



**Awuor v Kenya Power and Lighting Company (Cause 431 of 2020)
[2023] KEELRC 1867 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1867 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 431 OF 2020
NZIOKI WA MAKAU, J
JULY 31, 2023**

BETWEEN

GEOFFREY AMBOKO AWUOR CLAIMANT

AND

KENYA POWER AND LIGHTING COMPANY RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent for the unfair and unlawful termination of his employment. He prayed for Judgment against the for:
 - a. A Declaration that the Claimant's fundamental rights under Articles 41(1), 47 and 50 of the [Constitution of Kenya](#) 2010 have been infringed by the Respondent;
 - b. A Declaration that the termination of the Claimant's employment by the Respondent was unprocedural, unfair and unlawful;
 - c. Compensation for unfair and/or unlawful dismissal from employment being his twelve months' salary - Kshs. 2,115,362.40
 - d. One month's wages in lieu of notice - Kshs. 176,280.20;
 - e. Payment of foregone leave days for the seven (7) years in employment - Kshs. 1,233,961.40
 - f. Gratuity and/or service pay for, calculated at 15 days for every year of service - Kshs. 881,401/-
 - g. Exemplary damages for malicious and unlawful dismissal from employment - Kshs. 5,000,000/-
 - h. Interest on the monetary orders from the date of the filing of the Claim till payment in full.
 - i. Costs of the Claim.



2. The Claimant averred that on or about August 23, 2012, the Respondent employed him as a Technician, Revenue Collection receiving a basic monthly basic salary of Kshs. 27,540/- and House Allowance of Kshs. 3,500/- per month. That on or about October 29, 2015 subject to being certified medically fit, he was subsequently confirmed on permanent and pensionable basis as a Technician, Regional Coordination Division, Customer Service, Western Region, Kakamega County. In this latter position, he received a gross monthly salary of Kshs. 97,408/- that was inclusive of a monthly salary of Kshs. 62,920/- and a house allowance of Kshs. 34,488/-. It was the Claimant's averment that his salary was thereafter increased in 2019 to Kshs. 176,280.20/- after he was promoted to a Feeder Based Business Unit Customer Service in Charge. His stance was that he diligently served the Respondent and had never at any point been involved in any unlawful action or summoned to appear before any disciplinary panel for gross misconduct or otherwise.
3. The Claimant averred that on or about April 25, 2019, he was issued with a letter inviting him to a disciplinary hearing. The charges levelled against him were that he allegedly fraudulently obtained Kshs. 112,000/- from a customer named Isaac Momanyi for facilitation and installation of 32 pre-paid meters at Ekeru Market; participated in the irregular processing and installation of 32 pre-paid meters at Ekeru Market; and exposed and shared confidential customer application data/details to Mr. Abdullahi Shaban. He was charged alongside four other colleagues and attended the disciplinary hearing at Kisumu on May 21, 2019 but was advised that the same had been postponed until further notice, without any written notification. Then on 3rd June 2019, the Human Resource Assistant ambushed him with a phone call asking him to appear before the disciplinary panel at Kisumu for hearing of the disciplinary case. It was the Claimant's averment that he was never accorded ample time to prepare for the hearing and had to travel from Mumias to Kisumu for the said hearing.
4. He further averred that at the disciplinary hearing, he informed the Disciplinary Panel that he had never received any money as alleged. That he also made it known to the Panel that Mr. Abdillahi Shaban was his employee as a taxi driver and all the mobile phone money transfer transactions between them were because of employer-employee relationship or in relation to the taxi business involving Motor Vehicle Registration No. KCH 095U registered in the Claimant's name. He also shared that Mr. Shaban was at the time contracted by KPLC as a Metering Contractor. The Claimant asserted that the supplied meter forms indicated that one Royvincent Ochieng Nyadimo was the employee who had taken the 32 pre-paid meters from the stores and he could not therefore have participated in the irregular processing of the said pre-paid meters. In addition, that the statement recorded by the customer, Robinson Isaac Momanyi, never mentioned the Claimant's name or his involvement in the alleged charges.
5. Further, he was subsequently issued with a Summary Dismissal Letter dated July 29, 2019 terminating his services with effect from July 31, 2019, with the abovementioned charges as the reasons. That notably in the said dismissal letter, the Respondent never informed him of his right to appeal against the decision and by his own initiative, proceeded to the Company's main offices to lodge an appeal letter dated 8th August 2019. Through a letter dated November 11, 2019, he was consequently invited to appear before the Appeals Committee on November 22, 2019, when his appeal was heard. Unfortunately, he was advised by a letter dated 14th January 2020 that his Appeal had been dismissed for the reason "that there was no new evidence against the earlier accusation".
6. It was the Claimant's averment that in issuing him with the said dismissal letter terminating his employment, the Respondent failed to observe procedural and substantive fairness as set out under the law. That the dismissal was based on invalid and unfair reasons and that the Respondent failed to act in accordance with justice and equity and breached the rules and principles of natural justice. In the Claimant's opinion, the termination of his employment was wilfully malicious, baseless, oppressive, fraudulent, wanton or grossly reckless as instigated by his fellow employees – Mr. Simon Mugambi



