



Case Number:	Cause 1149 of 2011
Date Delivered:	23 Jul 2014
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Award
Judge:	James Rika
Citation:	Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited [2014] eKLR
Advocates:	Mrs. Omenta Advocate instructed by Omenta & Company Advocates for the Claimants Mr. Harrison Okeche and Ms. Lorraine Oyombe Advocates, instructed by the Federation of Kenya Employers [FKE] for the Respondent
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claim Partly Allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Ksh.15,531,922
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REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1149 OF 2011

BETWEEN

1. PETERSON NDUNG'U
2. STEPHEN GICHAGA GITURO
3. NICHOLAS OJWANG'
4. PETER KARIUKI
5. JOSEPH M. KYAVI
6. JAMES KIMANICLAIMANTS

VERSUS

THE KENYA POWER AND LIGHTING COMPANY LIMITED.....RESPONDENT

Rika J

CC. Edward Kidemi

Mrs. Omenta Advocate instructed by Omenta & Company Advocates for the Claimants

Mr. Harrison Okeche and Ms. Lorraine Oyombe Advocates, instructed by the Federation of Kenya Employers [FKE] for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The 6 Claimants filed a joint Statement of Claim against their former Employer Kenya Power and Lighting Company [KPLC], on 14th July 2011. 5 of them claim they were forced to retire early from employment, in circumstances amounting to unfair and unlawful termination of their contracts of

employment. The 5th Claimant's contract was terminated under the termination Clause 13, in similar circumstances. They seek an order for reinstatement without loss of rights, privileges and incidents of employment, from the date of termination to the date of reinstatement. In the alternative, they ask to be paid service pay at 15 days' salary for every completed year of service; 2 months' salary in lieu of notice; payment of half salary for the months of April and May 2009 and full salary for the months of June to September 2009; general damages for unlawful termination; costs; interest; and any other remedy the Court deems fit to grant.

2. The Respondent filed a Statement of Response on 20th June 2012. It is conceded the Claimants were Employees of the Respondent. They were employed in various positions and, all were based at Nairobi West Substation on the date of termination. **Peterson Ndung'u** was employed as a Trainee Technician in 1982. He last held the position of Senior Technician 1. **Stephen Gichaga Gituro** was employed on 27th September 1982. He last held the position of 2nd Assistant Superintendent. **Nicholas Ojwang'** joined the Respondent on 23rd June 1980, and last held the position of Senior Foreman 1. **Peter Kariuki** last worked in the same position as Ojwang. He was employed on 2nd January 1980. **Joseph M. Kyavi** was employed on 1st June 1989, and last held the position of Foreman. The last Claimant **James Kimani** was employed on 1st June 1985. He last worked in the position of Senior Foreman 1. The Respondent states all the Claimants, save for Joseph M. Kyavi whose contract was regularly terminated, were retired early on 3rd September 2009. The reason for leaving service in all cases, is given as the Claimants' implication, in an Audit Report, of gross negligence. The Audit Report revealed the Respondent lost a total of Kshs. 60,286,976.49, resulting from fraud in which the Claimants were involved. Each was granted the opportunity to defend himself. They defended themselves. They did not do so satisfactorily. Termination and Early Retirement were just, fair and reasonable decisions. The Respondent calls upon the Court to dismiss the Claim.

3. The Claimants gave evidence on 12th February 2013, 29th April 2013, and 5th February 2014 when they rested their case. The Respondent gave evidence through its Auditor Argwings Kodhek Ochiel and Information Technology Officer Paul Mugo, on the 20th February 2014. The Parties filed Closing Submissions subsequently, which their Advocates underscored in their address to the Court on 26th March 2014. The Award was not ready by 27th June 2014 as scheduled, and the Court rescheduled delivery of its decision to today. Delay is regretted.

4. **The Claimants' evidence** may be summarized as follows:-

i. **Peterson Ndungu, Claimant Number 1:** He was informed on 10th July 2008 by his Colleague Vincent Odhiambo who was based at Kericho Town, that Store Transaction Forms [STFs] bearing Peterson's name, were being used by a Contractor to collect electricity poles from the Stores at Kericho. The Forms were allegedly authorized by Peterson. He informed Mr. Henry Njenga, the Deputy Manager who coordinated Upgrade Schemes. They examined the Forms, and the 1st Claimant was convinced his signature on the Forms was forged, and in instances, the wrong designation had been shown in the Forms. He recorded a statement with the Auditor Mr. Cheruyiot, emphasizing he did not sign the Forms. Most Forms related to Schemes that had not been allocated to him, and therefore, he would not be able to generate the Forms under the Respondent's Design and Construction System [DCS]. He submitted his signature for expert examination, whose result was never availed to Peterson. The Respondent wrote to Peterson on 15th December 2008, requiring him to show cause why disciplinary action should not be taken against him within 72 hours. The Claimant wrote back explaining he was the one who brought the fraud to the attention of the Respondent. He denied ever sharing his password with anyone. He also explained that anyone with the Respondent's DCS profile did not require another person's password, to manipulate another's job. The 1st Claimant was suspended on 2nd February 2009. He was paid full salary for February and March 2009; half salary for April and May 2009; and no salary for the rest of the period.

