



Republic v Kenya Pipeline & Lighting Company Limited; Kaluli (Exparte Applicant) (Judicial Review Application E022 of 2024) [2024] KEELRC 2699 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2699 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E022 OF 2024**

B ONGAYA, J

OCTOBER 30, 2024

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

AND

IN THE MATTER OF: ARTICLES 22(1) AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: PART III OF THE FAIR ADMINISTRATIVE ACTION ACT, CAP. 7L

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, CAP 226

AND

**IN THE MATTER OF: RULE 7(2) OF THE EMPLOYMENT
AND LABOUR RELATIONS COURT (PROCEDURE) RULES**

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26

BETWEEN

REPUBLIC APPLICANT

AND

KENYA PIPELINE & LIGHTING COMPANY LIMITED RESPONDENT

AND



JUDGMENT

1. The applicant filed the Notice of Motion dated 09.05.2024 through Regina & Company Advocates under sections 8 and 9 of the [Law Reform Act](#) and Order 53 rule 3(1) and (3) of the [Civil Procedure Rules, 2010](#), seeking the following orders:
 1. An order of Certiorari to remove into this Honourable Court and quash the decision of the respondent made vide the letter of dismissal dated 26th May, 2021 purporting to dismiss the ex parte applicant from the employment of the respondent with effect from 28th May, 2021 and the respondent's subsequent letter dated 16th November, 2021 dismissing the ex parte applicant's Appeal in view of the judgment delivered on 17th November, 2023 by Hon. H. Onkwani (SPM) in Makadara Criminal Case No. MCCR/E676/2021(MCCR/770/2021): *Republic v Robinson Ongeru Mogaka and Philip Mueti Kaluli* whereby, the ex parte applicant was acquitted of all the offences that had informed the respondent's decision to dismiss him from employment.
 2. An order of *Mandamus* compelling the respondent to reinstate the ex parte applicant in the service of Kenya Power and Lighting Company Ltd with effect from 28th May, 2021 in the position held before the unfair termination without a break in his service with full prevailing benefits and to continue in that service until the due date of retirement or lawful separation.
 3. An order of *Mandamus* compelling the respondent to pay the ex parte applicant all withheld monthly salaries and allowances from 28th May, 2021 to date consequential to the ex parte applicant's reinstatement.
 4. An order of *Mandamus* compelling the respondent to pay the ex parte applicant compensation for unfair termination of employment in addition to Orders 1, 2 and 3 above.
 5. That in alternative and without prejudice to prayers (1), (2), (3) and (4) above, an order of *Mandamus* compelling the respondent to pay the ex parte applicant;
 - a. General damages for malicious prosecution.
 - b. Compensation for unfair termination of employment.
 6. Interest on 3, 4 and 5 above at Court's rates.
 7. Costs of and incidental to the application be provided for.
 8. Such further and other reliefs that this Honourable Court may deem just and expedient to grant.
2. The application was based upon the grounds set out in the ex parte applicant's statutory statement and verifying affidavit (filed together with the application for leave to file the instant application) both sworn on 07.05.2024. The ex parte applicant's case is as follows:
 - a. That he was at all material times a permanent and pensionable employee of the respondent through a letter of absorption dated 09.04.2018. He was Artisan Mate Assistant in Network Management Division, O & M Function, Ruai FBBU, Nairobi South Region, Ruai with a starting monthly basic salary of Kshs. 38,809.00 plus monthly House Allowance of Kshs.



22,490.00. His salary was advanced shortly thereafter to monthly basic salary of Kshs. 41,914.21 plus monthly House Allowance of Kshs. 24,513.00 and later to a net monthly pay of Kshs. 55,300.00 plus monthly House Allowance of 26,403.00 and Electricity Bill Allowance of Kshs. 2,000.00.

- b. That within two (2) years of his employment with the respondent, he was promoted through a letter dated 19.02.2020 to the position of Customer Service Division, Customer Service Function “Know Your Meter-Fallback Activities”, Nairobi South Region, Electricity House. Three (3) months later, he was promoted to the position of Artisan Mate Assistant (Installation Inspection), Customer Service Function, Utawala/Mihango Sector, Nairobi South County with effect from 01.06.2020, which position he held until the date of his unfair dismissal on 28.05.2021.
- c. That on 19.03.2021, he was arrested alongside his colleague named Robinson Ongeri Mogaka at V-Mall, Utawala area by police officers attached to the respondent and others from Ruai Police Station. He was then arraigned in Court on 22.03.2021, charged and prosecuted in Makadara Criminal Case No. MCCR/E676/2021(MCCR/770/2021): *Republic v Robinson Ongeri Mogaka and Philip Mueti Kaluli* with the respondent herein as the complainant.
- d. That while the said criminal case was pending hearing and determination, on 16.04.2021, the respondent subjected him to disciplinary proceedings alongside his said colleague on account of allegations of their joint involvement in extortion and receiving of a bribe of Kshs. 30,000/- on 19.03.2021 from a customer, Alice Akumu Ongeri, for reconnection after the customer was disconnected on 16.03.2021, which allegations were the subject of the criminal case.
- e. That the respondent thereafter dismissed them from its employment vide a Letter of Dismissal dated 26.05.2021 with effect from 28.05.2021 after conducting disciplinary proceedings. Further, vide a letter dated 16.11.2021, the respondent dismissed the Appeal he had lodged challenging the decision of the respondent’s Disciplinary Committee on the grounds that the applicant did not adduce any new evidence in his Appeal.
- f. That through a judgment delivered in the said criminal case on 17.11.2023, the Court made a finding that effectively acquitted him of all the charges pursuant to the provisions of section 215 of the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya.
- g. That he thereafter wrote to the respondent vide a letter dated 09.02.2024 forwarding a copy of the aforesaid judgment and requesting the respondent to set aside the decision of its disciplinary committee and reinstate him back to employment in view of the said judgment in the criminal case. However, his said letter has not elicited any response from the respondent to date.
- h. That the decision to dismiss him from employment was made with an ulterior motive or purpose calculated to prejudice his legal rights and that the respondent’s Disciplinary Committee failed to take into account relevant considerations. Furthermore, the Disciplinary Committee’s action and decision to dismiss his Appeal was made in breach of the rules of natural justice, was arbitrary, unreasonable and thus unfair in the circumstances.
- i. That after his unfair dismissal by the respondent and following the prolonged hearing of the criminal case instigated by the respondent, he has been unable to secure employment elsewhere.
- j. That he was meant to retire on 08.09.2044 at the age of 60 years as per clause 10 of the respondent’s Conditions of Employment executed by parties on 20.04.2018.



