



Kinyua v Kenya Power and Lighting Company Limited (Cause E911 of 2021) [2024] KEELRC 349 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 349 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E911 OF 2021
SC RUTTO, J
FEBRUARY 23, 2024**

BETWEEN

NORMAN MURURU KINYUA CLAIMANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant on 5th November 2021 seeking the following orders:
 - a. Determination that the Respondent's actions infringed on Claimant's constitutional right to fair labour practices.
 - b. Determination that the Claimant was unlawfully, unfairly and wrongfully terminated.
 - c. Order for payment to the Claimant of the actual pecuniary loss suffered as result of wrongful termination from date of such dismissal to date of such determination and as detailed through paragraph 29 to 34.
 - d. Order for payment of interest in (c) above at Court rates to the Claimant by the Respondent.
 - e. Order for payment of legal costs.
 - f. Order to the payment of other costs and any other relief this Honorable Court may deem fair and fit to grant.
2. The Claimant avers that he was employed by the Respondent as a casual worker in 2007 and later absorbed on permanent basis as a technician under the Revenue Protection Unit on 1st March 2011. According to the Claimant, he worked diligently and tirelessly and had a good performance and dedication record necessitating increase of his gross salary to Kshs 93,186.00.



3. From the record, the Claimant was taken through a disciplinary process and was subsequently dismissed from employment through a letter dated 5th February 2020. It is that dismissal that has triggered the instant Claim. It is the Claimant's view that his dismissal from employment was unfair, unlawful and wrongful.
4. The Claim was opposed through the Respondent's Statement of Response dated 30th November 2021. The Respondent has denied the Claimant's assertions, specifically that he worked diligently and tirelessly and that his dismissal from employment was unlawful, unfair and wrongful. Accordingly, the Respondent has asked the Court to dismiss the suit with costs.
5. The matter proceeded for hearing on 18th October with both parties calling oral evidence.

Claimant's Case

6. The Claimant testified in support of his case. To start with, he adopted his witness statement and supplementary witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed together with the Statement of Claim as well as the supplementary list and bundle of documents as his exhibits before Court.
7. It was the Claimant's evidence as per his initial witness statement, that on December 2019, he received a call from the Respondent's Audit Department inviting him to their offices on that particular day.
8. Upon arrival, he was ambushed and asked to give more information about account numbers 33620483, 52049816 and 14305627 that had their meters replaced. He requested for time to prepare and furnish the Audit Department with the required information.
9. However, his request was denied and he had to respond to the questions there with faded memory. As the meeting concluded, he was promised that he will be invited for another meeting once he was fully prepared. This never materialized.
10. Instead, he was issued with an Explanation letter dated 18th December 2019 for rebilling and un-procedural meter change. He responded to the Explanation letter but to his utter surprise, he was never accorded any response to the Explanation letter, but was summoned to a disciplinary hearing through a letter dated 6th January 2020.
11. On 14th January 2020, he reported to the disciplinary hearing. According to the Claimant, the disciplinary committee kept referring to and reading Audit Report no. 01-2019/2020 which he did not have and had never seen.
12. He was further shocked that the disciplinary hearing concluded without discussing what he had been invited to respond to as outlined in the invitation letter. He raised the issue with the Appeal Hearing Committee but he was bluntly shrugged off with the Chair citing that the disciplinary hearing discussed related issues.
13. He was later invited by the Human Resource through a phone call to come and sign the minutes of the disciplinary hearing. Upon arrival, he was given the minutes to read and sign. He requested for a copy of the minutes before signing, but it was declined. His attempts to make a written request on the same was also declined and he was informed that he should first sign and then get a copy. He complied and signed but his efforts to get a copy have been in vain since.
14. What followed was a dismissal letter issued to him on 5th February 2020 on grounds that he had failed to observe the laid down procedures for meter replacement thereby contributing to the network



