



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1034 OF 2011

BETWEEN

PETER KAMAU CHEGE
CLAIMANT

VERSUS

TELKOM KENYA LIMITED
RESPONDENT

Rika J

CC. Leah Muthaka

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

Ms. Situma instructed by Kamau & Maema Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Peter Chege Kamau filed his Statement of Claim on 26th June 2011. The Respondent filed its Statement of Reply on 12th September 2011. Both Parties filed Secondary Statements to supplement their original positions. The Claimant gave evidence and closed his case on 22nd October 2012. The Respondent testified through its Investigator Boniface Mwando, and its Human Resources Manager Stella Ndirangu. Mwando testified on 21st January 2013, while Ndirangu testified on 25th February 2013, when the Respondent's case closed. The dispute was last mentioned on 22nd March 2013, when Parties confirmed they had filed their respective Final Arguments, and were advised by the Court Award would be delivered on Notice.

2. The Claimant told the Court he was employed by the Respondent on 29th January 1988 as a Clerical Officer 3. He was assigned to the Head Office on 17th February 2006, in appreciation of his good work. On 13th June 2003, he was promoted to the position of Assistant Supplies Officer 1, with an improved salary of Kshs. 14,675. He earned more commendations from the Respondent, culminating in his promotion as the Senior Supplies Officer, on 15th March 2004. His salary rose to Kshs. 54,156. He served as a member of the Procurement Evaluation Committee, a position that appears to have been the course on his eventual departure from Telkom Kenya Limited.

3. On 3rd June 2009 the Claimant was summarily dismissed by the Respondent. By this time he earned a monthly gross salary of Kshs. 68,912. It was alleged that the Claimant flouted tender procedures. He had been given the task of advertising for supply of diesel to be used around the Country by the Respondent. The Respondent advertised and there were responses from reputable Firms-TKM Maestro, Gulf Energy, A.M. Kadir Barsalinga, and WATA Expo Limited. In the letter to the Claimant to show why disciplinary action should not be taken against him, the Respondent made the following accusations:

- a. The Claimant failed to scrutinize and verify tender documents availed by various bidders;
- b. He failed to scrutinize and verify the eligibility of some of the bidders to act in consortium;
- c. TKM Maestro failed to present a legal document to support its bid as a consortium involving other players Crystal Motors and Bosio Kooro Holdings;
- d. TKM Maestro was said to be a Civil Engineering Firm, licensed to carry out the business of Civil and Electrical Engineering, whereas the tender was aimed at companies in the Petroleum Industry;
- e. Some of the companies did not have the required Bid Bonds;
- f. Gulf Energy had an uncertain Management, and unresolved issues;
- g. WATA Expo Limited complained of unfair treatment from the Claimant, and it was alleged the Claimant demanded Kshs. 1,000,000 baksheesh from WATA to award in its favour; and
- h. As Chairman of the Procurement Evaluation Committee, the Claimant's conduct was grossly negligent, and failed to observe the Human Resource Policy Manual Chapter 17, 4[e], 5[c] and 5[h].

4. The Claimant responded on 21st May 2009. His explanation was that the supply chain was based on value addition, optimization and rationalization. Allegations against the Claimant were made by one aggrieved bidder. This complaint was occasioned by ignorance of fundamental information. He countered:

