



Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Ltd (Cause E603 of 2022) [2024] KEELRC 2694 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2694 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E603 OF 2022
B ONGAYA, J
OCTOBER 30, 2024**

**BETWEEN
KENYA ELECTRICAL TRADES & ALLIED WORKERS UNION CLAIMANT
AND
KENYA POWER & LIGHTING COMPANY LTD RESPONDENT**

JUDGMENT

1. The Claimant filed the Memorandum of Claim dated 27.07.2022 through Onyony & Company Advocates. It prays for orders against the respondent as follows:
 - a. A declaration that the termination of the services of the grievant by the respondent was unlawful and unfair.
 - b. Payment of one-month salary in lieu of notice being Kshs. 118,843/=.
 - c. Payment for unfair and unlawful termination – Kshs. 118,843 x 12 = Kshs. 1,426,116/=.
Total.....Kshs. 1,544,959/=
 - d. Costs.
 - e. Any other or further remedy this court deems just and expedient to grant.
2. The claimant’s case was that there was wrongful and unlawful dismissal of Mr. Charles Muriithi (grievant) and gross labour malpractice. It averred that the grievant, a unionisable member of the claimant union, was an employee of the respondent who served in various positions including Cook and Wayleave Assistant. That at the time of termination of his employment, the grievant had served the respondent company for over 22 years and was earning a salary of Kshs. 118,853/- working as a Wayleave Assistant III.



3. The claimant averred that the claim arose out of an Investigation Report on alleged customer mishandling of Tala Office – Ref: E21482020090200 dated 08.02.2021 that was forwarded on 11.02.2021 with its subsequent findings and recommendations. That from the report, the grievant was alleged to have received Kshs. 10,000/- as a token from a customer and failing to report to the respondent company after detecting an illegal power supply at a customer’s premises.
4. It was the claimant’s averment that the grievant received a show cause letter on or around 18.02.2021 demanding an explanation on the aforementioned allegations and why disciplinary action should not be taken against him. The grievant responded vide a letter dated 22.02.2021 denying the allegations and asserting that he was under pressure and unable to confidently meet his work obligations. On 11.03.2021, the grievant was invited to disciplinary hearing that was held at Electricity House Boardroom on 16.03.2021 in the presence of five (5) panellists, who were the respondent’s employees. The grievant attended the hearing with his two witnesses.
5. The claimant pleaded that pursuant to the disciplinary meeting, the disciplinary committee did a recommendation dated 17.03.2021 finding that the committee was not able to prove the exchange of money between the grievant and one Mr. Kabutha. That the disciplinary committee’s conclusion was that the grievant be warned because of negligence of duty on failure to report illegal power connection.
6. The claimant averred that on 12.05.2021, the grievant was served with a dismissal letter with effect from 18.05.2021 and that the dismissal letter relied on the respondent’s letter of 18.02.2021, the grievant’s letter of 22.02.2021 and the disciplinary hearing held on 16.03.2021. Subsequently, the grievant appealed the dismissal through a letter dated 21.05.2021 on grounds that the dismissal and the process thereto were unfair based on the findings and recommendations of the disciplinary committee.
7. The claimant further averred that it thereafter received a letter dated 02.06.2021 acknowledging receipt of the grievant’s appeal letter and indicating that the date of hearing of the appeal would be communicated to the grievant. On 21.09.2021, the grievant was invited to appear before the Appeals Committee on 29.09.2021 at 8:30am at Stima Club Ruaraka with any witness that is an employee of the respondent. As scheduled, the grievant in the company of one witness appeared before the appeals committee that consisted of five (5) panellists. That the appeals committee upheld the decision to dismiss the grievant from service vide a letter dated 16.11.2021.
8. It was the claimant’s case that in both disciplinary meetings, Eng. Lawi K. Kamencu, the D & C in-charge of Tala Office, was never summoned or called to give his position as far as the report and the allegations against the grievant were concerned. The claimant argued that the grievant having approved the wayleave on 09.01.2021 as indicated on the printout from the respondent’s system, it was untenable for him to have visited the customer’s father, Mr. Kabutha, on 14.01.2021 to give him back the alleged Kshs. 10,000/-, which allegation was notably not substantiated by the first disciplinary hearing panel. That the first disciplinary hearing panel relied on the CCTV footage shared by the security team, which could not prove that the grievant returned Kshs. 10,000/- to Mr. Kabutha, to find that the grievant was innocent.
9. The claimant further pleaded that it received a letter dated 23.08.2021 from the Labour Ministry acknowledging receipt of the union’s report on the unfair dismissal of the grievant and confirming appointment of a Ms. Hellen Maneno as a conciliator. That after two conciliation meetings convened in December 2021 and January 2022, on 09.03.2022 the claimant received a Conciliation Report dated 08.03.2022 in which the conciliator recommended that the grievant be reinstated back to work without loss of benefits and be paid his salary and allowances from the date of dismissal. However, the respondent rejected the conciliation report vide a letter dated 12.04.2022 and reiterated that the grievant’s dismissal effective 18.05.2021 was lawful.