and Mr. Simon Mwangi Kuria. He further averred that the Respondent's actions have subjected him to humiliation, psychological torture and trauma and placed him and his family in an appalling financial state.

Respondent's Case

7. The Respondent filed a Response to the Statement Claim dated September 20, 2020 averring that the suit was premature since the Claimant had not exhausted the statutory laid down procedure for addressing and ventilating such disputes. It nevertheless denied in entirety the Claimant's assertions of the remuneration he received as alleged. It averred that the basis for the dismissal of the Claimant was legal and proper in the circumstances and that it adhered to all the requisite procedures prior to, during and subsequent to the dismissal.
8. The Respondent affirmed that the Claimant was afforded the opportunity to be heard and his representations were considered. It averred that the Claimant was issued with a Notice to Show Cause on April 25, 2019, which he responded to through his letter dated May 4, 2019. That it considered the Claimant's response and issued him with a notification on May 27, 2019 inviting him for a hearing on June 3, 2019. It was the Respondent's averment that at the hearing, the Claimant was informed of the reason for the disciplinary hearing and his entitlement to have a representative of his choice present during his explanation. That the Claimant's explanations were however found unacceptable and his services were subsequently terminated *vide* a letter dated July 24, 2019.
9. The Respondent further averred that over the period the Claimant was in its employ, he had disciplinary issues on two occasions involving the disconnection of a customer on an inaccurate bill and his lack of adherence to the set performance target, for which he was issued with caution letters on June 11, 2018 and 4th April 2019 respectively. It denied the particulars of any outstanding dues and reliefs as sought in the Statement of Claim averring that the prayers sought by the Claimant are untenable. Without prejudice to the foregoing, the Respondent averred that the Claimant's claim was fraudulent and a ploy and/or devise conjured up to facilitate his unjust enrichment. It thus prayed that the suit against it be dismissed with costs.
10. The Respondent also filed a Witness Statement made on February 10, 2021 by Ms. Nancy Nyarige, its Senior Human Resource Officer. Ms. Nyarige asserted that the Claimant was initially employed on September 17, 2012 on temporary employment and rose through the ranks to become a Technician in Regional Coordination Division, West Kenya. That as was the norm for each employee, the Claimant signed the Company's Code of Conduct and Ethics dated September 27, 2017 as part of his employment contract. Ms. Nyarige stated that the Claimant's act of illegally uprating and obtaining money from a customer was unethical conduct against the Company's Code of Conduct and that it was therefore necessary to confirm his culpability through the Respondent's disciplinary processes.
11. Ms. Nyarige further stated that during the disciplinary hearing on June 3, 2019, the Panel was composed of the Claimant's supervisors and the Human Resources Department representatives and that the Claimant attended in person and without a colleague or witness. That the Claimant was granted a very fair hearing in which he actively participated and thereafter signed the Minutes of the hearing. That the Claimant was also given an opportunity to appeal against his dismissal and accorded ample time to present his case at the appeal hearing after which he confirmed the Minutes through signing. She revealed that the Respondent considered the facts contained in the Investigation Report and the Claimant's explanation and reasons during the disciplinary hearing and found that the facts were against the Claimant to warrant his dismissal from employment. She asserted there was no malice in the dismissal of the Claimant since the Company held no grudge against him.



