephone allowance at Kshs. 17,000.

7. The Claimant worked diligently, in accordance with his Letter of Appointment, the Job Description, Public Service Code of Regulations and the Human Resources Manual. However, the Respondent summarily dismissed the Claimant on 4th June 2010. At the date of dismissal, the Respondent had not paid the Claimant's dues stated under paragraph 6 above, which comprised house rent allowance at Kshs. 72,000; transport allowance at Kshs. 210,000; security allowance at Kshs. 90,000; utility and entertainment allowance at Kshs. 300,000; telephone allowance at Kshs. 60,000; leave allowance at Kshs. 89,000; and gratuity at Kshs. 674,684- total arrears Kshs. 1,495,684.

8. The Respondent justified its dismissal decision on the following grounds:-

- The Claimant caused delay in provision of airtime to the Respondent leading to inconvenience;
- The Claimant failed to respond to complaints related to recruitment of the Respondent's Staff;
- The Claimant failed to obey official instructions of the Respondent;
- He failed to meet performance targets; and
- Absented himself from work without the leave of the Respondent.

9. The Claimant termed these grounds as completely untrue, farfetched and amounting to afterthought. He was removed from office through the malicious orchestration of the Respondent's Director General. The orchestration comprised fabrication of facts to justify dismissal; fabrication of complaints against the Claimant; fabrication of discussions and meetings; backdating of alleged official communication; and disregarding of the Employment Act 2007, Human Resources Manual and Staff Regulations, and the Public Service Employment Regulations.

10. Sifuna denied the claim by the Respondent that he absented himself from work without the leave of the Respondent. He would seek the Respondent's leave whenever compelled to be absent. No assessment of the Claimant's performance was carried out and documented, and allegations of poor performance were totally without foundation. Sifuna prays the Court to find dismissal unfair and unlawful and grant the following orders:-

[a]

- i. 3 months' salary for notice period at Kshs. 421,000;
- ii. 3 months' house allowance for notice period at Kshs. 180,000;
- iii. 3 months' remunerative allowance for notice period at Kshs. 63,000;
- iv. 12 months' gross salary as provided by law at Kshs. 1,687,200;
- v. 12 months' house allowance at Kshs. 720,000;
- vi. 12 months' remunerative allowances at Kshs. 252,000;
- vii. Gratuity at 31% of the annual basic salary at Kshs. 523,032;
- viii. Leave allowance at Kshs. 50,000;
- ix. Telephone allowance for 12 months at Kshs. 204,400;
- x. Utility and Entertainment allowance at Kshs. 600,000;

- xi. Security allowance at Kshs. 180,000;
- xii. Outstanding arrears at Kshs. 1,495,684; and
- xiii. Withheld salary at Kshs. 8,175,000

Total..... Kshs. 14,552,116

In the **alternative**

[b] The Claimant is reinstated to his previous job at the Respondent Authority on the same terms and conditions to the period prior to dismissal.

[c] Any other relief the Court deems appropriate to grant.

[d] Costs of the Cause

11. Sifuna testified he is today a Human Resources Consultant, working under Management Consulting Associates Limited. His allowances were adjusted after 1 year in service. This was done through a resolution of the Board. Adjustment was from June 2009. Other allowances, including transport and security, were introduced. The Claimant was on approved annual leave from 7th May 2010 to end 22nd July 2010. He was summoned while on leave, on 4th June 2010, and issued the letter of dismissal.

12. On the accusation that the Claimant failed to secure Medical Cover for Respondent's Staff, the Claimant explained there was a Committee established to develop terms of reference for procurement of Medical Services. Sifuna chaired the Committee, other Members being Managers Legal Department and Manager Procurement. The Committee was sanctioned by the CEO/ Director General. The Committee developed Medical Scheme, which the Board approved on 7th May 2009, just 4 months after the Claimant was employed. The Director General thereafter refused to implement the Scheme. The Director General instead asked the Claimant to develop a list of hospitals and consultants, and a List of Diseases to be covered under the Scheme. He specifically directed there should be no limit to the coverage of the Director. The Claimant consulted Insurance Companies and prepared his report to the Respondent on 5th August 2009.

13. The Procurement Manager was supposed to get the approval and advertise for service provision. When the Procurement Manager started working on the approval, the Director General appointed a Tender Committee comprising 4 Engineers and 2 Casuals, to technically evaluate provision of medical provision. None of the Tender Committee Members had the experience or technical know-how, and none was an Employee of the Respondent. The Engineers were not drawn from the Ministry of Roads. The Claimant was not part of the Committee. The Director General later wrote to the CEO of the Insurance Regulatory Authority, who gave the Respondent a Technical Officer Mr. Ndegwa, and award for provision of medical services was made after this. It was incorrect to say the Claimant delayed procurement of medical services. The Claimant had in fact expressed his concern over the delay and suggested Employees are paid medical allowance, pending finalization of the medical insurance policy. The Director General opted to follow a path that completely kept the Claimant out of the picture.

14. The Claimant denied that he delayed in the provision of airtime to the Employees. He developed guidelines for telephone allowances and services. The guidelines were approved by the Board. He wrote to the Procurement Manager, and asked him to arrange for procurement of airtime. Procurement advertised for the service. The Claimant discharged his role on provision of airtime.

15. It was not true that the Claimant failed to respond to complaints on recruitment of staff. There was a Recruitment of Staff Committee, which excluded User Departments. There were complaints lodged by certain Job Applicants. One Peter Koskey complained about the interview for Results Engineer. The complaint was not directed to the Claimant. He was not aware about the complaint, or that Koskey had interviewed for Results Engineer. Some persons in the Respondent were pushing for Koskey to be shortlisted for the job. The Complainant had not expressed his current and expected salary, and was not

registered as an Engineer.

