



**Chelule v Kenya Power and Lighting Co Ltd (Cause 44 of 2020)
[2024] KEELRC 2505 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2505 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 44 OF 2020
MA ONYANGO, J
OCTOBER 17, 2024
(FORMALLY NAKURU ELRC NO. 7 OF 2017)**

BETWEEN

JULIUS CHELULE CLAIMANT

AND

KENYA POWER AND LIGHTING CO. LTD RESPONDENT

JUDGMENT

1. Vide his Memorandum of Claim dated 16th January 2017 and filed in Court on 18th January 2017, the Claimant avers that his employment was unfairly and unlawfully terminated by the Respondent. He seeks the following orders:
 - a. The Claimant be reinstated to his position or an equally suitable position with the Respondent with all his back salary, allowances benefits and any other dues.
 - b. In the alternative and without prejudice to (a) above, general damages for lost income
 - c. Interest thereon
 - d. Costs of this suit
 - e. Any other relief the court deems fit to grant.
2. It is the Claimant's case that he was employed in 1991, that he served the Respondent until on 20th November 2012 when he was unfairly, illegally and unprocedurally, wrongfully and without any valid reasons, his employment was terminated.
3. The Claimant avers that in terminating his employment the Respondent breached the provisions of the *Employment Act* and the *Regulations of Wages and Conditions of the Employment Act*.



4. In response, the Respondent filed a Memorandum of Response dated 4th December 2017 denying that the termination of the Claimant's employment was unfair. It was contended that the Claimant's employment was lawfully and fairly terminated in accordance with the *Employment Act*.
5. The Respondent thus averred that the Claimant's allegation that the termination of his employment was unfair and unjustifiable is false.

The Evidence

6. The Claimant testified on 13th April 2023 as CW1. He adopted his witness statement recorded on 31st October 2017 as his evidence in chief. In his testimony the Claimant stated that he was employed by the Respondent in 1991 as a store man and was unlawfully terminated from employment in 2012 on allegations that he had defrauded the Respondent.
7. The Claimant denied being at work during the period the Respondent accused him of committing the offence for which his employment was terminated. He stated that while in the Respondent's employment, he was subjected to performance contracts and that his performance was very good.
8. The Claimant told the court that he never had any disciplinary issues during the course of his employment with the Respondent. It was his contention that the materials alleged to have been stolen were not missing from the store.
9. On cross examination by Counsel Cheloti, the Claimant averred that according to the investigations done at the Respondent's store, the audit report confirmed that no material was missing.
10. The Claimant stated that he was invited to a disciplinary hearing on 5th September 2012 and he attended the disciplinary hearing on 24th September 2012. He admitted to signing the minutes of the disciplinary hearing.
11. It was the Claimant's case that in the course of performing his duties, he would share his passwords with two of his colleagues when work was overwhelming, that this was against the Respondent's policy and that he raised the issue severally with the management.
12. Contrary to what the Claimant stated in examination in chief, he agreed that there was documentation for the items that got lost in the stores where he was in charge.
13. The Claimant testified that upon being issued with a summary dismissal letter, he preferred an appeal against the decision but his appeal was dismissed.
14. On re-examination, the Claimant denied sharing his password with any of his colleagues. He insisted that the disciplinary hearing was not conducted in a fair manner.
15. The Respondent called three witnesses in support of its case. Mr. Justine Maina Gitachi, its Senior Supply Chain Officer testified on 13th April 2023 as RW1. He adopted his witness statement recorded on 1st November 2021 as his evidence in chief and relied on the documents filed on 6th March 2018 in support of the Respondent's case.
16. RW1 took the court through the procedure of removing materials needed from the Respondent's stores. He explained that once a customer applies for power, the customer is allocated a KPLC team and a reservation is created in the system, which is known as Design & Construction (DCS), for the required materials of that customer's scheme.
17. He explained that the reservation can be reviewed by people in the store in the Integrated and Logistics System (ILS). That when the team or contractor goes to the store, the staff in the Stores post the



reservation with details of the materials required. The system generates two duplicates one of which has a gate pass, which is taken to the store keeper to issue the materials after authorization by the stores in charge. The materials then leave the store.

