



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 64 OF 2012**  
**(Originally Nairobi Cause No. 754(N) OF 2009**

**ANTHONY MKALA CHITAVI**

**CLAIMANT**

**v**

**MALINDI WATER & SEWERAGE COMPANY LTD**

**RESPONDENT**

**JUDGMENT**

1. Anthony Mkala Chitavi (Claimant) was appointed as Chief Executive Officer by Malindi Water & Sewerage Company Ltd (Respondent) through a letter dated 28 June 2006. The appointment was on a three year renewable contract. The Claimant was entitled to a basic salary of Kshs 70,800/- house allowance of Kshs 30,000/- and other remunerative allowances of Kshs 27,000/- per month.
2. On 2 August 2007 the Permanent Secretary, Ministry of Water and Irrigation wrote to the Claimant informing him of his appointment as the Managing Director (NWPC) Mombasa Municipality Water Supply on a three year contract commencing on 15 August 2007 at a basic salary of Kshs 200,000/- , house allowance of Kshs 60,000/- and other remunerative allowances of Kshs 40,000/- per month.
3. The Ministry of Water and Irrigation through a letter by the Permanent Secretary dated 16 October 2008 informed the Claimant that he was being redeployed from the Ministry of Water (NWPC) Mombasa to Malindi Water & Sewerage Co. Ltd as the Managing Director. The letter of redeployment further informed the Claimant that his starting salary package would be a basic salary of Kshs 179,000/- and house allowance Kshs 45,000/- totaling Kshs 224,000/- per month. The letter also informed the Claimant that he would sign an employment contract with the Board of the Respondent.
4. Pursuant to the redeployment, the Respondent through a letter dated 3 November 2008 offered the Claimant the position of Managing Director on a three year renewable contract commencing on 3 November 2008. The letter indicated that the Claimant's basic salary would be Kshs 179,000/- and house allowance Kshs 45,000/- per month. The contract was to be terminable by giving three months written notice or payment of equivalent of three months basic pay. The Claimant accepted the offer.
5. On 22 January 2009 the Claimant was charged with abuse of office contrary to section 46 of the Anti-Corruption and Economic Crimes Act, 2003. The particulars of the charge related to the period that the Claimant was the Managing Director of Mombasa Water & Sewerage Services Ltd.
6. The Claimant challenged the charges in Nairobi High Court Petition No. 103 of 2009, *Anthony Mkala Charo Chitavi v Republic & 2 others*. The Court ordered maintenance of the status quo of the suspension of the Claimant by the Respondents, who included the present Respondent pending full hearing of the application.

7. On 27 July 2009 the Court dismissed the Claimant's application for prohibitory/injunctive orders. On 7 August 2009 the Permanent Secretary, Ministry of Water wrote to the Chairman of the Respondent to suspend him in accordance with the provisions of the Anti Corruption and Economic Crimes Act. The Claimant was subsequently convicted and sentenced. (In the course preparing this judgment and research, I learnt that the High Court in Mombasa Criminal Appeal No. 279 of 2009 on 1 November 2013 upheld the Claimant's conviction in count one while the conviction and sentence in the alternative charge was quashed).
8. On 13 August 2009 the Permanent Secretary, Ministry of Water and Irrigation wrote again to the Respondent's Chairman bringing to his attention a report on mismanagement of the Respondent involving non adherence to the Public Procurement and Disposals Regulations Act, 2006. The letter made specific reference to some 7 items of malpractices.
9. On 24 August 2009, the Respondent's Chairman called a Board meeting on 27 August 2009 to discuss the letter dated 13 August 2009 from the Permanent Secretary, Ministry of Water and Irrigation. The Board met and resolved to form a select Special Audit Committee to look into the Claimant's *administrative style*.
10. On 14 September 2009 the Respondent's Ag. Managing Director wrote to the Claimant informing him of the formation of the Select Committee to analyse the audit report. The letter enclosed the report from the Ministry of Water and Irrigation together with the Report of the Select Committee. The letter asked the Claimant to give his explanations because the findings of the Committee indicated *gross administrative misconduct* under the Human Resource Policy section 8:2:4 and 8:2:5. The Claimant was to give his explanations on or before 30 September 2009.
11. The Claimant responded through a letter dated 30 September 2009 and on 8 October 2009 the Respondent's Chairman informed the Claimant that the Board had resolved that he appears before it on 13 October 2009 so as to defend himself.
12. On 15 October 2009 the Respondent's Chairman wrote to the Claimant notifying him of the Board's resolution to summarily dismiss him without notice or payment in lieu of notice on the grounds of gross misconduct and abuse of office. The letter referred to several reasons.
13. The Claimant was dissatisfied with the dismissal and on 2 December 2009 he lodged a Statement of Claim before the Industrial Court in Nairobi. The Cause was later transferred to the Industrial Court Mombasa when a station was established there.

