



**Kikata & another (As Legal Representatives of the Estate of Patrick Nzuki Mutinda - Deceased) v Kenya Power & Lighting Company Ltd (Petition E111 of 2022) [2024] KEELRC 272 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 272 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E111 OF 2022**

**B ONGAYA, J**

**FEBRUARY 16, 2024**

**IN THE MATTER OF ARTICLES 1,2,3(1),10,19,20,21,22,27,28,41(1) & (2), 48, 165(3) & 258 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 4,10,11,13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007, NO. 11 OF 2007**

**AND**

**IN THE MATTER OF SECTIONS 4, 6,7,10(1), 11 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**BETWEEN**

**CHARITY MWENDE KIKATA ..... 1<sup>ST</sup> PETITIONER**  
**ROSINA NDINDA KISILA ..... 2<sup>ND</sup> PETITIONER**  
**AS LEGAL REPRESENTATIVES OF THE ESTATE OF PATRICK NZUKI MUTINDA - DECEASED**

**AND**

**KENYA POWER & LIGHTING COMPANY LTD ..... RESPONDENT**



## JUDGMENT

1. The petitioners filed the amended petition dated 22.05.2023 through M.M Uvyu & Company Advocates. The petitioner prayed for:
  - a. A declaration that the act of the respondent in dismissing the deceased from employment vide its letter dated 20.06.2022 is unlawful, illegal and wrongful for being in violation of the deceased's rights under article 41, 47 and 50 of the Constitution and therefore null and void.
  - b. An order of judicial review of certiorari be issued to quash the decision of the respondent vide its letter dated 20.06.2022 dismissing the deceased from employment.
  - c. General damages for unlawful and unfair dismissal from employment.
  - d. Any other relief the honourable court may deem fit to grant.
  - e. Costs of the petition.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and sworn on 22.06.2023 as well as the further affidavit sworn on 11.09.2023. The petitioner's case is as follows:
  - a. The respondent on 01.12.2008 employed Patrick Nzuki Mutinda (deceased) until 30.12.2019 when he was absorbed into the workforce on a permanent basis.
  - b. He was subsequently issued another letter dated 06.01.2020 which set out the conditions and terms of employment.
  - c. On 12.01.2022, a complaint was lodged against the said Patrick Nzuki Mutinda by one Mr. Rono Kiprotich Simon alleging that he had fraudulently obtained Kshs 250,000 from him purporting to assist him to reinstate him back to his employment with Kenya Power Lighting Company.
  - d. On 01.03.2022, Mr. Rono Kiprotich Simon wrote a letter to the respondent's Regional Human Resource officer in which he withdrew the complaint against the deceased after a meeting with one of the officers employed by the respondent one Reson Oleitiptip.
  - e. On 09.05.2022 the respondent wrote to the deceased a letter seeking explanation on allegations made against him by Rono Kiprotich Simon vide the said letter dated 12.01.2022.
  - f. On 09.05.2022, Mr. Rono Kiprotich Simon wrote a letter to the respondent's Chief human resource officer in which he withdrew the complaint he had lodged against the deceased.
  - g. By a letter, dated 09.05.2022, the deceased wrote back and pointed out that Mr. Rono Kiprotich Simon had withdrawn the malicious allegations against him and attached copies of the letters written to this effect.
  - h. Rono Kiprotich Simon swore an affidavit on 07.06.2022 in which he stated that he had officially withdrawn a complaint against Patrick and that he had never procured the deceased's services to secure employment with KPLC.
  - i. On 18.05.2022 the respondent wrote a letter to the said Patrick informing him of the disciplinary proceedings which were to be held on 20.05.2022.