10. It was the claimant's case that the respondent's actions as evidenced in its averments hereinabove show arbitrariness, defiance to the rule of law and abuse of the grievant's rights.
11. The respondent's Memorandum of Response is dated 07.10.2022 and was filed through Irene Walala Advocate. The respondent prays that the claimant's suit be dismissed with costs and judgment entered for the respondent against the claimant.
12. The respondent averred that it engaged the grievant vide an employment agreement dated 12.07.2007 as a Cook IV and he later rose through the ranks to the position of a Wayleaves Assistant until his dismissal from employment on 12.05.2021.
13. The respondent's case was that the grievant was implicated in a case reported by a customer of mishandling and demanding money and that he was subsequently afforded the opportunity to be heard and his representations considered. It denied the assertion that the first disciplinary committee recommended that the grievant be warned on account of negligence of duty on failure to report illegal connection as alleged or at all. The respondent averred that the appeal disciplinary committee upheld the decision to dismiss the grievant after noting that he failed to tender any new evidence against the reasons leading to his dismissal.
14. The respondent pleaded that in its invitation to the disciplinary hearing received by the grievant, it had advised him to bring any evidence or witness he may have in support of his case. That in this case, the grievant was therefore at liberty to bring the aforementioned Eng. Lawi K. Kamencu to give his position at the disciplinary hearing.
15. The respondent further averred that in dismissing the grievant, it complied with the procedure set out in law and that the claimant's prayers are untenable and amount to engaging this Court in an academic exercise. The respondent argued that the grievant's actions were contrary to the respondent's Code of Conduct and Ethics. Further, that the grievant's conduct and character left it with no alternative but to dismiss him in order to maintain and enforce a conducive work environment, order, discipline, service delivery and to safeguard its employees from unwarranted corruption/fraud.
16. The respondent further pleaded that in the course of his employment, the grievant also accrued various liabilities with the respondent company totaling to Kshs. 444,438.91 and for which he remains liable.
17. The grievant Charles Muriithi Marangu testified to support his case. The respondent witness No. 1(RW1) was Isaac Abdo Jarso, the Chief Security Officer who investigated the case, and RW2 was Hellen Ng'ang'a, the Chief Human Resource and Administration Officer. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.
18. To answer the 1st issue, the Court returns that there is no dispute that parties were in a contract of service. The respondent employed the grievant on 21.03.2005 as a Cook and the grievant rose through the ranks and was re-designated or promoted on 01.08.2011 as Wayleave Assistant III. As at termination the grievant's gross monthly payment was Kshs.118, 843.00.
19. To answer the 2nd issue, the grievant was dismissed from employment per respondent's letter of dismissal dated 12.05.2021. the reasons for termination stated in the letter were as follows:
 - a. Receiving Kshs. 10,000.00 from a customer as a token to fast track the customer's power connection contrary to company code of ethics and the Anti-Corruption Act.
 - b. Failing to report to the company the illegal supply at the customer's premises, having visited the site on 11.12.2020.



