



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1492 of 2011**

**DAVID KEMEI ..... CLAIMANT**

**VERSUS**

**ENERGY REGULATION COMMISSION ..... RESPONDENT**

*Rika J  
CC. Elizabeth Anyango*

*Mr. Paul Lilan instructed by Lilan and Koech Associates, Advocates for the Claimant; and*

*Mrs. Mwenesi instructed by S. Musalia Mwenesi, Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

**AWARD**

1. David Kemei initiated this claim by way of a statement of claim, filed on 5<sup>th</sup> September 2011. The statement of reply was received in Court on 30<sup>th</sup> September 2011. Parties agreed on 15<sup>th</sup> December 2011, to file submissions within a total of 60 days. The Claimant filed his submissions on 23<sup>rd</sup> January 2012. Nine months later, on 18<sup>th</sup> September 2012, the Respondent had not filed its submissions. Mrs. Mwenesi informed the Court that the Respondent had instructed her there was a separate case filed in the High Court by the Claimant against the Respondent over the same subject matter, reason wherefore Mrs. Mwenesi sought and was granted more time to study the High Court matter. Parties agreed to come back to Court on 15<sup>th</sup> October 2012 in order for the Respondent to appraise the Court of its position. On 15<sup>th</sup> October 2012 neither the Respondent nor its Advocates attended Court. Mr. Lilan for the Claimant asked the Court to proceed to give its decision based on the submissions and pleadings on the record, as agreed by the parties earlier, in view of the Respondent’s absence and delaying tactics. The Court agreed with Mr. Lilan and advised that Award would be delivered on notice.

2. The Respondent is a State Corporation created under the Energy Act, Number 12 of 2006. It was formerly known as the Electricity Regulatory Board. The Claimant was employed by the Respondent from 2<sup>nd</sup> June 2000 as a Financial Analyst. On 28<sup>th</sup> November 2006, the Respondent interdicted the Claimant. Interdiction followed the charging of the Claimant with the offence of stealing by servant, in ***Nairobi Chief Magistrates Court, Criminal Case Number 2195 of 2006, Republic vs. Edwin Onyango and David Kemei***. On 2<sup>nd</sup> January 2008, the Claimant was summarily dismissed from employment. Summary dismissal was based on the same facts, subject matter of the interdiction and the criminal trial.

The criminal trial culminated in the acquittal of the Claimant on the 6<sup>th</sup> January 2011.

3. While the criminal trial was pending, the Respondent had gone on to ask the Claimant to show cause why disciplinary action should not issue against him. This was on 19<sup>th</sup> November 2007. The Claimant replied through his Advocates on 6<sup>th</sup> December 2007. He protested that he had the constitutional right to the protection of the law; the right not to be subjected to double jeopardy; and not to make statements that would prejudice his defence. Kemei asked the Respondent unsuccessfully, to suspend the criminal trial and abide the outcome of the criminal trial. The Respondent went ahead and summarily dismissed the Claimant. The Claimant feels the decision to summarily dismiss him was unlawful and unfair. He earned a gross salary of Kshs. 227,746.50 at the time of the summary dismissal.

4. Owing to the trumped up charges, unfair dismissal and the attendant adverse publicity, Kemei missed several employment opportunities. He had qualified for the position of Finance Manager with the Kenya Seed Company. He was interviewed for the post of Chief Manager Kenya Pipeline Company Limited. He was among the candidates interviewed and highly rated, but was felled by the criminal proceedings hanging over his head. The Public Officer Ethics Act Cap 183 the Laws of Kenya and the Anti Corruption and Economic Crimes Act Cap 65 the Laws of Kenya, entitled the Claimant to his full salary for the period between summary dismissal and the date the criminal trial ended. He was entitled in terms of these Legislations, to reinstatement on acquittal.

