



Kenya Power & Lighting Company v Kaindio (Employment and Labour Relations Appeal E032 of 2023) [2024] KEELRC 13222 (KLR) (25 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13222 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E032 OF 2023**

JW KELI, J

NOVEMBER 25, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY APPELLANT

AND

SOSPETER NTONCUU KAINDIO RESPONDENT

(An Appeal from the Judgment & Decree of the Honourable S.A. Opande, P.M. dated and delivered on 2nd March, 2023 in Nairobi CMELRC Cause No. E876 of 2020)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment of the Honourable S.A. Opande, P.M., delivered on 2nd March, 2023 in Nairobi CMELRC Cause No. E876 of 2020 Between Sospeter Ntoncuu Kaindio versus Kenya Power & Lightning Co Ltd, filed the Memorandum of Appeal dated 16th March 2023 and Record of Appeal dated 17th January 2024 and received in Court on the 3rd October, 2024, seeking the orders that the Appeal be allowed and the Judgment of the Subordinate Court be set aside with costs to the Appellant both in this Court and the Lower Court.
2. The Appeal was premised on the following grounds: -
 - a. That the learned trial Magistrate erred in law and in fact in failing to find and hold that the Appellant had made out a proper case for lawful termination.
 - b. That the learned trial Magistrate having found as a matter of fact that the Respondent had engaged a third party to carry out his duties and being reason for termination still misdirected himself in holding that the Respondent was unlawfully terminated.
 - c. That the learned trial Magistrate misdirected himself in failing to acknowledge that the Respondent was subjected to proper procedure in accordance with the provisions of the Employment Law before he was terminated.



- d. That the learned trial Magistrate erred in law and in fact in failing to appreciate and consider the uncontroverted evidence of the Appellant that the Appellant had reasons at the time which reasons it believed existed and which caused it to terminate the Respondent's services.
 - e. That the learned trial Magistrate erred in law and fact in failing to consider the impracticability of the order of compensation if granted.
 - f. That the learned trial Magistrate erred in law and fact by failing to balance the interests of the employee with the interests of the employer in granting the order for compensation.
3. In response to the Appeal, the Respondent entered appearance vide a Memorandum of Appearance dated 29th March, 2023 and filed a Notice of Cross Appeal of even date seeking the following reliefs::
- a. The cross-appeal be allowed;
 - b. The Judgment delivered on 2nd March 2023 be enhanced to the extent that salary for January 2019 be paid together with three months in lieu of notice be paid; and
 - c. Costs of the Appeal and Cross appeal be paid to the Respondent.
4. The Cross-appeal was premised on the following grounds: -
- a. The Learned judge erred in law in failing to make a finding that the Claimant was entitled to his unpaid salary of January 2019;
 - b. The Learned judge erred in both fact and law in finding that one month in lieu of notice was sufficient whereas the collective bargaining in place provided for 3 months' notice of intention to terminate employment or three months wages in lieu.
5. The Appeal and Cross-appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Justus Odonda Advocate were dated 30th July, 2024 and received in court on 3rd October, 2024. The Respondent's written submissions drawn by Omongo Gatune & Company Advocates were dated 26th September 2024 and received in Court on 30th September 2024.

Background to the Appeal

6. The Respondent/Claimant filed a suit in Nairobi MCELRC Cause No. E876 of 2020 against the Appellant for unlawful and unfair termination. Vide an Amended Memorandum of Claim dated 4th December 2020, the Respondent/Claimant sought for the following reliefs: -
- a. Kshs. 54,000.00 being salary of January 2019;
 - b. Kshs. 162,000.00 being 3 months' salary in lieu of notice;
 - c. Damages for unlawful and unfair termination;
 - d. General and aggravated damages;
 - e. Costs and interests;
 - f. Any other relief that the Court deems just and fair to award
- (pages 58-62 of the record is the Respondent's claim).
7. The Amended Statement of Claim had been supported by the Verifying affidavit sworn by the Claimant on 4th December, 2020(Page 64 of the Record) and accompanied by the Claimant's Witness



statement (Pages 22-25 of the Record) dated 15th September, 2020, and the Claimant's List and Bundle of documents of even date. (Pages 26 to 52 of the Record).