- j. Upon receipt of the said letter, the deceased immediately wrote a letter to the respondent seeking for another date because he was sick.
  - k. The disciplinary proceedings were held on 13.06.2022 in which officials from the Union represented the deceased, namely, Moses Mokuwa, Jared Owande and Aden Derow.
  - l. On 13.06.2022 during the disciplinary proceedings, the deceased presented Rono Kiprotich Simon as his witness but he was not given an opportunity to testify in the proceedings but he confirmed that he had written the letters to the respondent withdrawing the complaint against the deceased.
  - m. No complainant testified against the deceased during the proceedings.
  - n. The respondent wrote a dismissal letter addressed to the said Patrick dated 20.06.2022 and the reasons given therein were that he received a bribe of Kshs. 250,000 from Rono Kiprotich Simon an ex-employee of the respondent who was dismissed, promising to assist him procure employment with KPLC.
  - o. On 25.02.2022, the said Patrick was elected as a director of Stima DT Sacco Society ltd and his opponent was one Cecilia Kalungu Uvyu the respondent's General Manager, Human Resource and Administration.
  - p. During the election on 25.02.2022 the said Cecilia Kalungu Uvyu threatened the deceased with dire consequences and told him that she had a letter on her desk regarding the complaint against him and that she will deal with him.
  - q. The deceased believed that the disciplinary proceedings against him were conducted despite the withdrawal of the complaint because the said Cecilia Kalungu Uvyu had a grudge and vendetta against the deceased because he defeated her when he was elected as a Director of Stima TD Sacco Society ltd since she was also contesting for the same position.
  - r. The deceased was aggrieved by the unilateral administrative decision taken by the respondent in dismissing the deceased from employment when there was no complaint against him and more so when there was no accuser and or complainant to prove the allegations against him.
3. The respondent filed the replying affidavit of Justus Ododa, sworn on 18.08.2023. It was stated and urged as follows:
- a. The terms and conditions of the respondent's employment contract stipulated that the deceased was to at all times adhere to the obtaining laws, regulations and the respondent's code of conduct and policies. The employment contract further stipulated that the company reserved the right to terminate the applicant's service without notice if in its opinion the respondent is a party to any fraud or dishonourable act or be guilty of any other gross misconduct.
  - b. The respondent's Human Resource Staff Regulations and Procedures also governed the deceased's employment. The guidelines stipulated the respondent's ethical principles that guide the employees in their day-to-day operations. One of the ethical principles is that the employees are expected to share and declare any information they may have about personal or corporate conflict of interests to avoid a compromising situation.
  - c. All employees employed by the respondent must sign the code of conduct and ethics, and, are bound by its provisions.



- d. The respondent's code of conduct provides that an employee shall among other duties;
- i. Perform their duties honestly, fairly, transparently and to act in the best interest of the company in all situations avoiding interest, activities, investments, relationships and influences that might compromise their objectivity, effectiveness and the faithful performance of their duties.
  - ii. Carry out her duties in a way that maintains public confidence in the integrity of his office.
  - iii. Take responsibility for the reasonable foreseeable consequences of their actions or omissions arising from the discharge of their duties.
  - iv. Observe impartiality and objectivity as required by the constitution and not practice favouritism, nepotism, tribalism, cronyism and religious bias or engage in corrupt in unethical behaviour.
  - v. Not to accept a personal loan or benefit which may compromise him/her in carrying out the duties of his office. Financial integrity also involves exercising prudence in one's financial affairs.
  - vi. Conduct his/her private affairs in a manner that maintains public confidence in the integrity of his office and does not compromise or jeopardize the image or interest of the company. This applies both to the officer's public and private life.
- e. The respondent on 13.01.2022 received a complaint from a former staff Mr. Rono Kiprotich Simon who had earlier been dismissed from employment following a disciplinary case. The complainant indicated that the deceased had taken advantage of his dismissal from employment to defraud him money. He stated that in January 2021 the deceased had approached him with a view of assisting him with his reinstatement since the deceased was allegedly well connected with the then respondent's CEO and the first family. Further, the deceased had requested for a facilitation fee of Kshs.500,000 for his reinstatement but after discussions they agreed on a figure of Kshs.250,000 and the remaining balance to be paid to the deceased upon his reinstatement.
- f. On 19.01.2021, the complainant proceeded to pay the deceased a sum of Kshs.150,000 via mpesa and the complainant's brother Mr. Nicholas Kipngetchi Rono further transferred Kshs.100,000 to the deceased via Co-operative Bank of Kenya. In his complaint, Mr. Rono indicated that he had thereafter attempted to reach the deceased to no avail thus necessitating him to approach the respondent to assist in recovery of the said monies and caution the respondent on the conduct of the deceased.
- g. The Public Officer Ethics Act, Cap 183 and the respondent's Code of Conduct and Ethics provides for a zero tolerance policy to gross misconduct (in all their forms) which the deceased was evidently involved in.
- h. Pursuant to the complaint raised against the deceased the respondent independently undertook its investigations that entailed interviewing various parties involved in the complaint process and obtained mpesa and co-operative statements of the deceased and established that indeed he had received the monies as indicated by the complainant Mr. Rono Kiprotich Simon and the complainant's brother on the dates indicated.
- i. Upon investigations it was established as follows:



