



**Ojala v Kenya Power and Lighting Company PLC (Petition
E175 of 2021) [2024] KEELRC 2016 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2016 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E175 OF 2021**

BOM MANANI, J

JULY 25, 2024

BETWEEN

PAUL REGE OJALA PETITIONER

AND

KENYA POWER AND LIGHTING COMPANY PLC RESPONDENT

JUDGMENT

Background

1. The dispute before court relates to whether the Respondent's decision to terminate the Petitioner's contract of service was unfair. On the one hand, the Petitioner contends that the decision was unfair. On the other, the Respondent contends that the decision was substantively and procedurally fair.

Petitioner's Case

2. The Petitioner avers that he was employed by the Respondent in 1988 and had served the latter for over thirty (30) years when his contract of service was terminated. He contends that his exit gross monthly salary was Ksh. 224,904.
3. The Petitioner contends that on 12th June 2020, he received a letter from the Respondent asking him to account for an incident in which a member of the public was electrocuted allegedly because of his (the Petitioner's) negligence in performing his duties. He contends that the Respondent gave him seventy two (72) hours to tender the explanation.
4. The Petitioner contends that although the time for providing his response was not sufficient to enable him gather full particulars on the incident, he nevertheless tendered an explanation in respect of the occurrence. According to him, he was out attending to another emergency when the incident occurred. As such, he was not to blame for the lapse that led to the occurrence.



5. The Petitioner states that on the day when the incident occurred, he had left another employee to attend to emergency reports at the emergency desk. He contends that this employee was expected to have periodically notified him of any emergencies that were reported and which required his immediate attention to enable him address them. However, he did not get a report on the incident that resulted in the electrocution.
6. The Petitioner contends that despite giving a comprehensive response to the Respondent's management over the incident, the latter convened a disciplinary session for him in respect of the occurrence. He avers that the Respondent accused him of failure to supervise its emergency desk and act on reported emergencies thus resulting in the incident in question.
7. The Petitioner accuses the Respondent of having convened the disciplinary session before sharing with him information on the incident. He contends that although there was indication that some investigations on the incident had been conducted, he was neither supplied with a copy of the investigation report nor the statements which were recorded from witnesses. As a consequence, he avers that he was deprived of the opportunity to adequately respond to the accusations against him.
8. The Petitioner contends that the manner in which the Respondent handled the disciplinary process violated the law, the Constitution and its own Staff Regulations and Procedures. He contends that besides not being supplied with copies of witness statements and the investigation report, the Respondent allowed the investigator to interrogate him as if he was a member of the Disciplinary Panel. Thus, he contends that the process was a sham and unlawful.
9. The Petitioner contends that although he was allowed to challenge the results of the disciplinary case on appeal, the Appeals Committee did not consider new evidence which he presented before it. As such, he did not get a fair hearing on appeal.

Respondent's Case

10. On its part, the Respondent avers that the Petitioner failed to adequately supervise staff within the emergency department resulting in the electrocution incident. The Respondent accuses the Petitioner of having failed to monitor reports relating to emergency incidents and ensure they were prioritized for action. The Respondent contends that this lapses were occasioned by the Petitioner's perennial absence from his workstation.
11. The Respondent contends that the Petitioner was accorded a fair process before his contract of service was terminated. It avers that it issued him with a notice to show cause to which he responded. It further contends that the Petitioner was taken through a disciplinary hearing where he was allowed to call witnesses if he wished. It avers that the Petitioner was permitted to appeal against the decision of the Disciplinary Committee and the appeal was heard in full. Thus, the Respondent contends that it complied with both the substantive and procedural requirements in the disciplinary process.

Issues for Determination

12. After evaluating the pleadings and evidence on record, it is apparent that the following are the issues that require determination:-
 - a. Whether the Respondent's decision to terminate the Petitioner's contract of service was processed in accordance with the law.
 - b. Whether the Petitioner is entitled to the reliefs that he seeks through the Petition.