8. The Respondent entered appearance and filed a Memorandum of Appearance dated 5th November, 2020 (Page 53 of the Record). The Respondent filed a Statement of Response dated 5th November, 2020 (pages 54-57 of the record).
9. The Appellant/Respondent filed the Respondent's List of witnesses dated 24th May, 2021, the witness statement of CPL Daniel Njoroge and Elijah Kipkemei Kosgei both dated 24th May, 2021, the Appellant's list and bundle of Documents dated 24th May, 2021 (Pages 71-144 of the Record).
10. Conversely, the Claimant filed a Reply to Statement of Response dated 4th December 2020 (Pages 66-67 of the Record).
11. The Trial Court proceeded with the hearing of the Respondent/Claimant's case with him as the only witness on the 29th March 2022. The Defence case was heard on the 17th October, 2022 with Elijah Kosgei and Daniel Njoroge as the Appellant's Witnesses (pages 228-234 of the record).
12. The parties filed written submissions in the lower Court after the closure of the defence case. (The Claimant's submissions dated 7th November, 2022 at pages 147-156 of the Record). (The Appellant/Respondent filed written submissions dated 1st February, 2023 at pages 157-167 of the Record).
13. The trial Court (Hon. S.A Opande, P.M.) delivered its judgment on the 2nd March 2023 (pages 5-14 of the record) in favour of the Claimant finding that the Claimant's termination was unfair and illegal and awarded the Claimant one-month salary in lieu of notice of Kshs. 54,000/-, and compensation the equivalent of 3 months' salary of Kshs. 162,000/-, and costs of the suit.

DETERMINATION

Issues for determination.

14. The Appellant in its submissions identified the following issues for determination in the appeal against the Judgment of Hon. S.A. Opande delivered on the 2nd March 2023, namely: -
 - a. Whether the Learned Trial Magistrate erred in law and in fact in failing to find and hold that the Appellant had made out a proper case for lawful termination;
 - b. Whether the learned trial Magistrate misdirected himself in holding that the Respondent was unlawfully terminated having found as a matter of fact that the Respondent had engaged a third party to carry out his duties which was the reason for the dismissal;
 - c. Whether the learned trial Magistrate misdirected himself in failing to acknowledge that the Respondent was subjected to proper procedure in accordance with the provisions of the Employment law prior to dismissal;
 - d. Whether the learned trial Magistrate erred in law and in fact in failing to appreciate and consider the uncontroverted evidence of the appellant that the appellant had reasons at the time which reasons it believed existed and which caused it to dismiss the Respondent's services;
 - e. Whether the learned trial Magistrate erred in law and fact in failing to consider the impracticability of the order of compensation if granted;



- f. Whether the learned trial magistrate erred in law and in fact by failing to balance the interests of the Respondent with the interests of the Appellant in granting the order for compensation; and
 - g. Who should bear costs?
15. The Respondent, on the other hand, identified the following issues for determination in the Appeal and Cross - appeal namely: -
- a. Whether the Court erred in failing to hold that the Respondent was lawfully terminated for having engaged a third party to carry out his duties
 - b. Whether the Court failed to appreciate and consider the uncontroverted evidence presented by the Appellant, establishing a proper case for lawful termination;
 - c. Whether the Court failed to acknowledge that the Respondent was subjected to the proper procedure before his termination;
 - d. Whether the Court failed to consider the impracticability of the compensation order;
 - e. Whether the learned Judge erred in failing to award the Respondent his unpaid salary for January, 2019;
 - f. Whether the learned Judge erred in awarding one month's salary in lieu of notice instead of the three months' notice provided by the Collective Bargaining Agreement.
16. The court taking into consideration the issues raised by the parties, finds that the issues for determination in the appeal are: -
- a. Whether the appeal is merited.
 - b. Whether the cross-appeal is merited.

Whether the Appeal was merited

- 17. To determine whether the appeal was merited, the court considered the following sub-issues-Whether the Magistrate erred by failing to find the termination of the Respondent was lawful and fair. Whether prayers in the appeal were merited.
- 18. The court is guided by decision in *Selle & Another v Associated Motor Boat Co. Ltd & Others (1948) EA123* to the effect that the court sitting at first appeal has to re-evaluate the facts and evidence before the trial court while making allowance of not having seen the witnesses to reach own conclusion.

Whether the Magistrate erred by failing to find the termination of the Respondent was lawful and fair.

- 19. The appellant contended that the learned trial Magistrate misdirected himself in holding that the Respondent was unlawfully terminated having found as a matter of fact that the Respondent had engaged a third party to carry out his duties which was the reason for the dismissal. The Court finds that the reasons for dismissal were stated in the letter of dismissal dated 17th January 2019 (page 118 of the record) to be:-
 - a. That he violated the company's code of conduct and ethics including financial integrity, corruption, bribery, misuse of company assets, and acting through others.
 - b. Abuse of office.