- that defrauded the company its due revenue by facilitating replacement of meters to conceal irregular rebilling.
15. He wrote an appeal letter dated 3rd March 2020 requesting to be served with specific documents to aid in his appeal but the documents were never availed. Instead, he was invited to an Appeal Hearing through a letter dated 14th August 2020 which he appeared for on 26th August 2020. In the Appeal Hearing, he was denied the opportunity to ask anything with the Chair citing that the Committee was under specific guidelines from the appointing authority.
 16. On 17th November 2020, he received a response to his appeal letter informing him that the appeal was not successful.
 17. As stated herein, the Claimant adopted his further witness statement in which he averred that the Respondent changed the operating system from ICS to InCMS and didn't align meter replacement procedures to match the new system captured in the Audit Report.
 18. He averred that failure by the Respondent to align meter replacement procedures to conform with the new operating system led to some of the procedures being inconsistent with the available laws and actual application on the ground.
 19. The Claimant further stated that the persons who conducted the investigation and subsequently submitted the audit report were neither qualified as a technical team nor registered as technical auditors. This led to them being unfair in their judgment given that meter replacement is a technical process.
 20. That up to date, not any line customer service engineer allocated to him testified to the investigators that he did not follow the procedures. Subsequently, not any other line customer service engineer or any other line manager was involved and/or testified to the investigation process that led to his dismissal.
 21. Further, the allegations in the Explanation letter had insufficient details which were not factual as it failed to follow available evidence. He was therefore not accorded prior and adequate notice as to the nature and reasons for the proposed administrative action against him.
 22. The Claimant was categorical that he followed meter replacement procedures when dealing with meter account number 33620483. Further, the auditors failed to consider all relevant facts and material evidence in their possession in regard to meter account number 33620483.
 23. He further averred that there was massive discrimination and selective applications of justice in implementing the recommendations on the audit report.

Respondent's Case

24. The Respondent called oral evidence through Mr. John Otieno Tolla and Hellen Ng'ang'a who testified as RW1 and RW2 respectively. Mr. Tolla who was the first to go, identified himself as an Internal Auditor in the Respondent company. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.
25. RW1 stated that in the course of business, the Respondent uses energy meters for ascertaining the quantity of electrical energy supplied and consumed by its customers. The supply of electricity to its customers comes with an obligation on the Respondent to maintain the electricity installations/apparatus/infrastructure and ensure safety of the public in the course of its business.



26. He is aware that the Claimant was an employee of the Respondent working as a technician until 5th February 2020.
27. It was RW1's evidence that the Claimant was dismissed from employment as a result of a disciplinary process which was occasioned by an investigation report number 01-2019/2020 and dated 09.12.2019.
28. He further stated that the Respondent has been on the spotlight for suffering losses while it is the sole distributor of electricity in the Country. In an attempt to reduce the losses, the Respondent's internal auditors conducted an investigation on rebilling and unprocedural meter change in the Coast region and generated an investigation report.
29. The internal audit investigation was occasioned by receipt of information that complementary rebilling was being used to issue irregular credits to customers and meters replaced to conceal the irregular rebilling on allegations that their meters were faulty.
30. It was his evidence that the internal auditors established that Kshs 41,139,766.00 had been irregularly rebilled and immediately ordered for the reversal of the same. As at the date of the investigation report, Kshs 22,873,841 had been paid to the Respondent by the affected customers.
31. During investigations the Claimant stated that Humphrey Mwaura staff number 85682 requested him to raise a work order for meter replacement for account number 52049816 and that Humphrey was responsible for any irregularity on the account. That the Claimant raised a work order and assigned it to himself whereupon he changed the meter for account number 33620483 since it was reported to have a blank screen.
32. That his (Claimant) subordinate Patrick Makokunga reported to him a faulty meter on account number 14305627. He raised a work order and assigned it to him to replace it. That in case of any irregularity, Patrick should be held responsible.
33. RW1 further stated that the investigation report revealed that the Claimant had generated work orders for some accounts whose meters were replaced after receiving irregular credit rebilling by Crispus Mwaniki staff number 85118.
34. The report also revealed that the Claimant did not follow the due procedure for changing the meter for account number 33620483. It was also established that the Claimant immediately replaced the meter when it received an irregular credit of Kshs 22,245.00
35. The Investigation report further recommended disciplinary action against the Claimant for being part of the network that collected money from customers and private electricians, aiding in meter retrofit, and handing meters to private electricians to install all in an effort to abet irregular complementary rebilling that denied the Respondent revenue.
36. The internal audit was not only conducted upon the Claimant herein but also on other employees of the Respondent.
37. In RW1's view, the audit was independent, unbiased and each employee was questioned independently during the investigation.
38. RW2 who identified herself as the Respondent's Chief Human Resource and Administration Officer, also adopted her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.