5. The Claimant asks the Court to hold that the summary dismissal was unfair and unlawful. He prays for the following remedies-:

**A.**

- I. 3 months' salary in lieu of notice at Kshs. 683,239.50;
- II. Severance pay at 15 days' salary for each year completed in service at Kshs. 1,138,732.50;
- III. Leave allowance for the years 2006,2007,2008,2009 and 2010 at Kshs. 46,000 per annum totaling Kshs. 275,678;
- IV. Salary arrears for the period under interdiction at Kshs. 988, 731.25;
- V. Salary arrears between the date of dismissal and the acquittal in the criminal trial at Kshs. 10,912, 701.30;
- VI. Employer's pension contributions for the period of interdiction;
- VII. Medical allowance for the years 2007, 2008, 2009, and 2010 at Kshs. 150,000 per annum at Kshs. 600,000;
- VIII. Retirement benefits due to the Claimant for the years 2008 to 2010 at Kshs. 1,091,270.15;
- IX. Telephone allowance for the years 2006 to 2010 at Kshs. 243,664

Sub-total Kshs. 16,032,889.85;

**B.** General Damages for wrongful and /or unlawful dismissal the equivalent of 24 months' salary;

**C.**

- a) Projected Salary for 14 years at Kshs. 50,925,939.37;
- b) Leave allowance for 14 years at Kshs. 857,164;

- c) Telephone allowance for 14 years at Kshs. 894,432;
- d) Employer's contribution of retirement benefits at Kshs. 5,092,593;
- e) Medical allowance for 14 years at Kshs. 2,100,000;

Sub-total Kshs. 57,770,129;

**D.** Costs; and,

**E.** Interest on [a], [b], [c], and [d] at court rates from the date of filing of this claim to the date of payment.

6. In the closing submissions, the Claimant referred to section 62 of the Anti- Corruption and Economic Crimes Act, which provides that a public officer who is charged with corruption or economic crime shall be suspended at half pay, with effect from the date of the charge, and that a suspended officer shall continue to receive the full amount of any allowances. It further stipulates that *"the public officer ceases to be suspended if the proceedings against him are discontinued, or if he is acquitted."* The Respondent went on with the disciplinary process against the Claimant due to ill-will. He was entitled to reinstatement on acquittal. The Respondent's Human Resource Policy Manual Section 6.84 provides for dismissal *"where the employee is found guilty of gross misconduct."* Section 6.96[b] provides that interdiction may be lifted *"where the employee is acquitted on merit by a Court of law of the offence or offences which formed the basis of his interdiction."* Section 6.100 states, *"an employee acquitted of a criminal charge in any Court of law may not be dismissed, or otherwise punished on any charge on which he has been acquitted, but nothing shall prevent his being dismissed.....unless the charges raise substantially the same issues as those on which he was acquitted."* The Respondent relied on the same facts as dealt with by the criminal Court, in dismissing the Claimant. This contravened the Respondent's own Manual. The Claimant submitted that although the Employment Act takes precedence over the Manual, the Court ought to uphold these provisions of the Manual. The summary dismissal was unfair, and in contravention of sections 18, 44 and 45 of the Employment Act 2007. The Claimant is entitled to the orders sought. He asks the Court to allow the claim.

7. The Respondent did not file any submissions. It did however file a comprehensive statement of reply. The Claim was filed out of time. The cause of action arose on 2<sup>nd</sup> January 2008. Any claim if any should have been filed on or before 2<sup>nd</sup> June 2011. It was filed in contravention of section 90 of the Employment Act 2007. The Respondent conceded the Claimant was its employee, and was summarily dismissed as claimed in the statement of claim. Interdiction and dismissal were procedural as per sections 6.84 and 6.94 of the Human Resource Manual. The Claimant was invited to show cause, in a letter from the Respondent dated 19<sup>th</sup> November 2007. Investigations were carried out by Respondent's officials who took statements from colleagues of the Claimant - Mrs. Susan Oyatsi, Mrs. Carolyn Shimanyalu, Alfred Oloo Okala and Edwin Onyango - all implicating the Claimant. The Claimant did not respond to the letter to show cause within the stipulated time. Pursuant to section 6.93 of the Manual, the Respondent was not bound to await the outcome of the criminal trial. The criminal trial was not a bar to disciplinary proceedings. There was no stay of the disciplinary process on the basis of any constitutional issue or otherwise. The criminal trial was dealt with, within the structures of the criminal procedure, which does not have relevance to the disciplinary process. Under section 6.99 of the Manual, the Claimant did not merit the salary and benefits for the period under interdiction. He is not entitled to damages or notice pay having been justifiably and fairly dismissed on gross misconduct. Severance pay is not payable to him by virtue of section 35 [6] of the Employment Act 2007. He was invited to show cause, given an opportunity to defend, but opted not to do so. The Respondent urges the Court to find the claim time-barred and without merit.