- a. He was not the Chairman of the Procurement Evaluation Committee. The Public Procurement Regulations require that the Chairman of the Evaluation Committee, comes from the User Section;
- b. The Claimant could not have been negligent, having participated in a decision that saved the Respondent Kshs. 4.8 million annually in its Western Region Operations, and Kshs. 3.6 million in the Eastern Region;
- c. He was not negligent because he secured the Respondent credit period of 60 days in supply of fuel, in an industry where transactions are mainly through cash payments;
- d. He was not negligent as the bid winner, was supplying the Respondent in Western through reputable Firms such as Alcatel, Safaricom and Zain.
- e. The aggrieved Party WATA was offering Kshs. 14 per litre; the Outgoing Supplier Tripac supplied at Kshs. 15 per litre; while the bid winner TKM Maestro supplied at Kshs. 12 per litre;
- f. The Claimant could not have been negligent, while the market rate for the commodity was between Kshs. 13.50 and Kshs. 19.50 per litre;
- g. The allegations by the Respondent that Maestro, Barsalinga, and Gulf Energy, did not have Bid Bonds was incorrect. Copies of the Bid Bonds were available in the tender file;
- h. The Claimant was not aware of unresolved issues at Gulf;
- i. TKM Maestro was already supplying Respondent's BTS Silos through Alcatel;
- j. The Claimant did not demand for any greasing of the palm from WATA. The Claimant had been involved in many procurement transactions in the past, and has never had reason to defraud his employer;
- k. The decision on award of the tender was collegial, and in the best interest of the Respondent; and
- l. The Claimant stated he did everything to get the best for the Respondent in terms of price; quality; value; delivery period; and payment terms. He hoped the wisdom of King Solomon would prevail, and he would receive fair judgment.

5. The Claimant explained that the Respondent had divided the Country into 3 Regions-Western, Eastern and North Eastern. The Evaluation Committee was to recommend a company to serve Western. TKM Maestro was recommended. Gulf was already serving in Eastern. It at the same time was a company contracted by the Government to supply crude oil. A.M. Kadir Barsalinga was selected to serve North Eastern. Barsalinga had experience in that Region.

6. Every company was awarded marks, based on objective criteria. Maestro was a consortium of 3 companies. They had a legal document to deal as a consortium. They had the capacity. Even after the Claimant was dismissed, Maestro continued to supply the Respondent with the product. Two Officers from Procurement – the Claimant and Mr. Kilel- were dismissed over the issue. The Committee worked as a team, developed the criteria as a team, and made decisions collectively. The recommendation from the Committee was not in any event, binding on the Respondent. The Claimant and his colleague Mr. Kilel were experienced Officers. They did a comprehensive report. The disciplinary process was not objective. The disciplinary panel was made up for the same persons who investigated the allegations. The process was not fair. The Claimant was not heard before termination. The Claimant had worked for 20 years. He has not secured alternative employment. He described himself as a hustler based at Nakuru.

7. The Claimant feels the wisdom of King Solomon did not prevail. He prays the Court to find and grant: that termination of the Claimant's services by the Respondent on 3rd June 2009 was unfair and unlawful; he is paid one month salary for every year worked at Kshs. 68,912 x 21 years = 1,447,152; annual leave pay of Kshs. 52,833; loss of earnings of Kshs. 1,447,152-total Kshs. 2,947,187; he is paid exempted and aggravated damages; the Claimant be reinstated to his previous job; and costs be borne by the Respondent.

8. In cross-examination, the Claimant stated he was a Member, not Chairman of the Evaluation Committee. The Chair was from the technical department. The Claimant was acting as the Assistant Manager Procurement. He was well-versed with the procurement procedures. There were three stages in the process- mandatory, technical and commercial. It was defined criteria. Previous supply was not part of the criteria. T.K. Maestro is a civil engineering company. Trade and Energy licenses were required. Maestro bid as a consortium. This was allowed within the tender rules. Chege agreed that the evaluation report only referred to T.K.M Maestro, not the consortium.

9. Maestro offered Kshs. 12 per litre. No company offered Kshs. 10 per litre. WATA complained after evaluation. This firm's experience was in the export of fuel to Rwanda. Gulf Energy similarly complained about the evaluation. The Claimant was present when the technical evaluation was carried out. Divisionalisation of the country into 3 regions was done for efficiency. Previously, a single supplier was used to service the whole country, and would hold the Respondent at a ransom. The Western region was not created by the Evaluation Committee specifically to award TKM Maestro.