39. It was RW2's evidence that the disciplinary process against the Claimant originated from the Respondent's internal investigation report for rebilling and un-procedural meter change, Coast Region.
40. RW2 confirmed that she sat in the panel of the Claimant's disciplinary hearing.
41. Prior to the Claimants' termination, the Respondent issued him a show cause letter requesting him to show cause within 72 hours why disciplinary action should not be taken against him pursuant to the internal investigation report.
42. The Claimant responded to the Respondent's letter and upon establishing that his explanation was unsatisfactory, the Respondent invited him for a disciplinary hearing on 14th January 2020.
43. The disciplinary hearing proceeded as scheduled. During the disciplinary hearing, the Claimant was unable to defend himself successfully and on 5th February 2020, he was issued with a dismissal letter.
44. RW2 further stated that the Claimant was dismissed for failure to observe the laid down procedures for meter replacement thereby contributing to the network that defrauded the Respondent its due revenue by facilitating replacement of meters to conceal irregular re-billings.
45. The Claimant appealed against the decision of the Respondent to dismiss him from employment. The Respondent heard the Claimant's appeal. The Claimant declined to sign the minutes.
46. The appeal hearing committee forwarded its recommendations to the Respondent's Managing Director and CEO for approval. On 4th November 2020, the Respondent's Managing Director and CEO approved the appeal hearing committee's report upholding the Claimant's earlier dismissal.
47. According to RW2, the Claimant was lawfully dismissed.

Submissions

48. The Claimant submitted that the disciplinary process was a cosmetic procedure with a pre-determined end result. In this regard, the Claimant made reference to the handwritten and signed instructions on the cover page of the investigation report. In the Claimant's view, the Respondent failed on the grounds of procedural fairness as required under Section 41 of the *Employment Act*.
49. The Claimant further submitted that the Respondent did not adhere to the provisions of Section 41 of the *Employment Act* by not considering his response to the Explanation letter, refusing to afford him a hearing and refusing to present him with any investigation report and or documents to enable him effectively respond to the same. In support of the Claimant's arguments, the case of Kenya Ports Authority v Mary Saru Mwandawiro (2017) eKLR was cited. Further reliance was placed on the decision in Sabina Mutua v Amedo Centre Kenya Limited (2017) eKLR.
50. The Claimant further posited that the Respondent did not prove the reasons as to why they terminated him from employment. In the same vein, it was further submitted that the Respondent did not prove that the Claimant failed to observe the laid down procedures for meter replacement thereby contributing to the network that defrauded the company its revenue.
51. It was the Claimant's further submission that meter replacement is a technical process that requires technical expertise. In this respect, the Claimant submitted that RW1 was neither a registered qualified technical auditor nor a registered qualified technician. The Claimant thus contended that the audit report was authored and prepared by persons not qualified to do so.



52. The Claimant stated in further submission that the allegation that he was part of a network that defrauded the company of its revenue was unfounded, unjustified and an afterthought by the Respondent in a bid to try and justify their illegal action of terminating him.
53. On the Respondent's part, it was submitted that during the investigations, it was revealed that the Claimant had singly raised a work order for account number 33620483, assigned it to himself and proceeded to pick a meter from the store and replaced the same for a customer. It was the Respondent's position that the Claimant has failed to prove any fault against it for alleged illegal, unlawful and unfair dismissal as alleged.
54. It was the Respondent's further submission that the Claimant was the author of his misfortune and that it duly complied with the laid down procedure for disciplinary process and the *Employment Act*. In support of this position, the Respondent referenced the case of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* and *Janet Nyandiko v Kenya Commercial Bank Limited (2017) eKLR*.
55. According to the Respondent, the delegation of authority produced by the Claimant does not confer authority upon him to concurrently act as a Routine Inspection Supervisor, the Installation Inspector and Routine Inspection Clerk.