*The Court Finds and Awards:-*

8. The Claimant was employed by the Respondent as a Financial Analyst, in a written letter of employment, effective from 19<sup>th</sup> May 2000. Other terms and conditions of his employment were contained in the Respondent's Human Resources Policy Manual.

9. Clause 6.93 of the Manual defined gross misconduct to comprise “ *misconduct such as theft, forgery, assault, whether one is charged and/or convicted in a court of law or not, so long as the Board has reasonable and justifiable grounds to believe that the employee has committed the offence with which he is charged.....*” Employment Act 2007 defines gross misconduct under section 44 [4] [g] to include cases where “ *an employee commits, or on reasonable and sufficient ground is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property.*” This was the same definition given under the repealed Employment Act Cap 226 the Laws of Kenya. The Manual and the Acts agree that the employer does not have to wait for the findings of a criminal trial to initiate its own disciplinary process against an offending employee. There is nothing in the Manual and the Acts to prevent the employer from declaring an employee to have been involved in an act of gross misconduct, or from summarily dismissing the employee upon such a finding; all that the employer is required to have are reasonable, sufficient and justifiable grounds.

10. The Claimant argued that he was a Public Officer within the meaning of section 2 of the Public Officer Ethics Act Cap 183 the Laws of Kenya and was entitled to certain procedural guarantees under the Anti –Corruption and Economic Crimes Act Cap 65 the Laws of Kenya. He made specific reference to section 62 of Cap 65. The Claimant did not show that his criminal case came within these two Acts of Parliament. The Criminal Court is not shown to have been sitting in a specialized jurisdiction; the charge sheet and the ruling of the criminal trial, do not mention anything about corruption and /or economic crimes. The Claimant was charged with two counts under the Penal Code- Stealing by Servant and Attempting to Steal. He did not show this Court how the Public Officer Ethics Act and the Anti-Corruption and Economic Crimes Act applied to his criminal trial. Was he investigated by the Anti-Corruption Officers, and charged in a specialized Magistrates’ Court? Not every crime under the Penal Code, or the fact that an accused person in a criminal trial is a Public Officer, justify the invoking of the Anti-Corruption and Economic Crimes Laws. Section 62 of Cap 65 is specific in any event, that it does not derogate from any power or requirement under any law, which the Public Officer may be suspended or dismissed. Even had the Claimant shown that his trial fell under the anti-corruption and economic crimes jurisdiction, the Respondent would not be prevented from invoking section 44[4] [g] of the Employment Act 2007 or its equivalent under the repealed Act, and section 6.93 of the Manual. The power to suspend, and eventually dismiss, was given by the Employment Acts and the contract of employment as read in the Manual.