Suspension was lifted on 3rd September 2009, and Peterson sent on early retirement effective from 4th September 2009. He only had minor disciplinary lapses, which had been dealt with, more than 10 years before early retirement.

Cross-examined, Peterson testified he was employed in 1982 and confirmed in 1986. He was a trained Technician. He graduated at Form 6. He was conversant in the use of computers, held no certificate in computer study, but was adequately trained internally by the Respondent in the use of computers. The poles were not originated from his computer profile. He was informed the poles were obtained from Kericho and Lanet, using his profile. He did not authorize use of his profile. He recorded a statement on 22nd August 2008. He commented that the DCS system could not allow one to modify a profile. The DCS had 3 categories- Engineer, Construction and Supervisor. The Claimants' specimen signatures were taken. The 2nd Claimant, Mr. Gituru, was the 1st Claimant's immediate boss. Only these 2 Claimants were in the Operations Department. Peterson was not aware that the Claimants' passwords were being given to Casual Employees. It was possible for another Employee to know Peterson's password. His Supervisor did not have Peterson's password, but Peterson's profile was in the computer. The Respondent lost about Kshs. 33 million. Peterson testified on redirection that he did not receive any materials from Kericho and Lanet. He did not authorize any person to receive such materials. Someone with a higher profile, like the Construction Engineer, could use the Supervisor's profile to generate a document. Peterson enquired from his boss Njenga, who advised that it was not possible for the 1st Claimant's name to have been used in Kericho and Lanet. The poles removed from Kericho were recovered. He seeks reinstatement above other possible remedies. What was paid by the Respondent as terminal benefits, was not all inclusive.

ii. **Stephen Gichaga Gituro Claimant Number 2.**

The 2nd Claimant learnt from the 1st Claimant that the Claimants' names were being used by a Contractor to remove materials from Kericho. Stephen was Peterson's immediate Supervisor and was aware it was not possible to use the Claimants' names to access materials outside Nairobi. The 2nd Claimant denied signing the Store Issue Notes under investigation. He did not sign or print the Forms. The signature on the Forms was not his, but forged. He too could not be allowed under the KPLC DCS system to print the Forms outside Nairobi. He was asked to explain why he keyed Inter Stores Transfer [ISTs], without confirming actual poles were issued from Lanet Stores. He explained that these were only keyed in by the Storekeepers; he was an Engineer Superintendent, working in Nairobi; not a Storekeeper based at the respective upcountry Stores. The Audit Report, contrary to the Respondent's position, did not allege that the 2nd Claimant keyed in the ISTs. He was suspended on 2nd February 2009, suspension lifted on 3rd September 2009 and early retirement imposed effective from 4th September 2009. He told the Court on cross-examination that Peterson was his junior. He could not use Peterson's profile to make an order for the poles. Stephen's profile was restricted to Nairobi. He has never given his password to a Casual Employee. He was the Team Leader, and aged 52 years on retirement. The retirement age was 60 years. He clarified on redirection that it was possible for System Administrators to use his profile. The poles were said to have been taken to Nairobi, while there was no shortage of poles at Nairobi.

iii. **The 3rd Claimant N. Ojwang' 4th Claimant Peter Kariuki, 5th Claimant Joseph M. Kyavi and 6th**

Claimant James Kmani, basically gave the same narrative in chief, as the first 2 Claimants, with minor differences on the details leading to their exit from the Respondent. All, save for the 5th Claimant whose contract was terminated under clause 13 of the employment contract which he claimed relates to probationary contracts, were sent away on early retirement. Their profiles were said to have been used to remove poles from Lanet and Kericho. All denied involvement, alleging their signatures could have been forged; they did not authorize use of their profiles; their profiles were only actionable within Nairobi; they were suspended and denied salary for certain months; suspensions were lifted before the decision on early retirement and termination was made; and they all, with the exception of the 4th Claimant who testified he prefers compensation, seek reinstatement as the primary remedy.

Cross-examined, they variously stated that they entrusted clerks with their passwords. They were not aware it was wrong to reveal their passwords to third parties. They learnt it was wrong to give out their passwords from 2008. There was a written policy on use of passwords. The passwords were staff numbers. There was a wide access to these staff numbers. There was restriction placed by the Respondent on use of passwords. They did not misuse their passwords. The poles were lost outside their station. Their respective signatures were sampled and examined, but no results were communicated. They were not ripe for retirement. They seek the assistance of the Court in terms of the Claim.

