



**Power Group Technologies Ltd v Kibugi (Civil Appeal
169 of 2017) [2021] KECA 62 (KLR) (8 October 2021) (Judgment)**

Neutral citation: [2021] KECA 62 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 169 OF 2017
AK MURGOR, S OLE KANTAI & JW LESSIT, JJA
OCTOBER 8, 2021**

BETWEEN

POWER GROUP TECHNOLOGIES LTD APPELLANT

AND

SAMUEL MAINA KIBUGI RESPONDENT

*(An Appeal arising from the judgment and decree of the Employment
and Labour Relations Court of Kenya at Nairobi by (Abuodha
J.) dated 26th February 2016 in ELRC Cause No.2038 of of 2013)*

JUDGMENT

1. The background of the appeal is that the Respondent was employed by the Appellant on December 1st, 2011 as a technician earning a salary of Kshs. 21,000/- per month, which was reviewed later to Kshs. 27,000/- per month as at the time of termination. By virtue of a letter from the Appellant dated January 30th, 2013 the Respondent's contract was terminated for lack of due diligence in performance of his duties. This led to the Respondent filing with the Employment and Labour Relations Court (ELRC) a statement of claim dated November 18th, 2013.
2. In the statement of claim, the Respondent contended that the Appellant assigned him a project of constructing and installing overhead electrical lines at Kauthuluni, Yatta in October 2012. That on November 17th, 2012 and before the completion of the Kauthuluni Project, the Appellant transferred him to another project in Mbita. The Respondent handed over the Kauthuluni Project to one Mr. John Lagho (DW 1). He stated that at the time of handing over, only 50% of the project was completed, and that everything was in perfect condition.
3. The Respondent stated that on January 28th, 2013 he received a call from the Appellant's representative, Mr. James Abugha (DW2) requesting him to report to the office in Nairobi the



- following day. That at the office in Nairobi, Mr. Abugha informed him that the Kauthulini Project had been rejected by Kenya Power as it had some defects, and that he was responsible for the said defects.
4. The Respondent contended that the Appellant soon thereafter terminated his contract without any explanation as to the alleged defects, and that he was not given a chance to defend himself. The Respondent sought orders for payment of lawful terminal dues totaling to Kshs. 75,915/- and compensation for wrongful termination up to a maximum 12 months' salary, as well as interests and costs.
 5. The Appellant filed a memorandum of response and counterclaim dated March 31st, 2014. The Appellant admitted that the Respondent was its employee from December 1st, 2011 to February 13th, 2013. The Appellant contended that the Respondent was tasked with overseeing a project at Kauthulini Market in Yatta, which had been commissioned by the Rural Electrification Authority and Kenya Power and Lighting Company.
 6. The Appellant stated that the two organizations conducted an inspection of the work done and discovered defects, being that the depth of the dug holes was found to be 4 feet as opposed to the required 6 feet. The Appellant stated that upon investigations, it emerged that the defects occurred due to negligence on the part of the Respondent which amounted to gross misconduct.
 7. The Appellant averred that it incurred costs in rectification of the defects, and that the Respondent's terminal dues were deducted to cover the cost of rectification of the defects occasioned by his negligence. The Appellant contended that after the terminal dues were offset, the Respondent owed the Appellant Kshs. 26,089/- being the balance of the cost of repairs. In addition, the Appellant counterclaimed for payment of Kshs. 26,089/- being balance of payment of repairs occasioned by the Respondent's negligence, as well as interest and costs of the suit.
 8. The cause was canvassed by way of oral testimonies.
 9. The trial judge, at the conclusion of the trial, found that the Appellant failed to prove reasons for termination of Respondent's services as required by Section 43(1) of the *Employment Act, 2007*. He further found that the Appellant did not follow due process in terminating the Respondent's contract, and that the Respondent was entitled to terminal dues as well as compensation for unfair termination totaling to Kshs. 274,371/-, as well as costs of the suit.
 10. Aggrieved by this decision, the Appellant filed an appeal before this court urging that the Learned Judge erred:
 - a) In finding that the Respondent denied that it was his responsibility to dig stay holes, a fact which he admitted;
 - b) In failing to acknowledge that DW1 witnessed the inspection by KPLC and saw the defects, and (sic) such, there was no need for the Appellant to avail a witness from KPLC to testify to the inspection;
 - c) In finding that the Appellant failed to provide evidence of rectification costs yet imprests were attached in the Appellant's bundle of documents and produced by DW1;
 - d) In finding that the Respondent was not issued with a termination notice when the Respondent admitted as much, and even attached the notice to his Memorandum of Claim;
 - e) In finding that the Appellant was paid for the Yatta Project despite the defects when in fact the Appellant was only paid after the defects were rectified; (not clear)



