



**Oyengo v Aggreko International Power Projects Ltd (Cause  
560 of 2019) [2023] KEELRC 953 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 953 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 560 OF 2019  
L NDOLO, J  
APRIL 27, 2023**

**BETWEEN**

**GODFREY OMULAKO OYENGO ..... CLAIMANT**

**AND**

**AGGREKO INTERNATIONAL POWER PROJECTS LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant's claim against the Respondent is for wrongful and unfair dismissal. The claim is documented by a Statement of Claim dated August 22, 2019. The Respondent filed a Replying Memorandum on October 30, 2019.
2. At the trial, the Claimant testified on his own behalf and the Respondent called is Operations Manager, Michael Gitau Mwangi. The parties further filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on September 14, 2006, in the position of Generator Technician. At the time of leaving employment, the Claimant earned a monthly salary of Kshs 105,942.92.
4. Between the months of May and June 2017, the Claimant was deployed to the Respondent's customer's site at Mumias Sugar Complex, Kakamega, to supervise the decommissioning of the Respondent's equipment.
5. The Claimant avers that the equipment was in a poor state of maintenance. He adds that an accident occurred in the process of lifting/loading a generator onto a truck, resulting to damage to the generator.
6. The Claimant complains that the process of decommissioning and transportation of the equipment had been bungled and the whole procedure was fraught with negligence on the part of the Respondent and employees of the client.



7. The Claimant points out the following shortcomings:
  - a) The site had been operated by different people, both international and local technicians;
  - b) The poor state of machine maintenance was caused by the contract signed between the Respondent and the client; the agreement contained instructions to the Respondent's technicians and Mumias Sugar Company Limited;
  - c) The Claimant and his small team were subjected to long and arduous working hours without any help;
  - d) The site was plagued with lack of water which was necessary for the cooling of the generators, lack of spare parts, tools and equipment resulting from cost cutting by the Respondent;
  - e) The Claimant and his decommissioning team were handed the equipment in poor condition because the person handing over to the Claimant had been served with a dismissal letter one month prior to the handing over and he therefore did not bother maintaining the machines;
  - f) There was poor handling of the equipment by the client's unqualified operators.
8. The Claimant states that he gave a satisfactory explanation regarding the damage to the Respondent's equipment. He claims that the disciplinary hearing held on August 11, 2019 was a formality as the Respondent had already decided to dismiss him from employment. He adds that the Respondent did not consider his defence.
9. The Claimant lays a claim of wrongful and unfair dismissal and now seeks the following remedies:
  - a) 1 month's salary in lieu of notice.....Kshs 105,942.92
  - b) Overtime for 66 days.....149,644.37
  - c) 12 months' salary in compensation.....1,271,304.00
  - d) Service pay for 11 years.....582,681.00
  - e) Costs plus interest

### **The Respondent's Case**

10. In its Replying Memorandum dated October 25, 2019 and filed in court on October 30, 2019, the Respondent admits having employed the Claimant in the position of Generator Technician but gives the effective date of employment as October 1, 2008 and not September 14, 2006 as pleaded by the Claimant.
11. The Respondent admits that at the time of termination, the Claimant earned a monthly salary of Kshs 105,942.92.
12. The Respondent contends that the Claimant's employment contract was lawfully terminated on account acts of gross misconduct and pursuant to a fair disciplinary process as required under the [Employment Act](#).
13. The Respondent avers that the Claimant was negligent in the performance of his duties.
14. The Respondent summarises the events culminating to the Claimant's dismissal as follows:



- a. Sometime in May 2017, the Claimant was assigned the responsibility of supervising the decommissioning of the Respondent's equipment and machinery from a client's site at Mumias Sugar Complex, Kakamega;
  - b. During the handover, the Claimant failed to ensure that the equipment and machinery handed to him by the client for purposes of decommissioning were properly maintained. As a consequence, the equipment and machinery handed over to the Respondent were in a poor state of maintenance;
  - c. During lifting and loading of a generator onto a truck, the Claimant failed to properly supervise the operations and safety of the crane used to lift the generator and to ensure that the safety handling procedures were properly followed. In particular, the Claimant did not verify that the crane operator was qualified to operate the crane. Further, the Claimant did not supervise how the crane was operated and as a consequence, the crane operator engaged the wrong gear, resulting in a crash that damaged the generator;
  - d. The Claimant failed to blind and properly close the fuel pipes in a fuel tank leaving the fuel to spill over overnight and during transportation. This resulted in fuel spillage to the environment while the tank was in transit, exposing the truck to a likely fire incident and imminent environmental claims.
15. The Respondent asserts that the Claimant's conduct was in breach of the Respondent's safety policies and procedures.
16. Regarding the disciplinary procedure applied in the Claimant's case the Respondent states that:
- a) On July 20, 2017, the Claimant was issued with a letter requiring him to show cause why disciplinary action should not be taken against him;
  - b) The Claimant was also issued with a suspension letter on July 20, 2017, to enable the Respondent to conduct further investigations;
  - c) By an email dated July 24, 2017, the Claimant responded to the show cause letter, confirming his failure to ensure that the decommissioning process was done in accordance with the applicable handling procedures;
  - d) By letter dated August 7, 2017, the Respondent invited the Claimant to a disciplinary hearing scheduled for August 11, 2017. The Claimant was informed of his right to be accompanied by a witness of his choice;
  - e) The disciplinary hearing was rescheduled from August 11, 2017 to August 18, 2017, due to the general elections in Kenya;
  - f) On August 18, 2017, the Claimant appeared before the Disciplinary Committee, where he was given an opportunity to respond to the charges levelled against him;
  - g) During the hearing, the Claimant confirmed the following:
    - i) He did not inspect the equipment to confirm the condition of the machines before decommissioning;
    - ii) The inspection and loading of the generators onto trucks was done under his supervision;



