



**Tonio v Kenya Power & Lighting Co Ltd (Cause 1359 of 2018)
[2023] KEELRC 2544 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2544 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1359 OF 2018
L NDOLO, J
OCTOBER 19, 2023**

BETWEEN

ROBERT NGUGI TONIO CLAIMANT

AND

KENYA POWER & LIGHTING CO LTD RESPONDENT

JUDGMENT

Introduction

1. This dispute flows from an employment relationship between the Claimant and the Respondent. The Claimant states his claim in a Memorandum of Claim dated and filed in court on 6th September 2018.
2. The Respondent filed a Statement of Defence dated 10th June 2019 but did not attend the trial in spite of due notice. The Claimant testified on his own behalf and I directed the parties to file final submissions.
3. Subsequently, the Respondent filed a Notice of Motion dated 19th January 2023, seeking to re-open the case. By my ruling dated 9th February 2023, I dismissed the Respondent's Motion and directed it to file final submissions within seven (7) days.
4. The Respondent did not comply with the directions to file final submissions. Instead, it filed another application dated 28th February 2023, seeking review of the orders issued on 9th February 2023 and leave to amend its Statement of Defence. I struck out this application by a ruling dated 27th July 2023 and gave the Respondent a further seven (7) days to file final submissions on the main claim.
5. By the time of writing this judgment, the Respondent had not filed its submissions. This judgment is therefore based on the parties' pleadings and the Claimant's testimony and submissions.



The Claimant's Case

6. The Claimant states that he was employed by the Respondent on 3rd December 2010 as a Technician Engineer in the Information, Technology & Telecommunications Division, Telecommunications Business Unit. On 10th October 2012, the Claimant was offered the post of 4th Assistant Engineer in the same Division. He was confirmed to this post on 7th May 2013.
7. In an Audit Report No. 16-2017/2018 on Prequalified L&T Contractors Tender No. KPI/9AA-2/OT/58/PJT/16-17 it was alleged that the Claimant's name was in the list of key personnel of a prequalified labour and transport firm.
8. On 30th April 2018, the Claimant was issued with a show cause letter by which he was required to submit a written explanation, detailing reasons why disciplinary action should not be taken against him for conflict of interest and breach of the Company's code of ethics.
9. The Claimant responded on 3rd May 2018, explaining that he was not and had never been an employee of any labour and transport firm and that he had no personal or professional relationship with the firm of which he was alleged to be a key personnel.
10. A disciplinary hearing was conducted before the Staff Disciplinary Committee on 15th May 2018 and by letter dated 28th May 2018, the Claimant's employment was terminated.
11. The Claimant appealed the decision on 31st May 2018 with a follow up letter on 2nd August 2018. He states that to date, he has not received a response to his appeal.
12. The Claimant's case is that his employment was terminated unlawfully and unfairly as:
 - a. The copies of the audit report and investigation were never formally availed to him and the name of the alleged labour and transport firm in which the Claimant is alleged to be a key personnel was not formally disclosed to him;
 - b. The Claimant was not afforded a fair hearing as due process was not followed. The process requires that the Claimant is supplied with a detailed list and description of allegations against him, an opportunity to appear before the Disciplinary Committee and make representations against the allegations, and the evidence against him to enable him prepare an adequate defence against the said allegations;
 - c. The Claimant was not afforded a fair hearing as no employee, representative and/or directors of the alleged labour and transport firm was made available for examination into the veracity of the allegations levelled against the Claimant.
13. The Claimant avers that the hearing before the Staff Disciplinary Committee on 15th May 2018 was stage-managed to deliver a predetermined outcome and was therefore a sham.
14. The Claimant claims that the termination of his employment was in violation of his employment contract as well as the *Employment Act*. He seeks reinstatement to the position he held before 28th May 2018 or in the alternative, damages for unlawful termination of employment and loss of career. He also asks for costs of the case.

The Respondent's Case

15. In its Statement of Defence dated 10th June 2019 and filed in court on 29th June 2019, the Respondent admits having employed the Claimant as a Technician Engineer in the Information, Technology and Telecommunications Division, Telecommunications Business Unit.



16. The Respondent further admits that on 10th October 2012, the Claimant was offered the post of 4th Assistant Technician Engineer to which he was confirmed on 7th May 2013.
17. The Respondent however denies that the termination of the Claimant's employment was unlawful or unfair. The Respondent states that it conducted an open audit and availed copies of the report to the Claimant, which indicated the name of the company where the Claimant was listed as a key personnel.
18. The Respondent further states that it availed the evidence against the Claimant at the hearing of 15th May 2018.
19. The Respondent asserts that the Claimant was accorded a fair hearing.