10. The role of the Evaluation Committee was confined to evaluation. After that the process moved to the Procurement Manager. The Procurement Manager prepared his report, and then the process moved on to the Head of Support Services. The Claimant conceded he was issued with a charge letter by the Respondent. He replied to the charges. He was given an opportunity to respond. He was granted the opportunity to appeal. The Appeal Committee members were involved in the previous investigations. Christopher Kandie who investigated was from the Audit Department, which was a sub-unit of the Compliance Department. Kandie did not appear before the Appeals Committee. It was felt there were no new facts. The Claimant was not aware that an employee could be dismissed under the Human Resources Manual.

11. Redirected, the Claimant testified that the Evaluators looked at the monetary, technical and commercial requirements. Experience was critical. Evaluation was in March 2009, and accusation of gross negligence against the Claimant was made in May 2009. WATA complained 2 months after the award had been made. The Committee Chairman was from the user department. T.K.M Maestro was selected by the whole Committee, but only 2 members of the Committee were summarily dismissed. The Claimant prays the Court to grant the claim.

12. The Respondent admits the Claimant was employed by the Respondent on 29th January 1988. It is true he was promoted as Senior Supplies Officer Nyanza Region. He was transferred to the Head Office on 24th March 2006. He served as the Chair of the Tender Evaluation Committee. It was his responsibility to ensure procurement process was carried out in accordance with the law and the relevant regulations. On 19th February 2009, the Respondent advertised for tender for the fuelling of the Respondent's diesel engine generators, countrywide. The Respondent laid out mandatory and technical parameters to be met

by all bidders.

13. 15 bidders applied but only 8 submitted their bid documents. 4 firms- T.K.M. Maestro, Gulf Energy, A.M. Kadir Barsalinga and WATA Expo Limited were shortlisted. The tender was given to 3 firms- Maestro, Gulf and Barsalinga. There were complaints about the process. The Respondent called in the assistance of its Fraud Management Unit. Investigations revealed the Claimant flouted tender procedures. The Claimant used his influence as the Chairman, to award the tender to the 3 firms. T.K.M Maestro is a civil and electrical contractor; it does not deal in petroleum. It was among the successful firms. It did not present a legal document to support the position that it was acting as a consortium. Gulf and Barsalinga did not submit their bid bonds. Gulf was facing a winding up petition, which was unresolved at the time of the tender.

14. To make matters worse, the Claimant demanded for a bribe of Kshs. 1 million from WATA. WATA refused to give the Claimant his cut, and was accordingly denied the tender. It had met all the requirements. The Claimant violated all the contractual and statutory duties as the Chair and Member of the Committee. The complaint against the Claimant was made by an aggrieved supplier, but investigations conducted independently by the Respondent confirmed the case of gross negligence against the Claimant. Chege was charged, responded to the charges, and there was consideration of his defence by the Disciplinary Committee. His explanation was found to be unsatisfactory. The Committee recommended his removal. He was summarily dismissed. He appealed. The Appeal was considered on 29th July 2009, and dismissed. On appeal, the Claimant requested he be given the opportunity to voluntarily retire early, instead of being summarily dismissed. Termination was justifiable and fair. The Respondent asks the Court to dismiss the whole Claim and order the Respondent to pay the costs of the Claim.

15. Boniface Mwando explained that a tendering company had complained it was rigged out of the awarding of the tender. He investigated and interviewed the Members of the Evaluation Committee. The Committee was supposed to examine the tender documents. There were 3 stages of evaluation- technical, mandatory and commercial. The mandatory stage related to the registration and licensing aspects of the bidders; technical referred to the logistical capacities such as the bidder's number of trucks; while the commercial aspect related to the price quotation.

