



**Wasike v Kenya Power & Lighting Company Limited (Employment and Labour Relations Appeal E014 of 2022) [2023] KEELRC 3352 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3352 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E014 OF 2022  
ON MAKAU, J  
DECEMBER 20, 2023**

**BETWEEN**

**SOLOMON CHESIKAKI WASIKE ..... APPELLANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... RESPONDENT**

*(Being an Appeal against the Judgment of the Hon.F.Muguongo, delivered on 27th July 2022 in the Chief Magistrate's Court at Nyeri MELRC Cause No.55 of 2019)*

**JUDGMENT**

1. The appellant was employed by the respondent from 1<sup>st</sup> January 2015 to 29<sup>th</sup> January, 2019 when he was dismissed for gross misconduct. He sued the respondent alleging that the dismissal was unfair and sought various reliefs including quashing of the dismissal. The respondent contested the suit and after considering the evidence, the trial court dismissed the suit with costs.
2. The appellant was aggrieved and filed this appeal citing the following grounds-
  - a. That the learned Trial Magistrate erred both in law and in fact in finding that the claimant had not proved his claim on a balance of probabilities.
  - b. That the learned Trial Magistrate erred in law and fact in finding that the prayers sought could not be granted.
  - c. That the learned Trial Magistrate grossly misdirected herself in divesting herself of jurisdiction and holding that she could not quash a decision of the respondent and restricting herself to form in lieu of dwelling on substance.
  - d. That the learned Trial Magistrate erred in law and fact in finding that section 41 of the [Employment Act](#) had been adhered to in the dismissal of the claimant.



- e. That the learned Trial Magistrate erred in law and in fact in finding the dismissal of the claimant was procedural and fair albeit he had not been charged and convicted in any criminal case in regard to the allegations leading to his dismissal.

### **Appellant's submission**

3. The appellant collapsed the said grounds of appeal into the following issues: -
  - a. Whether the trial court erred in law and fact in finding that he was lawfully dismissed.
  - b. Whether the reliefs sought in the suit were merited.
4. On the 1<sup>st</sup> issue, it was submitted that the appellant was dismissed for an offence he was never charged and convicted. It was submitted that the dismissal letter dated 29<sup>th</sup> January 2019, stated in paragraph 2, that the appellant was dismissed for offence of theft by servant. It was submitted that the appellant was never convicted as the DCI wrote a letter exculpating him of any offence. Consequently, it submitted that the dismissal was not grounded on a valid reason but mere allegations.
5. In view of the foregoing matters, it was submitted that the dismissal was unlawful and the trial court fell into error by failing to award the reliefs sought. Consequently, this court was urged to allow the appeal with costs here and court below.

### **Respondents submission**

6. It was submitted that the trial court was right in holding that the appellant did not prove his case. It was argued that the appellant was dismissed through a fair procedure since he was afforded an opportunity to be heard as required by section 41 and 45 of the *Employment Act*.
7. It was further submitted that the dismissal was justified since investigation into the material incidence revealed that the appellant instructed the ferrying of the respondent's property to third parties. It was argued that, the appellant being the team leader, he grossly misconducted himself through fraudulent actions.
8. As regards the reliefs sought, it was submitted that parties are bound by their own pleadings. The pleadings were drafted by the appellant in person and when he instructed counsel no amendment was done to correct the pleadings. Consequently, it was submitted that the court dealt with issues in dispute conclusively and the appeal should be dismissed with costs.

### **Analysis and determination**

9. My mandate as a first appellate court is to re-evaluate the evidence on record and make my own independent conclusions as was held in the case of *Selle v Associated Motor Boat Company Ltd (1968)* EA 123 thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular



circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. Having considered the pleadings, evidence and submissions tendered, the following issues fall for determination: -
- a. Whether the appellant failed to prove a case of unfair termination.
  - b. Whether he failed to prove that he was entitled to any relief.

### **Failure to prove unfair termination**

11. Section 45 of the *Employment Act* provides that: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
  - b. That the reason for the termination is a fair reason -
    - i. related to the employee’s conduct, capacity or compatibility, or
    - ii. based on the operational requirements of the employer; and
  - c. That the employment was terminated in accordance with fair procedure.”