Findings and Determination

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

The Termination

21. The Claimant's employment was terminated by letter dated 28th May 2018 stating thus:

"Dear Robert,

DISMISSAL

Further to our explanation letter to you dated 30th April 2018, your response dated 3rd May 2018 and the disciplinary hearing conducted on 15th May 2018, this is to advise you that your explanation has been found unacceptable. You are therefore dismissed from the company services with effect from 28th May 2018 under clause 11 of your Employment Agreement on the following grounds:

1. That your name is in the list of key employees of prequalified Labour & Transport firms.

Please note that you owe the Company the following liabilities.

1. Car loan - Kshs. 81,567.00
2. Insurance premium - Kshs. 5,181.00
3. Reallocation of paymaster - Kshs. 2,607.00

Total - Kshs. 89,355.00

Please let us know how you intend to settle the total liabilities of Kshs. 89,355.00 within 14 days from the date of this letter.

As regards your interest in the Retirement Benefits Scheme, separate communication will be sent to you for this purpose, you are requested to leave a forwarding address.

However, please note that payment of your final dues will be subject to you completing the Clearance Certificate form enclosed herewith.

Yours faithfully,



FOR: The Kenya Power & Lighting Co. Ltd.

(signed)

DR. Jeremiah Kiplagat

Director, Kenya Power International

22. The single charge that led to the Claimant's dismissal was an allegation that his name was on the list of employees of a labour and transport firm, known as Beamlan Agencies Limited, that had been prequalified for business with the Respondent.
23. On his part, the Claimant denied any connection or interaction with Beamlan Agencies Limited. In his letter dated 3rd May 2018 he states that he had no knowledge as how his professional documents were acquired by the said firm. In advancing the charge against the Claimant, the Respondent appears to have relied on an investigation report on prequalified labour and transport contractors.
24. Prior to the termination, the Claimant was issued with a show cause letter requiring him to submit a written explanation why disciplinary action should not be taken against him, on account of conflict of interest and breach of company code of ethics. In his response dated 3rd May 2018, the Claimant denied the charge levelled against him. He was subsequently invited to a disciplinary hearing on 15th May 2018.
25. The Claimant complains that he was not issued with a copy of the investigation report prior to the disciplinary hearing nor was he provided with the name of the labour and transport firm of which he was alleged to be a key personnel.
26. The record of the disciplinary proceedings disclose that the Disciplinary Committee recommended that the Claimant be given the benefit of doubt. The relevant part of the record states thus:

“It is evident the employee has little interaction with the regions as the nature of his work confines him to KPI. There is no link on what he does and the L&T contractors.

The employee should be given a Benefit of Doubt.”
27. For some reason that was not clear to the Court, the Respondent went against the findings and decision of the Disciplinary Committee and instead proceeded to dismiss the Claimant.
28. In its decision in *Emmanuel Fresco v Camusat Kenya Limited and another* (Cause No 1884 of 2017) this Court stated as follows:

“By relying on a charge of which the Claimant had been cleared, to terminate his employment, the Respondents in effect ignored the findings of a disciplinary process set up by themselves. I do not think an employer has the latitude to set aside the findings of a disciplinary process, without a valid reason, which must be explained. I say so because it is during the disciplinary process when the employee gets a chance to rebut the accusations levelled against them. By their action therefore, the Respondents trashed the findings of the disciplinary process and went ahead to find the Claimant culpable without complying with the mandatory procedural fairness requirements set out under Section 41 of the *Employment Act*.”



29. In the present case, the Respondent ignored the recommendation of the Disciplinary Committee, that the Claimant be given the benefit of doubt, and instead went ahead to dismiss him. No explanation was offered for this unusual departure.
30. By ignoring the recommendation of the Disciplinary Committee, the Respondent in effect set aside the outcome of its own disciplinary process. The result is that the Claimant was dismissed on an unproved ground as required under Section 43 of the *Employment Act* and in violation of the due procedure established by Section 41 of the Act.
31. The dismissal was thus substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

32. The Claimant asks for reinstatement. However, due to the lapse in time since his separation from the Respondent's employment, the remedy of reinstatement is not appropriate in the circumstances.
33. Instead, I award the Claimant ten (10) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's unlawful conduct in bringing the employment to an end.
34. I further award the Claimant one (1) month's salary in lieu of notice.
35. Cumulatively, I enter judgment in favour of the Claimant as follows:
 - a. 10 months' salary in compensation.....Kshs. 1,213,110
 - b. 1 month's salary in lieu of notice.....121,311

Total.....1,334,421
36. This amount will attract interest at court rates from the date of judgment until payment in full.
37. The Claimant will have the costs of the case.
38. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF OCTOBER 2023

LINNET NDOLO

JUDGE

Appearance

Mr. Kibera for the Claimant

Mr. Marete for the Respondent