16. T.K.M Maestro was awarded 100% by the Evaluation Committee. This company was registered as a civil and engineering business. It was alleged to have tendered as a consortium, but there was no document to support this allegation. The bidders were supposed to quote Kshs. 10 per litre. Barsalinga quoted Kshs. 25 per litre. The companies were nonetheless awarded the tender. The minimum score was approved at 75% then arbitrarily shifted to 85%, to close out the bidders who had scored 83%. The Chair of the Evaluation Committee was Chege, while Kilel was the Secretary. Chege was responsible for the whole outcome. The process was manipulated and parameters shifted. WATA the complainant was disqualified after scoring 83%. Maestro was not in the petroleum business. None of the successful companies offered Kshs. 10 per litre. WATA satisfied this condition. Mwando prepared a report and concluded that the process was flawed. WATA deserved the award of the tender. Gulf Energy had issues with its shareholders.

17. Mwando testified on cross-examination that he has been an investigator for 24 years. The report on record is indicated to have been prepared by Christopher Kandie. The termination letter referred to the Claimant's manipulation of the tender process, as a ground for termination. There were 4 members of the Evaluation Committee- Chege, Kilel and 2 representatives of the user department- Mburu and Nge'no. The 4 were appointed by Chege. This was the finding by Mwando. The witness conceded the decision on the appointment of the Evaluation Committee members was a management decision, not an individual one. Mwando was persuaded the 4 avoided the mandatory evaluation stage. Maestro would have been disqualified for not having a license. This company offered Kshs. 12 per litre. 8 companies qualified at the technical stage. Maestro took the lead after the technical and commercial evaluation. Mwando did not see any legal document in evidence of a consortium. Mwando stated investigation was carried out by a team, not by an individual.

18. He fully endorsed the contents of the report on redirection. Maestro was a civil and electrical engineering firm; it had nothing to do with petroleum. The objective was to reduce the fuel price from Kshs. 15 to Kshs. 10. No company quoted Kshs. 10. The documents did not refer to other entities other than T.K.M Maestro. Tendering was flawed. Mwando was involved in the investigation personally.

19. Stella Ndirangu has served the Respondent for 20 years, and specifically 4 years as the Human Resources Manager. She knew Peter Chege. He worked in the Procurement Department and was the Chair of the Tender Evaluation Committee. He had expertise in the area. Ndirangu wrote the letter to the Claimant asking him to show cause why disciplinary action should not be taken against him. He was alleged to have awarded tender to T.K.M Maestro irregularly. There was a charge of gross negligence.

20. Chege replied saying it would have been suicidal to award the tender to WATA at the expense of Maestro. There was no specific basis for his position. The Claimant did not adequately respond to the charges. There was no reason to lean in favour of Maestro. The Human Resources Department looked at the charges and decided to summarily dismiss the Claimant. The decision was justified on the ground that the Claimant awarded the tender to Maestro which was not an energy company. Chege appealed against the decision. An Appeal Committee was constituted and appeal heard. There were no new grounds to interfere with the initial decision. The Claimant asked that he be allowed to exit under the Voluntary Early Scheme, instead of summary dismissal. He said the license for Maestro was not as important as the other qualities. He said they divided the country into 3 zones to avoid the presence of 1 supplier. The Evaluation Committee went out of the tender specification. The Claimant's Appeal was rejected. He was paid his salary for May 2009. He was dismissed in June 2009. He was summarily dismissed and was only entitled to salary for days worked and pension dues. Service pay is not merited. Damages are not merited. He asked to be allowed to voluntarily retire early. He cannot turn around and ask to be reinstated.

21. Ndirangu testified on cross-examination that Chege was employed earlier than her. He was a senior officer at the time of termination. She did not know if he had received warnings. Evaluation was done by the Committee of 4 persons which included Chege, Mburu, Ng'eno and Kilel. Maestro is a civil and electrical engineering company. She did not see any consortium agreement. The Claimant asked he be allowed to retire early. The VER scheme was already closed, having been opened for just about a month. She did not recall the details of the VER package. Chege was in management. The Respondent followed the disciplinary procedure established under the Human Resources Manual. The Claimant is not entitled to damages. Termination was fair. She emphasized on redirection that the Claimant made a request for VER. It was not an option given by the Respondent. He made this request twice: at the initial disciplinary hearing; and on appeal. The Claimant did not at any time challenge the disciplinary procedure. He did not in his Claim seek to be paid 12 months' salary for unfair termination. The Respondent asks the Court to reject the Claim.

