



Mcharo v Kenya Power & Lighting Company Limited (Cause E052 of 2022) [2023] KEELRC 2033 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 2033 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E052 OF 2022**

**M MBARÚ, J
JULY 27, 2023**

BETWEEN

NATHAN KAMUNDE MCHARO CLAIMANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a casual employee in the year 2005. Through an admission letter dated 8 October 2009 the respondent invited the claimant to a basic and safety training and upon successful completion, through letter dated 20 September 2010 the claimant was offered a 3 months employment as an Artisan Mate Assistant in O & M department in Ukunda earning Ksh 11,115 and house allowance of Ksh 2,400 with effect from January 1, 2015.
2. The respondent offered the claimant employment through letter dated 3 May 2015 on a 3 years contract at a salary of Ksh 29,436 and house allowance of Ksh 6,650 with effect from January 1, 2015.
3. Following a memorandum of agreement between the respondent and the claimant's trade union KETAWU and letter dated 27 June 2016 the claimant was absorbed by the respondent as a permanent employee earning Ksh 23,023 and a house allowance of Ksh 29,157 with effect from January 1, 2016.
4. The respondent issued the claimant with a notice to show cause dated 3 August 2020 on the grounds that on 29 July 2020 a danger complaint was logged into the IMS system from substation number 6759. The given incident number 5716073 was for a broken pole and conductors that had been lying on the ground for a week. This was captured at 2056 hours and reported via telephone 0735 XXXXXX. The incidence remained unattended from Wednesday evening up until Thursday. The delayed response to this marked danger and the complaint resulted into a public fatality at 0800 hours on 31 July 2020 where an adult lady and child were electrocuted. The show cause notice also alleged that the fallen pole had been reported to the claimant in the last two weeks and no action had been taken.



5. Through letter dated 5 August 2020 the claimant responded and was then summoned to the disciplinary hearing on 11 August 2020.
6. During the disciplinary hearing, the claimant explained the case he had handled on 30 July 2020 to which he described all the tasks he had handled and which required patrols but was not able to attend to all of them on the basis of sensitivity.
7. Through notice dated 24 August 2020 the respondent dismissed the claimant from his employment on the grounds that under clause 25 of the Collective Bargaining Agreement (CBA) his employment stood terminated with effect from 26 August 2020. The dismissal was unlawful, unfair and contrary to Article 10, 47 and 50 of the constitution and contrary to fair labour practices. There was no reason to justify such dismissal.
8. The claimant's union KETAWU lodged a complaint on 24 June 2021 on the grounds that the disciplinary hearing was conducted by the same persons involved in investigations. The respondent has an emergency response team comprised of the operator, field team and driver, which team was mandated to handle the danger complaint that was logged into the respondent's IMS system on 29 July 2020. The respondent has also placed a number of methods of reporting complaints as follows – hot line numbers;
Facebook;
Twitter;
Office emergency line;
Emails;
KPLC app and USSD.
9. Complaints are logged in by an operator from the call center in Nairobi, an incident management system then tracks all complaints and a solution is found. The IMS must locate the area incident and creates a tree where all complaints can be retrieved. The operator looks at the complaints and priorities the complaints and the operator then send the Emergency Team to respond.
10. On 29 July 2020 the afternoon shift started at 1500 hours and ended at 2300 hours. During the shift, the Emergency Desk Operator was Cliff Nyambanga who never assigned the clearly marked danger call to the emergency field team on duty. The allegations made against the claimant by the respondent were hence with malice and unjustified because the danger complaint was already recorded in the system and termination of employment could not be on the basis that the claimant had failed to report the complaint. When the danger report was reported, Cliff Nyambanga was on duty and he failed to forward the complaint and it was wrong to assign the mistake to the claimant. When the complaint was reported, the claimant was not on duty until 30 July 2020 when there were a lot of break downs due to windy and rough weather and the system was slow and the claimant gave attention to work depending on sensitivity since he was all alone at the emergency desk.
11. The claimant lodged an appeal following termination of employment on 18 September 2020 and in a letter dated 12 April 2021 the respondent informed the claimant that the matter would be reinvestigated and on 7 June 2021 the claimant was informed that the appeal was not successful. The appeal process was devoid of due process and was all meant to wrongfully justify the unfair termination of employment.

The claimant is seeking for an order of reinstatement.