18. RW1 stated that there were instances where there were no gate passes but the materials left the store and that the Claimant was solely responsible.
19. The Respondent's witness stated that the Claimant was taken through a disciplinary hearing and the issues raised therein were that he did not follow procedure by sharing his passwords and also, that materials were removed from the stores without authority.
20. On cross examination, RW1 told the court that one of the reasons the Claimant was dismissed from employment was that he posted Stores Transaction Form (STF) in the system and that as a result, there were materials which were lost because of that posting.
21. RW1 admitted that there are times when the system is down and that there is a procedure to issue materials offline. He stated that in the Claimant's case, he had not seen any evidence that the posting was done when the system was down.
22. RW1 stated that during the disciplinary hearing, the Respondent relied on the investigations report and the Claimant's own admissions. RW1 reiterated that the reasons for dismissal of the Claimant was password sharing and release of materials from a scheme which was already completed.
23. RW1 also stated that he was part of the disciplinary panel and maintained that in the invitation letter dated 5th September 2012, the Claimant was informed of the right to representation and to bring his evidence in support of his case. He stated that the Claimant had a right to cross examine witnesses and bring his witnesses but he chose not to bring any witness nor cross examine the witnesses called by the Respondent.
24. On re-examination, RW1 testified that from the minutes of the disciplinary hearing, the Claimant stated that he did not ask his staff to share passwords, not that he never shared passwords. That he admitted that he shared passwords at times because of shortage of manpower.
25. The witness explained that when materials are posted, they must be approved by the stores in charge, in this case, the Claimant. That this authorization is done on a physical print out of the documents by use of passwords to issue materials.
26. RW2 was Faith Kaberenge who introduced herself as the Respondent's Human Resource Manager. She adopted her witness statement recorded on 1st November 2021 and relied on the documents filed by the Respondent as part of her evidence.
27. She stated after the Respondent established that its employees had defrauded it, it carried out an audit and the investigations as per the audit report recommended that disciplinary action be taken against all the staff involved in the theft of the Respondent's materials from the stores. She further stated that the Claimant was in charge of Kitale stores where the materials came from.
28. RW2 reiterated that the Claimant was invited to a disciplinary hearing and after the hearing a decision was made to dismiss him from service. That he was dismissed vide a letter dated 20th November 2012 and was paid his salary up to the date he was dismissed on 27th November 2012.
29. On cross examination, RW2 maintained that the Claimant was the custodian of the materials and that the audit report recommended that the Claimant be held accountable for the lost materials. She also stated that the Respondent did not prefer criminal charges against the Claimant as they decided to handle the case using internal mechanisms.



30. RW2 contended that what transpired in the disciplinary hearing is well documented in the disciplinary records.
31. On being re-examined, RW2 maintained that the minutes of the disciplinary hearing were filed and are at No. 4 in the list of documents filed in court on 13th June 2018 and also, that the audit report was filed in the bundle dated 1st November 2021 at No. 1. She stated that the audit report at paragraph 11.3 recommended that the Claimant be held accountable for failure to account for company documents.
32. Argwings Kodhek Ochieng, the Respondent's Senior Internal Auditor testified as RW3. He adopted his witness statement recorded on 1st November 2021 as his evidence in chief. RW1 stated that he was involved in the compilation of the Audit report dated 28th April 2012. According to RW3, the findings of the audit report were that the Respondent lost KShs 13.5 million from Kitale stores, which materials were removed from the stores but never went to the customer's premises.
33. RW3 re-affirmed that the person in charge of the stores where the materials were kept was the Claimant.
34. On cross examination, RW3 stated that the Audit Report did not state that the Claimant stole the materials but that his profile was used.
35. It was RW3's evidence, that the Claimant in his statement during investigations confirmed that he shared his passwords.
36. At the close of the Respondent's case, parties were directed to file written submissions. Both parties filed their submissions.

The Claimant's Submissions

37. In his submissions filed in court on 17th October 2023, the Claimant stated that section 45 of the *Employer Act* prohibits unfair termination by employers. He submitted that according to the letter of termination and evidence adduced by the Respondent, the main reason for the termination of his employment was that he shared his password which led to loss of material from the Respondent's stores.
38. According to the Claimant, no evidence was adduced during the disciplinary proceedings or in court by witnesses that indeed he shared his password as alleged and whom the password was shared to.
39. It is therefore the Claimant's Submission that the reasons offered by the Respondent to terminate his employment did not meet substantive nor procedural fairness. The Claimant urged the court to find that he was unlawfully terminated from employment.
40. with regard to the order for reinstatement that he sought in his Memorandum of Claim, the Claimant urged the court to grant this prayer on the grounds that his employment was terminated unlawfully. In support of this position, the Claimant placed reliance in the cases of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* (2017) eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR.
41. In the alternative to the order for reinstatement, the Claimant sought to be compensated KShs 10,160,000 being one month's salary in lieu for notice and gratuity.
42. The Claimant also sought to be awarded costs.