- i. That on 13.01.2022 when the respondent received the complaint and summoned the deceased, he never disputed the allegations.
- ii. When the deceased was invited during the course of the investigations to shed more light on the allegations levelled against him, he declined to appear twice (29.03.2022 and 30.03.2022) and on the 3<sup>rd</sup> and 4<sup>th</sup> time (12.04.2022 and 21.04.2022), he appeared with union officials and declined to record a statement.
- iii. That the deceased never issued any explanations on the money transferred to him by the complainant Mr. Rono.
- iv. The deceased never produced any correspondence vide email or even text to explain the validity of the transactions he was accused of.
- v. There was no evidence to show that the money was paid back to the complainant vide Mpesa as alleged by the applicant.
- j. The wilful failure and refusal of the deceased to co-operate with the investigators as was required of him constituted a deliberate attempt to frustrate and delay the investigations as he conjured up false allegations and/or explanations.
- k. Pursuant to conclusion of the investigations, the respondent issued a show cause letter to the deceased dated 09.05.2022 to show-cause why disciplinary action should not be taken against him.
- l. In response to the Show cause letter, the deceased responded through a written response dated 10.05.2022. In the response, he never issued any explanation for the money transfer between him and the complainant Mr. Rono.
- m. The respondent invited the deceased for a disciplinary hearing on 20.05.2022.
- n. On 19.05.2022, the respondent received an undated letter from the deceased requesting for the postponement of the hearing on grounds that he was not well and had 2 days sick off. He was also due for travel and was expected back on 28.05.2022.
- o. On 31.05.2022, the respondent reached out to the deceased to reschedule his hearing on Friday 04.06.2022. The deceased requested for a further postponement of the hearing saying he had a board meeting to attend in Mombasa.
- p. On 13.06.2022, the hearing was finally conducted at 8<sup>th</sup> Floor Electricity House Board room and the deceased came along with union representatives and alleged witnesses.
- q. After hearing the deceased the disciplinary hearing committee evaluated the evidence adduced in respect of the allegations as well as the deceased's response during his oral submissions before the committee on 13.06.2022 and found them to be unconvincing to warrant his continued stay as the respondent's employee in light of his manifest gross misconduct.
- r. The evidence guided the committee and the responses given by the deceased and unanimously resolved to summarily dismiss the deceased via letter dated 20.06.2022 with immediate effect based on the allegations against him, he was found to be culpable.
- s. The deceased was afforded the opportunity to appeal the decision of the board dismissing him but instead chose to proceed to court claiming illegal, unlawful and un-procedural dismissal from employment.



- t. The deceased had resorted to insulting the respondent's General Manager, Human Resource and went further to threaten the General Manager's life by informing her colleagues that he is looking for a gun to end her life. The General Manager reported the threats to her life at the Gigiri Police Station and further witness statements were recorded. The deceased was summoned severally to the police station but he refused or failed to appear to record a statement or to exonerate himself from the allegations.
  - u. The minimum standards of fair procedure and the procedural protections accorded to the deceased under the law were honoured and therefore the process leading to the deceased's dismissal was conducted in a fair and transparent manner.
  - v. The respondent maintains that the deceased's dismissal was lawful and every finding by the committee against the acts by him were independently evaluated.
4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
  5. To answer the 1<sup>st</sup> issue, the Court finds that the respondent followed due procedure of a notice and hearing prior to dismissing the employee. The employee was given the show-cause letter and he replied. He attended the disciplinary hearing. The respondent complied with section 41 of *Employment Act* and as well as Articles 47 on fair administrative action and Article 41 on fair labour practices. The alleged violation of the provisions of the Bill of Rights as alleged have not been established at all.
  6. To answer the 2<sup>nd</sup> issue, the Court returns that the respondent has established that it had a valid reason per section 43 of the *Employment Act*, 2007 which existed as at the time of dismissal. Further, as at dismissal, the reason was fair per section 45 of the *Act* as it related to the employee's conduct and the respondent's operational requirements. In particular, the respondent has shown that it received the letter of complaint and while the maker subsequently purported to withdraw the same, the allegations and the substance of the letter of complaint were never significantly rebutted. The Court finds that the respondent had a reasonable and genuine ground to dismiss. The Court has considered the affidavit by the complainant on withdrawal of the complaint. It is returned that in absence of any other material evidence, the respondent was entitled, as an employer, to make a finding on the circumstances of the withdrawal. The respondent found, despite the withdrawal of complaint, nevertheless, trust and confidence in the employee had been lost. In any event, it was open for the employee to claim against the complainant for an alleged fraudulent inducement of the ensuing dismissal. In all circumstances, the respondent's decision cannot be disturbed.
  7. To answer the 3<sup>rd</sup> issue the Court upholds the respondent's objection and case that the petition amounted to an abuse of court process as the constitutional petitions procedure amounted to avoidance because the issues raised were purely amenable to remedies under the *Employment Act*, 2007 upon the allegation of unfair termination or dismissal.
  8. The Court returns that the petition must fail. The employee has since passed on. In that consideration parties to bear own costs.

In conclusion judgment is hereby entered for the respondent against the petitioner for the dismissal of the petition with orders each party to bear own costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16<sup>TH</sup> FEBRUARY 2024.**

**BYRAM ONGAYA**



**PRINCIPAL JUDGE**

