



Nyaga v Kenya Power & Lighting Company Limited (Civil Appeal E131 of 2021) [2024] KECA 1036 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 1036 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E131 OF 2021
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
APRIL 26, 2024**

BETWEEN

JOHN WANJOHI NYAGA APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

(Appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nyeri (Marete, J.) dated and delivered on 30th June, 2021 in ELRC Cause No. 35 of 2019)

JUDGMENT

1. The appellant, John Wanjohi Nyaga, was at all material times an employee of the respondent, Kenya Power and Lighting Company Limited. He was employed as a Technician Grade II on 3rd of October 1994. By the time of his termination from employment on 24th May 2018, he had been promoted to the position of Senior Technician I. According to the memorandum of claim lodged by the appellant before the Employment and Labour Relations Court (ELRC), the appellant alleged that he was terminated from employment under unjustified and unfair circumstances. In particular, he complained that the basis of the alleged misconduct that led to his termination from employment was not proved or established to the required standard. The appellant contended that he was not accorded fair hearing and/or given an opportunity to defend himself before he was dismissed from employment.
2. In the premises therefore, the appellant urged the ELRC to declare that the disciplinary proceedings that led to his termination from employment were wrongful and did not meet the legal threshold. He further prayed that he be reinstated back to employment or in the alternative, he be paid general damages for wrongful dismissal from employment. He also asked the court to award him costs of the suit.
3. When the respondent was served with the memorandum of claim, it duly entered appearance and filed a memorandum of response. In the said response, the respondent denied the appellant's claim that he



had been wrongfully terminated from employment. To the contrary, the respondent averred that it had terminated the appellant from employment after it had been established that the appellant had, without the authority of the respondent, used the respondent's company resources to construct an illegal power line, and further ferried concrete poles to a site without the respondent's authority. The respondent stated that, as a result of the appellant's unlawful action, eighteen (18) concrete poles went missing.

4. It was for this reason that the appellant was subjected to a disciplinary process, according to the respondent's laid down disciplinary procedure, which led to the appellant's termination from employment. The respondent denied the appellant's claim that he was not given a hearing before the decision to terminate him from employment was made. The respondent insisted that the appellant was terminated from employment after the due disciplinary process was followed. In the premises therefore, the respondent urged that the appellant's claim to be dismissed with costs, because the appellant was not entitled to any of the remedies that he had sought in his claim.
5. After hearing the parties, including considering the documentary evidence and the written submissions presented before him, the learned Judge of the ELRC (D. K. Marete, J.), dismissed the appellant's claim. At the material part of his judgment, the learned Judge stated thus:

“The claimant's case above does not take into account that he was taken through disciplinary proceedings at the work place. The issues now raised were available as a defence and even on appeal, if he chose to. Disciplinary proceedings are elementary in nature. They are never intended to carry the facilities of a trial as in this case. The defence is, therefore, not available to the claimant or it was not raised at the appropriate forum. A case of unlawful termination of employment, therefore, does not arise. A look at the respective cases of the parties brings out a case in favour of the respondent. Her case overwhelms that of the claimant. She demonstrates a clear situation where the termination of the employment pursued all legal procedure in so doing. At all times, the claimant was alerted of the reasons for disciplinary process and allowed time to answer and walk through the process. He never raised the denial now expressed in defence”.

6. The appellant was aggrieved by this decision. He filed an appeal to this Court. In his memorandum of appeal, the appellant raised four (4) grounds of appeal challenging the decision of the trial court. He complained that the trial court had failed to appreciate the issues before it and proceeded to determine issues of its own. The appellant was aggrieved that the trial court had failed to take into consideration the relevant Employment and Labour laws and thus arrived at an erroneous decision. The appellant faulted the trial court for failing to give legal and sound basis for its verdict. The appellant finally faulted the trial Judge for being overly influenced by the disciplinary proceedings instituted at the instance of the respondent and not on the merits of the claim which led him to consider irrelevant considerations. In the premises therefore, the appellant urged the court to allow the appeal and grant the prayers that he had sought in his claim.
7. Prior to the hearing of the appeal, both the appellant and the respondent filed written submissions in support of their respective cases. The appellant stated that the trial Judge erred in failing to take into consideration the fact that the respondent called no witnesses to challenge the appellant's serious assertion that he had been wrongfully terminated from employment. In particular, he submitted that no documentary evidence was produced by the respondent to establish the claim that the appellant had been warned before disciplinary proceedings were commenced against him. The appellant reiterated that under Section 47 (5) of the *Employment Act*, 2007, the respondent was required to bring witnesses to establish the fact that the appellant was lawfully terminated from employment. The appellant