Analysis

13. From the evidence on record, there is no dispute that there was an incident which occurred on 14th May 2020 within Majiwa area in Siaya which resulted in the death of a member of the public through electrocution. It is also apparent that the electrocution was occasioned by an electric fault in the Respondent's electricity supply chain.
14. The initial information suggests that the incident occurred as a result of a sagging electricity pole. However, the Petitioner contends that the sagging electricity pole had been fixed and the incident was as a result of a broken electric conductor which he had not been notified about.
15. Whatever the actual cause for the unfortunate occurrence, the Respondent's case was that the faults had been reported to the emergency desk by members of the public. It is also apparent that the emergency desk fell under the Petitioner's docket. As such, it was expected that the Petitioner would attend to the faults by allocating staff to address them in order to avert accidents including the electrocution.
16. The Respondent's position is that the accident occurred because the Petitioner failed to monitor the incidents that were reported at the emergency desk on regular basis. As such, they were not addressed timeously.
17. On his part, the Petitioner argues that on the material day, he had left a member of staff to attend to the emergency desk and update him on urgent matters. However, the member of staff failed to notify him of the incident which resulted in the electrocution.
18. There is however evidence which suggests that the Petitioner was required to constantly monitor what was going on at the emergency desk through physical visits to the desk, online checks and telephone calls to staff who were manning the desk. However, he had failed to do so.
19. For instance, it was indicated that the Petitioner did not collect a password which would have enabled him to access the system remotely. As a result, he could not access the system to monitor the emergencies that were reported and act on them. Yet, it was his responsibility to ensure he had access to the system.
20. During the hearing before the Disciplinary Committee, the Petitioner conceded that he did not follow up to ascertain whether the incident of the sagging pole had been addressed to stall the possibility of accidents such as the electrocution which happened. Yet, investigations into the incident attributed the accident to electric conductors that were lying on the ground following the collapse of a rotten electric pole which the emergency department had failed to fix in time.
21. In my view and having regard to the evidence on record, it is apparent that the electrocution incident was attributable to the Petitioner's failure to diligently supervise the emergency report desk. As such, I am satisfied that the Respondent had legitimate grounds to consider terminating his contract.
22. Even if I am wrong in the above analysis, the evidence before the Disciplinary Committee was sufficient to provide a reasonable basis for the Respondent to entertain a genuine belief that the Petitioner had failed to act on the incident thereby resulting in the electrocution of a member of the public. This is all that an employer needs to establish in terms of section 43 of the *Employment Act* before he can terminate an employee's contract of service (*Kenya Revenue Authority v Renwel Waitbaka Gitabi & 2 others* [2019] eKLR).



23. Although the Respondent had valid reason to consider terminating the Petitioner's employment, it was incumbent on it to ensure that the decision to terminate the contract was processed in accordance with fair procedure. The evidence on record shows that it (the Respondent) failed in this respect.
24. Part VII of the Respondent's Staff Regulations and Procedures Manual requires infractions by employees to be subjected to investigations before they can be escalated into disciplinary cases. There is evidence that the Petitioner's case was subjected to an investigation in line with this requirement. Indeed, the Respondent's witnesses confirmed this fact during their oral testimony before court.
25. Article 47 of the *Constitution* entrenches the right to fair administrative action. This right is operationalized through the *Fair Administrative Action Act*.
26. Section 4 (3) (g) of the aforesaid *Act* obligates a person who proposes to make an adverse decision or take administrative action against another to share with the person who is likely to be affected by the decision or action all information that is relevant to the process beforehand. As such, the Respondent was under obligation to share copies of the investigation report and witness statements with the Petitioner before it convened the disciplinary session against him.
27. The record does not show that this was done. The failure to discharge this duty compromised the Petitioner's right to adequately prepare his defense to the accusations that he faced.
28. Thus, I arrive at the conclusion that although the Respondent had valid grounds to consider terminating the Petitioner's contract of service, it failed to process his release from employment in accordance with fair procedure. As such, I declare that the decision to terminate the Petitioner's contract was procedurally flawed.
29. The next issue to be considered relates to whether the Petitioner is entitled to the reliefs that he seeks through this Petition. As indicated above, the court has already declared the Respondent's decision to terminate the Petitioner's contract of service as procedurally flawed and therefore unfair.
30. The foregoing being the case, the Petitioner is entitled to compensation for the unfair termination of his employment in terms of section 49 of the *Employment Act*. However, the court is obligated to consider various factors in assessing the quantum of compensation to award. These include the extent to which the employee's conduct contributed to the employer's decision to terminate his contract.
31. In the instant case, it is apparent that the Petitioner's omissions were the reason why his employment was terminated. But for the procedural flaws that I have alluded to above, the Respondent was legitimately entitled to end the relation between the parties.
32. Having regard to the aforesaid, I am minded to award the Petitioner minimal compensation to vindicate his right to procedural fairness which was not upheld. As such, I award him compensation that is equivalent to his salary for two months, that is to say Ksh. 224,904 x 2 = Ksh. 449,808.00.
33. This award attracts interest at court rates from the date of this decision and is subject to the applicable statutory deductions.
34. I award the Petitioner costs of the Petition.

Summary of the Award

35. The Respondent's decision to terminate the Petitioner's contract of service is declared as procedurally flawed and therefore unfair.



36. The Petitioner is awarded compensation for the unfair termination of his contract of service in the sum of Ksh. 449,808.00.
37. The award attracts interest at court rates from the date of this judgment.
38. The award is subject to the applicable statutory deductions.
39. Costs of the case are granted to the Petitioner.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF JULY, 2024.

B. O. M. MANANI

JUDGE

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

