



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 341 of 2010**

**KILIOPA OMUKUBA OKUTOYI .....CLAIMANT**

**VERSUS**

**TELKOM KENYA LIMITED .....RESPONDENT**

**JUDGEMENT**

The claim herein dated the 19<sup>th</sup> March 2010 and later amended on 5<sup>th</sup> October 2010 is for a declaration that the claimant Kiliopa Omukuba Okutoyi dismissal from his employment with the respondent was unfair and unlawful, general damages for unprocedural and irregular dismissal and a claim for terminal dues and or benefits and special damages of loss of income and or earnings.

The claim is opposed in the respondents memorandum of reply dated 24<sup>th</sup> May 2010, a supplementary reply dated 3<sup>rd</sup> November 2010, and a further supplementary reply dated 16<sup>th</sup> November 2010 urging the Court to dismiss the claim.

Court has noted all the filed documents, evidence in Court and the written submissions. That the claimant was employed by the respondent on 13<sup>th</sup> April 1993 as a trainee technician, later confirmed as a technician, a position he held as a permanent and pensionable employee until 22<sup>nd</sup> January 2010 when he was dismissed after serving the respondent for 15 years. That at the time of dismissal he was earning Kshs. 42,277.00 per month. That on 17<sup>th</sup> November 2011, the claimant was suspended from duty on suspicion of being involved in arson at the work premises. That on this day he reported to work at 7 am and found from the security guard that there had been an attempted burglary the previous night. That he could not access his office since before entry there was smoke and the office was on fire. That until the 21<sup>st</sup> November 2008 the claimant and other staff were busy restoring the burnt equipments in order. On 21<sup>st</sup> November 2008 at 5 pm he was arrested and taken to Kisumu police Station.

It was further submitted in evidence that following the events of arson and arrest, the claimant was on 25<sup>th</sup> November 2008 suspended indefinitely. That on 13<sup>th</sup> January 2009 he was asked to defend himself against arson attack at the Kisumu Tool switch where he gave his written response on 14<sup>th</sup> January 2009. On 28<sup>th</sup> January 2009 he was dismissed vide letter dated 22<sup>nd</sup> January 2009. He appealed on 29<sup>th</sup> January 2009 but the respondent confirmed the dismissal in a letter dated 27<sup>th</sup> February 2009. That these proceedings were contrary to sections 41 of the Employment Act. That the same violated the Respondents human Resource Policy manual clauses 17.

It was the respondents defence and evidence that following an arson attack at their Kisumu Toll switch their preliminary investigations indicated that claimant was involved, they reported to the police who

arrested him and they followed by suspending him. They later commissioned an investigation into the incident which confirmed that the claimant was the culprit with respect to the arson. That they offered the claimant an opportunity to defend himself when he submitted a written defence but the respondent was of the view that the contents thereof were not convincing.

The respondent has submitted that the contract between the parties did not specifically impart the applicability of the rules of natural justice and that the claim for general damages cannot be awarded for breach of contract. That the declarations and orders sought by the claimant are not applicable in this case. The respondent has further submitted that the claimant's dismissal was in compliance with the respondent's human Resource policy manual with provisions for suspension, dismissal and appeal procedure. That the dismissal of the claimant was based on section 44 of the Employment Act where summary dismissal is allowed in cases where a party has fundamentally breached his obligations under the contract of service. That the respondent dismissal of the respondent also followed the human resource policy manual.

The court has keenly considered the evidence, the record and the written submission by both parties. The issues before court can be outlined as follows:

Was there breach of the rules of natural justice?

Was there breach of the respondent's disciplinary procedures?

Is the claimant entitled to the declarations and orders being sought?

Are there special damages to the claimant?

Under Section 41 of the Employment Act:

***“... an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***... an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee ...***  
“

Court notes that these sections of the Employment Act are emphatic on issues relating to summary dismissals, where an employer *shall* before terminating the employment of an employee on grounds of misconduct *hear* the employee and *consider any representations* from a person of the employer's choice. These provisions not only apply the fundamental principles of natural justice but further entrench the provisions under the Constitution in Articles 22(3)(d) all Court are guided by the rules of natural justices and should avoid legal technicalities to ensure access to justice to all litigants.