11. The employment disciplinary process remains an internal and private mechanism. It is not subject to the criminal process, which is a public process. It cannot be expected that employers have to wait for Policemen, Prosecutors and Judicial Officers to determine employment offences at the workplace, unless the contract of employment; the law governing the contract; or the letter suspending or interdicting the employee, clearly state that the disciplinary process is subject to the criminal one. Courts are not there to hear and determine charges of gross misconduct. The employment offence is not *per se* to be treated as a penal offence. The workplace is not a public arena, and the procedures and standards of proof in dealing with gross misconduct, do not match the onerous requirements of the public criminal trial. The finding of not guilty in the criminal process did not tie the hand of the employer from arriving at a guilty finding in the disciplinary process. The timing and pace of the disciplinary process did not follow the criminal process. Unless the employment contract, the law or the letter initiating the investigation into the employment offence, state the police investigations and criminal trial have relevance to disciplinary process, the concerned employee has no reason to invoke the concept of double jeopardy. The Claimant misperceived the essence of the two processes, by his assertion that he was doubly jeopardized; he was not, but was only put through two legitimate but different processes; one private and the other public, which processes were not bound to reach the same outcome.

12. The Claimant was charged in Court on 27<sup>th</sup> November 2006, with the offence of stealing by servant. The Respondent interdicted him under section 6.94 of the Manual. This section allowed the Respondent to interdict whenever an employee is charged in a court of law with an offence which if proved, will lead to dismissal; where an employee was detained in lawful custody; if the interest of the Commission required an employee to cease to exercise the functions and powers of his office and the question of his dismissal is being contemplated; or where an employee is charged with misconduct or gross misconduct and the question of his dismissal is being contemplated. The Claimant was charged, and called to answer

specific charges in the letter to show cause. He was to answer by 30<sup>th</sup> November 2007. He did not respond as instructed by the Respondent; instead, he asked his Advocates to write on 6<sup>th</sup> December 2007, raising the double jeopardy and *sub judice* argument. He refused to answer the specific charge relating to the employment offence. He was not denied the opportunity of rebutting the offence at the workplace; he refused to submit himself to the disciplinary process. The Respondent then held a meeting on 21<sup>st</sup> December 2007. It was decided that the Claimant had failed to answer the charges given to him by his employer. He was summarily dismissed on 2<sup>nd</sup> January 2008. Nothing in the Law and the Policy Manual compelled the Respondent to stay the disciplinary process, pending the outcome of the criminal trial. The Court is satisfied dismissal was in accordance with the law governing the employment relationship.

13. The Court does not see any factual or legal bases, to grant the orders sought in this claim. There is the additional objection against the claim, grounded on section 90 of the Employment Act 2007. This provision places a 3 –year time limit on the filing of employment claims arising under the Act. Dismissal was on 2<sup>nd</sup> January 2008, while the Employment Act 2007, came into force on 2<sup>nd</sup> June 2008. The Employment Act 2007 would not apply to the claim. Neither the limitation, nor the unfair termination laws under the Employment Act 2007, have any application to this dispute. The relevant Act would be the repealed Employment Act Cap 226 the Laws of Kenya. The Industrial Court could only apply this repealed Employment Act, following the procedure laid down under section 84 of the Labour Relations Act Number 14 of 2007. The Claimant did not follow this law. He withheld information from the Court, stating in the statement of claim, that there is no other claim filed in any Court over the same subject matter. It emerged in the course of the proceedings herein that the Claimant has sued the Respondent for damages at the High Court in Nairobi, arising from what he perceives as malicious prosecution. In the Industrial Court, he has pleaded for a wide range of damages, claiming his employability has suffered. How does an employee come to one Court and ask for over Kshs. 73,000,000, and then proceed for more across the Ngong’ Road? Employment relationships are based on fair play where all information should be placed on the table, whenever disputes arise and just solutions called for. He needed to reveal to the Court the exact details of the other claim, to avoid the possibility of engaging two Superior Courts and the Respondent, in parallel proceedings, and un-informed decisions. He has not shown a proper procedural law that would enable the Court to take cognizance of the dispute, and grant the raft of remedies that he seeks. In the end, the Court finds fault with the substance and form of the claim filed by Kemei. *IT IS HEREBY ORDERED-*:

***[a] The claim is dismissed in its entirety; and***

***[b] No order on the costs.***

Dated and delivered at Nairobi this 19<sup>th</sup> day of February 2013

**James Rika  
Judge**