- f) In finding that the Respondent was given until 30th January 2013 to provide an explanation for the alleged defects, when in fact his deadline was close of business 29th January, a timeline the Respondent failed to comply with;
- g) In dismissing the Appellant’s counter claim when the same had been proven on a balance of probabilities.
11. The Appeal was canvassed by way of written submissions. Counsel for the Appellant, Mr. Wanjeri, urged that the evidence of DW1 established that the Respondent was tasked with inspection of the holes that were dug by casual labourers, a role that was captured in his contract of employment. He faulted the trial court for failing to acknowledge that DW1 was present during the inspection by KPLC, and that he witnessed the defects, and there was therefore no need to call a witness from KPLC or REA as held by the Judge. Counsel submitted that DW1 stated that he was tasked to carry out rectifications after the inspection, and that the costs of the rectification was Kshs. 95,388/-. Counsel urged that DW1 produced imprest evidencing this amount, which form part of the record of appeal.
12. Counsel for the Appellant further submitted the Appellant had proper grounds to terminate the Respondent’s contract and provided evidence to show that the Respondent’s work was not up to par. He urged that part of the Respondent’s duty was to install, commission and maintain electric installations which included the holes the subject matter of this case. He stated that the Respondent failed to explain the defects when he was questioned on the same.
13. It was further submitted that the trial court erred in finding that the Appellant failed to provide reports of the defects from KPLC, when KPLC did not provide the same. He urged that evidence by DW1 and DW2 proved that there was a complaint from KPLC regarding the work that the Respondent was in charge of.
14. Mr. Wanjeri further urged that the termination letter dated February 13th, 2013 showed that the Respondent’s termination was with immediate effect, and that he was to be paid salary in lieu of notice. He submitted that the Appellant did not concede that the Respondent’s termination was unfair.
15. Turning to the counterclaim, counsel asserted that the appellant’s claim was proved by the evidence of DW1 and DW2 as well as by the imprest produced in evidence, yet, the trial court had dismissed the counter claim in a single sentence, backed by no legal reasoning and in so doing, failed to comply with Order 21 Rule 4 of the *Civil Procedure Rules, 2010*. For that proposition counsel cited Civil Appeal No.79 of 2012 *Peter M. Kariuki vs Attorney General* where it was held that reasons ought to be given for every judicial decision. He was of the view that the Judgment by the trial court
16. Despite being served with all the requisite documents in this appeal by the Appellant, the Respondent failed to file any submissions in response thereto.
17. This being a first appeal, the role of the first appellate court is well settled as in the case of *Selle vs Associated Motor Boat Co. Ltd* where Sir Clement De Lestang stated that:

“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



18. What is before us is a challenge on the judgment of the employment court's finding in favour of the Respondent for unfair termination of employment, and awarding him one month's salary in lieu of notice, January salary for month worked and not paid, accrued leave for 15 days, imprest, 7 months' salary for unfair termination of services, and for dismissing the Appellant's counterclaim.
19. The Respondent had been engaged on a one years' contract which was renewable. The evidence of the Respondent shows that on January 28th, 2013 he received a call from Mr. Abugha acting for the Appellant, and asked to report to the Appellant's head office in Nairobi the following day which he did. The Respondent stated that at Nairobi head office, one Mr. Kihoro for the Appellant informed him that the Yatta Project had defects and that his services would be terminated. He stated that he was not given details of the alleged defects. He also contended that he was not accorded a hearing or a given a notice prior to his termination.
20. The evidence shows that the Respondent was served with a letter of termination of employment dated January 30th, 2013. The letter said in part "Your employment contract Is hereby terminated from January 29th, 2013 for lack of due diligence in the performance of your duties details of which you have orally been informed."
21. Thereafter, the Respondent was served with another letter from his former employer dated February 13th, 2013. It was headed 'termination of employment contract'. In brief it informed the Respondent that due to lack of due diligence in his duties to the Appellant company, it had incurred extra costs to rectify the defects due to his negligence, which costs the Appellant deducted from his terminal dues, leaving a balance of Kshs. 26, 089/-.
22. The Respondent was served another letter from the Appellant dated March 27th, 2013, referencing its letter of February 13th, 2013 and was headed 'construction defects'.
It informed the Respondent that it had come to their attention that the construction works which the Respondent was supervising prior to termination on January 28th, 2013 had major defects on the poles erected and that he would bear the costs of rectification.
23. The learned trial judge found that the termination was unfair as the Appellant had not shown that it had a reason to terminate the Respondent's employment. He also found that the Respondent was not given any notice to explain the defects, nor were there any minutes of any meeting where the issue was discussed and that the dismissal did not comply with the *Employment Act, 2007*.
24. The issue before us is whether the learned judge came to wrong findings of fact and law, thus arriving at the wrong conclusions.
25. We have considered the evidence adduced before the trial court. We find that there was no dispute that the Respondent handed over the Yatta project to one Lagho on November 17th, 2012 as directed by the Appellant. According to the Respondent the works were 50% complete, but according to the Appellant, they were 93% complete. It is not disputed that the Appellant terminated the Respondent's employment with effect from January 29th, 2013, in a letter dated 30th January. This was two and a half months after he handed over the Yatta project. Was there due process?
26. It is the process of termination that is central to this appeal. The Constitution expressly recognizes the right to an administrative action that is fair, and stipulates that;