12. From the above provision, it is clear that for termination of employment to pass the test of fairness, there must be a valid and fair reason to justify the termination, and then a fair procedure must be followed. Section 41 of the Act set out a mandatory procedure that must be adhered to before termination of employment at the instance of the employer. It provides that:-

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

13. In view of the foregoing, I must say that a court trying a case of unfair termination is obliged to address itself to the two elements of fair termination. In this case, the trial court addressed itself only to the



question of procedural fairness under section 41 of the *Employment Act*. The court stated in page 7 of the impugned judgment as follows:

“I have particularly looked at the procedure taken by the respondent over the incident of 15<sup>th</sup> November, 2018.

I find that the respondent complied with the due process in line with section 41 of the *Employment Act*, 2007 and the claimant was accorded a fair opportunity to present his case before the disciplinary hearing.

In a letter dated 29<sup>th</sup> January, 2019 the respondent communicated the outcome of the disciplinary hearing by dismissing the claimant.”

14. In page 8 of the Judgment, the court stated that: -

“The claimant’s case is also that since he was cleared by DCIO-Murang’a, then the respondent could not dismiss him from work on account of the same allegation.

In ELRC Cause No.67 of 2014 the court held:-

“... the purpose and objective of criminal trial are different from disciplinary proceedings within the employment relationship. Different legal principal (sic) apply. In my view, the acquittal of an employee cannot without prove be a legal ground for finding that a dismissal was unfair or wrongful.”

Thus having held that the due process was followed by the respondent, there (sic) it cannot be faulted at aiming at an outcome not pleasant with the claimant herein.”

15. The foregoing excerpt from the impugned judgment confirms that the trial court avoided the question of substantive fairness. It is clear that the trial court never analyzed the evidence to arrive at a fair decision on whether the respondent had proved a valid and fair reason to justify the termination as required by section 43 and 45 (2) of the *Employment Act*.

16. For example, the trial court never considered and commented on the evidence adduced by both sides on the validity of the reason for the dismissal. Besides, the trial court seemed to shift the burden of proof from the employer to the employee contrary to section 45 (2) of the *Employment Act*. Once the dismissed employee testified that the police found no fault in him, the burden shifted to the employer to justify the dismissal by adducing evidence to establish a valid and fair reason.

17. Having so said, I must hold that the trial court erred in law and fact by dismissing the claim for unfair termination without considering the question whether the termination was grounded on a valid and fair reason.

## **Reliefs**

18. The trial court stated as follows at page 8, regarding the reliefs sought: -

“As earlier observed here and conceded by claimant’s Advocate all other reliefs sought are either unintelligible or outside the jurisdiction of this court.

In the conclusion the claim fails. I hereby dismiss the same.”



19. The prayers sought in the memorandum of claim dated 23<sup>rd</sup> September, 2019 largely made no sense or were beyond the jurisdiction of the trial court. However, prayer (e), (g) and (h) were reasonably clear. I copy the said prayers here: -
- e. A declaration that there is no offence committed by the claimant that warrants disciplinary action such as losing pension if he had worked until retirement age, service for the period rendered and any other benefits the court may deem fit.
  - g. An order on the strength the letter dated 6.12.2018 from the DCIO investigation report be interpreted properly to the employee and my employment for reinstatement back to my employment without loss of my benefits whatsoever.
  - g. Cost of suit plus interest at court rates.
20. In brief, prayer (e) sought declaration that the appellant had committed no offence to warrant any disciplinary action and loss of pension. Prayer (g) then sought for reinstatement without loss of benefit on the basis of the letter from the DCIO which indicated that the appellant was not culpable of the alleged theft. Lastly, prayer (h) was for costs of the suit plus interest.
21. These reliefs were not difficult to filter from the appellants pleadings. They could easily be considered upon determination of the question of validity of the reason for the termination of appellant's employment. Consequently, I find that the court fell into error by dismissing the above three prayers on grounds that they were either unintelligible or beyond the court's jurisdiction.

### **Conclusion**

22. I have found that the trial court fell into error when it dismissed the appellant's claim for unfair termination without analyzing the evidence in respect of the question of validity of the reason for terminating the appellant's employment. I have further found that the trial court fell into error when it dismissed all the prayers by appellant through generalized finding that the reliefs were either unintelligible or outside the jurisdiction of the court. Consequently, I allow the appeal, set aside the impugned judgment and refer the suit back to the lower court for a retrial by a different judicial officer. The appellant is awarded costs of the appeal to be agreed upon or taxed.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