16. It was alleged by the Respondent that one Felistas Matingi Musebe, was interviewed and recruited as Human Resource Officer without the relevant academic qualifications. The decision to recruit her was made by the Committee. There were vested interests. It was not a valid complaint that the Claimant did not advise on the Job Advertisements.

17. Sifuna was not informed what official instructions he failed to obey. There was no performance contract between the Respondent and the Claimant. The performance contract in place was between the Respondent and the Ministry of Roads. Sifuna initiated reporting format. He advised the Respondent to have Advisory Committees in the meantime. He was able to develop a Service Charter; Policy on Sexual Harassment, Alcohol and Substance Abuse; presented progress report; and developed staff appraisal forms. It was ridiculous to charge that the Claimant failed to meet his performance targets.

18. He did not absent himself from duty without leave of the Respondent. His leave was approved by the Director General as per attachment APP 10 in the Response. He was authorized to have leave of 2 days. He resumed duty and continued working. There was no time the Claimant was shown to be absent without the leave of the Respondent.

19. Sifuna was not given any letter, calling on him to show cause, why he should not be disciplined. His contract was terminated. This was contrary to the Human Resources Manual. The Director General had asked the Claimant to split the Claimant's department into two - Human Resources and Administration. The Claimant had not been recruited to fill a split Department, and the Director General's advice went against the policy of the Interim Management Office. The Director General intended to have another Officer take up the Claimant's role, and asked the Claimant to resign, or he would be dismissed. The Director General said the Claimant would be paid terminal benefits and a personal payout of Kshs. 3,000,000 which would enable the Claimant secure tenders once out of employment. Sifuna declined this soft landing. He wrote to the Director General, with copies to Board Chairman and the Chairman of the Human Resources Committee, rejecting the soft landing. The letter is dated 30th April 2010.

20. In his Memo to the Claimant dated 29th April 2010, the Director General mentioned a meeting between the 2 Officers, which was said to have taken place in the latter's Office, on 28th April 2010. There was nothing in this meeting, touching on the charges against the Claimant; it was all about trying to prevail on the Claimant to resign. The Claimant received the Director's Memo on 5th May 2010 as shown in the extract of the Delivery Book. He was asked to respond to the allegations on the same day 5th May 2010. The letter containing the allegations had been backdated to 29th April 2010.

21. The Human Resources Officer had already notified the Human Resources Committee about the meeting to take place on 5th May 2010. The Director General was aware the Claimant would be busy preparing for the meeting and would not be able to play to the intrigues. At the time, the Claimant received an erroneous SMS communication from the ICT Manager Paul Rono stating, "*help in the removal of Sifuna!*" Sifuna lodged a complaint on this with the Police.

22. There was no Disciplinary Committee constituted to hear the Claimant in terms of the Human Resources Manual. There were no recorded warnings. His employment file only had the letter of appointment, letter of reference, leave forms and letter of dismissal. The Manual called for warnings before dismissal. His disciplining was not part of any of the Respondent's Committees' agenda. In the initial Statement of Response, there were no minutes of any meeting held by the Respondent, justifying termination; such minutes only came up after the Claimant presented his documents in Court. The Claimant prays the Court to grant the Claim.

23. It was the Claimant's testimony on cross-examination, that he was employed by Crown Berger Limited from July 2010, immediately on leaving the Respondent in June of that year. He then became Director of Management Consultants from April 2012.

24. He was employed by the Respondent on 21st January 2009, and accepted the terms and conditions of employment. Under clause 2, he was to report to the CEO, who gave instructions on day to day basis. Clause 3 contained the Claimant's duties. Clause 4 gave the Director General authority to assign any other duties. The contract was for 3 years.

25. Sifuna developed the Human Resource Manual. Clause 10 contained the terms of exit from service. It was adopted and approved by the Board. It became a working tool for the organization. Clause 10.4 provided for dismissal from employment. Dismissal process involved the Advisory Committee, then the Board. The Claimant was not taken through this process.

26. The Minutes of the meeting held on 27th May 2010, by the Human Resource Committee, referred to a period before termination. Prof. Johnstone Kiamba was the Chairman of the Respondent's Human Resource Committee, while Mary Gesare and Engineer Nkadayo were Members. The relevant minutes indicate disciplining of the Claimant, was part of the Committee's day agenda. On 2nd June 2010, there was a special meeting of the Board of Directors. It was before the disciplinary meeting. This meeting discussed the disciplining of Sifuna. The meeting of the Committee on 27th May 2010, recommended the summary dismissal of the Claimant, based on 3 grounds stated in the letter of dismissal.

27. Clause 8 of the letter of appointment gave the Claimant's remuneration. There was a standard, annual increment for all Employees, of Kshs. 6,000 on the basic salary. The Claimant's basic salary stood at Kshs. 140,600 per month at the date of summary dismissal. Notice pay would not be payable in case of a valid dismissal, the Claimant testified. He seeks 12 months' gross salary in compensation, in accordance with the Law. He claims unpaid increments. The increments were proposals, which required the approval of the Minister to become payable. Sifuna did not know if the Minister had given his approval by the time of dismissal. The arrears claimed are based on the proposals. Everyone who was affected by the proposal was entitled to the payment. The effective date according to Sifuna, for payment of the proposed increments, would be the date the proposals were approved by the Board.

28. The contract of employment provided for termination under Clause 26. Either Party could terminate the contract by giving the other 3 months' notice, or by payment of 3 months' basic salary and 3 months' house rent allowance, in lieu of notice. Telephone allowance had been approved from 2009. Sifuna conceded his claim of Kshs. 204,400 in telephone allowance, reflected a higher rate than what he was receiving under the item. Utility and entertainment allowance was contained in the proposals. It was only the Director General who used to receive this allowance by the time of Sifuna's exit. Security allowance was also based on the proposal. Gratuity of 31% annual basic salary was based on successful completion of the contract. The Claimant did not complete his contractual period.