### **Claimant's pleadings and evidence**

14. The Claimant pleaded that he was the Respondent's Managing Director and that on 12 October 2009 he received summons to attend and defend himself before a full Board meeting in relation to allegations of mismanagement, that he attended the meeting and informed the Board the notice was too short and he needed at least a day to prepare but his request was declined and that on 15 October 2009 he received a summary dismissal letter.
15. Regarding the dismissal, the Claimant pleaded that it was unjustified and in breach of contract because no investigations were carried out and natural justice was not observed.
16. The Claimant further pleaded that he was constructively dismissed because his salary was reviewed downwards, the dismissal was despite a pending case and the Respondent failed to disclose irregular and/or fraudulent tendering.
17. The Claimant prayed for Kshs 1,102,000/- as salary arrears, damages for unlawful dismissal, damages for breach of contract, costs of suit and interest.
18. The Claimant testified. I will make reference to parts of his testimony which are material to the determination of issues arising. He testified that prior to working with the Respondent he worked with Mombasa Water before being redeployed by the Ministry of Water.
19. On the dismissal, the Claimant testified that it was unfair because he was not given notice prior to dismissal. He stated however that prior to dismissal he was asked to explain in writing about some procurement issues. After giving the written explanations he was asked to attend a meeting to defend himself but he told the Board the notice was too short and asked for more time but was denied more time after which the Respondent proceeded to dismiss him.
20. He further testified that he was not part of the inquiry/investigations by the Ministry of Water/Special Audit Committee which led to his dismissal, that his salary was reduced when he moved to the Respondent from Mombasa Water, that, he was driving his own car and therefore

- entitled to mileage but the Board never set the mileage so he signed for what was reasonable, irregular tenders were never brought to his attention and that the procurement of Amarco Insurance Ltd was lawful.
21. During cross examination the Claimant stated that was redeployed by the Ministry of Water, that he signed a contract with the Respondent on 3 November 2008, that he did not complain to the Ministry of Water about the terms of the new contract, that the contract was not a continuation but a new contract, that he was convicted by the Anti Corruption Court, that Kenya Anti-Corruption Commission wrote to the Ministry to suspend him, that he was given a copy of the audit report by the Ministry of Water and Irrigation, that he was asked to give explanations which he gave on 30 September 2009 and that he was aware of the charges against him and that he walked out of a Board meeting where he was to defend himself.

### **Respondent's pleadings and evidence**

22. The Respondent filed a Response on 27 May 2010 and various issues were raised most of which I have outlined in the Introduction because they are not disputed.
23. On the dismissal, the Respondent pleaded that the Claimant was given sufficient notice and time to prepare (14 days), was given an opportunity before the Board, that proper investigations were conducted and that the Claimant was dismissed for

***excessive mileage claim, failure to stop irregular and fraudulent tendering, failure to carry out Training Impact Assessment before sending staff members for training, violation and non observance of the Respondent's management procedures, irregular recruitment of staff members and excessive use of budget allocations.***

