



**Kitema v Kenya Power and Lighting Company Limited (Civil Appeal
453 of 2018) [2022] KECA 859 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 859 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 453 OF 2018
K M'INOTI, S OLE KANTAI & KI LAIBUTA, JJA
JUNE 10, 2022**

BETWEEN

PAUL KITEMA APPELLANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED RESPONDENT

*(Being an appeal from the Judgment of the Employment and Labour Relations Court of
Kenya at Nairobi (Makau, J.) dated 2nd November, 2018 in ELRC Cause No. 747 of 2015)*

JUDGMENT

1. Paul Kitema (the appellant) was employed by Kenya Power and Lighting Company Limited (the respondent) in or about 1991 as a clerk. He served in that position for many years during which there were allegations of absenteeism and other acts of misconduct (which he denied) but by a letter dated 27th February, 2015 his services were terminated, it being stated that he had refused to accept or receive letters written to him regarding misconduct. He appealed those decisions but the appeals were dismissed by the respondent.
2. In a suit filed at the Employment and Labour Relations Court (ELRC) at Nairobi, the appellant claimed that the termination of his employment was unfair; he prayed for reinstatement; payment for work done in February to April, 2013, a remedy for unfair dismissal; and a Certificate of Service. Apart from the prayer for reinstatement and award of a Certificate of Service the claim was summarized as follows in the Memorandum of Claim:

“remedy for unfair dismissal in the sum of Ksh.2,200,000; unpaid salary from February to April 2015 Ksh.412,307.91 and payment in lieu of notice for 4 months Ksh.327,333.60.”
3. There was a prayer for costs and interest.



4. The respondent delivered a Memorandum of Response where it denied the claim and wondered why Haid Yusuf, its Manager who had authored the termination letter had been made a party to the suit. It was stated in the said response that the appellant's employment was governed by a Collective Bargaining Agreement entered into between the respondent and a workers union (Kenya Electrical Trades and Allied Workers Union); that the appellant had been asked to show cause why disciplinary action should not be taken against him for absconding duty; that the appellant had refused to accept that letter and other letters written to him by the respondent and even refused to attend meetings called to discuss his disciplinary issues; as a result those meetings were held in his absence and were attended by Union officials; it was for those reasons that the appellant's employment was terminated and his appeal was dismissed and his terminal dues tabulated.
5. The suit was heard by Makau, J. who took the evidence of the appellant and that of witnesses called by the respondent. In a Judgment delivered on 2nd November, 2018 the learned Judge found that the dismissal of the appellant was substantially unfair and 3 years had since lapsed since the date of dismissal. The Judge then entered Judgment for the appellant for salary in lieu of notice 4 months (KSh.422,333.60); 12 months compensation for unfair dismissal (KSh.1,267,000,80); and unpaid salary (KSh.36,548.10), making in all KSh.1,725,882.50 with costs and interest.
6. The appellant is unhappy with those findings and in the Memorandum of Appeal drawn for him by his lawyers M/S Ngala Morara & Company Advocates where 11 grounds of appeal are taken, it is stated that the Judge erred in law in not finding that by the time the appellant filed the claim the remedy of reinstatement was available to him; that the court erred by failing to find that as long as the matter remained in court, time could not run against the appellant; that the Judge erred in failing to exercise a discretion and order reinstatement. Grounds 5, 6 and 7 in the Memorandum of Appeal are not easy to follow – it is alleged that the matter proceeded undefended on 21st March, 2017 and closed at 11.45 a.m. and that evidence taken thereafter was a nullity; that the trial court erred in disallowing fresh documents filed in the middle of the case after the appellant had closed his case; that documents were admitted into evidence after the appellant had closed his case. The appellant also complains that the respondent was granted many adjournments and finally, at ground 11:

