



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 203 OF 2011**

**ENGINEER FRANCIS N. GACHURI .....CLAIMANT**

**VERSUS**

**ENERGY REGULATORY COMMISSION.....RESPONDENT**

**JUDGMENT**

This case was commenced by the Claimant by a plaint dated 4<sup>th</sup> December 2008 and filed in the High court on the same day through the Law firm of Kimani Kimondo & Company Advocates. The plaint was accompanied by a verifying affidavit of the Claimant sworn on 4<sup>th</sup> December 2008.

The Respondent filed a statement of Defence dated 29<sup>th</sup> January and filed in court on 30<sup>th</sup> January 2009 through the firm of S.MUSALIA MWNESI Advocates.

In the Plaint the Claimant alleges that the Respondent wrongfully, illegally and in breach of the employment contract, the Labour Laws and the Respondents Human Resources Policy Manual, terminated his employment on 29<sup>th</sup> September 2008. He prayed for Judgment as follows;

- a. Special damages amounting to Kshs.42,588,000/=.
- b. General damages in respect of wrongful dismissal, embarrassment, humiliation and loss of earnings, unlawful retrenchment and loss of future employment as a result of unlawful action of the Defendant.
- c. Costs of this suit.
- d. Interest on (a) and (b) above at court's rate.
- e. Any other relief that the court may deem fit to grant.

The Respondent in the statement of Defence denies the allegations by the Claimant in the plaint and averred that the Claimant acknowledged his normal, legal and procedural termination and willingly received 3 months salary in lieu notice and partial withdrawal benefits from the Respondent's staff pension fund. The Respondent prayed that the court strikes out the plaint and dismisses the suit with costs to the Defendant.

The Claimant filed a Reply to Defence on 10<sup>th</sup> February 2009 in which he joined issues with the Respondent on all issues except those that had been admitted in the defence.

On 28<sup>th</sup> January 2011, the claim was transferred to this court for hearing and final determination.

The parties filed their respective list of documents in the Industrial Court and the case was heard on 5<sup>th</sup>

February and 15<sup>th</sup> March 2012. The Claimant testified on his behalf while the Respondent called 2 witnesses, RW1, the Director General Mr. KABURU M'WIRICHIA and RW2 the Company Secretary of the Respondent CATHERINE ADONGO KOLA.

The Claimant testified as follows;

He was employed by the Respondent on 6<sup>th</sup> January 2003 as Chief Power Engineer on permanent and pensionable terms. He was entitled to a salary, house allowance, annual leave, leave allowance, medical and pension. He was also entitled to other benefits as set out in his letter of appointment. He was promoted to the position of Chief Manager, Technical Affairs with effect from 1<sup>st</sup> July 2006 at a basic salary of Shs.340,260.75. He left employment on 1<sup>st</sup> October 2008. The circumstances leading to his leaving employment were that on 13<sup>th</sup> August 2008 he was summoned by e-mail to attend a meeting on the same date to discuss his work performance. At the meeting some verbal allegations were made against him which he considered to be wild, malicious and unfounded. On 14<sup>th</sup> August 2008 he received a letter from the Director General documenting allegations of misconduct that took place over the past 1 year. On 18<sup>th</sup> August 2008 he received another letter accusing him of misconduct and sending him on compulsory leave. On 29<sup>th</sup> September 2008 while still on leave he received the letter of termination of his employment. In his opinion the termination was not proper because it was based on accusations accumulated over 1 year and the letter of termination did not give reasons in for termination. He had not received any warning letters. He was condemned unheard. His termination was against the Law and the Respondent's Manual attached as Appendix F10. The Claimant was 54 years old at the time of termination. His retirement date was 30<sup>th</sup> September 2014. His claim is for damages of 6 years salary together with terminal benefits all amounting to Kshs.42,588,000. The Claimant's last gross salary was Shs.356,760.75. His payslip for August 2008 is attached as evidence of the same.