29. One of the Claimant's duties was to administer payroll and staff benefits. Sifuna conceded there was delay in the provision of airtime to Employees. Both the Director General and the Procurement Manager had written to the Claimant, complaining about the delay. Sifuna testified he did not occasion the delay.

30. Recruitment of Employees was in the Claimant's docket. He denied that he was in charge of the recruitment exercise, however. The Chairman Human Resource Committee was in charge. The Claimant denied that he generated job advertisements; he only created the job descriptions. He did not complain when adverts appeared in the press with errors. He did not write a Memo to point out there were errors in the adverts. There were clear errors. The advert for the position of Senior Administrative Officer was duplicated, and had different job qualifications. The qualifications were determined by the Interim Management Office. The position of Human Resources Officer required to be filled by a person with a Degree and Professional qualifications in Human Resources; Felistas Matingi who was recruited, did not have such a Degree. Sifuna testified he did not employ her himself. Peter Koskey applied for the position of Results Engineer. He claimed he was invited for the interview for 3.30 p.m. on short notice, on the same day the interview was scheduled for. He had left his testimonials at Kericho. Sifuna thought Koskey may have been lying, but conceded this was a Human Resource issue. He did not recall any instructions he failed to implement from the Director General. He denied that his instant case is a personal vendetta against the Director General. Dismissal took place more than 3 years ago.

31. Redirected, the Claimant told the Court that his obligation was to pass information of entitlement to airtime to the Employees, and to the Procurement Manager. He advised Procurement on 28th August 2009. He discharged his obligation upon passing of the information. He gave the breakdown of the entitlements. He continued to advise, but Procurement delayed in provision of airtime. The Director General met Regional Managers on 3rd December 2009, discussed staff recruitment, and adverts were placed in the press on 7th December 2009. The Claimant was excluded from the meeting of 3rd December 2009, although what was discussed fell within his role.

32. The Short-listing Committee recommended who would be interviewed. The Chairman could over-rule any of the Committee Members. Felistas had qualifications that were required for the position, not the qualifications appearing by error in the press. The position required a Diploma- Holder. There were Degree- Holders who were interviewed, and rejected in favour of Diploma- Holder Felistas. The error was noticed and rectified by the Committee. The position was scale 3, requiring a Diploma- Holder. Peter Koskey did not have the requisite qualifications, and had not been short-listed or called for the interview. His name was not on the interview schedule, and it was not clear who called him on short notice. Koskey wrote his complaint to the Director General through the Minister, with copy to the Executive Assistant. The complaint was not copied to the Claimant. The Executive Assistant must have been the person who called Koskey for the interview.

33. Sifuna denied that he has any personal grudge against the Director General; he has sued the Respondent, not its CEO. He seeks reinstatement. He explained that Management Consultants Limited is his personal outfit, and he would have no problem returning to the Respondent. He is entitled to gratuity, as he did not leave employment voluntarily. He seeks allowances in arrears, based on the approval of the Board. There is no evidence that these were not approved. He was not given any opportunity to appear before any Management Advisory Committee. Termination did not follow the Human Resource Manual or the rules of natural justice. The Board Meeting to discuss the Claimant's disciplining did not take place, and minutes of such a meeting were made in afterthought. The minutes, were introduced to the Court in the year 2011, a year after the Claim was filed. Sifuna did not fail to follow the instructions of the Director General; he only declined to act on instructions which would affect his own integrity, and that of the Director General. He was not guilty of gross misconduct. He performed his duty competently and had served as Human Resource Manager in other State Corporations such as KIRDI. Felistas, who was alleged to have been recruited irregularly, was still in employment at the time the Claimant was dismissed. Sifuna urges the Court to allow the Claim.

34. The Respondent conceded it employed the Claimant, and terminated his contract of employment on the dates given in the Claim. Gratuity was payable only on successful completion of the contractual period. It was not available on termination as a result of gross misconduct. Leave allowance was only payable upon the Claimant having taken more than half of the annual leave entitlement. It was only the Claimant's basic salary which was reviewed. Review of allowances had not been approved. None of the Employees had any of the allowances reviewed. Telephone allowance was only available to Employees in active service; it was discontinued once an Employee exited.

35. The Claimant had clear job description, as well as other duties as would be assigned by the Director General; he failed in the discharge of these duties. He had the duty to ensure Employees were adequately covered through medical insurance; he avoided the role by requesting the Director General to be removed from the team tasked with the development of the Bill of Quantities. He had the duty to ensure proper job advertisements were placed in the media; he failed in this role, by misadvising applicants on the job requirements for the position of Senior Administrative Officer, with two adverts placed on the same job, but with different job requirements. Sifuna did not advise on remedial measures. Felistas Matingi Musebe was employed as Human Resources Officer; she did not have the requisite job qualifications; and the Claimant failed to advise on the lapse. Peter Koskey complained he was invited to attend the job interview within a short period of 6 hours, for the position of Engineer. Sifuna failed to ensure there was sufficient furniture and equipment for the Office. He failed to prepare an implementation schedule for specified performance contract targets, as instructed by the Director General. The Claimant also failed to ensure Employees received their airtime in good time. He was absent from duty without leave. His dismissal was on valid grounds, and followed a fair process. The contract of employment allowed for

premature termination of employment, but the Respondent nonetheless went ahead and accorded the Claimant a fair and full disciplinary process. He was heard; a decision made against him; and had the right of appeal under the Manual which he opted not to exercise. The decision was made by the Board, not the Director General. He was not entitled to terminal benefits except those that may have accrued, on the date of termination. The Claim has no merit and should be dismissed with costs to the Respondent.