5. It is **the Respondent's evidence**, that the Auditor Argwings Kodhek Ochiel was involved with the investigations on the fraud relating to removal of the Respondent's poles from the Stores. He prepared a Report, attached to the Statement of Response as appendix 2. Poles were being recycled around Kericho, Lanet and Naivasha. A loss of approximately Kshs. 60 million was sustained by the Respondent. He accounted for this figure as follows: 3,051 poles of assorted sizes valued at Kshs. 31,405,754 were issued from Kericho, Lanet and Naivasha using forged DCS Issue Notes; 40,200 meters of 50mm² hd bare conductor, valued at Kshs. 2,326,441 were issued using fraudulent documents; and 2,169 poles of assorted sizes valued at Kshs. 26,554,780 were recycled or not delivered at all by Rural Distributors Enterprises, one of the Respondent's contracted suppliers of poles.

6. The Auditor found that although the 1st Claimant denied approving the affected STF and / or knowingly giving out his password, his profile was used to generate and print the fraudulent Issue Notes. He was negligent, or a part of the conspiracy to defraud the Respondent. It was also the Auditor's finding that Casual Employees based in Nairobi West, were given DCS passwords by their Supervisors. Martin Mwaura, a Casual Clerk, had the password of N. Ojwang, James Kimani, and Peter Kariuki. These passwords were known too, to Kaberere and Onuko, both Casual Employees. The passwords allowed modification of materials, allocation of jobs to various Supervisors and generation and printing of STFs. Martin Mwaura was able to access Stores in different regions, using James Kimani's password. The Auditor explained that the same poles would be delivered to the Stores as fresh materials. The Claimants were negligent with their passwords. They owned up to having given out their passwords. Passwords are personal and confidential and there was a circular issued by the Respondent on this.

7. On cross-examination, the Auditor told the Court that the STFs were forged, which would mean signatures on them, were forged. The Respondent's Systems were interconnected, and the materials could be removed from any place. The Claimants' signatures were sampled for examination. This was carried out by the Police in conjunction with the Respondent's Security Department. The Auditor did not come to learn of the results. The Auditor was certain the Claimant's profiles were used. He did not have evidence that the Claimants received the circular on the use of password. The Report was not availed to

the Claimants. They were asked to explain their positions in light of the Audit Report, which Report was not availed to them. The Report mentioned the DCS system had a fault, but this would not affect the Claimants' culpability. Argwings testified on redirection that his finding was not on the use of the Claimants' signatures; his finding was that the Claimants' profiles were used. The Audit Report was supplied to Management, and the letter calling on the Claimants to answer to the allegations against them, mentioned that they had reacted to the Auditor's Report. It was not for the Auditor to charge the Claimants.

8. Paul Mugo unpacked for the Court the workings of the Respondent's IT department. With regard to Stores Transaction Forms [STFs], the IT Officer explained that all information was communicated electronically. Work for customers, labour and material costs, are captured in one project. Once a customer paid, materials would be released from the Stores and construction carried out. The Claimants could order for material. Departmental Heads, Supervisors or Construction Engineers could order for materials. Supervisors could generate and sign STFs. Each had a profile, which operated like an ATM card. Once a request was made, it went to the person authorized to use the password. One could not go to the second level without the User Identity. One would have to change User Identity after 21 days. The Claimants were all trained when the system was introduced. There was a circular regulating use of passwords. It was dispersed to Employees through their e-mails and pasted on the notice board. It was correct that profiles would normally be used to generate materials from a given jurisdiction, but the Respondent Management made this rule flexible, to ensure ease of access for the Respondent to materials from any store, whenever needed.

9. Questioned by the Claimants' Advocate, Mugo testified that no material could be released in the absence of the Supervisor. One could access the system using the staff numbers. The Administrator allocated the profiles. The system was introduced in 1997. Mugo did not know if the System Administrator was investigated. He was not consulted by the Auditor when the Auditor concluded that the DCS was faulty. He could not say all the contents of the Auditor's Report, were correct. Initially, it was not possible for a profile to be used to access materials from outside the jurisdiction. One had to be authorized to create a profile, Mugo testified on redirection. The systems locked after 21 days. It was only a person with the details of the profile holder, who could get to the system. The Respondent urges the Court to dismiss the Claim.

10. To underscore the Parties' positions, the Advocates made brief oral ***closing submissions***. Mrs. Omenta submitted the materials could not be taken from a station outside Nairobi, if at all the Claimants signed the Forms. Specimen signatures were taken; the investigations did not find the Claimants to have signed the Forms. The password was the staff number. The Audit Report was not shown to have been availed to the Claimants. They were not arrested and arraigned in Court, despite the Respondent alleging they occasioned loss of Kshs. 60 million. They were not negligent on use of passwords. Employees were aware of each other's staff numbers. They were not shown to have been trained on the use of the system. They were not appraised of the new system. Audit Report was inaccurate. STF was localized. At termination, not all the Claimants had attained the age of 50 years. They were ineligible for early retirement. Miss Oyombe submitted for the Respondent that the Claimants were negligent with the use of their passwords, leading to the fraud. Access was regulated. The Claimants conceded they shared passwords. They gave their passwords to Casual Staff. It was only the initial password which was a staff number. The correct position was that the password had 8 characters and was alpha-numeric. The system prompted change after 21 days. The Claimants had powerful profiles, which could access stores in other stations. The Claimants were trained in use of the system. There was a well publicized policy on the use of the password. The Claimants' laxity resulted in loss of money to the Respondent. They participated in the Audit, were interviewed and recorded statements.