24. The Respondent called one witness Johnson Henry Randu who served as the Respondent's Finance and Administration Manager at the material time. The witness testified that the Claimant's engagement with the Respondent was not a continuation of the contract with Mombasa Water. He further stated that the Permanent Secretary, Ministry of Water and Irrigation wrote to the Respondent on 7 August 2009 to suspend the Claimant and that he was suspended and the same day the witness was appointed the acting Managing Director.
25. In mid August 2009 a report accusing the Claimant came from the Ministry to the Respondent's Chairman and a Board meeting was called. The Board deliberated on the report and formed a special Audit Committee to investigate and report back and that the Committee came up with 7 issues for the Claimant to respond to.
26. The witness also stated that on 14 September 2009 he wrote to the Claimant to respond to the issues on or before 30 September 2009 which he did after which the Board Chairman wrote to the Claimant to attend a Board meeting on 13 October 2009 and that he was told by the Chairman that the Claimant attended the meeting with his Advocate and later walked out (witness was in Nairobi on the material day).
27. On the reasons for the dismissal the witness referred to those given in the dismissal letter.
28. On the excessive mileage, the witness testified that the Managing Director was allowed a mileage of 2000km in a month and that the Claimant had exceeded the limits in some months and the quantified amount was Kshs 593,186/-. The witness stated that he cautioned the Claimant against the excesses but he refused to adhere to the limits.
29. He also testified that the Claimant failed to disclose irregular tendering in that he procured furniture worth more than what had been budgeted for during the financial year. The budget was Kshs 4,000,000/- while furniture worth Kshs 6,000,000/- was procured.
30. Again the witness stated that the Claimant engaged an IT and HR person to fill in for those who were on leave and also run an advert for the recruitment of a Commercial Manager, but employed someone else and not the person who had been recommended by the Board. In the circumstances, the witness stated that the dismissal of the Claimant was justified.
31. In cross examination, the witness stated that the Claimant continued to receive his salary until 15 October 2009 when he was dismissed. He stated that the Audit Committee did not call the Claimant and further that he was the vice chairman of the Tender Committee and the increase in the cost of furniture was due to a variation, the Local Purchase Orders were prepared by the

- Procurement Manager and approved by the Claimant as the Accounting Officer.
32. The dismissal, according to the witness was justified and the Cause should be dismissed with costs.
33. I had directed the parties to file draft issues. I have looked at the issues filed. They are not precise on the questions to be decided. Where necessary I will draw from them.
34. At the conclusion of the hearing on 7 October 2013, I directed the Claimant to file and serve his written submissions on or before 18 October 2013. By the time of preparing this judgment the same have not been filed/brought to my attention.
35. The Respondent was supposed to file its submissions within 14 days of service of the Claimant's submissions. I don't know whether the Claimant served it with his submissions.

### **Questions for determination**

36. In a complaint for unfair termination there are questions/issues which fall for determination purely because of the requirements of the law whether raised in the parties' pleadings or evidence or not.
37. Section 47(5) of the Employment Act, 2007 requires an employee to prove that an unfair termination or wrongful dismissal has occurred. The Court is therefore enjoined by the Statute to consider the issue.
38. The section also requires an employer to justify the grounds for the termination. The grounds which the employer is expected to justify are mentioned in sections 40 and 41 of the Act in broad terms as redundancy, misconduct, poor performance or physical incapacity. Section 43 of the Employment Act also requires an employer to prove reasons for termination while section 45 expects the employer to prove that the reasons for termination are valid and fair. These issues go to the substantive fairness of the termination/dismissal. In many instances the practice is developing in the Industrial Court to treat the grounds under the general rubric of whether the termination/dismissal was (un)fair.
39. I have outlined the parties' respective positions in some detail. I have considered the pleadings, testimony and documents relied on. Based on these, the questions begging for answers are broadly, whether the contract with Respondent dated 3 November 2008 was a continuation of the contract dated 2 August 2007, whether this is case of constructive dismissal, whether the dismissal of the Claimant was unfair (procedurally and substantively) and if so, appropriate relief. At some point I will briefly address the issue of multiple reasons for dismissal.

### **Whether the contract with Respondent dated 3 November 2008 was a continuation of the contract dated 2 August 2007.**

40. The Claimant entered into an initial renewable contract with the Respondent on 28 June 2006. The contract was to commence on 3 July 2006 and run for 3 years. If this contract had run its full term it would have expired on 2 July 2009.
41. The Claimant did not serve out the full three year contract because the Ministry of Water and Irrigation decided to engage him *in the services of Ministry of Water and Irrigation (NWCP) Mombasa Municipality Water Supply* (Mombasa Water Supply contract) through a new contract dated 2 August 2007 and accepted by the Claimant on 3 August 2007. This contract was also stated to be for 3 years and was renewable on expiry. Under this contract the Claimant was to receive Kshs 200,000/- as basic salary, Kshs 60,000/- as house allowance and Kshs 40,000/- remunerative allowances all totaling Kshs 300,000/-
42. The contract with Mombasa Water Supply also did not run its full term. On 16 October 2008 the Ministry of Water and Irrigation wrote to the Claimant that he was being *redeployed from the Ministry of Water and Irrigation (NWCP) Mombasa to Malindi Water and Sewerage Company as Managing Director*, and that he would sign a new employment contract with the Respondent's Board. The redeployment letter was explicit that the Claimant starting salary package would be a total of Kshs 224,000/-.
43. Pursuant to the redeployment letter, the Claimant and the Respondent entered into a contract of employment which provided that the contract was for three years commencing on 3 November 2008 on a salary of Kshs 179,000/- and house allowance of Kshs 45,000/- all totaling Kshs 224,000/-.