- further submitted that he was not accorded a fair hearing because he was not given ample opportunity to present his case or his side of the story.
8. The appellant accused one Bernard Ambaka of being a witness, investigator, prosecutor and judge in the disciplinary proceedings that were instituted against him by the respondent. The appellant complained that the trial court failed to take into consideration clear evidence which showed that the appellant was not given a fair hearing and that the resultant decision to terminate him from employment was, therefore, unlawful and should be set aside by this Court.
 9. The appellant urged the court to award him appropriate remedies as provided under Section 49 of the [Employment Act](#) and particularly that he should be reinstated back to employment or in the alternative be paid general damages for unlawful dismissal. These submissions were relied upon by the appellant during the plenary hearing of the appeal.
 10. On its part, the respondent asserted that the appellant breached the terms of his employment by illegally connecting a power line to a customer using the respondent's company's resources. The customer was supposed to pay the sum of Kshs.521,079 for the connection but ended up paying less after colluding with the appellant to have the electricity illegally connected to his premises. The power connection was not authorised by the respondent. When the respondent became aware of this misconduct, it commenced disciplinary proceedings against the appellant. All the requirements pertaining to fair hearing procedures were followed. The respondent commenced investigations which established that the appellant had breached his terms of employment. It commenced the disciplinary process.
 11. The appellant was given every opportunity to explain his conduct and defend himself. The appellant availed himself to the Appeals Tribunal constituted by the respondent. The respondent reiterated that the appellant was lawfully terminated from employment and was not entitled to any of the prayers sought in his memorandum of claim. The respondent urged the Court to dismiss the appeal. During plenary hearing the respondent relied on its written submissions.
 12. This is a first appeal. We are under an obligation to re-consider, re-assess and re-evaluate the evidence that was adduced before the trial court and, thereafter, independently reach our determination whether or not to uphold the decision of the trial court. In doing so, we are required to always bear in mind that we neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See *Kenya Airports Authority vs Kuston (Kenya) Ltd* [2009] 2EA 212).
 13. In the present appeal, there is really only one issue for determination: was the appellant lawfully terminated from employment by the respondent? Was the trial court justified in reaching the conclusion that it did in light of the evidence that was presented before that court?
 14. The following facts were not in dispute. The appellant was at the material time an employee of the respondent. At the time of his termination from employment, he had worked for the respondent for a period of twenty-four (24) years. He had been promoted so that by the time of his dismissal he had attained the rank of Senior Technician 1. This position accorded him additional responsibilities which included supervising other technicians during works which entailed connection of power to new customers' premises. He also had the authority to sign the paperwork for the power connection to be made.
 15. The appellant worked in Maralal, Samburu County at the material time. A customer by the name Fred Lenges made an application to have power connected to his premises. He was given a quotation of Kshs.521,079 which he was required to be paid before power could be connected to his premises. The customer did not pay this amount. The respondent later discovered that power had illegally been



- connected to the said customer's premises at the instance and supervision of the appellant. When the appellant was confronted and asked why he had connected power without the respondent's authority and before the respondent paid for the connection, the appellant blamed one Agunda for the entire decision to install power at the said customer's premises.
16. Although the appellant's denies that he was involved in the decision to illegally connect power to the said customer's premises, our re-evaluation of the evidence, including the authorization documents signed by the appellant himself, lead us to the same conclusion at the trial court that indeed, the respondent was justified in concluding that the appellant had authorized the said illegal connection of power to the said customer's premises, contrary to the procedures put in place by the respondent.
 17. The appellant was aware of the procedure, which, inter alia, required that a quotation had to be procured first, then payment made, before a new customer was connected to the power grid. The appellant short-circuited this process. We are not persuaded by the appellant's assertion that he did so under someone else's instruction. If this were the position, he would have had no difficulty in availing this evidence to the disciplinary panel when he was summoned to appear before it. He failed to provide such evidence.
 18. As regards the claim by the appellant that he was not accorded fair due process, on our re-evaluation of the evidence adduced before the trial court, it was clear to us that the appellant's was afforded the opportunity to present his side of the story before he was terminated from employment; the respondent issued a notice to show cause letter to the appellant to explain why he should not be subjected to the disciplinary process; he was given an opportunity to answer to the charges once the disciplinary committee was constituted; he was given ample time to prepare and present his defence; he even took advantage of the appeal process put in place by the respondent.
 19. In all these instances, the appellant took the curious position that it was someone else who did the illegal connection and that he had been singled out of vendetta by a senior employee of the respondent. He did not provide evidence of such vendetta or grudge even when he appeared before the Appeal Tribunal established by the respondent. The Tribunal begged the appellant to give his true side of the story but he failed to take up the opportunity that was availed to him. We hold that the disciplinary process commenced against the appellant by the respondent that resulted in his termination from employment substantially accorded with the requirements of Section 41 of the [Employment Act, 2007](#).
 20. In *Mary Wagikuyu Komu –v- The Kenya Hospital Association t/a Nairobi Hospital [2016] eKLR* it was held thus:

“The procedural fairness set out under Section 41 of the [Employment Act, 2007](#) are fulfilled by asking an employee facing disciplinary action to respond to a notice to show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegation levelled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided.”
 21. In the present appeal, it was clear to us that the appellant chose to adopt the strategy not to respond directly to the charges laid against him by the respondent by blaming others for his travails even when he was given the opportunity to do so in the hope that somehow the disciplinary process would be impeached by the court when he appeared before it. That strategy failed. We hold that the respondent afforded the appellant all the opportunities to explain and exonerate himself before the decision was made to terminate him from employment. The respondent established that the appellant abused the position of trust placed upon him by using the respondent's resources to the detriment of the respondent's financial position. We hold that the appellant was lawfully terminated from employment.



22. The appellant is not entitled to the prayers sought in his memorandum of claim. His appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

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