



Wambugu v Kenya Power and Lighting Company (Employment and Labour Relations Cause E006 of 2022) [2024] KEELRC 543 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 543 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E006 OF 2022**

ON MAKAU, J

MARCH 8, 2024

BETWEEN

JAMES MACHARIA WAMBUGU CLAIMANT

AND

KENYA POWER AND LIGHTING COMPANY RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 14th June 2022 alleging that his employment was unfairly terminated by the respondent on 7th January 2021. Therefore, he prayed for the following reliefs: -
 - a. A declaration that the claimant's termination was in violation of the claimant's Constitutional rights in particular Articles 41 and 47 of the Constitution of Kenya, 2010.
 - b. A declaration that the claimant's termination was in violation of sections 41, 43, 44 and 45 of the Employment Act No.11 of 2007 and was therefore unfair.
 - c. Compensation for:-
 - i. Violation of the claimant's constitutional rights as envisaged under Articles 41 and 47 of the Constitution of Kenya 2010 and
 - ii. Violation of the Claimant's employment, legal and contractual rights.
 - d. Compensation for unlawful loss of employment calculated as Kshs.97,408/- multiplied by 12 months totalling to Kshs.1,168,896/-
 - e. One month's salary of Kshs.97,408/- as compensation in lieu of notice.
 - f. Interests in (d) and (e) above at court rates.
 - g. Costs of this suit.



- h. Any other relief that this honourable court may deem fit to grant.
2. The respondent denied the alleged unfair termination and averred that the termination was lawful because it was grounded on a valid reason and the claimant was accorded a fair hearing before the termination. Therefore, it prayed for the suit to be dismissed with costs as the claimant is not entitled to the reliefs sought.

Background

3. The claimant was employed by the respondent on 1st May 2015 as a Technician until 7th January 2021 when he was dismissed. His gross monthly salary was Kshs.97,408.00.
4. The reason for the dismissal was that he was involved in an illegal re-routing of electricity poles on diverse dates between 2nd August 2020 and 19th September 2020 along Hospital Road and Kathima Road. He was also accused of misusing KPLC Hiab Registration number KCE 881D to carry out the illegal re-routing of electricity poles upon payment by the contractor to pave the way for road construction.
5. However, he contended that the claims were without substance as there was no supporting evidence. He further contended that though he was subjected to a disciplinary hearing, the same was just a public relations exercise towards a predetermined conclusion. It was hastily done and the claimant was denied legal representation. Therefore, he contended that the termination violated his rights under section 41, 43, 44, 45 and 47 of the Employment Act and he is entitled to compensatory damages.
6. The claimant further averred that his dismissal without following the proper procedure set out under the employment Act amounted to violation of the right to fair labour practices, right to equality and freedom from discrimination right to human dignity and right to fair administration as enshrined under Article 41 and 47 of the Constitution and automatically entitles him to compensation.
7. However, during the cross examination he admitted that the matter was investigated and the investigator spoke to him. He confirmed that other people were interviewed and the report implicated him, Ephraim Muthambure and Antony Mwai. The claimant admitted that all the persons implicated were working in the same office and he was in charge of O&M office. He contended that the recommendation by the Investigator was mere victimization since none of the people who alleged that bribe was paid were never interviewed by the investigator.
8. He further admitted that he was served with a show cause letter and he responded by his letter dated 27th November, 2020. Thereafter he was called to a disciplinary hearing before a committee of five (5) people from different departments. He attended the hearing and minutes were recorded. On 12th January 2021 he received a dismissal letter dated 7th January 2022.
9. The claimant was dissatisfied with the decision of the disciplinary committee and appealed. The appeal was heard by an appeal committee composed of different persons from the ones in the disciplinary committee. He presented evidence of work tickets to the Appeal committee but it was rejected and ordered to return to the transport office to produce to them. Hence the appeal was dismissed. He contended that the work tickets were proof that he never authorised the lorry to go to the site.
10. He maintained that the procedure was not fair and contended that the committee members were rude and threatened to send him home. He was also not given opportunity to be accompanied by a colleague to the disciplinary hearing and the appeal hearing. Finally, he maintained that the allegations made against him and his colleagues were not factual.