The Court Finds and Awards:-

22. There is common evidence from the Parties that Peter Kamau Chege, was employed by the Respondent Telkom Kenya Limited as a Clerical Officer 3, on 29th January 1988. He went through the ranks, becoming Senior Supplies Officer in 2004, before ascending the peak of his career as an Acting Manager. It is agreed he was a member of the Tender Evaluation Committee. It is not agreed if he chaired that Committee.

23. Problems between the Parties seem to have started with the advertisement by the Respondent on 19th February 2009, for supply of fuel countrywide, to power the Respondent's Diesel Engine Generators. There were 15 applicants. 8 of these submitted their bid documents for evaluation. The tendering process resulted in the short-listing of 4 firms: T.K.M Maestro; Gulf Energy; A.M. Kadir Barsalinga; and WATA Expo. The first 3 bidders were successful and assigned the tender to supply fuel in Western, Eastern and North-Eastern Regions, respectively. The failure by the fourth of the shortlisted firms WATA Expo led to a complaint lodged with the Respondent by WATA Expo, alleging the tender process was tainted with corrupt dealings and not fair. The Respondent investigated the complaint. The Claimant was presented with specific charges on 19th May 2009 and asked by the Respondent to show cause why he should not be

disciplined. He responded on 21st May 2009 aggressively defending his role. On 3rd June 2009, the Respondent informed the Claimant that his defence was unsatisfactory. He was summarily dismissed. His pay slip for May 2009 shows he earned a total of Kshs. 68,912 on the date he last worked for the Respondent. The Claimant lodged an appeal against the decision by the employer, which was promptly rejected.

24. The letter to the Claimant from the Respondent, asking him to show why he should not be disciplined, made several accusations:-

- a. The Claimant as the Chairman of the Tender Committee, used his position to influence the award of tender to 3 firms, despite their failure to meet all the mandatory and technical parameters;
- b. The Claimant flouted tender procedures by ignoring laid down evaluation parameters, and showed lack of interest in other critical issues raised by other Committee Members;
- c. He failed to scrutinize and verify some documents availed by some firms, and authenticate their bona fides as consortium bidders. T.K.M Maestro failed to present legal agreement in support of the alleged consortium; and was a civil engineering company, not in the petroleum industry. Gulf Energy Limited and A.M. Barsalinga did not submit Bid Bonds; Gulf Energy Limited had unresolved problems with the shareholders; and the uncertainty over Gulf's Management raised doubt about its ability to supply the fuel;
- d. The Claimant did not give WATA the opportunity to discuss its offer on the price per litre of fuel;
- e. WATA was unfairly treated, and alleged the Claimant demanded Kshs. 1,000,000, to assist WATA in clinching the tender. WATA was denied the tender upon its refusal to bribe the Claimant, although it was among the best of the tendering firms; and
- f. Claimant's actions had brought the company into disrepute.