The Court Finds and Awards:-

11. The 6 Claimants were employed by the Respondent in various capacities and on dates shown in paragraph 2 of this Award. They all left employment on the 4th September 2009. Their respective monthly salaries are not disputed, and are supported by their last pay statements, attached to the Statement of Claim. The decision to disengage them was made by the Respondent, following a fraud involving the illegal removal of the Respondent's materials such as electricity poles, from the Respondent's Stores in Naivasha, Lanet and Kericho, whereof the Respondent alleged to have lost materials worth about Kshs. 60 million. Except for the 5th Claimant Joseph M. Kyavi whose contract was terminated under Clause 13 of the contract, all the Claimants were retired early by the Respondent, relying on Part IV of the Staff Regulations and Procedures.

12. There are two instruments regulating the employment relationship: each Claimant signed an individual contract of employment at the outset; and secondly, was subject to the Staff Regulations and Procedures. Under the contract, the relevant clauses were clauses 11, 13 and 14. Clause 11 reserved the right of the Respondent to summarily dismiss any of the Claimant, if in the opinion of the Respondent such Claimant, willfully disobeyed the lawful orders and instructions of the Respondent. Clause 13 granted either Party the discretion, after completion of probation, to terminate the contract by a written notice of 1 month, or payment of 1 month salary in the absence of the written notice. Clause 14, set the normal retirement age of the Claimants at 55 years. Part IV of the Staff Regulations and Procedures allowed the Respondent to retire early, Employees from the age of 50 years and above. The grounds upon which early retirement could be justified under these Regulations and Procedures, were given to comprise, " *the facilitating of improvement of the organization of the department to which he [the Employee] belongs, by which greater efficiency of economy may be effected; and two, where the office is abolished.*" The Regulations and Procedures defined employment offences and set out the various penalties.

13. The Court has outlined early, the framework within which the Parties engaged, so as to attempt to understand if the Claimants underwent a regular disciplinary process culminating in regular disciplinary sanction, or were regularly retired early under the terms of employment.

14. It is agreed the Claimants were all working for the Respondent, based at the Nairobi Offices. They left employment some years before they were due to arrive at the normal retirement age of 55 years. Peterson was 50 years, Stephen 53, Nicholas 50, Peter 53, Joseph 44, and James 51. Joseph, at 44 years, was deemed unripe for early retirement, and therefore had his contract terminated, under Clause 13 of the contract.

15. Early retirement and other forms of retirement, result in termination of the contract of employment. Termination under the normal contractual clauses which provide for written notice, or pay in the absence of such notice, likewise results in termination of the contract of employment. Under Section 43 of the Employment Act 2007, it is stated:

[1] *"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair, within the meaning of section 45.*

[2] *The reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."*

16. The term 'prove' is described by the Merriam- Webster Dictionary to mean " *demonstrate the truth or existence of something, by evidence or argument.*" Other supplemental definitions are " *to establish the validity or correctness of something.*" It was the responsibility of the Respondent to demonstrate the truth or existence of the reasons given in justifying termination, and establish the validity or correctness of these reasons. Failing to do so would lead to the conclusion that termination was unfair under Section 45 of the Employment Act, for want of substantive justification. Section 45 describes unfair termination to exist where the Employer fails to prove that the reason for termination is valid and fair.

17. Five of the Claimants were placed on early retirement, and one, the 5th Claimant had his contract terminated through the termination clause contained in the contract. ***The first question arising out of the decision by the Respondent to terminate the Claimants' contracts is whether the Respondent proved the reason or reasons for termination; the second question, which is imposed by section 41 of the Employment Act, is whether the decision was arrived at fairly; while the last is whether, if the termination was unfair either for want of proof of reason or fair procedure, the Claimants are entitled to the remedies sought"***

18. In answering the first question on ***substantive justification***, the Respondent led evidence to show that it lost materials from its Stores in Naivasha, Lanet and Kericho, worth approximately Kshs. 60 million. The existence of the fraud is not contested. These materials, comprising electricity poles and conductor, were removed from the Stores, by use of fraudulent documentation. The removal of the materials and the loss occasioned to the Respondent are not contested. The Respondent's action against the Claimants, was based on its position that the Claimants' profiles, were used to generate Store Transfer Forms [STFs] which were then presented at the various stores to remove the materials. Again there is no dispute that the Claimants' Profiles were used in the fraudulent transactions. They were, according to the Respondent, aware that they were not supposed to entrust their passwords to third parties. There was a policy, sufficiently dispersed to the Employees through their e-mails and workplace notice board, spelling out the confidential terms of use of the passwords. The Respondent charged that the Claimants did not protect their passwords, entrusted the passwords to Junior and Casual Employees, compromising the safety of the system of access to the Stores.