11. On the other hand, the respondent's case is that, indeed the claimant was employed as Technician in 2015 and at the time of his dismissal, he was stationed at Maua office as the officer in charge of Operations and Maintenance. On 18th September, 2021 the company security team received information that there was an illegal re-routing of Low Voltage (LV) Lines and High Tension (HT) line done along Kathima road within Maua area in Meru County during the weekend of 19th and 20th September, 2020.
12. Two police officers attached to the respondent's Meru office were sent to investigate the illegal activities on Sunday 20th September 2020. The officers allegedly witnessed the illegal activities going on and took photographs. They also met the claimant near the site in his black Subaru KCG 673U that Sunday and he asked them whether they were on duty in that area. The officers also saw Ephraim Muthambure and Anthony Mwai in the site in motor vehicle KCG 795H Probox white in colour.
13. During the hearing, PC John Ireri (RW1) adopted his written statement and on cross examination he stated that if the claimant and his colleague were residents around the scene of the illegal rerouting, and not involved, then they should have been the ones who reported the offence.
14. Humphrey Otuko, respondent's Chief HR and Administration Manager, Mt.Kenya Region testified as RW2 and adopted his written statement. He confirmed that he was based at the respondent's Headquarters when the incidence occurred. He did not interact with the claimant before the incidence. He reiterated that the claimant was in charge of Operations and Maintenance and that meant that he was in charge of re-routing of electronic poles in Maua but the County Business Manager was his boss.
15. He further stated that the procedural for releasing company vehicle requires signing of a work ticket to authorise the release. He contended that no work tickets were produced during the disciplinary hearing on appeal or in this case by the claimant if at all they existed. He stated that the investigation report contained the evidence of the re-routing of the power lines.
16. He contended that there is no way the illegal activity could have happened without claimant's knowledge and as such he was at the centre of it. He contended that Operations and Maintenance Manager is always on duty for which he was entitled to a General Availability Allowance for senior managers. He was therefore not supposed to fill a call out form leave alone in a case of illegal re-routing.
17. He stated that the termination letter was written on 7th January 2021 at the Regional office and it took some time to reach the claimant. He contended that there is no evidence that the claimant was on duty from 8th January 2021 and clarified that if he was, then he is entitled to payment.

Submissions

18. The Claimant submitted that his dismissal was unlawful because there was no justifiable reason. He contended that the dismissal was based on investigation report by the respondent's Chief Security Officer Mt.Kenya Region, one Stephen Muoka who neither gave evidence herein nor was the investigation report produced as exhibit. Besides, the evidence by PC John Ireri (RW1) did not connect the claimant with the illegal re-routing.
19. He further submitted that although he was subjected to a disciplinary hearing, the same was hugely pre-determined case and therefore lacked substance of fairness. He was denied a chance to cross examine any witness who had been adversely mentioned during the investigation. Accordingly, he maintained that the disciplinary hearing was just a public relation geared towards a pre-determined conclusion.
20. The claimant concluded that his dismissal was unlawful for want of substantial and procedural fairness. For emphasis, he relied on the case of *Menginya Slimi Murgani v Kenya Revenue Authority* (2006)



eKLR, Joshua *Rodney Marimba v Kenya Revenue Authority* (2019) eKLR and *Walter Ogal Onuro v Teachers Service Commission* (2013) eKLR.

21. In view of the foregoing matters, he submitted that he is entitled to reliefs sought including compensation, salary in lieu of notice and costs.
22. The respondent, on the other hand maintained that the dismissal of the claimant was lawful because there was valid reason and fair procedure was followed. It contended that it has produced evidence to prove that electricity poles were moved and power lines removed illegally under the watch of the claimant. It argued that the claimant, being the person in charge of infrastructure maintenance in the area must have known about the illegal re-routing. It contended that the company lost revenue as a result of the illegal rerouting since ordinarily, re-routing of power lines is done at a fee.
23. The respondent further submitted that the failure to call Mr. Stephen Muoka as a witness to give his evidence was not deliberate but due to the difficulty faced in tracing him. It contended that more effort to look for him would have delayed the conclusion of the matter. Consequently, it urged the court to consider the statement written by the witness pursuant to section 33 of the *Evidence Act*.
24. It submitted that it has adduced sufficient evidence to prove that the reason for the dismissal as required under section 43 of the *Employment Act*. It cited the case of *Kenya Revenue Authority v Reuel Waitbaki Gitabi 2 others* (2019) eKLR and *Thomas Sila Nzivo v Bamburi Cement Limited* (2014) eKLR where this court and court of Appeal agreed that the employer is not required to have conclusive proof of the employee's involvement in an offence, but only to prove that he had reasonable and sufficient grounds to believe that the employee committed the offence or he was involved.
25. In this case, the respondent submitted that though the investigations report was clear and nearly conclusive on the claimant's culpability, it still invited him by serving him with a show cause letter to defend himself. However, he failed to give proper and cogent explanation but just made mere denial of the allegations. Thereafter he was invited to disciplinary hearing before a committee but again failed to exonerate himself hence the dismissal. He appealed the dismissal and he was heard by different committee which upheld his dismissal.
26. The respondent maintained that it dismissed the claimant for a valid reason and through a fair procedure and therefore he is not entitled to the reliefs sought.