36. Respondent's Manager Legal Affairs Carolyn Ng'ang'a, confirmed the Board meeting of 2nd June 2010 took place. She recorded its minutes. The minutes reflect a true record of the deliberations of the Board. She testified on cross-examination that she advised the Respondent, that the dispute be handled on the part of the Respondent, by external Lawyers.

37. Francesca Cherotich Boen testified she holds the position previously held by Sifuna. She confirmed the Claimant was employed by the Respondent, as shown in his letter of appointment. The Claimant reported to the Director General. Gratuity was only payable on successful completion of 3 years. The Board's resolution reviewing the allowances, or introducing others, had not been approved by the time Sifuna's contract was terminated. The Minister was to approve in accordance with the relevant Act of Parliament. Employees who left before such approval would not be entitled to such allowances. The objective was to compensate for actual service. Sifuna did not claim any arrears while in service.

38. There were job adverts. The same vacancy was advertised, but different qualifications called for. The Human Resources Manager was Sifuna and must be held responsible. Much as there was a Committee, Sifuna was in charge of the Secretariat and had the duty to advise. He was the expert and would take responsibility for any mistakes. The Human Resources Officer vacancy, called for a candidate with a Degree from a recognized University. Felistas, who was employed to fill the position, did not have a Degree Certificate. Sifuna again was responsible, and had no reason to shift the blame to the Committee. Koskey was called for the interview at 3.30 p.m. on the date of the interview. This was not normal. The Human Resources Manager again was to blame. It was the Human Resources Manager's duty, to ensure staff received their airtime in time; Sifuna failed to do so, and could not blame it on other Officers. The Regional Managers met frequently without involving the Human Resources Department. More than 3 years have lapsed since the Claimant left.

39. Testifying on cross-examination, Boen stated gratuity would be paid on pro-rata basis, in event an Employee's contract was regularly terminated. The Minister eventually approved the allowances. They were not approved as proposed by the Board. Security allowance was not included. Some amounts were reduced. Commuter allowance was approved at Kshs. 30,000 at the Claimant's job level; telephone at Kshs. 11,000; house rent allowance at Kshs. 65,000; entertainment at Kshs. 20,000; while leave allowance stayed at Kshs. 50,000, or a third of the basic salary, whichever was less. Approval was given in November 2010. No arrears were paid. The Human Resources Manager did not work in the recruitment exercise in isolation. He did not procure goods and services, but had a role. The Human Resources Office initiated the procurement process, but did not do the actual procurement. There was advice given by Sifuna on airtime, in writing. Koskey did not address his complaint to Sifuna, and Sifuna would not be in a position to respond. Sifuna was the custodian of the records and had an obligation to correct the errors in the adverts. Boen conceded it would be possible that the Claimant did not have knowledge of the adverts.

40. Redirected, Boen testified that Sifuna signed the requisition for the adverts. These accompanied the actual adverts. Request for airtime was done every month, before the 5th day, by the Human Resources Manager. Sifuna could not blame other Officers for failure to discharge this duty. Regional Managers consulted the Human Resources Office in discharging their roles. Sifuna had left employment by the time the Minister approved the review of allowances in November 2010. No one who had left by the time the Minister approved benefited from the review. No arrears were paid to any Employee. Some items such as security allowance were excluded altogether. Telephone allowance was approved at Kshs. 11,000; utility at Kshs. 20,000; and entertainment at Kshs. 25,000. Gratuity was paid pro-rata in case of regular termination. The Respondent prays for dismissal of the Claim with costs.

The Court Finds and Awards:-

41. Mr. Ben Panhill Sifuna was employed by the Respondent State Corporation on 1st February 2009. The Respondent was created through the Kenya Roads Act 2007, with the objective of developing urban roads within the country. It was in its embryonic stage at the time of employing Sifuna, and was recruiting for staff to fill various vacancies.

42. The Claimant was employed in the pivotal position of Manager, Human Resource and Administration. His duties and responsibilities were defined under Clause 3 of the letter of appointment. He was entitled to a monthly basic salary of Kshs. 134,500; house rent allowance of Kshs. 48,000; remunerative allowances of Kshs. 21,000; Leave allowance of Kshs. 50,000; and would be entitled to gratuity at 31% of the annual basic pay upon completion of the contract period. Employees were entitled to an annual increment of the basic salary of Kshs. 6,000. At the time of the Claimant's dismissal, his basic salary was Kshs. 140,600. There were proposals to review allowances and introduce new allowances, but by the time of dismissal, the proposals had not been acted upon. He was offered a 3 year contract. He did not serve the entire period; he was summarily dismissed on 4th June 2010, midway through the contract. His relationship with the Respondent was governed by the Contract of Employment, the Staff Rules and Regulations contained in the Manual, and the Employment Act 2007.

43. The letter of summary dismissal listed the following grounds in justification of the decision:-

- a. The Claimant failed to secure medical cover for the Staff and Board Members as per his job description;
- b. He caused a delay in the provision of airtime, inconveniencing the entire Organization in service delivery;
- c. He failed to respond to complaints related to recruitment of Staff;
- d. He failed to obey official instructions;
- e. He failed to meet his departmental performance targets; and
- f. He absented himself from duty without permission.

The Respondent concluded that these failures amounted to neglect of duty, unlawful absence from duty, failure to obey lawful instructions, insubordination, and above all non-performance, contravening the Human Resource Manual, the Employment Act 2007 and constituting gross misconduct.

44. Were these reasons valid, in justifying summary dismissal under Section 43 and 45 of the Employment Act 2007; was the decision arrived at fairly in accordance with Section 41 and 45 of the Act; and is the Claimant entitled to the remedies sought?