Evidence

12. The Claimant testified that he did not receive any monies from Mr. Momanyi in any form and that there was no evidence whatsoever that he did. He asserted that he supervised meter reading and was not in charge of installing meters and that neither did he share confidential information with Mr. Abdullahi. On cross-examination, the Claimant confirmed receiving and accepting the Respondent's Code of Ethics and also confirmed having been previously cautioned following two notices to show cause. He clarified that Mr. Abdullahi was not a contractor with the Respondent Company when he employed him for his taxi business and stated that he only knew it was wrong to have engaged him when he received a show cause. He stated that he neither took a witness nor carried any evidence to the disciplinary hearing because he was called on the morning of June 3, 2021 to go for the hearing in Kisumu. The Claimant further confirmed that he signed the Minutes of the disciplinary hearing and that the minutes captured accurately what transpired. It was the Claimant's testimony that he had cleared with the Respondent and obtained the Certificate of Service and that he was to get Pension from the Pension Fund as he was pensionable.
13. The Claimant asserted in re-examination that they were not given a chance to verify the Minutes after hearing and were given a few minutes to sign them and that his plea to the Committee for more time was not captured. He stated that there was no conflict of businesses in relation to Mr. Abdullahi, himself and KPLC as he ran a taxi business engaging Mr. Abdullahi while KPLC on the other hand was in the business of selling electricity. The Court declared the Respondent's case closed since it was absent. The Court thereafter gave directions on the filing of written submissions.

Claimant's Submissions

14. The Claimant submitted that as the Respondent did not avail any witness in support of its case, the Claimant's case is unopposed and the Response remains mere allegations. He was however aware that a defence held as mere allegations does not lessen the burden vested on the Claimant to prove his case. On this submission, he relied on the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR in which the Court stated that a plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.
15. It was the Claimant's submission that what constitutes fair termination is condensed into the elements of procedural and substantive fairness as pronounced in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. As regards procedural fairness, the Claimant submitted that Article 41 of the *Constitution of Kenya* provides for the right to fair labour practices while the basic substance or essentials of the right to procedural fairness before termination of employment services is provided in section 41 of the *Employment Act*, 2007. He relied on the cases of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited* [2013] eKLR and *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR in which the Courts discussed the procedural prerequisites under section 41 of the *Employment Act*. According to the Claimant, none of the statutory procedural prerequisites was complied with because he was *inter alia* not accorded ample time to prepare for the hearing. That it was thus right to conclude that his dismissal was procedurally unfair as was similar highlighted in the case of *Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Ltd* [2014] eKLR. On substantive fairness, the Claimant submitted that section 43 of the *Employment Act* essentially requires an employer to demonstrate a valid reason for terminating the employment of an employee, both in normal termination as well as in cases of summary dismissal. That the province of sections 43 and 45 of the *Act* was well pronounced in the case of *Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd* [2013] eKLR on the need for the employer to prove the reasons for dismissing the Grievant; that the reasons were valid and fair and lastly, to justify the grounds for dismissal. It was the