20. It is settled law for the termination of employment to pass test of fairness it must be based on valid reasons and procedurally fair. This flows from authorities cited by the appellant and the respondent. See *Walter Ogal Anuno vs. Teachers Service Commission (2013)* eKLR which was cited by the Trial Magistrate Court and which I uphold to wit:- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness.”

21. The Learned Trial Magistrate having heard the case found that the termination of the employment was unlawful and unfair. The crux of the decision on the reasons for the termination being held not valid is in paragraphs 31 to 34 of the Judgment:-

“31. From the evidence tendered, the only evidence against the claimant was that he caused disconnection of the alleged customer’s power from the post. The court has not been told whether the investigation established that the alleged customer had no defective installation that called for the disconnection that the Claimant effected. If the customer had a defective installation, this court has not been led into the standard operating procedure for the disconnection of the defective installation. The court has not been guided that even if the Claimant effected the disconnection of a defective installation, he exceeded his mandate as he had no powers to order a disconnection.

32. What the court is led into is the fact that the Claimant sourced the services of the contractor who disconnected power. That he introduced the customer to the contractor who ended up extorting the customer. We are not told whether the Claimant who is the accused got a chance to face his accuser the customer.

33. The fact that it has not been shown that the claimant demanded or received any money from the customer gives credence to the assertion that the termination was unfair. This is compounded by the fact no evidence was led that the Claimant breached any procedure in having the power disconnected. During the hearing, the panel did not lead evidence to the Claimant that these are company procedure and that this is what you breached.

34. It is important to demonstrate that the disconnection was unnecessary as there was no defective installation and if there was a defective installation, there was another way of going about it rather than disconnection. It has to be shown that person who asked the disconnection had no power to order it and the person asked to disconnect had no power to receive instructions from the claimant. In fact it seems that the claimant acted in the ordinary course of his work until a complaint from a person personally known to George Kosgey (the customer) raised a complaint. The said George Kosgey was called to accept or deny his relationship with the customer. The immediate boss Mr. Ekwam who gave an order for disconnection was not called to give evidence as to the veracity of his instructions to disconnect.”

22. The reasons for termination are to be proved by the employer according to section 43 of the *Employment Act* to wit:-

“43

(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.

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.”



23. Further the reasons, under the *Employment Act*, have to be related to the employee's conduct, performance, or physical incapacity (section 41) and related to the employee's conduct, capacity, or compatibility; or based on the operational requirements of the employer (section 45(2)) and that the employment was terminated following fair procedure (section 41). The burden of proof lies with the employer to prove the forgoing according to section 47(5) of the Act to wit:-

“ 47

- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

Substantive fairness (valid reasons)

24. The court evaluated the evidence against the foregoing legal framework before the lower court in-depth. The uncontroverted evidence before the trial court was that the Respondent was an employee of the Appellant. In the course of his duties the claimant had found a customer with defective installation. He disconnected the power in the meter and had assistance from a third party to disconnect power from the pole. The respondent handed over the DI (Defective Installation) to the boss, Ekwom, who okayed the disconnection. That the claimant was authorised to do the disconnection and that was within his work. The only issue was use of a third party to do the disconnection. The Respondent led evidence at the disciplinary proceedings of the appellant and the trial court that the said third party was a known contractor of the Appellant. The Respondent led evidence that the customer was informed to report to the office following the disconnection. The customer visited the Appellant's offices on 8th December 2017 and signed a liability form admitting she had drilled MCCD on her meter box. The customer's account was debited Kshs. 3.8 Million and she commenced payments(see para 11 and 12 of judgment, claimant's witness statement pages 22 and 23, page 31-333 was the DI report and debit on the bypassed load current by the customer which was debited) At page 122 (of the record) during the proceedings it was not disputed the respondent had been authorised to disconnect the power.
25. The Appellant filed witness statements of CPL Daniel Njoroge and Elijah Kipkemei Kosgei (pages 140-144). RW1 was Elijah Kosgei. He told the trial court that he did not participate in the investigation. He stated that there was no admission of the crime by the claimant. He stated that the claimant had asked for a bribe of Kshs.700000 but the same was not paid. The claimant during the disciplinary proceedings raised the issue of bias on RW1 having instigated the allegations and also having been a former colleague of the customer. RW1 stated he was just doing normal work. RW2 was Daniel Njoroge who stated he investigated the matter. He had found no evidence to link the claimant to Jacob Ochieng who was found with suspicious MPESA transactions. In the re-exam, he stated that the claimant sent Simon to collect a bribe. That there was a link between Simon (the third party) and Jacob.
26. The court returns that the charge was on fraud and abuse of office and not the disconnection of the power by the third party who the court found was not a stranger to the appellant being its contractor and only assisted in the disconnection which had been authorized. The court finds in the chain of events the third party can only be treated akin to the biblical good Samaritan who assisted the claimant in doing his work (pole power disconnection) which was authorized. The Appellant never led evidence before the lower court on the particular code of conduct prohibiting seeking assistance in the manner the claimant did.