“The learned Judge erred and misdirected himself in failing to find that the appellant could not seek determination of the matter within a specific time frame without being accused of interfering with the normal court processes, hence should not be blamed or suffer prejudice for a judgment not read before a specific date.”
7. It is therefore prayed that the Judgment and decree of the trial court be set aside and be substituted for an order for reinstatement of the appellant to his previous position or re-engagement to an equivalent job without loss of continuity of service, back salaries, allowances and other accrued benefits and costs be awarded here and below.
8. When the appeal came up for hearing before us on 2nd March, 2022 on a virtual platform, Mr. Cosmas Ngala, learned counsel, appeared for the appellant while learned counsel, Mr. Wilberforce Akello appeared for the respondent. Both parties had filed written submissions and in an oral highlight learned counsel for the appellant submitted that the claim at ELRC was filed within the 3 year period contemplated by statute and that reinstatement should have been ordered.
9. Mr. Akello submitted that reinstatement could not be ordered as 3 years had lapsed since the appellant's employment had been terminated. Counsel cited Section 49 of the *Employment Act* on factors to be considered by a trial court in ordering reinstatement and submitted that the trial Judge had considered those factors.



We have considered the whole record, submissions made and the law.

10. As we have seen, the trial Judge found in favour of the appellant, finding that termination from employment was unfair. The Judge considered the circumstances obtaining in the matter and found that ordering reinstatement was not a suitable remedy. The Judge gave the appellant maximum compensation envisaged by statute amongst other remedies that were awarded.
11. Looking at the Memorandum of Claim, the main prayer made was for reinstatement. The other prayers made were in the alternative. The Judge refused the prayer for reinstatement but granted the prayers made in the alternative. The Judge used his discretion in declining the main prayer but granted the other prayers. The record does not show a reputable service by the appellant when he was an employee of the respondent. At one time he was even dismissed from employment but he was reinstated for what is stated by the respondent to be to give the appellant “another chance”. One of the witnesses called by the respondent was Fidelis Matuthia, an employee of the respondent, who was also a union official and the Union’s Shop Steward. He stated that as Shop Steward his role included advocating employees’ rights, receiving complaints regarding employee relations and representing employees in industrial negotiations and employee welfare issues. He testified that he had been approached by managers of the respondent to try to persuade the appellant about changing his attitude to work but that this had failed.
12. The appellant had even refused to accept a letter regarding his disciplinary issues issued by the respondent; that the appellant often absconded duty and:

“THAT despite numerous persuasions by myself, Union Officials and other employees including one Mr. Mbuvi, the Claimant refused to accept or acknowledge receipt of the said explanation letter.

THAT I confirm to this Court that on numerous occasions I persuaded the claimant to pick or accept the explanation letter, invitation letter and letters given to him by the Branch Business Head concerning the subject matter but he declined to do so.”
13. That witness further testified that there were various complaints by the respondent’s employees and customers regarding the appellant’s absenteeism from work and insubordination; that the appellant was a difficult person to work with.
14. Despite this evidence the trial Court found that there was procedural breach of the law in the way the decision to terminate employment was reached and made the findings we have talked to. We recognize that there is no cross- appeal here but may say in passing that the appellant is fortunate to have the reliefs that he got.
15. The grant of an order of reinstatement is discretionary and is in the nature of specific performance which should be granted only in exceptional circumstances. In *Kenya Revenue Authority v James Omondi Were* [2020] eKLR it was held that the grant of an order for reinstatement is discretionary in nature.
16. The Judge in the case before us was asked to order reinstatement but the appellant made alternative prayers.
17. The Judge found that ordering reinstatement was not appropriate in the case. That was an exercise of discretion by the Judge and we have not been shown that the Judge exercised that discretion wrongfully. We should not interfere with exercise of discretion unless wrongfully exercised - See *Mbogo v Shah* [1968] E.A. 93.



18. We have considered the whole record and the grounds raised on appeal and we cannot find any merit in any of the grounds raised. The appeal has no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

Dr. K.I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