12. In the alternative, the claimant is seeking payment of his terminal dues, maximum compensation of Ksh 90,490 x 12 Ksh 1,085,889, certificate of service and costs.
13. The claimant testified and supported his case that he was not on duty on 29 July 2020 when a complaint was logged and when he took over the desk on 30 July 2020 he did not see the complaint until later since there were several other emergency matters that were sensitive and he was addressing these. The officer in charge on 29 July 2020 was responsible for the complaint and not the claimant. On the 30 July 2020 the claimant remained alone at his station since one other colleague was on maternity leave and he was overwhelmed with other duties which required his attention. All the complaints received on this day were transmitted to the field team. Despite his responses to the show cause notice and giving his explanations, the respondents failed to give due considerations and unfairly terminated his employment.
14. In response, the respondent's case is that the claimant was employed as an artisan mate assistant on contract from 8 January 2011 which were renewed with time until 27 June 2016 when his terms of employment were translated to permanent and pensionable terms.
15. The basis of dismissal of the claimant was that on 3 August 2020 a notice to show cause was issued because on 29 July 2020 a danger complaint was reported but the claimant failed to address it. The claimant responded to the show cause notice on 5 August 2020 and then invited to a disciplinary hearing on 12 August 2020. All his rights were secured and the claimant allowed to bring his representative but his explanations were found unsatisfactory leading to termination of employment on 24 August 2020.
16. Termination of employment was occasioned by the offence committed by the claimant contrary to the code of conduct. The claimant's conduct was wanting because he was required to maintain and enforce a conducive work environment, order, discipline and efficient service delivery to its customers. The respondent does not have an emergency response team as alleged by the claimant and the claims made should be dismissed with costs.
17. In evidence, the respondent called Anne Siyamo the human resource officer who testified that the claimant's employment was regulated under the policy and code of conduct. Following an incident that was reported on 29 July 2020, an investigation was conducted by the safety committee and it was found necessary to issue the claimant with a notice to show cause why disciplinary action should not be taken against him for failing to act on the complaint. The claimant was invited to a disciplinary hearing but he failed to give satisfactory responses and termination of employment was found justified.
18. The witness testified that when the complaint was reported, the claimant was not on duty. It came in late evening and the claimant reported to work the following day. when an incident of this nature is reported, the respondent conducts an investigation which was done and the claimant found culpable. Several other employees were taken through the disciplinary process. Cliff Nyambuga was disciplined for failing to forward the complaint made on 29 July 2020 because on the report no action was taken. The claimant was taken through the disciplinary process because he was at the emergency desk and there were procedures on what he should have done but the immediate supervisor is not a witness in these proceedings to state what steps the claimant should have taken.
19. At the close of the hearing, both parties filed written submissions which are put into account and the twin issues for determination are whether there was unfair termination of employment justifying an order of reinstatement or the alternative reliefs.
20. On 29 July 2020 a member of the public reported a broken pole and conductor lying on the ground at Bowa Village, Kombani in Kwale County. The report was made at 2056 hours that the broken pole had