Analysis and Determination

56. Flowing from the pleadings on record, the evidentiary material placed before Court as well as the rival submissions, the following issues stand out for determination: -
 - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant.
 - ii. Whether the Claimant was afforded procedural fairness prior to termination.
 - iii. Is the Claimant entitled to the reliefs sought?

Justifiable reason for termination?

57. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination and in default, such termination is deemed to be unfair.
58. In addition to the foregoing, Section 45 (2) (a) and (b) of the Act provides that a termination of employment 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 employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
59. Fundamentally, an employer is required to prove that the reason for termination of employment was valid, fair and related to the employee's conduct, capacity or compatibility.
60. In the instant case, the Claimant was dismissed from employment on grounds that he failed to follow the laid down procedures for meter replacement thereby contributing to the network that defrauded the Respondent company its revenue by facilitating the replacement of meters to conceal rebillings.
61. It was the Respondent's case that the Claimant had singly raised a work order for account number 33620483, assigned it to himself and proceeded to pick a meter from the store and replaced the same



- for a customer. According to the Respondent, the Claimant's action was contrary to Clause 6.3 of its Operating Procedure.
62. On his part, the Claimant was categorical that as a Routine Inspector Supervisor (RIS), he had delegated authority from the Respondent and or the right to generate work orders, receive meters from the store and install the same to the customer's premises. He averred that he never misused that authority.
63. In the Claimant's response to the show cause letter, he stated that he received knowledge of the faulty meter in respect of account no 033620483 meter no 60890059, generated a work order of the same, collected a meter from the store and installed the same to the customer's premises.
64. In support of its case, the Respondent exhibited the relevant Operating Procedures. Clause 6.3 which is significant in this case provides as follows:
- “ 6. 3 If it is a faulty meter case, the RIS shall raise a service order to resolve the anomaly and assign it to the Installation Inspector. 6.3.1 The Installation Inspector shall collect meter from the stores and proceed to site.
6. 3.2 If the S/O is for the meter change, the Installation Inspector shall change the meter and proceed on as 6.3.5.
6. 3.3 If the S/O is for check meter installation, he will install the meter and take (sic) 1st reading in the presence of the customer.
6. 3.4 He shall take the 2nd reading after 30 days, as per the statutory requirements, and replace the faulty meter with the check meter.
6. 3.5 The Installation Inspector shall raise an IF 130 and continue as in 6.7”
65. What is discernible from the above procedure is that there is more than one player in the event there is a faulty meter requiring replacement.
66. It is common ground that the Claimant was serving in the capacity of RIS. Therefore, his role was to raise a service order and assign the same to an Installation Inspector who was to collect the meter from the store and proceed to the site where he would change the meter in question.
67. In this case, the Claimant admitted in his response to the show cause letter that he raised the service order, assigned it to himself and proceeded to install the same at the client's premises. He admitted as much during cross-examination.
68. From the foregoing, it is clear that the Claimant acted contrary to Clause 6.3 of the Respondent's Operating Procedure when he raised the work order, assigned it to himself and proceeded to install the same at the client's premises.
69. There must have been a sound reason for the Operating Procedures to assign different roles to different players in cases of meter replacements. As I suppose, this was to ensure control and avert abuse.
70. Granted, the Claimant may have been given delegated authority by the Respondent. Be that as it may, that was not a blank check for him to undertake all duties pertaining to meter replacement. As per the Respondent's Operating Procedures, his role started and ended at raising work orders.
71. Therefore, by raising the work order, assigning it to himself and proceeding to install the same at the client's premises, the Claimant acted contrary to the Respondent's Operating Procedures, thus



giving the Respondent a valid and fair reason to take disciplinary action against him. Accordingly, his termination cannot be termed as substantively unfair.