Issues for determination

27. There is no dispute that the claimant was employed by the respondent as the Technician in charge of Operations and Maintenance Maua Town. There is also no dispute that he was dismissed from employment vide a letter dated 7th January 2021. The issues falling for determination are: -
 - a. Whether the termination was unfair and unlawful.
 - b. Whether the reliefs sought are merited.

Unfair termination

28. Termination of employment by the employer is unfair if there is no valid reason and fair procedure was not followed. The legal burden of proof of unfair termination lies with the employee, while the evidential burden of justifying the termination lies with the employer. Section 45 (1) & (2) of the *Employment Act* provides that:-

“(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.”

Reasons for termination

29. The dismissal letter dated 7th January 2021 captured the reason for the dismissal as follows:-

“That;

1. You were involved in illegal re-routing of electricity poles along Kathima road on 19/9/2020 using KPLC Hiab Reg.No.KCE 881D.
2. You were involved in illegal rerouting of electricity poles including KPLC Switch along Hospital road using KPLC Hiab Reg.No.KCE 881D on Sunday 2/8/2020.
3. You misused the KPLC Hiab to carry out the illegal re-routing of electricity poles upon payment by contractors to pave way for construction of the following roads: -Hospital Road, Kathima Road, Makiri Road, Kiegoi Tea Factory Part 2, Antubochio, Giteretu Road, Kiengoi Tea Factory Part 1, Igembe Campus and Kiegoi Tea buying Centre.”

30. The reasons for dismissal can be summarized as illegal re-routing of electricity poles and switch on 2nd August 2020 and 19th September 2020; and secondly misusing the respondent’s Hiab Registration Number KCE 881D to carry out the said illegal re-routing. The claimant denied the alleged offences during the disciplinary hearing and before this court. He contended that he was off duty when the offence was committed. He also contended that he had work tickets to prove that he did not authorize the use of the Hiab but the appeal committee rejected the same.

31. However, he admitted that he is the person in charge of Operations and Maintenance in Maua area where the offence was committed. He further admitted that he resides near the place where the offence occurred and that he met RW1 on the material date near the scene of the offence. He also did not produce the work tickets which he alleged that they contained evidence in his favour.

32. The respondent sought to discharge their burden of proof by lining up two witnesses. RW1 was one of the investigators and the other sat in the disciplinary committee that conducted the disciplinary hearing for the claimant. Pw1 stated that after an intelligence report was received at Meru office, he was sent to conduct investigation with another police officer PC Kibet.

33. He stated that the two visited the site at Maua on Saturday 19th September 2020 and held surveillance along Kithima Down park road where the illegal re-routing was scheduled. At around 3pm they