- been lying on the ground for two weeks. The complaint was not forwarded to the O&M emergency teams to attend the incident.
21. On 31 July 2020 at 0800 hours the emergency office Ukunda received a call from Matuga that a 34 year old lady and her 3 month old child were electrocuted.
 22. The respondent conducted investigations and observed that Cliff Nyambuga was on duty at the emergency desk Ukunda on 29 July 2020 from 1500 hours to 2300 hours but did not forward the incident to emergency O&M for action. He was called by the County O&M engineer, Paul Musau and was called to record a statement. The claimant was on duty on 30 July 2020 at 0700 hours and he failed to review complaints made in the earlier shift as the system was down and he stated that he could not get assistance from his supervisors as all had travelled to Mombasa for a meeting and only handled reports from that day customers. Elyas Marshel a supervisor stated that he travelled to Mombasa for a training. George Mwambusa the CBM Kwale County was also away attending training.
 23. From the investigations, proposed action was that Cliff Nyambuga failed to forward the complaint of broken poles and conductors lying on the grounds reported on 2056 hours on 29 July 2020 and that supervisors should not be called from a depot or County for training at the same time.
 24. There is no action proposed against the claimant from the investigations report filed by the respondent.
 25. However, on 3 August 2020 the respondent issued the claimant with a show cause notice requiring him to explain why the incidence reported on 29 July 2020 remained unattended from Wednesday evening up until Thursday the whole day. The delayed response to this clearly marked danger complaint resulted into a public fatality at around 0800 hrs on July 31, 2020, where an adult lady and child were electrocuted. It is further alleged that the fallen pole had been reported to you over the last two weeks and no action had been taken. ...
 26. The respondent conducted investigations to appreciate the cause of broken pole and conductors that had been left lying on the grounds despite an incidence report number 5716073 reported on 29 July 2020. There is an investigations report done by the Safety Engineer, Coast dated 4 August 2020. But, a day before the investigations report, on 3 August 2020 the claimant was issued with notice to show cause why his employment should not be terminated for the reason of the same matter.
 27. After the investigations, there seems to be no amendment to the notice issued to the claimant despite the fact that the investigations revealed that action should be taken against a different employee, Cliff Nyambuga who was on duty on 29 July 2020, he recorded the report but failed to forward it to the field team. The claimant was not on duty on the material date and time the incidence was reported.
 28. There is no record of the claimant being briefed or a handing over of the incidence reported on 29 July 2020 when he took over duty on 30 July 2020. Even where the claimant should have taken over operations from the previous day, the link between the particular incidence number 5716073 is not made.
 29. Even though an employer is allowed to terminate employment on the basis of genuinely believing there exists justified grounds to take such action as held in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR, such belief must be on the foundation of valid, fair and reasonable grounds and not whimsical.
 30. In the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court in addressing the same issue applied the test whether the action of the employer falls in the band of actions that would be considered reasonable in the circumstances. Put differently, the question would



be whether another reasonable employer acting on the same set of facts would have reached a similar decision.

31. In this case, the claimant was under several supervisors who could trace the records, work schedules and time lines going back to 29 July 2020 at 2056 hours when a danger complaint was logged into IMS system for substation number 6759 to trace the responsible officer and who actions were taken. The Safety Engineer, Coast investigations would have also assisted to show, the responsible officer was Cliff Nyaumbaga and not the claimant. If the claimant had any role, if at all, upon taken over duty on 30 July 2020, the handing over report would have offered crucial information as to whether this was part of the roles he took over.
32. The investigations report also highlights several crucial details. A report of the broken pole and conductor lying on the ground for two weeks had been reported to the respondent on 29 July 2020 but key officers, Elyas Marshed (4AE) a supervisor at the emergency desk had left the station on this day from a training at Mombasa. George Mwambusa, the CBM Kwale County and Paul Musau were away attending training at Mombasa. The investigation revealed that;

Mr Nathan Kamunde s/no. 18631 who was on duty on 30.07.2020 at 0700 hrs, Emergency Desk indicated that he was not able to review complaints made in the earlier shift as the system was down. He said he could not get assistance from his Supervisors as all had travelled to Mombasa for a meeting. He only handled reports of that day from customers.
33. Left alone at his stations, all supervisors away training, the system down, the claimant could only handle reports of his day shift from customers. He cannot be faulted for doing his day work as required.
34. Termination of employment on the basis that the claimant failed to act on an incidence that was reported while he was not on duty, during a different shift, this is wrongful and unfair. this cannot be justified through any other means since the respondent conducted investigations which directed action against a different officer but this was ignored and misdirected against the claimant leading to unfair termination of his employment.
35. The claimant is seeking reinstatement. His employment terminated on 24 August 2020. Even though the three years period required for the order of reinstatement is just about to lapse, the background of the matter is that following the incidence leading to the dismissal of the claimant, two persons lost their lives and to return the claimant to his work station and employer would not foster a healthy working relationship.
36. The alternative reliefs of compensation for unfair termination of employment shall be considered.
37. The claimant worked for the respondent under various term contracts since the year 2005 until his union, negotiated for a permanent and pensionable employment ending on 24 August 2020 through the unfair conduct of the respondent. these are in total 15 years without any poor work record. None is presented to this court.
38. The remedy of reinstatement addressed above, this is one case where maximum compensation should issue and the court finds 10 months compensation justified in this regard. The claimant was last earning Ksh 90,490.75 per month. compensation for 10 months amounts to Ksh 904,907.50.

The claim being successful, the claim for costs is justified.
39. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- 40.



- a. a declaration that the termination of the claimant's employment by the respondent was unfair;
- b. compensation awarded at Ksh 904,907.50;
- c. dues (b) shall be paid within 30 days after which the same shall accrue with interests from this date and until paid in full;
- d. costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