19. The Claimants conceded they entrusted their passwords to Casual Employees such as Mwaura, Kaberere and Dan Onuko. These Junior Employees recorded statements affirming they were entrusted passwords by the Claimants. The Claimants themselves recorded statements, in which they either denied entrusting their passwords to other Officers, or denied doing so, knowingly. Some of the Claimants such as Peter Kariuki unequivocally admitted on cross-examination, to sharing their password with Casual Employees. He also stated he was not aware it was wrong to give out his password. The other explanation was that the Claimants did not know at the time they shared their passwords, that it was wrong to do, and only came to learn it was wrong, in the year 2008. They alternatively argued that the passwords were after all staff numbers, which could be accessed by anybody, and that in any event, their profiles could not be used to access materials from the stores. The signatures used by the fraudsters did not belong to the Claimants; they were forged, the Claimants asserted.

20. The various explanations given by the Claimants do not persuade the Court that they exercised reasonable degree of care in dealing with their passwords. They were in supervisory roles, and not new to the DCS system. They were not unfamiliar with the Respondent's computer system. They were long serving Employees, all having worked for the Respondent from the 1980s. The evidence of Paul Mugo, IT Officer, confirmed passwords were secure and confidential, and could only be used by other persons other than their holders, with the consent of the persons holding the passwords. There was a clear policy on the control of access to the Respondent's information system. User account password was supposed to be at least 8 in character length, comprising numeric and alpha-numeric characters. The password

was to be changed every 14 days, and any of the last 6 previous passwords, would never be reused. The policy was well dispersed, and the Claimants, in their positions as Supervisors, and being experienced Employees, would have no good reason to share their passwords with the Junior and Casual Employees.

21. Ultimately there is no doubt in the mind of the Court that the Claimants' Profiles were used in perpetrating the fraud against their Employer. They may not have actively been involved in the fraud, but again they may also have been involved. It was not material to this dispute, that the results of their signature analyses were never announced, and did not confirm they actually signed the Forms. It is not even relevant for purposes of establishing employment culpability, if they were charged with any criminal offences. The investigation carried out may not have revealed a criminal offence against the Claimants. There was however a case of negligence shown, over which the Respondent was entitled to summarily dismiss the Claimants under Section 44 [4] of the Employment Act 2007. The Respondent opted for other disciplinary sanctions.

22. The Respondent would be justified in taking action against the Claimants under Section 44[4] [c] of the Employment Act on negligence, if not under Section 44[4] [g]. The former requires an Employee not to wilfully neglect to perform any work which it was his duty to perform, or not to carelessly and improperly perform any work which from its nature it was his duty to perform under the contract, carefully and properly. This law creates a duty of care on the part of Employees to their Employers, in performance of their roles. Like negligence in torts, this form of negligence is based on the duty of care. The Respondent was able to show to this Court that the Claimant owed the Respondent a duty of care; they failed in exercise of that duty; and the result was that the Respondent suffered loss of its property to the tune of Kshs. 60 million.

23. The Court is satisfied that the Respondent proved the reason for termination. It established the existence and validity of termination reason under Section 43. There would be no reason to doubt that the Respondent genuinely believed there was fraud in its Stores, and that the Claimants' profiles were used in driving forward this fraud. The actions against the Respondent's materials in the various Stores, and the Claimants' negligence which facilitated these actions, led the Respondent to take the termination and early retirement decision against the Claimants. Termination under Section 43 was on established grounds, and therefore fair, and would not amount to unfair termination, under Section 45 of the Act.

24. **Was termination procedurally fair**" The Claimants suggest they were informed around 10th June 2008 by their Colleagues, about Issue Notes bearing their names being used to remove poles from the Stores by Contractors. They took action by informing their Supervisors. The Auditor's Report indicates investigations covered the period January to August 2008. The Report was prepared by November 2008. The Claimants recorded statements as the Audit was going on. They were called upon to show cause why disciplinary action should not be taken against them, after the Audit Report was out. It was not clear if the Claimants were availed copies of the Report, before being asked to explain themselves. The letter to show cause refers to the Audit Report. The Claimants refer to the Audit Report in their responses, although they testified in Court they were not availed the Report. They did however respond to the issues in the Report, and the presumption would be they had access to the contents of the Report.

25. They were suspended on 2nd February 2009. The Staff Regulations and Procedures provided that where the company deemed it expedient to suspend an Employee from duty pending investigations of a disciplinary offence, such suspensions would be on full pay for the first two months and half pay for the next two months, and thereafter no pay, until the case was finalized.

26. The Claimants were paid full salary for the months of February and March 2009, and half salary for the next two months of April and May. They were not paid any other salary for the months running from June to September 2009 when they left employment.

27. There was no evidence that after suspension, there were investigations on the disciplinary offences carried out, as prescribed under the Regulations and Procedures. The investigations, including recording of statements from the various Witnesses, and the preparation of the Audit Report, came before the suspension. The Claimants answered to the letters to show cause, in December 2008.