Under this section of the law, where it relates to summary dismissal due to an employee breach of obligations arising out of his or her work, or has done an act that is tantamount to gross misconduct as outlined under Section 44(4), must be here and have consideration of any representations which the employee may on the grounds of misconduct choose to make.

It is important to note that a summary dismissal should be the last resort to an employer which is by law granted under Section 44. This will be used in the rarest of cases where an employee has fundamentally breached his obligations under a contract of service. In this case the respondent alleges that before the summary dismissal, they gave the claimants a notice to show cause as to why he should not be disciplined where he gave his written defence, and he was also allowed to appeal which he did by written

submissions.

However, the hearing by written submissions by the claimant to the respondent does not meet the threshold envisaged by the Employment Act and also by the Respondent human resource policy manual. Under the Act, what is stipulated is a hearing and a consideration of any representation, which can be interpreted to mean by a person close to the claimant, a union representative or any other member of staff that would be a witness or appear in representative capacity at any hearing. By giving written submissions without any due regard to the seriousness of the charges that faced the claimant and the possible consequences if found guilty, the respondent failed to adhere to its disciplinary procedures where under chapter 17 parts 7.1(a) and (b):

***An employee who appeals under this regulation shall be required to appear in person before the committee to hear his case. Unionisable employees may be accompanied by a fellow employee of their choice and a representative from the company's staff Union. ...***

Court finds that the due process was not followed before the summary dismissal of the claimant. Also the same was not done in accordance with the Employment Act under Section 41.

Court notes that the crime committed at Respondent premises is a serious one and the action taken by the respondent to investigate and indeed invite the police to conduct their own investigations was the proper thing to do. The respondent is not in control of police investigations, the duty was on the police at Kisumu Police Station to investigate arrest and prosecute the claimant based on their independent examination of facts and evidence presented to them. Their inaction should not be visited upon the respondent. However, court finds it odd that the night before the arson incident it was alleged that there was a burglary which was reported, the claimant heard about it from the security guard whereupon he sought threat they escort him to his office but this aspect never seems to have been followed and what the respondent were keen on was the arson itself. There seems to be several lapses in the kind of investigations that were carried to by the respondent all geared towards the arson and not considering other factors that could have been in the possession of the security guards who were on the site to ensure that the property of the respondent was secure.

Procedure adopted by employer in reaching decision to dismiss the employee was unfair in the circumstance and the same was not in compliance with the law. The law requires that the employee be heard and be informed of his right to call a representative or be accompanied by a person of his choice. The manner of communication of the decision and the handling of the appeal was wrong and inconsistent with respondent human resource policy manual and the law. The claimant having worked with the respondent for over 15 years without a prior record of indiscipline was a good ground to accord him due diligence and fair procedure as stipulated in the disciplinary guidelines for the respondent.

Court therefore finds that due to the flawed procedure in terminating the claimant employment, this was wrong and unlawful. Court further finds it improper on the part of the respondent to have shared the outcome of the claimant appeal by circulating a memo that he was no longer their employee even before serving him. Under the Employment Act Section 41(1), an employer should seek to explain to the employee in a language he understands the reasons for which the employer is considering termination in the presence of a representative of the employee's choice or in the case of a unionised employee, the union representative. By first sharing a memo to the whole office staff and then later seeking to send a letter to the same effect to the claimant was inhuman and degrading and meant to further injure the claimant circumstances.

Noting the circumstances of the arson, investigations which are still with the police, there are no good grounds advanced for unfair termination. The burden of proving that this was unfair termination of claimant's employment rested with him. Court notes that this was not discharged to the required standards and will not award in this regard.

The claimant was on permanent and pensionable employment with the respondent hence the need to consider his long service without prior disciplinary cases being reported against him.

For these reasons the court enters judgement for the claimant as follows:

- a) 1 month salary in lieu of notice at Kshs. 42,277.00
- b) Half salary unpaid for 3 months while on suspension at Kshs. 63,000.00
- c) Severance pay for 15 years worked at Kshs. 317,076.00

All amounting to Kshs. 422,353.00

- d) Costs of the suit.

Dated and delivered at Nairobi this 12<sup>th</sup> day of October 2012

**M. W. Mbaru**

**JUDGE**

**INDUSTRIAL COURT OF KENYA**

In the presence of:

Court clerk.....

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