The Respondent called 2 witnesses. RW1 testified that he is the Director General of the Respondent. The Claimants performance was good until a certain time when he started showing signs of non-cooperation around May 2008. When RW1 discovered this he talked to the Claimant to find out what the problem was. The Claimant would say everything was not his fault. One time when the complaints were getting too many RW1 called the Claimant on 13<sup>th</sup> August 2008 to a formal meeting in the presence of the commission secretary. The Claimant was informed that the meeting was to discuss his performance for the previous 6 months.

RW1 pointed out to the Claimant various instances where his performance had been put into question or found to be not good. The Claimant refused to respond and asked that the accusations be put in writing. The Claimant walked out of the meeting. The following day RW1 gave the Claimant a letter which summarized the issues raised at the meeting. He was asked to respond in writing. The Claimant did not respond following which RW1 decided to send the Claimant on leave so that he could discuss the matter with the board. While the Claimant was on leave RW1 presented the case to the Board. He had earlier on discussed the Claimant's issues with some members of the committee and then presented the case for the main committee on 11<sup>th</sup> September 2008. The committee decided to terminate the Claimant's services in accordance with his letter of appointment. RW1 issued the letter on 29<sup>th</sup> September 2008. The Claimant was paid 3 months gross pay and leave days not taken. The total amount paid to the Claimant was 1,270,640.40. After deduction of tax the net paid to the Claimant was Kshs.895,516. The Claimant's retirement age was 55 years. He denied that the Claimant was condemned unheard. RW1 stated it is the Claimant who failed to respond when called to the meeting.

RW2 testified that she attended the meeting at which the Director General (RW1) informed the Claimant about his concerns about the Claimant's performance. The Claimant did not respond to the accusations and asked that the accusations be put in writing. She stated she was aware RW1 wrote to the Claimant specifying his areas of concern. She attended the Committee meeting at which it was decided that the Claimant's employment be terminated. She took the minutes of the meeting in her capacity as Corporation Secretary. The accusations leveled against the Claimant was all she knew about the Claimants conduct as the Claimant did not report to her.

I have considered the pleadings, the documents submitted by both the Claimant and the Defendant. The oral evidence and the law.

I have also considered the written submissions of both the Claimant and the Respondent. In my opinion the issues in determination are as following;

1. Whether the termination of the Claimant's Employment was unfair.
2. Whether the Claimant is entitled to the prayers sought.

The facts leading to the termination of the Claimants employment are not contested.

On 13<sup>th</sup> August 2008 the Claimant was summoned by the Director General Eng. Kaburu Mwirichia by e-mail at 12.19pm to attend a meeting in his office at 3.30 pm on the same day to discuss his work performance in the presence of the Company Secretary. The meeting was to be held at the Director General's Office.

The Claimant attended the meeting where several allegations of misconduct were made against him. When asked to respond he declined and asked that the accusations be put in writing. On 14<sup>th</sup> August 2008, the Director General addressed a letter to the Claimant in which several accusations were leveled against him. The letter is reproduced herebelow;

**DIRECTOR GENERAL'S OFFICE**

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**Energy Regulatory commission**

**Our Ref: ERC/FA/PF 037/VOL.1**

**14<sup>th</sup> August, 2008**

**Your Ref:**

**Eng. Francis Gachuri**

**Chief Manager Technical Affairs**

**Energy Regulatory commission**

**P O Box 42681-00100**

**NAIROBI**

**Dear Eng. Gachuri**

**RE: DISCIPLINARY MATTER**

**On 13<sup>th</sup> august 2008, I held a meeting with you in the presence of the Commission Secretary, Mr.s Kila, to discuss your poor performance and misbehavior. I started by introducing the topic and asked for your comment before proceeding. You refused to say anything and kept quiet, just staring at us, even when prompted to speak. I decided to go ahead and give you a verbal report on the concerns ERC had with you.**

**For the last almost one year, you have shown negative attitude towards work and displayed lack of co-operation. You have been treating others without courtesy. You have also been displaying too much emotional outbursts.**