44. The Mombasa Water Supply contract had a termination clause. The clause provided that each party could terminate the contract by giving three months prior notice or payment of three months basic pay.
45. The Mombasa Water Supply contract also had provision for payment of gratuity upon successful completion of the contract term.
46. The Court was not informed whether the Claimant was paid any gratuity by Mombasa Water Supply upon redeployment to the Respondent by the Ministry.
47. The letter redeploying the Claimant to the Respondent was clear that he would sign an employment contract with the Respondent. The letter was also specific as to the remuneration that the Claimant would be entitled to. The Claimant signed a new contract with the Respondent on 3 November 2008. The new contract was explicit that it would commence on 3 November 2008. The contract did not make any reference to the previous contract between the Claimant and Mombasa Water Supply.
48. Mombasa Water Supply and the Respondent are distinct juristic persons. There was no express provision on the contract with the Respondent being a continuation of the contract with Mombasa Water Supply.
49. The Claimant was not engaged by one employer. At one point he was engaged by Mombasa Water Supply and at another by Malindi Water Sewerage Co. Ltd.
50. There can be no presumption of continuity in the case under discussion. Continuity of employment is purely a statutory concept. I would agree with the position expressed in *Secretary of State for Employment v Globe Elastic Thread Co. Ltd* (1979) IRLR 327 HL that continuity of employment and presumption of continuity must be with the same dismissing employer. In the instant case continuity was broken.
51. In any case, the Claimant did not lay any material, evidential, contractual or statutory on the role of the Ministry of Water and Irrigation and its powers *vis a viz* employment contracts of what are, water service providers and licensees. The Claimant only stated in cross examination that he was not happy with the terms of appointment and that he wrote to the Chairman of the Respondent and not the Permanent Secretary, Ministry of Water and Irrigation.
52. The Ministry of Water and Irrigation would have been a necessary party in this Cause to explain its role in relation to employment of management staff of water service providers such as the Respondent and Mombasa Water Supply, and licensees.
53. The Claimant's contracts were successive employments by different juristic persons.

#### ***Whether this is case of constructive dismissal***

54. Constructive dismissal has been defined in *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee - to such an extent that the employee has no other option available but to resign
55. Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach'. Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employers conduct was a significant breach going to the root of the contract. The termination would be due to the employers conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.
56. In England, constructive dismissal was given statutory clothing through the Redundancy Payments Act, 1965 and later in the Trade Unions and Labour Relations Act, 1974 and the same is discussed in *Western Excavations v Sharp* (1978) IRLR 27.
57. The doctrine of constructive dismissal has not been given statutory underpinning in Kenya. But the doctrine and principles developed in other comparative jurisdictions would be equally applicable here because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution and the need to interpret the Constitution in a manner that advances human rights and fundamental freedoms in the Bill of Rights and the doctrine that the Constitution is always speaking.
58. The Claimant did not resign. A resignation, under the doctrine of constructive dismissal should be prompt otherwise the employee may be taken to have acquiesced in the employer's intolerable

conduct.

59. The Claimant underwent a disciplinary process and was thereafter dismissed. Therefore he cannot be heard to say that the Respondent repudiated the contract by behaving or conducting itself in such an intolerable manner to justify his resignation.