28. On 29th August 2009, about 8 months after the Claimants replied to the letters to show cause, a Committee of 8 Management Staff appointed by the Managing Director of the Respondent to look into the Auditor's Report, reported back to the Managing Director. The Committee sought approval of the Managing Director, to implement the proposed disciplinary sanctions against the Claimants. Approval must have been given, because on 2nd September 2009, the Respondent 'lifted' the Claimants' suspension, and on 3rd September 2009, imposed the disciplinary sanction as recommended, in the nature of early retirement and termination. Termination became effective from 4th September 2009.

29. There is no record seen by the Court of any formal disciplinary hearing extended to the Claimants, in the period after they wrote their answers to the letters to show cause why disciplinary action should not issue. There is no hearing in the manner envisaged under Section 41 of the Employment Act 2007. The 8 Person Committee states its mandate was to discuss the Auditor's Report; it was not to hear the Claimants. The Claimants did not appear, as far as the Court was able to scrutinize the records availed to it, before any Disciplinary Committee. It is to be drawn from this that the Respondent, in spite of its very meticulous collection of evidence preceding its final decision, did not hear the Claimants. The involvement of the Claimants with the investigations, their answer to the letter to show cause, would not amount to a hearing under Section 41 of the Employment Act. The process was lacking in fundamental procedural protections, and therefore unfair within the meaning of Section 41 and 45 of the Act.

30. In examining what **appropriate remedies** to grant to the Claimants, the Court has looked at the sanctions issued against the Claimants by the Respondent. Some of the Claimants prefer reinstatement, above other remedies. Some testified they do not wish to be reinstated. The Court is of the view that in light of its finding on substantive justification, reinstatement would not be a reasonable remedy. For an order or reinstatement to issue, it is important that the Parties are shown to be capable of restoring the cornerstone elements of trust and confidence, in the employment relationship. Where an Employer credibly alleges its former Employees were so negligent in the performance of their roles, as to expose the Respondent to a monumental loss of Kshs. 60 million worth of materials, it becomes hard to see how trust and confidence could be rebuilt. Secondly, reinstatement would not be a practicable remedy, at least in the case of 5 of the Claimants who were retired early. This is because they were all close to the mandatory retirement age under their respective contracts of employment, of 55 years. They stated on occasion, that the mandatory retirement age was 60 years, but offered no document varying the age of 55 years under their contracts. They were already in their 50s, in the year 2009 when they left employment, and would either have attained the mandatory retirement age of 55 years today, or be approaching that age. Their contracts cannot practicably be restored, without upsetting the contractual clause on mandatory retirement age. **The prayer for reinstatement is neither reasonable nor practicable, and is rejected.**

31. They seek service pay at the rate of 15 days' salary for every completed year of service. Upon termination of the contracts, the Respondent offered to pay to the Claimants 1 month salary in lieu of notice; salary up to and including the 4th September 2009; and accumulated leave. PART IV of the Staff Regulations and Procedures entitled Employees who were retired early, to *3 months' salary in notice*

pay; pension at current age plus lumpsum; and 15 days' salary for each year worked. The Respondent, paid the items listed in the letters of termination and early retirement. It did not give the Court an explanation why it opted to pay the Early Retirees outside the terms of the Staff Regulations and Procedures. **The Court grants the 5 Claimants who were retired early 15 days' salary for each year worked in accordance with the Staff Regulations and Procedures.** The Claimants testified they received their pension. Nothing turns on the pension. They were paid the accumulated annual leave days. Some of the Claimants pray for 2 months' salary in notice pay. They were paid 1 month salary in lieu of notice. The 5 Claimants, who were retired early, would be entitled to 3 months' gross salary in notice pay, as per the Staff Regulations and Procedures. The 2nd Claimant was indeed paid 3 months' gross salary as notice pay, and it was not made clear by the Respondent, why the other early retirees were treated differently. **The remaining 4 Claimants, who were retired early are entitled to, and granted the balance of 2 months' gross salary as notice pay, in accordance with the Staff Regulations and Procedures.** The 5th Claimant did not leave employment on early retirement and did not provide the Court with any basis to grant him 3 months' salary in notice pay. The contract granted him 1 month salary in lieu of notice, which was paid to him. The Court similarly has no justification in granting him service pay at the rate of 15 days' salary for every year worked. This was only payable on early retirement. His contract was terminated under clause 13 of his contract. There was no provision for 15 days' salary for every year worked, under clause 13. He was subscribed to the NS.S.S.F and would not merit the payment under Section 35 [6] of the Employment Act. The 5 Claimants however left under specific Staff Regulations and Procedures meriting 15 days' salary for every year completed in service, and cannot be denied of 15 days' salary for every year completed in service.