Validity of Reasons

45. The Claimant's duties were listed under his contract of employment, as follows:-

- a. Manage, retain, develop and recruit Staff so as to ensure that the activities undertaken by the Human Resources and Administration are proactive and in line with the strategic plan;
- b. Responsible for day to day HRA working practices within the office ensuring compliance with legislation as necessary and best practice;
- c. Responsible for ensuring that the Organization's Human Resource principles and policies are implemented via local procedure manuals, monitoring accordingly to ensure they are effective and are consistently applied across all offices;
- d. Manage the human resources budget, monitor and highlight any likely overspends, trying to ensure that expenditure is in line with the approved budget. Also administer the payroll and budget ensuring that the Members of Staff receive their salaries and benefits in timely manner so as to ensure compliance with the necessary legislation and corporate financial regulations. Within the budget negotiate contracts so as to ensure value for money;
- e. Contribute to the Authority's Human Resources Strategic Plan, and also the regional Human Resources Operational Plans so as to ensure that the department works towards meeting the overall strategic plan;
- f. Responsible for ensuring the discharge of all relevant health and safety responsibilities including

- health and safety induction training, accident investigation and reporting, inspections and risk assessments in order to ensure that the working environment is as safe as possible for Staff;
- g. Take an active part in relevant Committees Meetings KURA wide HRA group, Consultative Committees, Management Advisory, Data Protection, Staff Welfare, Pensions, Job Evaluations etc, as necessary to ensure that the HRA view is taken into account; and
 - h. Manage the most efficient use of office space and organize all work associated with any modifications so as to ensure a safe and secure working environment for the Staff.

In addition, the Claimant was bound to perform any other duties given to him from time to time.

46. It was the Claimant's duty to ensure Employees received their salaries and benefits in a timely manner. He was alleged to have neglected this responsibility, by failing to ensure medical cover for Staff and Board Members was put in place; and secondly, by failing to ensure Employees received their cell-phone airtime.

- a. There was nothing given in the evidence of the two Witnesses for the Respondent to support the charge that the Claimant failed to secure Medical Cover for Staff and the Members of the Board. The Claimant gave adequate evidence to discount this allegation. There was a Staff Medical Scheme Committee, comprising the Claimant, the Manager Procurement Mr. Obwocha and Carolyn herself. This Committee deliberated on the Medical Scheme, gave its proposals to the Board, and on 21st May 2009, received communication from the Director General stating that the Board had met on 7th May 2009, and approved the proposal for the Medical Scheme. There is evidence that the Director General for some reason, sought review of the Scheme that had been approved and adopted by the Board. The Claimant followed this reversed position, went through a secondary process of preparing Bill of Quantities, Consulting Insurance Companies and Procurement. The Director General sought the input of Engineers and Casual Employees in designing the Medical Cover. The Insurance Regulatory Authority was asked to help and finally, Medical Covers were availed to staff. The Claimant, quite clearly played his role in provision of this benefit, and if there was delay in rolling out of the benefit, it can only be attributed to the involvement of the Director General with the process, after the initial Board's approval and adoption. This was therefore, not a valid ground in justifying summary dismissal.
- b. Boen testified it was the responsibility of the Claimant to ensure Employees received their airtime on time. He could not delegate this responsibility to the IT Manager. She conceded that the Claimant had, on 28th August 2009 written to the Manager Procurement, asking him to make arrangement for provision of airtime for all Staff for that month and subsequent months. Sifuna on his part explained that he developed Guidelines for Telephone Services in a Paper dated 7th May 2009. These were approved by the Board. He wrote to the Procurement Manager asking him to ensure Employees received their airtime. Procurement went on to advertise for the provision of airtime service, in the press. The Court is satisfied the Claimant did not neglect his duty in provision of airtime. He prepared the policy paper on phone services, and wrote to procurement advising on the provision of airtime. It is not clear from the evidence given by the Respondent what more the Claimant was supposed to do, in discharge of the role. Once he had advised the Procurement Department on the provision of airtime, it was for that Department to do the actual purchase of airtime and avail to the Employees. The Claimant gave Memos, such as the one dated 4th January 2010, listing Employees and their respective entitlements, and calling on Procurement to process the airtime. He not only developed the policy on airtime; he actively followed up on ensuring there was implementation of that policy. There was no evidence that any delay in processing of the airtime could be attributed to Sifuna. This was not a valid ground for summary dismissal.
- c. Most of the evidence in justifying the Claimant's summary dismissal, revolved around the charge of failure to respond to complaints on Staff recruitment. These complaints revolve around Job Applicants Peter K. Koskey and Felistas Matingi Katunge a.k.a Felistas Matingi Musebe. Koskey complained that he was given less than 6 hours to attend interviewing for the position of Engineer.

This Gentleman wrote his complaint to the Director General and the Minister for Roads, with copy to the Executive Assistant. The Minister, Hon. Franklin Bett, appears to have personally followed up the complaint, making remarks by hand directed to the Director General, asking ‘*what do you say to this?*’ Koskey did not direct his complaint at the Claimant. He does not say in his complaint, that it was the Claimant who called him for the interview on short notice, or at all. According to the uncontested evidence of the Claimant, Koskey was not a registered Engineer, had not been shortlisted or invited formally for the interview. He was not on the interview schedule. There were certain forces pushing Koskey’s case forward. The Respondent did not provide the Court with the shortlist for the candidates interviewing for the position of Results Engineer, or the Schedule for the Interview, to discount the position given by Sifuna. There was nothing to show that Koskey was a legitimate candidate, a registered Engineer who met the basic requirements for the vacancy. His complaint could not attract much weight, and appears to have been given unnecessary weight through informal networks headed by the Minister for Roads. It is not even clear if the Claimant was supposed to respond to Koskey on the complaint, as the complaint was addressed to other persons, not to the Claimant. If the Claimant was supposed to respond to the Director General on this complaint, the record indicates he did not fail to do so; he wrote at length on 20th May 2010 to the Director General. Sifuna replied that Koskey’s complaint was not attached in the Director General’s letter to him. He also stated that the recruitment exercise was managed through a Committee, and he had no control of the process as an individual. One would expect the Director- General, with the information communicated by Sifuna to him, to then respond to Koskey resting the complaint. Felistas was recruited as Human Resources Officer without the required Degree Certificate. She was a Diploma Holder. The Claimant explained that the recruitment of Felistas was above board, there having been an error in the advert, calling for a Degree-Holder to the position, while the position was Scale 3 requiring to be filled by a Diploma-Holder. The Recruitment Committee took a collective position, and rectified the anomaly. The Lady continues to work for the Respondent to-date, even after the Claimant exited, and it is difficult to see how this error in the advert, prejudiced the Respondent. Furthermore, recruitment was not done by the Claimant as an individual, but by a Committee of the Respondent.