**The following are some of the observed examples that I used to explain the observations.**

1. *You will recall that on 24<sup>th</sup> July 2008 I called you to my office and explained to you that I would not approve your request to go to USA for training. During that meeting you talked to me roughly insisting that I must put it to you in writing why I would not approve the training and you banged the door on me as you went out of the office in fury.*
2. *On 28 July 2008, you failed to attend the East African Regulators meeting held at Panafric Hotel without good reason. You only sent a verbal message to the Commission Secretary.*
3. *Overseas Tours: You had been charged with the responsibility of organizing overseas study tours the commission. You failed to perform and the responsibility had to be taken away from you late last year.*
4. *Electricity Tariffs and KenGen/KPLC PPA's: this project took place between March and July 2008. You played a laid back role and stayed away from any active participation. You avoided eve the meetings where your experience and input would have been very useful.*
5. *Pension fund AGM held on 6 June 2008: You attended the meeting and participated in emotional outburst and incitement of employees until the meeting aborted. You showed no respect to the trustees including the then Chairman, Eng. Bikundo.*
6. *Performance contract negotiations: You were invited to pay a major role in the recent Performance Contract 2008/09 negotiations. You failed to attend the meetings called at the Ministry of Energy, e.g. the meeting in called by the Permanent Secretary on 8 June 2008. You lack of cooperation delayed the negotiations.*
7. *Licensing of electricians: You failed to attend the function where the written interviews were being conducted recently in June at KICC. This was a major function for your department and you should have been there overseeing the activities of the day.*
8. *KLEEP launch held on 9<sup>th</sup> June 2008: You failed to attend without any known reason although invited.*
9. *Energy Management Award gala night held on 30 May 2008: You failed to attend without any known reason even though you were invited.*

*Whenever I have tried to explain your weakness you have shown lack of courtesy to me and to others by displaying emotional outburst and using disrespectful language.*

*I have given you time to change but, unfortunately, you do not show any signs of improvement. Taking into account that you are a senior officer of this organization, the above noted poor performance and misbehavior amount to gross misconduct and insubordination and; calls for an appropriate disciplinary action.*

*Yesterday, after I explained the charges to you, you just walked out and said that I put the said charges in writing for you to respond. Due to the foregoing, this is to ask you to show cause, in writing, why disciplinary action should not be taken against you. Your response should reach this office by 12:00 noon this Friday 15<sup>th</sup> August, 2008.*

*Yours sincerely*

*Eng. Kaburu Mwirichia*

**DIRECTOR GENERAL**

He was required to respond to the letter by 12.00 noon on 15<sup>th</sup> August 2008. The Claimant did not respond to the letter and on 18<sup>th</sup> August 2008 he received another letter from the Director General sending him on compulsory leave with effect from 19<sup>th</sup> August 2008. The letter further stated that the Director General would make recommendations to the Commission and implement disciplinary measures as approved by the Commission. A leave form was attached to the letter for the Claimant to fill. His date for resuming duty was stated as "to be advised" though the 63 days leave indicated in the form was to expire on 14<sup>th</sup> November 2008.

The case was discussed at the Commission meeting held on 11<sup>th</sup> September 2008. The Director General

recommended to the Commission the termination of the Claimant's services for misconduct and insubordination. The Commission approved the recommendation and the Director General issued the letter of termination of employment on 29<sup>th</sup> September 2008. The termination was effective from 1<sup>st</sup> October 2008.

The Human Resources Policy Manual for the Respondent in force at the time provided for both dismissal for misconduct and Dismissal on Notice as follows;

#### ***DISMISSAL FOR MISCONDUCT***

***An employee who is on permanent and pensionable terms may only be dismissed from the service of the Commission on grounds of gross misconduct.***

#### ***DISMISSAL ON NOTICE***

***The Commission may, at any time, dismiss from its services any employee on permanent and pensionable terms who is found guilty of misconduct by giving him three month's notice in writing or paying the employee three months's basic salary in lieu of notice.***

The Claimant alleges that the termination was unfair for failure to comply with the Respondents Human Resources Policy Manual Clause 6.81 and Section 41, 43, 45 and 46 of the Employment Act. The Respondent on the other hand contends that the termination was in accordance with the Claimants letter of appointment and therefore lawful.