- spotted some young men digging holes at a distance and some of them had the respondent's uniform. RW1 recognized one of them, Mr. Cyprian Mwiti who was a former casual employee of the respondent at Maua office. The young man ran away when he noticed them RW1 and his colleague left at 3.30pm being satisfied that the diggers will not return.
34. RW1 was, however surprised to learn the same evening that the low voltage line poles were re-routed after they left the site. He visited the site with his colleague and the following day, Sunday morning and confirmed that a total of 7 poles were re-routed along the road and created room for the road constructor to carry on his work without paying the required fees to the respondent.
 35. RW1 later that Sunday met the claimant driving KCG 673U Subaru near the site and after greetings, enquired whether the security officers were on duty in the area. A few minutes thereafter they saw Ephraim Muthambure driving his KCG 795H, white Probox in company of Mr. Anthony Mwai the Hiab driver. The car had other passengers including Cyprian Mwiti who were at the site the previous day.
 36. I have considered the evidence presented. It is clear that there is no direct evidence connecting the claimant with the alleged offence of illegal re-routing and misuse of Hiab. We are therefore left with circumstantial evidence to evaluate whether the respondent had good grounds to suspect that the claimant was involved in the offence. According to the respondent, the position held by the claimant placed him in a position to know if any re-routing of power lines and switch was to take place in his work area. He was also in a position to know when the Hiab was to be used.
 37. He denied having authorized the use of the Hiab and stated that it was supposed to be in the garage for repairs. He also denied knowledge of the illegal re-routing because he was not within his docket unless requested by the D&C Team at Meru Office. He also contended that he was off duty on the material day.
 38. During the disciplinary hearing, the chairman asked Mr. Samuel, I believe, Samuel Karengo, the Distribution Engineer-Maua to clarify on the allegation by the claimant on reporting relation and he responded that under the old structure the claimant, as the Operations and Maintenance in charge, was also in charge of FBBU in Maua. He did not give the reporting relations under the new structure. He also did not deny that re-routing was his docket in Meru office.
 39. RW2, who is the Regional HR boss did not clarify on the relations structure either it follows that something is not clear about the reporting relations. It appears from the claimant's explanation that arrangement to re-route power lines can be done without his knowledge especially if done while he is off duty.
 40. In this case, the respondent had burden of disproving that the claimant was not off duty. The fact that an office was generally available on short notice does not mean that someone cannot be on off duty. It is a fact that the illegal re-routing happened over the weekend which points to the fact that the claimant was off duty. Having considered the weight of the evidence I find that the same tilts in favour of the claimant.
 41. The fact that he is presumed to be senior enough to have been aware of the illegal re-routing, and the fact that he was seen driving near the scene of the offence after the investigations witnesses the illegality does not connect him to the offence.
 42. Accordingly, I do not find that the employer has proved before this court sufficient and proper grounds upon which it generally believed that the claimant was involved in the offence. No witness was called from Maua office to give evidence in the nature of work ticket was adduced to connect the claimant to the offence of misusing the Hiab to carry out the illegal re-routing. Accordingly, I must hold that



the respondent has failed to prove on a balance of probability, the validity of the reasons upon which it dismissed the claimant from employment vide the letter dated 7th January, 2021. Having said that, I am clear in my mind that the respondent's case herein does not meet the criteria set by the case of *Thomas Sila Nzivo V Bamburi Cement Ltd* and *Kenya Revenue Authority V Reuwel Waitbaka Gitabi*, *supra*.

Procedure followed

43. Section 41 of the *Employment Act* provides that: -

“(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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

44. In this case, the claimant was interviewed by the respondent's chief Security Officer during the investigations. He was also served with a show cause letter and he responded. Thereafter, he was invited to a disciplinary hearing before a committee and he attended alone and said he was okay. He was heard by the disciplinary committee and his representations were considered before the decision was reached to dismiss him. Thereafter, he appealed and the appeal was heard by an appeal committee comprising different panellists. The appeal committee notified him of its decision to uphold the dismissal.

45. In view of the foregoing matters, I find that the employer has proved that it accorded the claimant a fair hearing before the dismissal. In doing so, I dismiss the allegation by the claimant that the disciplinary committee and the appeal committee were hostile to him. The minutes of the proceedings of the two committees filed by the claimant as exhibits do not reflect any hostility on the part of the panellists. In my view, the proceedings reflect a genuine and cordial interaction between the panellists and the claimant.

Reliefs

46. Section 43 of the *Employment Act* provides that:-

“(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.”

47. I have already made a finding of fact that the respondent has failed to prove that the reasons for dismissing the claimant were valid. Consequently, I award the claimant the declaration that his dismissal was unfair and unlawful contrary to section 45 of the *Employment Act*.



48. In view of the foregoing, I find that the claimant is entitled to compensatory damages under section 49 and 50 of the Employment Act being salary in lieu of notice plus compensation for unfair termination. He prayed for one-month salary in lieu of notice and I award him in line with his contract of employment. I further award him six months gross salary as compensation for the unfair dismissal considering his long service of over five (5) years and the fact that the respondent has failed to prove the alleged misconduct against him.
49. The claim for constitutional violation has not met the legal threshold established by the court in Anarita Karimi Njeru, thus: -
- “If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if any to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they were alleged to be infringed.”
50. In any event, I am certain that the protection under Article 41 and 47 of the Constitution are covered by section 41, 43 and 45 of the Employment Act and adequately remedied under Section 49 of the Act. Even if I was to find that the claimant’s rights were violated, the compensatory damages awarded sufficient remedy to the injury suffered.

Conclusion

51. I have found that the dismissal of the claimant was unfair and unlawful since there was no valid reason to justify the same. Consequently, I enter judgment in his favour in the following terms: -
- a. Notice.....Kshs. 97,408.00
 - b. Compensation.....Kshs.584,448.00
Kshs.681,856.00
 - c. Costs and interest at court rates from the date of this judgment.
 - d. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF MARCH, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