20. The dismissal was effective 18.05.2021 under clause 25.0 of the 2017/2020 CBA. The letter stated that the grievant owed the respondent a sum of Kshs. 444,438.91 as was particularised in the letter. He was entitled to appeal to the MD/CEO within 90 days from receipt of the letter. The grievant appealed by his letter dated 21.05.2021 denying receiving the alleged Kshs.10,000.00, that there was no illegal supply to be reported, the minutes of disciplinary hearing dated 16.03.2021 disclosed no clear basis for the dismissal, and, at disciplinary hearing there was no information or evidence making him culpable. He was invited to attend appeal hearing on 29.09.2021 and he attended with a witness. By the letter dated 16.11.2021, the respondent conveyed to the grievant that the dismissal had been upheld.
21. The 3rd issue is whether the dismissal was unfair. The evidence is that the grievant was accorded due procedure of a notice and a hearing. He appealed and the appeal was rejected. The procedure has not been faulted. The grievant lamented that his supervisor one Engineer Lawi had not been called to testify. However, the grievant had been allowed to bring witnesses at the disciplinary and appeal hearings. The grievant did not call the said Engineer Lawi and he cannot fault the respondent in that regard. It could be that Lawi was a necessary witness but the failure for him to be called cannot pass as impairing the procedure. The pertinent issue, in the Court's opinion, is whether the respondent has shown that as at the termination the reasons were valid per section 43 of the *Employment Act*, 2007 and that, the reasons were fair per section 45 of the Act.
22. The main dispute in the case is whether the reasons were valid and fair. Did the claimant receive the Kshs.10, 000.00? The investigator's report was that the claimant received the money as withdrawn by the customer's father (John Kabutha) from an M-pesa shop and given to one Daniel Wanyama to deliver to the grievant. RW1 testified that the statements were relied on as the truth and the makers were not called testify in Court or at disciplinary and appeal hearing. RW1 then testified thus, "...No evidence of deposit of Kshs.10,000.00 to grievant by the complainant. There is no evidence of such deposit and withdrawal by grievant...my investigation report refers to refund of the Kshs.10,000.00 or exchange of Kshs.10,000.00 but I have no evidence of such conversation that John and grievant discussed about the Kshs.10,000.00. CCTV shows. Is not exhibited." As relates to making the reports about the site, RW 1 testified confirming that the claimant had properly done his work and that he had reported to EEngineer Lawi, his supervisor. In particular, RW1 read out to the Court page R38 of his report. Paragraphs s, t, u, v, and w show that he properly undertook his site assignments reported the irregularity he had seen at the site to the said Lawi, and effected approval in the system on 09.01.2021 only after the customer had corrected the anomalies. The Court finds that as submitted for the claimant, both reasons for the dismissal were invalid and unfair. RW 1 also testified that the primary customer one Millicent did not complain about the grievant asking for money or receiving the alleged Kshs.10, 000.00.
23. The Court has considered the factors in section 49 of the Act on award of compensation. The grievant had worked for over 22 years with a clean record of service. He was unfairly implicated in the serious yet unfounded bribery allegation. The aggravating factor is that the respondent failed to involve the police or the Ethics and Anti-corruption Commission taking into account the seriousness of the allegations and the need to establish the same through the relevant statutory provisions and agencies. The further aggravating factor is that the grievant's supervisor at the material time Engineer Lawi was not involved and he would have easily confirmed that the grievant had reported all irregularities noted at the site and properly performed his work. The grievant appears to have properly performed his work as a Wayleaves Officer but then unfairly victimised and punished. He had a clean record of service and did not contribute to his termination. In that consideration the grievant is awarded maximum 12 months' compensation making $12 \times 118, 843.00 = \text{Kshs.1, 426, 116.00}$. He is also awarded Kshs.118, 843.00



being one month in lieu of the due termination notice. The respondent will pay the claimant's costs of the suit.

24. The Court has considered the respondent's alleged and particularised liability against the grievant and returns that there was no counterclaim or setoff in that regard and further that no evidence was provided to strictly establish the claims.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a. The declaration the dismissal was unlawful and unfair.
- b. The respondent to pay the claimant Kshs.1, 544, 959.00 (less PAYE), by 01.12.2024 failing interest to be payable thereon at Court rates from the date of this judgment until full payment.
- c. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 30TH OCTOBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