The Human Resource Committee chaired by Professor Johnstone Kiamba, and comprising among others the Director General Joseph Nkadayo met on 22nd March 2010, and gave the recruitment exercise a clean bill of health. The Committee noted that a *tremendous job was done as per the advertisement*. Management was asked to undertake due diligence in ensuring all academic papers of the new Employees were genuine. There is nothing to suggest the Claimant failed in his role, as a component of the Recruitment Committee. There were efforts from certain forces as captured in the case of Koskey, to force the hand of the Committee, but Committee Members led by the Claimant stood firm, and overall, considering that the Respondent was a nascent State Corporation recruiting Employees for the first time, objectivity was sustained in the exercise. Errors such as surrounded the adverts for Human Resources Officer and Senior Administrative Officer were minor errors in a mass, first time, recruitment exercise. What is important is at the end of day, Competent Officers such as Felistas were given a chance to serve, and that the top organ overseeing recruitment, noted a *tremendous job was done as per the advertisement*. There was no justification in the Respondent turning around and faulting the process, and laying the blame on the Claimant, who was a mere cog in a bigger Recruitment Group.

e) The charge that the Claimant failed to obey official instructions was not given support in the evidence of the Respondent. There was nothing said by Carolyn or Boen, to show that the Claimant disregarded lawful and reasonable instructions of the Director General. In his Memo dated 29th April 2010, the Director General repeated some of the accusations which the Court has disposed of above, as constituting failure to obey official instructions. These include failure or delay, to secure provision of medical cover and airtime. There is no need to repeat here why the Court does not think the Claimant failed in this obligation. Other accusations were that the Claimant somehow failed to obey official instructions relating to wealth declaration forms, safety and health, and registration with Directorate of Industrial Training. He is said to have failed in procurement of office furniture. All these accusations were not supported in the evidence of the Respondent, and the Court finds nothing to conclude the Claimant refused to obey official instructions.

f) There was no performance contract concluded between the Claimant and the Director General. The performance contract in place was between the Respondent and its parent Ministry. The records indicate individual staff performance contracts were yet to be concluded, and it is therefore unlikely that the Claimant would fail to meet his performance targets as charged by the Respondent. There was no form of appraisal carried out by the Director General on the Claimant's performance. It is difficult to say what data the Respondent relied upon, in determining that the Claimant failed to meet performance targets. The letter of dismissal refers to '*implementation plan and matrix agreed*' but these documents were neither availed to the Court, nor given evidential elucidation by the Respondent. The Claimant was able to explain with the aid of attached documents, what he had been able to achieve in his 1 ½ years of service with the Respondent. This is a ground that cannot have validity.

g) The last ground relates to absenteeism. The specific details of this were given in the Memo of the Director General to the Claimant, dated 29th April 2010. The Claimant applied for leave of 3 days from 29th to 31st March 2010. The Director General stated he approved the leave, but the Claimant did not report to duty on 1st April 2010, 2nd April 2010, 5th April 2010, and 6th April 2010. The Claimant returned on 7th April 2010 with a sick leave sheet, granting him leave from 6th to 9th April 2010. The Claimant gave a written response, which elicited no further comments or investigation, from the Respondent. He conceded he applied for leave from 29th March to 31st March 2010. The Director General approved, the Claimant did not proceed on leave, as he was held back by the staff recruitment exercise. He was not absent on the said days, although he had applied for leave, and been authorized to take the leave. He explained that on 6th March 2010 he developed a severe headache as a result of hypertension. He was rushed to the Nairobi Hospital by the Driver to Engineer Mwatu. He apprehended he would be admitted, returned to the workplace, took his car and drove to Kitengela Medical Centre who treated him and gave him the sick leave sheet, which was delivered to the Office the following day. The Claimant resumed work while not fully recovered, and worked even on the rest days of Saturday and Sunday. The Court has no reason to disbelieve the Claimant. He did not absent himself as alleged, or absent himself at any time, without lawful cause, so as to justify summary dismissal. To the contrary, he persuaded this Court he gave his all to the Respondent, working on rest days, to the extent that he sustained health problems. The Respondent ought to have garlanded the Claimant for this personal sacrifice, not hounded him out of office.

47. The totality of this is that the Court finds the Claimant's summary dismissal was not based on valid reasons. The grounds given in the letter of summary dismissal lacked evidential support.

48. The minimum statutory disciplinary procedure is given under Section 41 and 45 of the Employment Act 2007. This calls for the Employer to avail to the Employee charges upon which the contemplated termination decision is based. The charges must be explained to the Employee, in a language understood by the Employee. He or She must be heard, and allowed the company of a Workmate, or Shop Floor Trade Union Representative, during such hearing. Representations made by the Employee, or the Workmate, or Trade Union Representative, must be considered before the decision is made. Section 45 calls on the Employer to observe rules of natural justice, equity and fairness.