## **Whether the dismissal was unfair**

### ***Procedural fairness***

60. Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.
61. An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.
62. The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin maxim *audi alteram partem rule* into the employment contract. Whatever the reasons, the Employment Act, 2007 has fundamentally changed the employment relationship in Kenya.
63. And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.
64. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
65. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
66. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.
67. Has the Respondent demonstrated that the procedure or process it adopted fitted in with the principles I have attempted to set out herein above.
68. It is not in dispute that the Respondent wrote to the Claimant on 14 September 2009. The letter made reference to, and enclosed the report of the Ministry of Water and Irrigation together with the report of the Respondent's Select Special Audit Committee.
69. The two reports were not part of the Court record. Ultimately the question is whether the charges the Claimant had to meet were set out in any of the two reports. The letter made reference to administrative issues the Claimant was to respond to. Further reference was made to the Respondent's Human Resource policy sections 8:2:4 and 8:2:5. The Claimant was to respond on or before 30 September 2009.
70. Indeed, the Claimant responded to the allegations in detail through his letter dated 30 September 2009. In evidence, the Claimant admitted he was given the two reports with the allegations and that he was aware of the investigations going on and the charges.
71. Without going into the merits of the reports and letters, I am satisfied that the Respondent was in substantial compliance with its obligation to inform the Claimant of the nature of charges facing him.
72. On the issue of the employee's right to a proper opportunity to prepare and to be heard and to present a defence/state his case, the Respondent's letter seeking explanations was dated 14 September 2009. It required the Claimant to respond on or before 30 September 2009. This is a period of nearly two weeks.
73. Was this adequate? The adequacy and reasonableness in my view is a question of fact to be determined on a case by case basis. In my view the Claimant was given adequate and reasonable

- time/opportunity to prepare and present his defence.
74. The third issue then revolves on whether the Claimant was heard. His case was one of summary dismissal and there was an obligation on the Respondent to hear and consider any representations he wished to make.
75. Section 41 of the Employment Act, 2007 has not made it explicit that an oral hearing should be conducted. But there is a danger with purely oral hearings because in cases of challenge, it will be the word of the employee against that of the employer. A prudent employer is best advised to keep records/minutes. The charges should preferably be in writing, notices sent and should be signed by the employee or where he refuses to acknowledge the same a minute kept.
76. The Claimant responded to the charges on 30 September 2009. The Respondent's Board appears not to have been satisfied and on 8 October 2009 it invited the Claimant to appear before it to defend himself on 13 October 2009. The Claimant testified that he went to the meeting with his Advocate and sought at least one more day to prepare and when this was declined he walked out of the meeting.
77. The Claimant was served with the charges against him through the letter dated 14 September 2009. He responded in writing on 30 September 2009. On 13 October 2009 he was seeking for one more day. But he gave no reasons in Court why he was seeking one more day, having been served with the allegations more than three weeks back. Was it due health, to allow his Advocate to proper instructions? This is all speculation and the Court will not enter into the arena of speculation.
78. In my considered view, the Respondent has demonstrated that it gave the Claimant an opportunity to make both written and oral representations and he did make written representations but he did not utilize the opportunity to defend himself before the Board for reasons which cannot stand scrutiny.
79. The upshot of the foregoing is that the Court find that the process adopted by the Respondent was procedurally fair and in compliance with section 41 of the Employment Act.

### ***Substantive fairness***

80. The Employment Act has placed an onerous statutory duty on an employer in complaints of unfair termination or wrongful dismissal. The relevant provisions are section 43 (employer to prove reasons for termination), section 45 (employer to prove the reasons are valid and fair reasons) and section 47(5) (employer to justify the grounds for termination).
81. The letter of termination dated 15 October 2009 gave the ground of dismissal as gross misconduct/abuse of office. In terms of reasons the letter made reference to the reasons spelt out in the Special Audit Committee report sent to the Claimant on 16 September 2009.
82. The Claimant was dismissed based on multiple reasons. The Court is therefore enjoined to consider all the reasons, without more, since section 43(2) of the Employment Act, 2007 presupposes that the reasons for termination are the ones which genuinely existed and caused the employer to terminate.
83. The complexity with multiple reasons for termination under our framework however will arise where the employer proves one or some and not all the reasons. This is unlike the framework under the Employment Rights Act 1996 of the United Kingdom on designated reasons and out of which the Courts there have developed the concepts of principal and subordinate reasons for dismissal (see case of *St. Cuthbert's Co-operative Association Ltd* (1974) 188 NIRC, *Patterson v Messrs Bracketts* (1977) IRLR 137.
84. The parties did not address me on the issue therefore I would consider all the reasons as they formed part of the reasons for the dismissal.
85. The Special Audit Committee report regrettably was not placed before the Court. The Court is therefore constrained to pick out those reasons from the Memorandum of Response, the explanation letter by the Claimant dated 30 September 2009 and the termination letter.