- iii) The crane documentation was not provided for inspection and verification. The Claimant indicated that he relied on information given by the client's Engineer as to the condition of the crane without conducting his own inspection;
  - iv) The Claimant was aware of the Respondent's safety procedure which was not followed;
  - v) The decommissioning of the fuel tank was not done as per procedure.
  - h) The Respondent found the Claimant's responses to be unsatisfactory and consequently, the Claimant was summarily dismissed by letter dated August 31, 2017;
  - i) The Claimant was notified of his right of appeal which he chose not to exercise;
  - j) The Claimant was paid all his terminal dues and was issued with a certificate of service.
17. The Respondent maintains that there were valid reasons warranting the Claimant's dismissal and that he was accorded a fair hearing in accordance with the provisions of the Respondent's Human Resource Manual and Section 41(2) of the *Employment Act*.
18. The Respondent denies the Claimant's allegations that the disciplinary hearing was a mere formality and avers that the hearing was a transparent and objective process, affording the Claimant an opportunity to explain the circumstances leading to the incident.
19. The Respondent states that the Claimant's conduct resulted to great financial loss to the Respondent on account of the damage caused to the generator, in addition to exposure to possible environmental claims.
20. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it.

### **Findings and Determination**

21. There are two (2) issues for determination in this case:
- a) Whether the Claimant's dismissal was lawful and fair;
  - b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

22. The Claimant was dismissed by letter dated August 31, 2017 stating as follows:

“Dear Godfrey,

Re: Summary Dismissal

Following your recent suspension and the disciplinary hearing conducted on August 18, 2017, I write to confirm the outcome as stated below:

Investigations undertaken by the company revealed that proper laid procedure was not followed during demobilization process.

Decommissioning of the fuel tank was also not done as per procedure thus causing fuel spill into the environment.

The decommissioned equipment was also in poor state of maintenance.



You are hereby summarily dismissed for serious negligence of your duties, and unsafe working practices, as per clause 13 of your employment contract.

Your salary and leave days will be calculated and paid up to August 31, 2017. Please hand over any company property in your possession to your supervisor. This termination will not accrue any service benefits. You will also receive a certificate of service for the term you have served Aggreko.

You have the right to appeal, to your 2<sup>nd</sup> Line Manager within 7 calendar days if you wish to do so.

Yours sincerely,

(signed)

Rose Karanja

HR Manager East Africa”

23. Prior to this letter, the Claimant had been issued with a show cause letter dated July 20, 2017 to which he responded on July 24, 2017. Subsequently, the Claimant attended a disciplinary hearing on August 18, 2017.
24. According to the foregoing correspondence, the Claimant faced three (3) related charges:
  - a) Failing to ensure proper maintenance of the Respondent’s equipment;
  - b) Failing to properly supervise the loading of the Respondent’s equipment;
  - c) Failing to secure fuel tank to prevent oil spillage.
25. The Claimant did not deny that the equipment was in a poor state of maintenance nor did he deny the occurrence of an accident in the course of loading the equipment and oil spillage while on transit.
26. The Claimant however sought to exonerate himself from any wrongdoing and instead heaped blame on his employer and its client.
27. The question now before the Court is whether the Respondent had a valid reason for terminating the Claimant’s employment as set out under Section 43 of the *Employment Act*.
28. It is now well settled that in finding an answer to this question, the Court does not merely substitute the employer’s decision with its own. All the Court asks is whether the employer’s decision was reasonable in the circumstances of the particular case.
29. This is what is commonly referred to as the reasonable responses test which was defined by Lord Denning in *British Leyland UK Ltd v Swift* [1981] IRLR 91 as follows:

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”



30. This position was restated by the Court of Appeal in its decision in *Samuel Kalomit Murkomen v Telkom Kenya Limited* [2017] eKLR as follows:

“In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair in the circumstances of the employer.”

31. By the Claimant’s own admission, the decommissioning of the Respondent’s equipment, over which he had oversight, was not done in accordance with established best operating practices.

32. The Claimant complained of lack of logistical support from the Respondent. He however did not produce a single document to show that he had raised any issue with his employer. He claims to have fallen ill while at the client’s site but again, there was no evidence that he called for backup from his employer.

33. On the whole, I find that the Claimant was negligent in handling his assigned duties leading to loss to his employer and release of harmful substance into the environment. As a result, I have reached the conclusion that the Respondent had a valid reason for bringing the employment relationship to an end.

34. Regarding the disciplinary procedure adopted by the Respondent, it is on record that the Claimant was issued with a show cause letter to which he responded. He was also invited to a disciplinary hearing, at which he fully participated, and at the end signed the minutes as a true reflection of the proceedings. He was notified of his right of appeal which he chose not to exercise. In light of this, I find that the procedural fairness requirements of Section 41 of the *Employment Act* were complied with.

35. Ultimately, I find and hold that the Claimant’s dismissal was substantively and procedurally fair. The claims for compensation and notice pay are therefore without basis and are disallowed.

#### **Other Claims**

36. No details were given to support the claim for overtime which therefore fails and is dismissed.

37. Having been a contributing member of the National Social Security Fund (NSSF) the Claimant is not entitled to service pay.

#### **Final Orders**

38. Finally, the Claimant’s entire claim fails and is dismissed.

39. Each party will bear their own costs.

40. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL 2023**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr. Kiriimi for the Claimant**

**Miss Weru for the Respondent**