- k. That apart from earning a salary and allowances, he was also assigned the duty of driving the respondent's motor vehicles at a monthly allowance of Kshs. 8,000.00. Consequently, his monthly take-home pay was Kshs. 91,703.00 at the time of his unfair dismissal from employment.
3. The application is opposed in the respondent's Replying Affidavit sworn by Hellen Ng'ang'a on 08.07.2024. The respondent prays that this Court dismisses the application herein, statutory statement and verifying. It was averred as follows:
- i. The ex parte applicant was lawfully terminated over his gross misconduct that was contrary to section 300(1) (a) (2) of the *Penal Code* and the respondent's Code of Conduct. He had also previously been issued with a warning letter over his gross misconduct. The termination of his contract of employment was done in compliance with the law and there was both substantive reasons for his dismissal and adherence to all the requisite procedures.
 - ii. The respondent denies having instigated the ex parte applicant's arrest as alleged, asserting that he was arrested by the police following investigations on a complaint the respondent received from a customer, from whom the applicant had demanded Kshs. 60,000/- to reconnect her electricity supply. The respondent maintained that the customer named Ms. Alice Akumu Orenge was the complainant in the said criminal matter.
 - iii. The disciplinary proceedings the ex parte applicant refers to were not the subject of the criminal proceedings and in any event, internal disciplinary processes and criminal processes are two independent processes. Consequently, decisions from a criminal court do not absolve the ex parte applicant from being held accountable under the respondent's Code of Conduct.
 - iv. That the ex parte applicant having been acquitted under section 215 of the *Criminal Procedure Code* meant that the trial Court had weighed the evidence of the prosecution and found that the applicant had a case to answer and was subsequently put on his defence.
 - v. The respondent lacks locus to set aside its decision as well as reinstate the ex parte applicant back to employment as it became functus officio upon delivery of the appeal decision vide its letter dated 16.11.2021. Furthermore, the ex parte applicant's position had already been filled up and it would be impracticable to remove the current employee after over two years.
 - vi. The ex parte applicant, during his employment at the respondent company, had acquired numerous skills and vast experience, which the respondent believes are on high demand and marketable in his area of expertise. He has approximately 20 years to gain meaningful employment and/or utilize the skills and experience he acquired at the company until he attains the age of retirement.
 - vii. The respondent has not breached any statutory duties and the ex parte applicant has failed to demonstrate the alleged breached, and his claims for general damages for malicious prosecution and compensation for unfair termination are unmerited.
4. The ex parte applicant thereafter, with leave of the Court, filed the Supplementary Affidavit sworn on 11.07.2024. He refuted having previously been subjected to any other disciplinary proceedings by the respondent. He argued that the Employment Court has a set of guiding applicable principles in disciplinary cases against employees, where in the opinion of the employer there exists a criminal element as was stated in the case of *Mathew Kipchumba Koskei v Baringo Teachers SACCO* [2013] eKLR. That in its judgment dated 17.11.2023, the criminal Court decided on the validity of the reasons the respondent used to terminate his employment and made a finding that he was innocent of all the



charges preferred against him. The ex parte applicant averred that since the respondent has refused to administratively set aside the dismissal decision and the subsequent decision dismissing his appeal, this Court has the jurisdiction to set aside the said respondent's decisions and consequently grant him the consequential legal remedies sought through the application herein.

5. The ex parte applicant and the respondent filed their written submissions. The Court has considered all the material on record and returns as follows:
- a. The dismissal was by letter of 26.05.2021 and administrative appeal was declined by the letter dated 16.11.2021. Three years of limitation effective the dismissal lapsed on 26.05.2023. It appears to the Court that the proceedings are time barred because the three years of limitation under section 90 of the *Employment Act, 2007* have since lapsed. In any event certiorari may not issue as 6 months of limitation under order 53 of the *Civil Procedure Rules* attached to grant of the order have lapsed. Again, mandamus for reinstatement order may not issue since three years attached under section 12 of the *Employment and Labour Relations Court Act 2011* have since lapsed.
 - b. It is also correct that the disciplinary proceedings were different from the ensuing or related criminal case. Nothing stopped the applicant from promptly moving the Court after the dismissal or rejection of the administrative appeal. It could be that the suit challenging the dismissal may, upon good case urged in that regard, be stayed pending the outcome of the related criminal case. Invariably, the criminal proceedings were no bar to filing suit or relevant legal proceedings to challenge the dismissal or rejection of the administrative appeal. The applicant failed to act and is now trapped with the time of limitation as already found and in circumstances that the time of limitation cannot be expanded under the prevailing statutory provisions.
 - c. Considering all circumstances of the case including outcome of the criminal case, each party to bear own costs of the proceedings.

In conclusion, the judicial review proceedings are hereby dismissed and each party to bear own costs of the proceedings.

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

**BYRAM ONGAYA
PRINCIPAL JUDGE**