"47.(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- (b) promote efficient administration”.

27. In *Judicial Service Commission V Mbalu Mutava & Another*, this Court expressed itself on the importance of Article 47 of the *Constitution of Kenya, 2010* as follows:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

28. The applicable law to this case is the *Employment Act, 2007*, [2012]. (hereinafter the Act). Section 41 of the Act provides for notification and hearing before termination on grounds of misconduct. Section 41(1) provides:

- (1) Subject to section 42(1), 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.

29. Section 43 of the Act makes provision for proof of reason for termination and stipulates as follows:

43. Proof of reason for termination

- (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 the 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.

30. Section 45 of the Act defines what constitutes unfair termination thus:

45 (1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—



- (i) related to the employee's conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

31. In *Janet Nyandiko vs Kenya Commercial Bank Limited*, the Court summarized procedures to be followed when terminating employment as follows:

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

32. The reason advanced by the Appellant at the trial for terminating the Respondent's employment was negligence in the performance of his duties at the Yatta construction site which resulted in defects in the holes that were dug.

We note that the letter handed over to the Respondent on the January 30th terminating his employment did not contain any reason for the termination. The letter alluded to details of the termination having been communicated to the Respondent verbally.

33. The Appellant purported to give the Respondent the reasons for his termination in the letter, dated March 27th 2013. That was two months after the termination. Without properly outlining them it purported to explain that defects in the construction work he was supervising, were the reasons for his termination. The letter, lacked particularity and detail of the nature of the defects and where they were located. No documentation or report on the defects was produced. We agree with the learned trial judge that what the Appellant presented to court in support of that issue were mere allegations without proof. It is clear to us that the Appellant did not give any reasons for the termination. The



letter of March 27th 2013 did not meet the requirements of the law, inter alia for the reason it came long after the Respondent had been relieved of his duties.

34. Regarding the procedural requirements of termination, Section 41 of the Act enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to take specific steps in the process. The employer is enjoined to explain to the employee in a language that the employee understands the reasons for which the employer is considering terminating his or her employment, and that the said reasons should be given in the presence of a fellow employee or a shop floor union representative of the employee's choice. The employer is also required to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer. All these should be followed before the decision to terminate the employee is finally made and communicated to him.
35. It is clear that when the Appellant called the Respondent for the meeting on 29th January 2013 to inform him of his poor performance, he was not accorded the right to have a colleague or a union representative present. It is also clear that neither the Respondent nor his representative was accorded a chance to be heard or explain prior to his termination, the letter having been served on him one day after his employment was terminated.
36. Clearly, the Appellant did not make any attempt to comply with the procedural requirements set out in Section 41 and to follow the due process. We agree with the learned trial judge's finding that the Appellant terminated the Respondent's employment unfairly and without any reason contrary to Section 43 and 45 of the Act, The Appellant flouted the provisions of the Act and denied the Respondent his right to administrative action that was lawful, reasonable and procedurally fair.
37. Having come to this conclusion we are in agreement that the Respondent was deserving of the ones month's salary earned in January 2013, one month's salary in lieu of notice, the accrued leave for 15 days and imprest as claimed, in line with Section 49 (1) (b) as read with Section 50 of the Act.
38. As for the 7 months' salary for unfair termination of employment the court is guided by Section 49 (1) (c) as read with Section 50 of the Act. These provisions give the court leeway to determine how many months of salary to award under that head so long as it does not exceed 12 months. We do not see any reason to interfere with the learned judge's exercise of discretion on that award.
39. Ultimately, the orders we would make in disposition of this matter are as follows:-
 - (a) The judgment and decree of Abuodha, J. is upheld.
 - (b) The appeal is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

JESSIE LESIIT

.....



JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