49. These are minimum standards, and Parties frequently improve on these standards, through their Contracts and Workplace Practices and Procedures contained in Manuals. In the case of the Respondent, there is in place a Human Resource Procedures and Management Manual, with the Disciplinary Procedure contained in Chapter 4. The philosophical underpinning of the Disciplinary Procedure is stated in the document to be the correction of unsatisfactory performance or behaviour. Discipline does not only mean punishment, and in exercising its prerogative, the Respondent would at all times strive to exercise discipline in a fair and unbiased manner. This is the philosophical underpinning of the Respondent's Disciplinary Procedure.

50. Pursuant to this policy, the Respondent's Disciplinary Procedure calls for progressive disciplinary sanctions ranging from admonishment, reprimand, severe reprimand and three written warnings. The

complaints by the Director General against the Claimant were mostly raised in the month of April 2010, as shown in the Memo of the Director General dated 29th April 2010. This was close to the conclusion of the recruitment exercise, which had been going on from December 2009 and which the Court views as having resulted in a fallout between the Claimant and the Director General. The complaints related to performance and behaviour, which in the view of this Court, and upon careful consideration of the Human Resource Procedures and Management Manual, should have first been addressed through admonishment, reprimand, and severe reprimand or written warnings. There are no recorded warnings against the Claimant preceding the Memo of 29th April 2010. Even assuming the Claimant's performance and conduct fell below the expected standards, did the Respondent live up to its philosophy of correction of unsatisfactory performance or behaviour, by denying the Claimant the benefit of admonishment, reprimand, severe reprimand or written warnings?

51. Clause 4.13 on Dismissal requires that in case misconduct warrants dismissal, the Management through the Head of the Human Resource and Administration would convene the Disciplinary Committee at the earliest opportunity. The Parties to this dispute did not inform the Court what happens as was the case here, when the subject matter of the disciplinary proceedings, is the Head of Human Resource and Administration. The following persons are required to attend disciplinary meeting- the Chairman of the Committee, Departmental Head, Witnesses and the Human Resource Committee. The Disciplinary Committee under Clause 4.19 comprises the Management Advisory Committee made up of not more than 5 persons as appointed by the Director General. This Committee is supposed to investigate the case and make a detailed report, providing all its evidence and its recommendations. The Employee is to be given an opportunity to defend himself at the investigations. The Advisory Committee then gives its recommendation to the Director General, who in turn is supposed to table the documentary evidence to the Council for information. It was not made clear to the Court which is the documentary evidence or Council referred to here. In cases of Senior Management Staff, the Director General processes the matter for the consideration of the relevant Board Committee, which determines the case, and in doing so, shall grant the Employee the opportunity to defend himself or herself.

52. These procedures are not in clear terms, and there is difficulty in reconciling Clause 4.13 and 4.19, or the various sub-clauses within the two Clauses. It is nonetheless clear that the Claimant was entitled to be investigated and heard before the decision was taken. The Clauses require that he is given an opportunity to give his explanation on investigation, and defence at the hearing. There is no evidence that the Respondent followed its own procedures, or indeed the minimum statutory disciplinary procedures, in arriving at the decision against the Claimant. There was the Memo of the Director General of 29th April 2010, followed by the explanation of the Claimant dated 20th May 2010. Sifuna presented an extract of the delivery book, indicating he received the Director General's Memo on 5th May 2010, the same day he was required to defend the allegations. The letter of summary dismissal states that the Board of Directors met on 2nd June 2010, discussed the Claimant's disciplinary case, and determined he is summarily dismissed. It was not shown under what Clause of the Human Resource Manual the full Board met and made the resolution. There was no evidence that the Claimant appeared before the full Board, or any of its Committees, and was allowed to defend himself before the decision was made. There is no evidence of an investigation preceding the decision and no report of an Advisory Committee on any investigation, was availed to the Court.

53. The Respondent belatedly brought to the Court Minutes of a Board Meeting of 2nd June 2010. In the minutes, there is allusion to another meeting of the Human Resource Committee held on 27th May 2010 *"to review the disciplinary case against the Manager, Human Resource and Administration."* There is no mention of Management Advisory Committee as envisaged under the Human Resource Manual. There was reference to *" a summary report of the disciplinary case against the Manager, Human Resource and Administration together with the supporting evidence."* The Court was not shown this summary and supporting evidence. The minutes also refer to a hearing given to the Claimant by the Human Resource Committee on 5th May 2010. The Court again did not see evidence of such a hearing that took place on 5th May 2010. No proceedings of this hearings were made available to the Court. 5th May 2010, was the date the Claimant received the accusations from the Director General, back-dated to 29th April 2010. The

meeting of the Human Resource Committee of 27th May 2010 is captured in minutes introduced by the Respondent in its Additional List of Documents filed on 3rd March 2011. The minutes indicate the full Board had met the previous day, 26th May 2010, and requested the Claimant's case "be re-looked into" in light of the Claimant's letter to the Director General dated 20th May 2010. This was the letter where Sifuna answered the Director General's accusations. The Committee alleged to have studied the allegations raised by Mr. Sifuna and compiled a detailed report. The Committee does not refer to any hearing granted to the Claimant on 5th May 2010, as alleged in the minutes of the full Board of the meeting held on 2nd June 2010. In Both alleged meetings of the Board and the Human Resource Committee, three persons- Joseph Nkadayo, Mrs. Mary Gesare and Prof. Johnstone Kiamba were prominent features. How would the participation of the Director General Nkadayo, further the stated objective of the Respondent's Disciplinary Procedure, to act fairly and without bias? The Court has noted that the Director General had attempted to have the Claimant resign from the Respondent, and even offered him an attractive exit package, an offer the Claimant rejected. All the accusations against the Claimant originated from Nkadayo. There were e-mails circulating within the Respondent's Management under the banner, "help in removal of Sifuna!" There were certain persons, probably led by the CEO, who for certain reasons, were bent on having the Claimant out of their way. There is a lot of doubt on the truthfulness of these minutes. Even assuming they capture what took place, what took place is not in conformity to the Disciplinary Procedure created under the Manual and the Employment Act 2007. There is no evidence that the Claimant was properly investigated or heard, by the proper investigatory or disciplinary organ, on the allegations made by Nkadayo. Summary dismissal was not carried out fairly.