Procedural fairness?

72. Pursuant to Section 45 (2) (c) of the Act, an employer is required to prove that it complied with the provisions of a fair process in that it accorded an employee a fair hearing prior to termination. The specific requirements of a fair hearing are provided for under Section 41(1) of the Act, in the following manner: -

“(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.

73. From the record, the Claimant’s disciplinary process was commenced by way of a letter dated 18th December 2019 through which he was required to show cause why disciplinary action should not be taken against him. One of the specific allegations levelled against the Claimant was that, “he generated work orders for some accounts whose meters were replaced after receiving irregular credit billing by Crispus Mwaniki s/no. 85118.”

74. What stands out from the show cause letter is that the accounts in question were not disclosed to the Claimant at the point he was being asked to show cause. Indeed, it was only the account number contained in part (2) of the charge that was disclosed. That being the case, the question is, which accounts were being referred to in part (1) of the charge?

75. It goes without saying that the specificity of the charge in this case was very crucial to allow the Claimant effectively defend himself.

76. Without crucial information regarding the specific accounts in question, it may very well be said that the Claimant was not fully aware of the allegations laid out against him by the Respondent and the kind of defence he needed to mount against the same. Indeed, it is more than probable that this compromised his line of defence during the hearing.

77. In the case of *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR, the Court of Appeal found that the allegations against the employee in that case were too general hence termed his termination as unfair. The learned Judges thus held:

“As also rightly found by the learned trial Judge, no evidence was placed before court to show that the Respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the Respondent only knew in general terms, the allegations he was to face and counter...In the circumstances, therefore it cannot be said that the termination process was fair.” Emphasis mine

78. I subscribe to the position taken by the Court of Appeal in the above case. Nothing would have been easier than for the Respondent to fully disclose the details of all the accounts whose meters the Claimant replaced without following the Operating Procedures.



79. That is not all. The disciplinary process was further flawed by the fact that prior to the Claimant's disciplinary process, there were handwritten instructions on the cover of the investigation report to this effect: "Immediately move in and write letters to the staff affected to step aside through dismissal and termination as the case may be..."
80. Needless to say, the end result of the process had been determined even before it began. What this essentially means is that, in the face of such instructions to dismiss and or terminate, it is highly doubtful that the ensuing disciplinary process was objective.
81. To this end, in as much as the Respondent was substantively justified to take disciplinary action against the Claimant, the process applied in dismissing him from employment was not entirely fair as it had a predetermined conclusion. This was coupled by the fact that he was not served with sufficient details to respond to the charges laid out against him. This rendered the termination unlawful.

Reliefs?

82. As the Court has found that the Claimant's summary dismissal although substantively justified, was procedurally unfair hence unlawful, the Court awards him one (1) month's salary in lieu of notice and compensatory damages equivalent to four (4) months of his gross salary.
83. The claim for service pay is declined as the Claimant's contract of employment provided at Clause 8 that upon completion of his probation, he would join the Company's Retirement Benefits Scheme. Consequently, the Claimant fell within the exclusions under Section 35(6) of the *Employment Act*. He is therefore not eligible for service pay.
84. The claim for economic damages, emotional distress and loss of future earnings are similarly declined. On this issue, I concur entirely with the sentiments of the Court in the case of *Mary Mutanu Mwendwa vs Ayuda Ninos De Africa-Kenya* [2013] eKLR, thus:

"My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract."

Orders

85. Against this background, Judgment is entered against the Respondent and the Court makes the following award in favour of the Claimant: -
- a. One (1) month's salary in lieu of notice being Kshs 93,186.00.
 - b. Compensatory damages in the sum of Kshs 372,744.00 being equivalent to four (4) months of his gross salary.
 - c. The total award is Kshs 465,930.00
 - d. Interest on the amount in (c) at court rates from the date of Judgment until payment in full.
 - e. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

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STELLA RUTTO

JUDGE



Appearance:

For the Claimant Mr. Omondi

For the Respondent Mr. Ododa

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