32. The Respondent suspended the Claimants on 2nd February 2009. Relying on the clause regulating suspension in the Staff Regulations and Procedures, the Respondent paid to the Claimants full salary for the first 2 months of February and March 2009, and half salary for the next 2 months of April and May 2009. Thereafter, from June to August 2009, the Claimants were not paid any salary. The Respondent technically lifted suspension on 2nd September 2009, and terminated the Claimants' contracts effective from 4th September 2009. The letters of termination and early retirement advised the Claimants they would be paid "salary up to and including the 4th September 2009." The Respondent seems to have paid the Claimants salary for the 4 days in September 2009, but did not pay for the period April to August 2009, which arrears the Claimants demand they should be paid.

33. Are Employees on suspension entitled to receive emoluments that are withheld during the period of suspension pending finalization of the disciplinary outcome" The Court's understanding of the practice of withholding of Employee's emoluments during the disciplinary process is that this is meant to be a procedural practice, not an imposition of a disciplinary penalty. This practice on close scrutiny, indeed has no foundation in the Employment Act. It has no legal validity. The only provision of the Law under the Employment Act 2007, which allows Employers not to pay Employees whose contracts of Employment have not been terminated their wages, is Section 18 (6) of the Employment Act 2007. It states, "No wages shall be payable to an Employee in respect of a period during which the Employee is detained in custody or serving a sentence of imprisonment imposed under any Law." Section 19 which allows for deduction from wages, does not have any provision which would permit an Employer to deduct any money from the Employee or withhold any money, as a disciplinary step or sanction. The other provision of the Law through which an Employee may become dis-entitled to his salary is Section 80 (1) (b) of the Labour Relations Act 2007. This Section states that an Employee who takes part in, calls, instigates, or incites others to take part in a strike that is not in compliance with the Act, is deemed to have breached the contract 'and is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.' The Claimants were neither detained in custody, nor serving imprisonment imposed under any law, nor engaged in an unprotected strike, in the period between 2nd February 2009 and 4th September 2009, so as to be denied their

salaries. It is difficult to justify the practice, as there is no specific legal provision under the Employment Act 2007, suggesting an Employee whose contract of employment is still running, should forfeit his monthly salary while on preventive or administrative suspension.

34. In the instant case the Staff Regulations and Procedures made it possible for the Employer to completely withhold the salary of Employees who were still in employment, albeit suspended. Such Regulations are antiquated and out of tune with the modern employment law and practice. They violate Part IV of the Employment Act, on protection of wages. They also violate Article 41 of the Constitution on the right to fair labour practices. It is no longer acceptable to suspend an Employee as a holding action, pending the outcome of the disciplinary process, without pay.

35. Part IV of the Employment Act 2007 protects the emoluments of an Employee. As long as the Employee's contract remains in place, there is no reason to deny the Employee his salary. A salary should have no penal element. It is not part of the disciplinary sanctions against the Employee. The only case where forfeiture of salary may be justifiable, other than the instances given under the Employment Act and the Labour Relations Act, is where after a disciplinary process, the Employer imposes the sanction of suspension on the Employee. The mutual obligations in the employment relationship become suspended. In effect, the Employee's contract is terminated for a period of time as a disciplinary sanction, during which the Employer has no obligation to continue paying the salary, and the Employee has no obligation to give his labour to the Employer. The Employee is effectively reinstated at the end of the penal suspension. Administrative suspensions however, should not result in the imposition of a pecuniary sanction against the Employee. The administrative suspension should be distinguished from the penal form of suspension.

36. The Respondent seems to have equated the suspension to a temporary termination. This is borne out by the technical lifting of the suspension a day before termination. The Respondent appeared to be saying that since the Claimants were under suspension, they ceased to be its Employees at least from June 2009, when their emoluments were completely withdrawn. These are actions and practices that have no support in modern employment law. The contracts of employment were still very much alive. The Claimants remained Employees of the Respondent until 4th September 2009. Their emoluments still enjoyed the protection of Part IV of the Act. How would they go about their daily lives, or even meaningfully participate in the disciplinary process, without any income"

37. The Respondent assured the Claimants in the letters of termination, that they would be paid their salaries *"up to and including 4th September 2009."* Section 18 (4) of the Employment Act demands that even in cases of summary dismissal, the Employee shall be paid all monies, allowances and benefits due to him up to the date of his dismissal. There is no longer any legal support for Employers to deduct from the Employees' wages, or withhold the Employees wages, as a disciplinary imposition. The Claimants were not paid any form of salary for 3 months, which was harsh, unconscionable and bad labour practice. ***The Court grants that each Claimant shall be paid half his salary for the month of April and May 2009, and full salary for the month of June, July, and August 2009.***