54. What remedies are merited by the Claimant for these violations? The Board of Directors unanimously approved review of Staff Allowances, in a meeting held on 2nd December 2009. The proposed new allowances were to be forwarded to the Minister for his approval and concurrence, in accordance with Section 5 [3] of the State Corporations Act Cap 446, the Laws of Kenya.

55. The Claimant seeks to be paid arrears of the enhanced allowances, which together with the claim for unpaid gratuity, add up to Kshs. 1,495,684. The evidence of the Respondent is that the Minister had not given his approval and concurrence in accordance with the Law, by the time the Claimant left employment in June 2010. The Claimant testified on cross-examination, that he did not know if the Minister had given his endorsement, by the time the Claimant left.

56. The Court's view is that the Claimant does not merit the enhanced allowances. He did not give any evidence to show that the Minister had given his approval, by the time the Claimant left. He did not establish that the Board's proposals had been given legal force through Ministerial endorsement, in accordance with the State Corporations Act, to become binding terms of the Staff contracts of employment. Ms. Boen testified, and the Court has no reason to disbelieve her, that the Minister gave his approval and concurrence in November 2010, and that there were no arrears paid to any Employee. The Claimant had already left employment. The effective date would be the date of the Minister's approval, not the date the Board approved. It was for the Claimant to prove otherwise; he did not give any material to show the date of the Minister's approval, or confirm his assertion that the effective date was the date of the Board's approval. His claim for arrears of allowances has no foundation, and is declined.

57. The Court has concluded termination of the Claimant's contract was unfair, and he therefore merits notice pay as would be payable on regular termination, in accordance with Clause 26 of the contract. **He is granted 3 months' basic salary at Kshs. 421,800, together with 3 months' house rent allowance at Kshs. 144,000, amounting to Kshs. 565,800 in notice pay.** The claims for 3 months' remunerative allowances for notice period; 12 months' house rent allowance; 12 month's remunerative allowances; leave allowance; telephone allowance for 12 months; utility and entertainment allowance; and security allowance; and withheld salary, have no factual or legal foundation and are rejected.

58. Clause 14 of the contract granted the Claimant 31% of his annual basic salary as taxable gratuity, on the condition that he successfully completed his contractual term. He did not complete the 3 year contractual period. His contract was terminated at the instigation of the Respondent, on the 17th Month. This Court has adopted the position in its past Awards, that where the Employee is not at fault for the

premature termination of the contract, it would not be fair or reasonable to deny the Employee contractual gratuity, proportionate to the number of months served. Gratuity serves as reward and recognition for the time served by the Employee, and also is an important social security mechanism. The rationale in proportionate payment is the same, as applied in allowing the prayer for notice pay. Notice pay becomes payable as would be in regular termination, because the Employee is not at fault. Ms. Boen was honest and forthright in testifying that gratuity would be paid pro-rata, in event of a regular premature termination. In cases where the Court finds the decision of the Employer was unfair, termination is at very least to be treated as regular, with all the benefits that have accrued to the date of termination, becoming payable. It was not the Claimant's fault that he did not complete 3 years. Fairness demands he is not denied gratuity for the 17 months completed in service. ***The Claimant is granted pro-rata gratuity at 31% basic salary for 17 months completed in employment, amounting to Kshs. 246,987.***

59. The Claimant's dismissal was unfair for want of validity of reasons and fairness of procedure. A grant of 12 months' gross salary in compensation for unfair termination is merited. The Court allows this prayer based on a basic salary of Kshs. 140,600, house rent allowance of Kshs. 48,000, and remunerative allowances of Kshs. 21,000 [Clause 8 of the contract] – monthly gross salary 209,600. The Claimant appears to have left out some of the invariable, standing monthly allowances, in arriving at his computation of the gross salary in his pleadings. Gross salary is the basic salary, together with all the invariable monthly allowances, and is not to be confused with consolidated salary, which is widely recognized as the basic salary put together with the house rent allowance alone. ***Compensation is granted at 12 months' gross salary of Kshs. 2,515,200 under Section 49 of the Employment Act 2007 and Section 15 of the Labour Institutions Act 2007.*** The alternative prayer for reinstatement is neither practicable, nor reasonable. The Claimant was on a 3 year contract. He had done 17 months at the time of dismissal. It would not be reasonable to order that he returns to complete the remaining 19 months. Over 3 years have lapsed from the time he left KURA, and both Parties have moved on. His successor Ms. Boen appears well settled in the Claimant's previous position. The Parties would not easily reconstruct the elements of mutual trust and confidence, which are the cornerstone of any employment relationship. It would be unsettling to both Parties, to order the restoration of the Claimant's contract of employment. The alternative prayer is rejected. Both Parties have prosecuted their respective briefs diligently, expeditiously, professionally and assisted the Court immeasurably in arriving at its decision. The Court takes the opportunity to thank the Parties. Against this backdrop, and in exercise of its discretion, the Court concludes it is only fair, that there shall be no order on the costs and interest. In sum:-

- a. ***Termination of the Claimant's contract of employment was unfair;***
- b. ***The Respondent shall pay to the Claimant within 30 days of the delivery of this Award, notice pay at Kshs. 565,800; pro-rata gratuity of 17 months at Kshs. 246,987; and 12 months' gross salary in compensation at Kshs. 2,515,200- total Kshs. 3,327,987; and***
- c. ***No order on the costs and interest.***

Dated and signed at Nairobi this 5th day of June 2014

James Rika

Judge

Delivered and signed at Nairobi this 5th day of June 2014

D.K. Njagi Marete

Judge