- Claimant's submission that the reasons given for termination of his services in the Dismissal Letter dated 29th July 2019 were at variance with the Show Cause Letter dated 25th April 2019. That the introduction of fresh charges through the termination letter indicated the Respondent's desperate attempt to terminate his employment without any valid reason and in the upshot the Respondent did not have a valid and justifiable reason to terminate his services. That the Respondent had notably failed to prove the reasons for dismissing the Claimant and its decision to dismiss fell outside the band of reasonableness that a reasonable employer might have adopted under similar circumstances.
16. The Claimant submitted that he was thus entitled to the reliefs sought in the Statement of Claim having found that his termination was unfair for want of due process and substantive fairness. That he was entitled to 12 months' salary as per section 49(1)(c) of the *Employment Act* as he was literally chased away from his only place of work, had kept a clean record at work, was dismissed without notice, did not contribute to the dismissal, and was not paid any terminal benefits upon termination. Furthermore, he suffered loss and damage and had been unsuccessful in getting new employment. He submitted that he was entitled to the claim for unpaid leave days, which was not paid to him for the seven years he was in employment and which the Respondent did not specifically oppose. That he was entitled to one month's salary in lieu of notice as he was dismissed without notice and that the claim for gratuity and/or service was also unopposed.
 17. The Claimant submitted that exemplary damages are awardable in this case because the Respondent acted out of an improper motive and in a high handed and unfair manner in dismissing him on fabricated charges. That he had sufficiently demonstrated that the Respondent acted with malice, cruelty or insolence, and treated him in a degrading treatment contrary to Article 25(a) of the *Constitution of Kenya*. He pleaded contravention of his fundamental rights and freedoms under Articles 25(c), 27, 41, 43, 47 and 50 of the Constitution in that his removal from office was without the force of law, unprocedural, without being afforded an opportunity to be heard and a total nullity.
 18. It was the Claimant's submission that in justifying the award of exemplary/punitive damages to the tune of Kshs. 2Million in an employment matter that was less grave than the instant matter, the Court in *Gedo Abdulahi Mohamed v Commissioner of Police & another* [2015] eKLR held that a punitive element in the consideration of compensation was a solution. That the Court in the case of *Peter Kamwi v Standard Group Limited* [2016] eKLR awarded Kshs. 1.5Million as exemplary damages under circumstances that were less grave than the instant case. He further urged this Court to adopt the holding in *GMV v Bank of Africa Kenya Limited* [2013] eKLR in which Rika J awarded exemplary damages of Kshs. 3M over and above the prescribed capped 12 months' compensation and stated that the Industrial Court must not be limited by the capping of compensatory awards fixed at a maximum of twelve months. The Claimant submitted that considering the above cited cases and the awards thereat were made a while ago, he proposed a sum of Kshs. 5Million as being sufficient for exemplary damages. In addition, that considering he was maliciously terminated and denied a source of livelihood, the Court ought to award compound interest on all monetary claims from the date of filing this suit. On costs, he submitted that costs follow the event and as he had been in corridors of justice for 3 years, he had incurred time and costs that should be awarded to him. The Claimant urged the Court to note that he was a University Graduate who was barely 35 years old at the time of the illegal termination.
 19. The Respondent did not file any submissions.
 20. The Claimant was terminated after a shotgun disciplinary hearing as the same was foisted on the Claimant without proper notice as he was called and asked to appear the very next morning in Kisumu for the same. The Respondent did not give the Claimant adequate time to prepare after the HR ambushed the Claimant with an oral notification of a disciplinary hearing. After the impugned hearing, the Claimant's services were terminated and the letter of termination introduced fresh



charges. This in the view of the Court indicated the Respondent's desperate attempt to terminate his employment without any valid reason. In the upshot, I do find that the Respondent did not have a valid and justifiable reason to terminate the Claimant's services. The Respondent having terminated the Claimant unfairly, what remedies lie? The Claimant seeks *inter alia* for compensation equivalent to twelve months' salary - Kshs. 2,115,362.40, one month's wages in lieu of notice - Kshs. 176,280.20; leave that was forgone for 7 years; gratuity/service pay at 15 days per completed year of service and exemplary damages for malicious and unlawful dismissal from employment. The Claimant is not entitled to gratuity or service pay as his termination was not on account of redundancy or such as to entitle him to the same. He was also not within the parameters for grant of the exemplary damages over and above what section 49(1)(c) of the *Employment Act provide*. The Claimant did not prove he was entitled to payment for leave for 7 years. No evidence was led to show he did not go on leave. In the final analysis, the Claimant did not demonstrate he was entitled to anything other than the following:-

- a. Compensation equivalent to 5 months' salary - Kshs. 881,401/-,
- b. One month's wages in lieu of notice - Kshs. 176,280.20
- c. Costs of the suit.
- d. Interest at court rates on the sums in a) and b) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