### ***Excessive mileage***

86. The termination letter stated that the Claimant had made an excessive mileage claim of Kshs 593,186/10. The evidence of the Claimant was that he was entitled to mileage but the

- Respondent's Board had not set any parameters/mileage limit so he used to sign for what was reasonable.
87. Clause 17 of the Claimant's contract entitled the Claimant to a mileage claim at the maximum of current AA rates when using personal car for official duties in lieu of official transport.
  88. The Respondent's first witness testified that the Claimant was entitled to a mileage of up to 2000km in a month on official duties and that the Claimant had exceeded the limit by some Kshs 593,186/10.
  89. There was no evidence at all as to whether the Claimant was using his personal car or not and whether the mileage was in respect of official duties or personal errands. Further nothing was placed before court to indicate whether the mileage claim related to one month or two months or whatever period. The Respondent could not have expected the Claimant to sit back in the office on the basis that he had utilized his mileage for the month.
  90. The limitation on mileage must have been based on some written document or policy or manual. None was placed before the Court. Similarly, the Court was not apprised of the maximum AA rates at the material time. By implication of section 10(2)(h) and (7) of the Employment Act, 2007 it was the duty of the Respondent to prove that the Claimant had a benefit to a limited mileage entitlement.
  91. With the material placed before the Court, bearing in mind it was the obligation of the Respondent to prove this reason and that it was fair and valid, the Court is unable to accept that this reason was fair and valid. The Respondent had other options available such as surcharge.

### ***Irregular/fraudulent tendering***

92. The Respondent's Response made mention at paragraph 3.13 of a letter written by the PS Water and Irrigation to the Respondent's Chairman. The letter made reference to loss of Kshs 3,780,000/- as a result of highly inflated procurement of furniture, computers, printers and bullet proofing of cash office.
93. The letter also indicated that the quotations were above the maximum given in the First Schedule Threshold Matrix of the Public Procurement and Disposal Regulations, 2006 and that the Inspection and Acceptance Committee were not involved.
94. Further that one cabinet was paid for and was not delivered and that members of the Tender Evaluation Committee participated as members of the Tender Committee contrary to section 16(4) of the Public Procurement and Disposal Regulations 2006 and that office records of term contracts for 2008/2009 were changed and false documents introduced to justify procurement of goods and services.
95. The Respondent's witness evidence in regard to this was that the Claimant had failed to disclose irregular tendering and that he procured furniture beyond the voted budget of Kshs 4,000,000/-. As a result the witness had to direct staggering of the payments over 5 months.
96. The details or material particulars of these irregular tenders were not given. Names or details of the members who sat in both the Tender Evaluation Committee and the Tender Committee were not given. It was not argued that it is the Claimant who appointed them. Details of office records on term contracts were not given.
97. Regarding the Inspection and Acceptance Committee, their responsibilities as far as procurement is concerned is set out in the Public Procurement and Disposals Act, 2006 and the Court was not told how and why they were not involved in carrying out of their statutory mandate.
98. The Act places personal liability in members of the Inspection and Acceptance Committee. It was not suggested that the Claimant was responsible for any omission or commission by the Inspection and Acceptance Committee. The Respondent did not prove nor place material before the Court to show that this was a valid and fair reason to dismiss the Claimant.
99. The Claimant's case in his response letter dated 30 September 2009 was that he was only involved at the stage of signing Local Purchase Orders/Local Service Orders and that there was no material evidence that he signed any of the documents.

### ***Failure to carry out Training Assessment needs before training/Irregular recruitment of staff***

100. This item appears in the Claimant's response dated 30 September 2009. The Respondent made no

- attempt in evidence to prove this as a reason for termination or that it was a valid and fair reason.
101. The Respondent's witness testified that the Claimant at some point engaged an IT and HR person(s) while the substantive office holders were on leave and that he recruited a Commercial Manager who was not recommended by the Board.
102. The Respondent did not confront the Claimant on this score and the Court is unable to determine whether this reason was valid and fair. Nor was the Court addressed on the authority to recruit staff at specific levels.