25. The handwritten explanation by the Claimant was comprehensive. He stated:

- a. The accusations against him were based on the information obtained from an aggrieved supplier;
- b. This information ignored the fundamentals of the tender, which were the foundation on which the tendering decisions were made;
- c. The Claimant was not the Chairman of the Tender Evaluation Committee; the Chair was drawn from the user section, while procurement section produced the secretary;
- d. The Claimant was not negligent, and participated in a decision that saved the Respondent Kshs. 4.8 million annually in the Western and Kshs. 3.6 million annually in the Eastern Region.
- e. The firms that won the tender were able to extend to the Respondent credit of 60 days, whereas fuel is a cash commodity;
- f. The same firms were supplying fuel to Respondent's Sites in Western through mobile phone companies Alcatel, Zain and Safaricom;
- g. Maestro offered Kshs. 12 per litre of fuel; Gulf Kshs. 11; the complainant Kshs. 14; while the outgoing supplier Tripac supplied at Kshs. 15 per litre. The market rate was between Kshs. 13.50 and Kshs. 19.50;
- h. The Bid Bonds for the 3 successful firms were availed and were accessible in the tender file;
- i. Gulf Energy is a key player in the industry and supplied other reputable firms; the Claimant was not aware of unresolved issues between Gulf and its shareholders;
- j. Chege did not demand for anything from WATA. He stated he is a Procurement Professional with over 15 years experience and understands the consequences of corruption. He has handled many other tender processes in the past. No one had before made a complaint against him. He had risen from a Clerical Officer to Acting Assistant Manager;
- k. He and the Committee secured the best for the Respondent in terms of price; quality; value; delivery period; and payment terms; and,
- l. All decisions made by the Tender Evaluation Committee, were through consensus.

26. The Respondent having weighed the accusations against these grounds in defence, decided to summarily dismiss the Claimant. The Respondent justified its decision on the following grounds:-

- a. The Claimant's explanation was found to be inadmissible;

- b. He did not properly bring his expertise to bear on the tender process and failed to guide other Committee Members;
- c. He awarded the tender to T.K.M Maestro which is a civil and engineering company, and not licensed to trade in Petroleum Products; the company is also not regulated by the Energy Regulatory Commission as required by law; and
- d. The Company was already supplying fuels based on the letter of intent given to the company upon the recommendation of the Claimant, which exposed the Respondent to risks

27. The first question that the Court must answer is whether these are valid reasons in justifying summary dismissal. The Court is persuaded these were not valid reasons. This conclusion is based on the following reasons-:

- a. The tendering was questioned only after WATA Expo made a complaint, alleging other things, that the Claimant demanded to be paid Kshs. 1,000,000, to assist WATA in clinching the tender. The bribery claims were grave, and ought to have been investigated properly by the Respondent. There is nothing on record to show this allegation had any foundation, and seems to have been as a result of sour-graping by a failed bidder;
- b. 15 firms showed interest and purchased the bid documents. 8 firms responded by submitting their bids. The 4 finalists were T.K.M Maestro; Gulf Energy; A.M .Kadir Barsalinga; and the complainant WATA Expo. All 4 scored the maximum 16 points at the evaluation of the mandatory requirements;
- c. They proceeded to the technical evaluation. T.K.M. Maestro scored 100 points; Gulf Energy 95; A.M. Kadir Barsalinga 87; and WATA Expo 83. WATA was deemed to lack the capacity to verify quality and quantity of fuel; did not have the capacity for meters approval; was short on safety equipment; and lacked experience in the area. Whereas the other 3 finalists already had major Kenyan Companies in their client base, WATA's client base was made up of companies from Uganda and Burundi. The technical parameters are well set out, and nowhere in the evidence or pleadings, did the Respondent demonstrate that these technical failures on the part of WATA were conjured up by the Claimant or the Tender Evaluation Committee;
- d. There was nothing to suggest that the Claimant or the Tender Evaluation Committee changed the pass mark, to lock out WATA from the tender award;
- e. The Claimant showed the allegations that some of the tender winners had not provided Bid Bonds was incorrect; these documents were available to the Respondent, and it is unclear why the Claimant's explanation was, in the words of the Respondent in the letter of summary dismissal, found inadmissible. It is clear to the Court also that the allegation by WATA that it was not involved in price negotiations with the Committee was false. Negotiations took place, and WATA offered Kshs. 14 per litre, above what its competitors offered. It also afforded the Respondent a credit period of 30 days as opposed to 60 days given by Maestro, in an industry predominated by cash transactions.
- f. The Court does not think that the allegation T.K.M Maestro did not fulfill mandatory requirements because it is a civil and electrical engineering firm, as opposed to being a petroleum firm, was a substantial ground to read mischief in awarding Maestro the tender. The Court takes judicial notice that the energy sector comprises both the petroleum and electricity industries. Consortia are common phenomenon in the field, and although the Respondent vehemently objected to the Claimant's late production of the legal consortium agreement, the Court did not find the explanation of the Claimant on the existence of the Maestro Consortium, implausible. Furthermore, there is no evidence that WATA challenged Maestro's satisfaction of this mandatory requirement, before the process moved onto the technical and commercial aspects. T.K.M Maestro was already supplying fuel to Alcatel, Ericsson, Safaricom, Generation, Tripack and Uganda Telkom. These are companies in the same industry as the Respondent. T.K.M Maestro was already supplying fuel to Respondent's Sites in Western Region through these other firms;
- g. In assessing whether the Claimant fulfilled his role as a Member of the Tender Evaluation Committee, the Court looks at the overall objective of the process. Did the Claimant act in the best interest of his employer? The Court is satisfied that Chege did so, and obtained for the Respondent the best in terms of price; quality; value; delivery period; and payment terms. There is nowhere in the pleadings and evidence of the Respondent where it was shown that this statement was