38. The decision to retire the 5 Claimants early, and to terminate the 5th Claimant's contract, was fair on substantive justification as seen above, but unfair on procedure. It must also be appreciated that early retirement is not traditionally a disciplinary sanction, but a decision made voluntarily by the Employee, or taken by the Employee with the consent of the Employer. Early retirement could for instance be taken through an early retirement plan designed by the Employer, or taken because an Employee is ill and incapacitated, or taken under a contractual clause. It was not intended as a disciplinary sanction in the Staff Regulations and Procedures of the Respondent. The Regulations and Procedures state early retirement is given to facilitate improvement of the organization of the department to which the Employee

belongs, to attain greater efficiency. It is more of a termination induced by operational requirement of the Employer as contemplated under Section 45 [2] [b] [ii]. It was therefore not really intended by the Parties as a disciplinary sanction. It was however adopted by the Respondent as an alternative to disciplinary sanction, a soft landing for the 5 Claimants, or as a plain disciplinary sanction in particular seen against the background leading to the decision. Having resorted to this form of termination of employment, the Respondent had an obligation to pay to the 5 Claimants, all the benefits extended to them under the Staff Regulations and Procedures relating to early retirement. This was not done, the Respondent instead coming up with its own formula for payment, outside the Regulations and Procedures. Whatever was in the mind of the Respondent, early retirement resulted in termination of employment, bringing into play the contractual provisions governing early retirement, and the law of termination contained in Section 41, 43 and 45 of the Act, as well as the remedial law under Section 49 of the Employment Act, as read together with the Section 15 of the Labour Institutions Act 2007 which was in force at the date of termination.

39. On the ground that the termination and early retirement decisions were procedurally flawed, the Court grants each Claimant 6 months' gross salary in compensation.

40. The Parties shall bear their own costs of the litigation, and the amounts granted shall not attract interest.

In sum, *the COURT ORDERS:-*

a. **Termination of the Claimants' contracts of employment was based on fair and valid grounds, but unfair on procedure.**

b. **The prayer for reinstatement is declined.**

c. **The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimants the following amounts-**

1st Claimant, Peterson Ndung'u

- **6 months' gross salary in compensation for unfair termination at Kshs. 589,392.**
- **Half salary for the months of April and May 2009, and full salary for the months of June, July and August 2009 at Kshs. 392,298.**
- **2 months' gross salary as the balance of notice pay at Kshs. 196,464.**
- **15 days' salary for 27 years completed in service at Kshs. 98,232 divide by the maximum 26 working days in a month = Kshs. 3,778 x 15 = Kshs. 56,672 x 27 = Kshs. 1,530,152.**

In total, the 1st Claimant be paid Kshs. 2,708,306.

2nd Claimant, Stephen Gichaga Gituro

- 6 months' gross salary in compensation for unfair termination at Kshs. 835,800.
- Half salary for April and May 2009 and full salary for June, July and August 2009 at Kshs. 557,200.
- 15 days' salary for 27 years completed in service at Kshs. 139,300 divide by a maximum 26 working day in a month = Kshs. 5,357 x 15 days = Kshs. 80,365 x 27 = Kshs. 2,169, 865.

In total, the 2nd Claimant be paid Kshs 3,562,865.

3rd Claimant, Nicholas Ojwang'

- 6 months' gross salary in compensation for unfair termination at Kshs. 612,348.
- Half salary for April and May 2009 and full salary for June, July and August 2009 at Kshs. 408,232...
- 2 months' gross salary as the balance of notice pay at Kshs. 204,116.
- 15 days' salary for 29 years completed in service at Kshs. 102,058 divide by a maximum of 26 working days in a month = Kshs. 3,925 x 15 days = Kshs. 58,879 x 29 years = 1,707,508.

In total, the 3rd Claimant be paid Kshs. 2,932,204.

4th Claimant, Peter Kariuki.

- 6 months' gross salary in compensation for unfair termination at Kshs. 610,332.
- Half salary for April and May 2009 and full salary for June, July and August 2009 at Kshs. 406,888.
- 2 months' gross salary as the balance of notice pay at Kshs. 203,444.
- 15 days' salary for 29 years completed in service at Kshs. 101,722 divide by a maximum of 26 working days in a month = Kshs. 3,912 x 15 days = Kshs. 58,685 x 29 years = Kshs. 1,701,188.

In total, the 4th Claimant be paid Kshs. 2,921,852.

5th Claimant, Joseph M. Kyavi.

- 6 months' gross salary in compensation for unfair termination at Kshs. 438,444.
- Half salary for April and May 2009 and full salary for June, July and August 2009 at Kshs. 292,296.

In total, the 5th Claimant be paid Kshs. 730,740

6th Claimant, James Kimani.

- 6 months' gross salary in compensation for unfair termination at Kshs. 621,204.
- Half salary for April and May 2009 and full salary for June, July and August 2009 at Kshs. 414,136.
- 2 months' gross salary as the balance of notice pay at Kshs. 207,068.

- 15 days' salary for 24 years completed in service at Kshs. 103,534 divide by a maximum of 26 working days in a month =Kshs.3,982 x 15 days = Kshs. 59,731 x 24 years = Kshs. 1,433,547.

In total, the 6th Claimant be paid Kshs. 2,675,955.

d) No order on the costs and interest.

Dated and delivered at Nairobi this 23rd day of July 2014

James Rika

Judge



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