



**Tsinjenga v Kenya Power and Lighting Co Ltd (Employment and Labour Relations Cause 7 of 2017) [2023] KEELRC 1748 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1748 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 7 OF 2017**

**MA ONYANGO, J**

**JULY 13, 2023**

**BETWEEN**

**NEBERT KEDOGO TSINJENGA ..... CLAIMANT**

**AND**

**KENYA POWER AND LIGHTING CO LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a former employee of the Respondent, a limited liability company incorporated in Kenya and engaged in the retail distribution of electricity.
2. In his Memorandum of Claim dated March 16, 2017 the Claimant avers that he was an employee of the Respondent between 1993 and 2015 when his employment was unfairly terminated. That his employment was terminated on grounds of alleged theft of the Respondent's property which was untenable as he was charged and acquitted of the charges in Eldoret Chief Magistrates' Court Criminal Case No 2402 of 2015. The Claimant prays for the following reliefs: -
  - i. A declaration that the termination of the claimant's employment with the respondent is unfair.
  - ii. Reinstatement of the claimant into the respondent's employment
  - iii. In the alternative to prayer (ii) the respondent be ordered to pay damages for unfair termination and interest thereon
  - iv. Costs of the claim
3. The Respondent filed a Reply to the Memorandum of Claim dated April 24, 2017 in which it admits that the Claimant was its employee but denies that the termination was unlawful.
4. According to the Respondent the termination of the Claimant's employment was lawful for the following reasons:



- a. The claimant was reasonably suspected to have been involved in housebreaking and stealing of company property.
  - b. The matter was reported to the police for investigation and the police acted independently and charged the claimant with the offence of housebreaking and stealing.
  - c. The Respondents having lost confidence in the claimant commenced internal company disciplinary process as provided for under the Collective Bargaining Agreement signed between the Union and the Respondent and the Provisions of the *Employment Act*.
  - d. The claimant was served with the requisite Notice to Show Cause why disciplinary proceedings should not be issued to him.
  - e. The claimant did show cause and was granted an opportunity to appear before a Disciplinary Committee which gave him an opportunity to be heard.
  - f. The Committee having heard the evidence against and for the claimant held the reasonable view that the claimant may have been involved in the loss of company property
  - g. Rather than summarily dismissing the claimant the Disciplinary Committee recommended that the claimant's services be terminated in accordance with clause 27 of the Collective Bargaining Agreement and Section 44 (4)(g) of the *Employment Act*.
  - h. The Claimant had in the past been issued with several warning letters.
  - i. The proceedings in the criminal case were initiated by the office of the DPP an Independent Public Office and did not bar the Respondent from invoking the Internal Company Disciplinary Procedure
5. The Respondent prays that the suit be dismissed with costs.
  6. At the hearing the Claimant testified on his own behalf while the Respondent called its Chief Security Officer based in Eldoret who testified on its behalf. The parties thereafter filed written submissions.
  7. I have carefully considered the pleadings, evidence and submissions and the issues arising for determination are whether the termination of the Claimant's employment was fair and whether he is entitled to the reliefs sought.
  8. Section 45(1) of the *Employment Act* prohibits an employer from unfairly terminating the employment of an employee. Section 45(2) provides that termination of employment is unfair if the employer fails to prove that the reason for termination was valid and in accordance with fair procedure.
  9. The Claimant testified that the criminal case against him was dismissed as there was no evidence connecting him with the theft of the Respondent's property. In his witness statement dated November 19, 2020 which he adopted at the hearing, the Claimant states that the two witnesses who testified against him did not link him to the theft. That in fact there was no evidence that the Respondent's warehouse was broken into or that there was any loss of copper wires which he was accused of stealing. He testified that he was acquitted under section 210 of the *Criminal Procedure Code*.
  10. For the Respondent RW1 adopted his witness statement dated November 10, 2020 in which he states that on or around May 9, 2015 he discovered and reported a case of missing items in the Respondent's Electrical Plant Workshop at North Rift Station. That it transpired that the Claimant bribed one of the security guards to gain exit from the Respondent's plant workshop after getting the wires to be loaded onto his motor vehicle registration No xxxx.