- incorrect, or that the Respondent suffered any loss following the outcome of the tender process. It was weakly argued that the Claimant sought a bribe, but no evidence was availed showing that he in any way, whatsoever, set out to manipulate tendering to his benefit. Other companies such as Barsalinga were awarded the tender on convincing grounds. It would not make sense to award a company doing business in Uganda and Burundi, a tender to supply fuel in Northern and North Eastern Kenya at the expense of another company which already has experience in the difficult business environment that are these Kenyan Regions. The Respondent failed to caution itself adequately, on the dangers of giving too much weight to the complaints of a chagrined, albeit one of the best evaluated bidders. Not all bidders in any process can be winners;
- h. A cost/benefit analysis given by the Claimant in relation to T.K.M Maestro and WATA Expo limited, showed the Respondent would save Kshs. 4.8 million, by awarding Maestro, instead on WATA. This cost/benefit analysis was not challenged by the Respondent. The outcome of the tendering process in any event, did not bind Telkom Kenya Limited. There was room for correction of any tendering failures, and reversal of the whole process. The Tender and Evaluation Committee merely recommended which companies should be awarded the tender. If any of the allegations subsequently made against the Committee and in particular against the Claimant held any weight, the Respondent had the discretion to overrule the Committee, cancel the tender, re-advertise and run the process all over again. The recommendations by the Claimant and the Committee of which he was a Member were not cast in bronze. The Respondent did not cancel the process, but went ahead to write to the successful bidders on 25th March 2009, calling on these firms to mobilize their resources, so that they take over the refueling of the Generators. The firms were advised the letter of intent was not a contract, and the final contract would be done in accordance with the conditions of the tender. This was the position communicated by the CEO of Telkom Kenya Limited. There was no hint of impropriety in the process, until one disaffected bidder lit the powder keg; and,
- i. The Court finds that the Claimant acted in the best interest of his former employer. It is notable that most of the allegations in the letter to show cause were not rehashed in the letter of summary dismissal. The Respondent stuck to the accusations against T.K.M Maestro, but failed to show why the Claimant would favour this one firm. It was not shown that T.K.M Maestro was in any way awarded scores undeservedly, or eventually, clinched the tender against the rules of fair competition. The Claimant is a Procurement Officer who has a rich experience in procurement. He served the Respondent for many years, and was involved in past procurement without any complaints. The Committee acted as a team, and the Court agrees all decisions were collegial. No Member of the Committee came to Court to testify on any undue influence, or duress, exerted upon such Member by the Claimant in making tender decisions. The Court does not find the issue whether the Claimant was the Chair of the Tender Evaluation Committee, or simply a member, to have any material effect. There was no evidence offered by the Respondent to show he chaired the Committee. He explained that the user section chaired the Committee, while his Procurement Section, offered secretariat service. This explanation was not seriously challenged by the Respondent, but as suggested above, this was not a weighty issue that would impact on the decision of the Court. The Court is solely concerned with the issue whether as a Member of the Tender Evaluation Committee, and as an employee of Telkom Kenya Limited, the Claimant acted appropriately, and in the best interest of the Respondent. The answer must, resoundingly be, that yes he did. There were no valid reasons shown to the Court in summarily dismissing the Claimant. He was diligent, rather than negligent. The Court was impressed by the good work of the Tender and Evaluation Committee, and the employees that served in that Committee. Termination of the Claimant's contract of employment lacked in validity of reasons, and consequently in substantive justification. It was unfair, and the Claimant is entitled to compensation.