Respondent's Submissions

43. The Respondent in its submissions framed the issues for determination to be:



- i. Whether the Claimant's termination was unfair and if the answer is in the affirmative;
 - ii. What is the appropriate relief and/or whether the Claimant should be granted the reliefs sought.
44. Regarding the issue of procedural fairness, it is the Respondent's submission that the dismissal letter dated 20th November 2012 made reference to the Claimant's misconduct with respect to sharing of passwords against the Respondent's employment policy, release of materials in respect of work that had already been done, failure to secure the Respondent's important documents and instructing employees under his supervision to share password which action was against the Respondent's policy.
 45. The Respondent submitted that the requirements of Section 41 were exhaustively invoked in the termination of the Claimant's employment as the termination process was conducted through both correspondence and oral hearing as evidenced by the letter of invitation to disciplinary hearing, minutes of disciplinary hearing and subsequently in the termination letter.
 46. On the aspect of Substantive fairness. the Respondent submitted that the Claimant's termination letter made reference to the Claimant's disciplinary hearing committee's observation/findings where it was noted that the Claimant colluded with other employees to steal from the Respondent and further, that this position was buttressed by the Audit report which immensely implicated the Claimant.
 47. While citing section 44(1) and 4(g) of the *Employment Act*, the Respondent submitted that an employer can summarily terminate an employee without notice or with less notice than that which the employee is entitled to by statutory provision or contractual term, on account of misconduct.
 48. The Respondent therefore submitted that it had reasonable cause to suspect that the Claimant was involved in fraudulent deals that were fundamentally against the Respondent's policies having been bestowed with the responsibility to be in control as a result of which the Respondent incurred immense losses.
 49. While citing the case of *Kenya Plantation & Agricultural Workers Union v Sotik Highlands Tea Estate Limited* [2016] eKLR, the Respondent submitted that the termination of the Claimant's employment was procedurally and substantively fair.
 50. On the second issue whether the Claimant should be granted the reliefs sought, it is the Respondent's submission that since Claimant was fairly terminated from employment, he is not entitled to the reliefs he is seeking.
 51. In response to the Claimant's claim for reinstatement and compensation in the alternative, the Respondent submitted that the said relief is misinformed and not anchored in any jurisprudential law. The Respondent cited Section 12(3) (vii) of the *Employment Act* and argued that that the Court may only issue an order for reinstatement within three years of dismissal and averred that in this case, the said order was untenable.
 52. The court was urged to dismiss the Claim herein with costs.

Analysis and Determination

53. From the pleadings, the oral testimony of the parties and their rival submissions, the issues that fall for this court's determination are:
 - i. Whether the Respondent had a valid and fair reason for terminating the Claimant's employment;



- ii. Whether due process was followed in terminating the Claimant's employment;
 - iii. Whether the Claimant is entitled to the remedies he is seeking.
54. The law on termination of employment is provided for in the *Employment Act*. It is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but must also ensure that the laid down procedure has been followed.
55. Section 45(2) of the *Employment Act* provides that termination of employment by an employer is unfair if the employer fails to prove valid reason and fair procedure. The burden of proof in employment claims as stipulated in Section 43 of the *Employment Act* is on the employer to prove the reason for the termination as valid in any legal proceedings.
56. Section 43(2) of the *Employment Act* defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employment of the employee.
57. In the instant case the Claimant avers that his employment was terminated on false allegations that he had shared the Respondent's passwords and that the Respondent's materials got lost under his watch. He stated that during the period the materials were alleged to have been stolen, he was not at work but in Nairobi on other official duties.
58. The Claimant admitted to sharing his passwords with two of his colleagues whenever they were swamped with work.
59. The Respondent on its part submitted that the Claimant was in charge of the stores in Kitale and that the materials went missing under the Claimant's watch. According to the Respondent, the Claimant posted Store Transaction Form (STF) for job Ref: No.E27202009070466 on 12th October 2011 in the ILS system for material worth Kshs. 682,142.42 a week after the job had been constructed and metered; that he failed to secure the Respondent's STF's leading to their destruction; that he posted STF No. E27202010040300 which facilitated issuance of 10 poles worth Kshs. 108,540 eight months after the scheme had been constructed and metered and lastly, that he shared official ILS password with the Respondent's other staff members contrary to the respondent's policy.
60. The Respondent's witness RW3 stated that from the Audit report dated 28th May 2012, the investigations that were done implicated the Claimant in the loss of the Respondent's materials.
61. From the above set of facts, I find that the Respondent had valid grounds to terminate the Claimant's employment. There was sufficient evidence to point to gross misconduct by the Claimant warranting the steps taken by the Respondent. Therefore, the dismissal was substantially justified.
62. On the second limb, the employer is required to prove fair procedure. Section 41 of the *Employment Act* provides for fair procedure as follows:
- Notification and hearing before termination on grounds of misconduct
- 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.

63. Although the Claimant admitted in his testimony to signing the minutes of the disciplinary hearing, he faulted the hearing as not being fair.
64. RW1 in his testimony stated that the Claimant was given an opportunity to cross examine witnesses during the disciplinary hearing but he chose not to.
65. I have analyzed the evidence of all the parties regarding the proceedings at the disciplinary hearing at length. In my view, the Claimant's allegation that the disciplinary hearing was not fair is unfounded as it is not supported by the evidence on record.
66. Regarding his appeal, the Claimant stated that it was not successful. The Respondent submitted that the appeal was dismissed since there were no new grounds raised.
67. From the foregoing, the court finds no fault with the procedure used by the Respondent in the process of the termination of the Claimant's employment as it satisfied the fairness test which requires both substantive and procedural fairness as articulated in the case of Walter Onuro Ogal -vs- Teachers Service Commission (2013) eKLR.
68. Consequently, the court is satisfied that the Claimant did not prove a case of unfair and unprocedural termination.
69. The suit is accordingly dismissed. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 17TH DAY OF OCTOBER 2024

MAUREEN ONYANGO

JUDGE