11. Under cross examination RW1 stated that he carried out investigations and his findings were that the Claimant took 6 blocks of copper wire and put them in his vehicle. He stated that the security guard alleged to have been bribed was not available to give evidence as he was working with a contracted security firm whose contract ended and the security guard could not be traced.
12. According to the Respondent the Claimant was implicated by the security guard whom he is alleged to have bribed. The report of the disciplinary hearing produced by the Respondent states that the security guard was arrested and wrote a statement in which he stated that the Claimant was involved in breaking into the workshop and stole the copper windings. This statement was never produced and neither did the Respondent call the security guard as witness.
13. The Respondents disciplinary hearing report further states that another employee, Japheth Lumwachi saw the Claimant load company copper windings into his vehicle xxxx but failed to report the theft to the supervisor and security immediately. That the employment of the said Japheth was terminated because he concealed the theft and later recanted his statement on account that it would incriminate him. Again the Respondent did not either call him as a witness or produce his statement to the court to support its case.
14. It further emerged during the hearing that the Claimant was arraigned in court over the theft of the copper wires but was acquitted under section 210 of the Criminal Procedure Code meaning that there was insufficient evidence adduced before the criminal court to warrant the Claimant being placed on his defence.
15. I reproduce the last paragraph of the ruling in the criminal case at CMCR 2402 of 2015 which I consider material to this case below:

I have considered the testimony of the two prosecution witnesses. I find the evidence of Pw1 contradictory with that of PW2.

PW1 stated that upon inspection they found all the items in the workshop intact while PW2 told the court that upon inspection of the workshop he found six copper wires missing. No evidence was given to the satisfaction of the court that indeed there were copper wires at the workshop which size were they and how many copper wires in total were they. There is no any iota of evidence to show that any item was stolen from Kenya Power Workshop in Eldoret. The prosecution has thus failed to establish a prima facie case against the accused. The charge against the accused is hereby dismissed. Accused is acquitted under section 210 of the Criminal Procedure Code.'

16. An acquittal in a criminal case is not necessarily proof that an employee is not liable in a civil case. This is because the degree of proof in a criminal case which is 'beyond reasonable doubt' is much higher than proof in civil cases which is 'on a balance of probabilities'. I have however looked at the evidence adduced before me which I find insufficient to prove valid reason for termination as provided in section 43 of the [Employment Act](#).
17. Section 41 of the [Employment Act](#) which provides for procedural fairness was complied with by the Respondent. Nonetheless procedural fairness without substantive justification of the reasons for termination cannot rebut a claim of unfair termination.
18. I accordingly find and declare the termination of the Claimant's employment substantively unfair.
19. The Claimant prayed for reinstatement or in the alternative damages for unfair termination and interest thereon.



20. Reinstatement is provided for in both Section 49(3) of the *Employment Act* and section 12(3) of the *Employment and Labour Relations Court Act*. the same can only be granted in exceptional circumstances and even then, only within 3 years of termination. In the instant case the Claimant's employment was terminated more than 3 years ago and, in any event, he has not demonstrated that his case is exceptional and therefore justifying an order of reinstatement.
21. I will therefore order the alternative prayer of compensation for unfair termination. Having considered the circumstances under which the Claimant's employment was terminated, his long service of about 12 years and all relevant circumstances as set out under section 49(4) of the *Employment Act* it is my considered opinion that 10 months salary is reasonable compensation. I accordingly award him the same.
22. According to the payslip of the Claimant for June 2015 filed with his Claim, he was earning a gross salary of Kshs 128,394.94. I therefore award him Kshs 1,283,949.40 as compensation.
23. The Respondent shall pay the Claimant's costs for this suit. The decretal sum shall attract interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JULY, 2023**

**MAUREEN ONYANGO**

**JUDGE**