28. Was termination procedurally fair? The Court does not find major flaws in the procedure, up to the time of the appeal. The Claimant was given an initial hearing. Specific charges were communicated to him. There was a hearing, though it was not shown that he was explained to by the Respondent, of his right to be accompanied by a workmate or trade union official of his choice, at the hearing. It is the responsibility of employers, under the Employment Act 2007 to appraise their employees of all their employment protections. Section 12 of the Employment Act 2007 requires employers to provide their employees with statements on disciplinary rules. Section 15 states that employers must conspicuously

display such statements, and ensure employees have full access. Eventually the Respondent determined that the Claimant was guilty of the allegations made against him. He appealed. The appeal was rejected. There are no particularized grounds for rejection of the Appeal. Employers appear to think that appeal processes at the workplace are mere formalities, where the initial decisions are placed on the table for endorsement. This is not the case. There must be procedural guarantees, proper hearings, adequate consideration of the grounds raised in appeal, and reasoned appeal decisions. The Respondent's appellate decision was a short, 3- paragraphed affair. It was even suggested by the Respondent, that the Appellate Panel had uncovered a weakness in its disciplinary process, where the Appellant was found in possession of critical company documents, a situation that should be avoided. This does not suggest a focused appellate process, rooted on the issues at hand, but points to a process where an employer, goes into the appeal stage with a fixed mind; if such employers can gain more material to justify their termination decisions, all the more suitable to them. The Appeal was not handled fairly, and this, coupled with the failure to advise the Claimant of his full procedural rights at the first hearing, leads to the conclusion that termination was not fair on account of procedure.

29. The Claimant prayed for damages which appear jumbled up. What are exempted damages in an employment claim? What are meant to be terminal benefits, such as service pay and annual leave allowances, are pleaded as damages. The Court does not have any legal justification to grant in damages, 1 month salary for every year worked; annual leave allowance; and loss of earnings. There is similarly no good ground to allow the prayer for aggravated damages. There is no bar against the Court considering a grant of a compensatory award, notwithstanding that the Claimant did not expressly seek such compensation. The Court is, unlike a Civil Court, given wide latitude in redressing employment wrongs, in its mandate as a specialized jurisdiction. Reinstatement is not a practicable or suitable remedy given that the Claimant left employment way back in 2009, and also considering the poisoned atmosphere under which he left employment. The circumstances that underlay his departure from employment were such that the values of trust and confident between him and his former employer were shaken to the foundation. He was perhaps aware of this when he pleaded with the Respondent that he is availed mutual separation based on the same terms applied to employees who had recently left on voluntary early retirement. Time has not been standing still. It is more than 3 years since his departure. Reinstatement is not suitable. The Claimant is Awarded:-

[a] Termination was unfair;

[b] He shall be paid 1 month salary in notice at Kshs. 68,912; and compensation at 10 months' salary at Kshs. 689,120 total- Kshs. 758,032, within 30 days of the delivery of this Award;

[c] No order on the costs.

Dated and delivered at Nairobi this 18th day of September 2013

James Rika

Judge