### ***Changes of procedures without approval of Board of Directors***

103. Similar to the reason discussed in the preceding paragraph no material was placed before the Court or testimony led to prove this reason or that it was a valid and fair reason. In his response letter dated 30 September 2009, the Claimant had mentioned under this item that a Commercial Manager was needed urgently and that the interviews were conducted by a Board Committee.

### ***Use of excessive budget allocations without approval***

104. No details, particulars or evidence was led in proving this reason. The Claimant stated in his letter of explanation that financial budgeting process was undertaken in February 2009 while he was away.
105. If this reason is connected to the procurement of furniture worth Kshs 6,000,000/- instead of the budgeted for Kshs 4,000,000/- then I would adopt what I have discussed under Irregular/fraudulent tendering.
106. This reason was not proved. No budgetary plans/approvals for the relevant period were produced.
107. The upshot of the foregoing is that although the Respondent may have heard reasons to terminate the services of the Claimant, it has failed to place before Court such material evidence as would have justified the ground of misconduct and proved the reasons for terminating the services of the Claimant and that those reasons were valid and fair reasons.
108. The termination was therefore substantively unfair.

## **Appropriate relief**

### ***Kshs 1,102,000/- salary arrears***

109. The Claimant sought Kshs 1,102,000/- on account of salary arrears for the 10 months he served the Respondent, this being the variance between what he was receiving while serving at Mombasa Water Supply.
110. Having found that the engagement between the Claimant and Respondent was not a continuous contract/lack of continuity of employment, this head of relief must be dismissed.

### ***Damages for unlawful dismissal***

111. Section 12(3)(v) and (vi) of the Industrial Court Act empower the Court to make awards of compensation and damages, respectively as may be contemplated under the Industrial Court Act or any other written law.
112. Section 49 of the Employment Act on its part has set out the primary remedies for unfair termination (statutory concept) and wrongful dismissal (common law/contractual concept).
113. One of the primary remedies is the equivalent of a number of months' wages not exceeding twelve months gross wages. This has not been explicitly referred to as compensation or damages and therefore an award under this head would qualify as compensation or damages though under comparative jurisdictions it has been called compensation.
114. What is clear is that the award is capped at a maximum of twelve months equivalent of gross wages and unless the contract itself makes provision for a higher period it is not material whether the contract was 'fixed term' or 'permanent' and that remedy, is discretionary.
115. The award however is subject to some thirteen factors set out in section 49(4) of the Employment

- Act. The Court can consider one, some or all of the factors.
116. A party wishing the Court to exercise its discretion in awarding compensation or damages under section 49(1)(c) of the Employment Act should lay some basis which he would wish the Court to consider otherwise the Court would be acting as a juggler or magician.
117. In the case in hand, the contract between the parties was for three years. It was terminated about 11 months after commencement (about 25 more months to go).
118. There was provision for payment of gratuity at the rate of 31% of annual basic salary upon successful completion of contract term. The Claimant is also an engineer and has reasonable prospects of securing alternative employment. Considering these factors it is my considered opinion that an award equivalent to three months gross wages would be just.
119. The Claimant was earning Kshs 224,000/- at time of termination and I would assess the compensation as Kshs 672,000/-.

### ***Damages for breach of contract***

120. No contractual basis was laid for claiming this head of relief and in any case the Employment Act, 2007 has now provided the same remedies for unfair termination and wrongful dismissal, which conceptually would be the basis for an award of breach of contract.

### ***Costs and Interest***

121. Unlike under the civil procure rules framework where costs follow the event, costs in the Industrial Court are awardable on different principles which are still developing.
122. I would have expected the parties to address the Court on the issue of costs and interest, but they did not. Because the Claimant failed to comply with my directions on filing of submissions, on that basis I would have declined, as I do, to award him costs.

### **Conclusion and Orders**

123. In conclusion, I do find and hold that the Claimant was not in continuous employment with the Respondent and that his termination though procedurally fair, was substantively unfair because the Respondent has failed to prove the reasons for termination and that the reasons were valid and fair reasons and I award him

- a. 3 months gross wages compensation **Kshs 672,000/-**

124. There will be no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 6th day of December 2013.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Ojode instructed by Ojode Onjoro

& Co. Advocates

for Claimant

Mr. Obura instructed by Obura, Mbeche

& Co. Advocates

for Respondent