Section 41 of the Employment Act requires that an employer explains to an employee the reason for which termination is contemplated and gives an employee an opportunity to present his case in the company of a fellow employee or a union shop floor representative.

I find that the Respondent did not give the Claimant an opportunity to defend himself. He was in the first instance ambushed by an email which gave him hardly 3 hours to attend a meeting to discuss his performance. This turned out to be a disciplinary hearing at which he was required to respond to numerous non-specific charges of misconduct spanning over a period of about 1 year. The Claimant was thereafter given less than 24 hours to respond to the charges which had been reduced into writing by letter dated 14<sup>th</sup> August 2008. This smacks of malice and witch hunting. This was perpetrated by the Director General, the complainant being he one recommending to the Commission the disciplinary action to be taken against the Claimant without giving him an opportunity to defend himself before the Board. The letter dated 18<sup>th</sup> August 2008 sending the Claimant on compulsory leave revealed that the Director General had already decided the action to be taken against the Claimant by stating that he will make appropriate recommendation on the Claimant's case to the Commission and implement the disciplinary measure as the Commission will approve.

The final mistake was giving the Claimant a letter of termination of employment without giving any reason for the termination. This was against both the Respondents Human Resources Policy Manual and the Employment Act both of which require that the employer terminates employment after establishing that the Claimant is guilty of gross misconduct.

For these reasons the termination of the Claimant's employment was unfair.

Is the Claimant entitled to the prayers sought.

The Claimant has prayed for the following;

- a. Kshs.42,588,000/= being Special damages..
- b. General damages in respect of wrongful dismissal, embarrassment, humiliation and loss of earnings, unlawful retrenchment and loss of future employment.
- c. Costs of suit.

d. Interest.

I will look at these heads individually.

## 1. SPECIAL DAMAGES OF KSHS.42,588.00

The Employment Act provides for the remedies for unfair termination at Section 49 as follows;

1. *Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following;*
  - a. *The wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service.*
  - b. *Where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to on paragraph (a) which the employee would have been entitled to by virtue of the contract or*
  - c. *The equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*
2. *Any payments made by the employer under this section shall be subject to statutory deductions.*
3. *Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to*
  - a. *Reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or*
  - b. *Re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.*

There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word 'permanent employment'.

The Claimant is not entitled to special damages of Shs.42,588,000 which is equivalent to the loss of income to the date of retirement. There was no guarantee of employment to the date of retirement. The claim is thus dismissed.

## 2. GENERAL DAMAGES

The Industrial Court Act provides that the court may award compensation or damages in any circumstances contemplated by law. The Employment Act section 49 provides for payment of compensation damages to the maximum of 12 months salary in cases of unfair termination.

Having found that the Claimant was unfairly terminated and taking into account he fact that the Claimant was 54 years old and with little chances of other similar employment elsewhere, I find that maximum compensation is reasonable compensation in the circumstances of his case. I therefore award him Kshs.4,083,129 being 12 months salary as compensation.

I have noted that the Claimant's leave form indicated that he was entitled to 63 days annual leave. He was sent on compulsory leave against the provision of the Respondents Human Resources Policy Manual which provides for either interdiction or suspension during the disciplinary process of an employee. There is no provision for compulsory leave for disciplinary purposes.

I therefore find that the deduction of the days taken by the Claimant as compulsory leave from his final payment was wrong and award him the 32 leaves days in the sum of Kshs.340,232.40 being the balance of his leave after deducting the 31 days paid for.

### **3. COSTS**

The Respondent shall pay the costs of the Claimant for filing of this claim.

### **4. INTEREST**

The amount awarded herein shall attract interest from the date of judgment to the date of payment to the date of payment in full.

### **Conclusion**

In summary therefore judgment is entered for the Claimant against the Respondent in the sum of Kshs.4,423,361.40 with cost and interest from the date of judgment.

Orders accordingly.

Read in open Court this 8<sup>TH</sup> day of JULY 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**ENG. FRANCIS GACHURI IN PERSON** \_\_\_\_\_ for Claimant

**MR. OMINDO** \_\_\_\_\_ for Respondent