27. There was no evidence placed before the trial court of the claimant having asked Simon to pick bribe of Kshs. 700000. The appellant's police investigator, RW2, in own witness statement stated that Simon (third party) was arrested and charged with possession of public stores and not bribery (page 141 of the Record of Appeal paragraph 10). The Court returns that the allegation of Simon having been sent by the Respondent/claimant to pick bribe from the customer amounted to hearsay.
28. The court for the foregoing finds no basis to disturb the holding of unlawful termination by the trial court.

Procedural fairness.

29. The appellant subjected the respondent to disciplinary proceedings and appeal according to section 41 of the *Employment Act*. RW1 was accused of bias. The Court returns that the accusation of bias was neither here nor there. The claimant was accused of colluding with one Jacob who had been found with suspicious money transfers (paragraph 9, page 140 of the record of appeal). RW2 told the trial court there was no link established between the claimant and the said Jacob. The Claimant pleaded Jacob was reinstated on appeal by the appellant. Section 45(5) of the *Employment Act* provides for issues to be considered in determining fairness of termination as follows:-

- “(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider—
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (f) the existence of any previous warning letters issued to the employee.”

30. The evidence before the Court was that Jacob effected the debit following the disconnection on the customer account. There was an allegation of collusion yet Jacob was returned to work. The court returns that the Claimant was entitled to the same employer's practice as Jacob. On a balance of probabilities, the court finds that the appellant complied with the procedural fairness as envisaged under section 41 of the *Employment Act*. For the termination to be lawful and fair it must be procedurally fair and for justified reasons. Having re-evaluated the evidence before the trial court the court holds that the reasons for the termination were unjustified. The court found no reason to disturb the decision of the trial court that the termination was unfair and unlawful. Section 45(2) prescribes unfair termination as follows: -“(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 employees 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.” The decision of the trial court Magistrate that the termination was unlawful and hence unfair is upheld.

Whether the cross-appeal was merited

- 31. The cross-appeal sought the following orders: - “The Judgment delivered on 2nd March, 2023 be enhanced to the extent that salary for January 2019 be paid together with three months in lieu of notice be paid;”
- 32. On the cross-appeal for salary for January 2019; the letter of dismissal indicated that the claimant would be paid upto and including 18th January 2019. RW1 was Elijah Kosgei. In a witness statement dated 24th May 2021 RW1 stated he was the principal human resources and administration officer of the appellant. He did not rebut the claim for January's salary. The Court returns that the cross-appellant was entitled to salary for days worked as stated in the dismissal letter up to and including 18th January 2019. The court awards the cross-appellant the unpaid salary for 18 days worked in January 2019. The monthly salary was not disputed to have been Kshs. 54000 per month thus the unpaid salary is tabulated as 18/31x54,000 total sum of Kshs. 31,355.
- 33. On the notice pay - the claimant was awarded 1-month notice but on cross-appeal he contended to be entitled to 3 months' notice under the Collective Bargaining Agreement. The said Collective Bargaining Agreement was not produced as evidence (page 26- in the Record of Appeal was the list of documents by claimant) The award by the Trial Court under section 35 of the Employment Act for 1 month notice payment in lieu and is upheld.

Conclusion

- 34. In the upshot the appeal is dismissed for lack of merit and the cross appeal allowed for 18 days salary of January 2019 which is awarded for Kshs. 31,355.
- 35. The appeal dated 16th March 2023 is dismissed for lack of merit with costs to the respondent. The cross-appeal dated 29th March 2023 is allowed for unpaid salary in January 2019 as per the dismissal letter of 18 days for Kshs. 31355 only less statutory deductions with costs. The judgment of Hon. S.A. Opande dated 2nd March 2023N is upheld by the Court save for the addition of unpaid salary in month of January 2019 for 18 days for sum of Kshs. 31,355 less statutory deductions.
- 36. Costs of the appeal to the Respondent. Costs of the Cross-appeal to the cross-Appellant.
- 37. It is so ordered.

READ, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 25th DAY OF NOVEMBER, 2024.

JEMIMAH KELI

JUDGE

In the presence of



C/A – Caleb Otieno

Appellant :- absent

Respondent – Ms. Achila

