



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E001 OF 2020

(Before D.K.N.Marete)

ANDREW OMBAGI.....CLAIMANT

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....RESPONDENT

J U D G M E N T

This matter was originated vide a Statement of Claim dated 21st September, 2020. The issues in dispute are therein cited as;

Illegal, unfair, inhumane and unlawful termination

Non-payment of terminal dues

The Respondent in a Response to statement of claim dated 8th December, 2020 denies the claim *in toto*.

The Claimant's case is that he was employed by the Respondent on 1st July, 2007 and served variously to the position of Senior Technician II in the Energy Transmission division, Control Section in the Mt.Kenya Region.

The Claimant's further case is that his contract of employment was terminated on 28th May, 2020 on allegation of involvement in fraudulent activities and negligence of duty. This was by receiving money from security guards, to wit, money obtained from the sale of pilferage conductor, and suppliers of concrete poles. A further allegation was one of using KPLC telelogger to offload poles all of which allegations were neither justified nor proved.

The Claimant's other case is that his duties did not revolve around the operation of the telelogger but a busy department under the surveillance of CCTV cameras. He worked under the close supervision of his immediate supervisor and therefore the basis of his termination on the alleged ground of neglect of duty was thus not sustainable.

He further avers that his purported dismissal was based on malicious falsehoods. These allegations were never substantiated and neither were there any witnesses at the hearing to confirm the same. It is his case that the Respondent did not conduct any investigation onto the allegations leading to his dismissal and instead relied on a false report and therefore denied him a hearing.

His other case comes out as follows;

- He was not subjected to any criminal proceedings despite the allegation of theft.
- He had had a diligent and blemish free stint of service for 13 years with a 'very good' rating in assessment.
- His termination was irregular, pre-determined and pre-meditated to ensure him by whatsoever means.
- The termination was insensitive to the labour Laws of Kenya.
- Due process was side lined in the process of his termination.
- One (1) months' notice on salary in lieu thereof was due to him on termination.
- Fair labour practice dictates justification for termination, giving of reasons, following rules of fairness, justice and equity.

The Claimant's case is that in the light of the above conduct and the part of the employer his termination of employment was unlawful, unfair

and inhuman and claims as follows;

a. One (1) month's salary in lieu of notice	-	Kshs.160,471.00
b. Accumulated leave (37 days)	-	Kshs.150,045.62
c. Twelve (12) months' salary as compensation		
For unfair termination	-	<u>Kshs.1,928,892.00</u>
TOTAL	-	<u>Kshs.2,236,168.62</u>

He prays thus;

- i. A declaration that Claimant's termination from employment was illegal, unlawful, unfair and inhumane and that the Claimant is entitled to payment of his terminal dues in full.
- ii. A mandatory order compelling the Respondent to reinstate the Claimant's employment, without loss of any salary or benefits.
- iii. In the alternative prayer to (ii) above, compensation for unfair and illegal termination amounting to Kshs.2,236,168.62/=
- iv. An order for the Respondent to issue the Claimant with a Certificate of service.
- v. Costs of the Claim plus interest thereon.

The Respondent's case is a denial of the claim.

It is her case that the claimant's contract of employment was terminated on 28th May, 2020 upon establishing his involvement in fraudulent activities. This is besides negligence of duty by receiving money from security guards. Such money was obtained from sale of pilfered conductors and payment for use of the Company's tele loggers to offload concrete poles by suppliers of such poles. This was evidenced and confirmed through an elaborate internal audit investigations and the Claimant was found culpable and therefore cannot deny liability.

The Respondent further case is that the work station of the Claimant was within the same location as the stores. He was the senior most employee on duty *most of the time*. He would oversee the goings on in the compound. This included the movement and usage of company machinery, especially tele loggers.

The Respondent again avers that the Claimant's supervisor worked on a different shift and was not at most times at work with the Claimant. He cannot therefore hide behind his supervisor.

Her other case is that the Claimant was involved in activities which were detrimental to the properties of the Respondent as his employer. His dismissal was therefore not based on malice but facts established through an objective investigation and therefore the question of malice does not arise.

The Respondent further avers that the process of investigations was prompted by suspicion and through a preliminary investigation and audit. The claimant was involved in this process and was found culpable of the issues raised against him.

The Respondent in the penultimate denies the allegations of diligent and faithfully service by the Claimant for the Respondent for over 13 years. It is her case that the claimant abused the trust and privilege which had been bestowed upon him by resorting to join a scheme which was substantially detrimental to the interests of the Respondent in which the Respondent lost a lot of valuable items. The claimant cannot hope to use his past work record to justify his latest activities which were detrimental to the interests of his employer. The Claimant was the author of his misfortune and only has himself to blame.

She in the penultimate prays as follows;

- a. The termination of the Claimant's employment contract was justifiable, proper, procedural, fair, legal and the Claimant is not entitled to the prayers sought.
- b. The Claimant is not entitled to any order of reinstatement or compensation in any other way his employment contract having been terminated lawfully.
- c. The Claimant is not entitled to any damages in any way or at all.
- d. The Claimant is entitled to a Certificate of service for the period served and the same be issued within 30 days of the judgment.
- e. The costs are awarded to the Respondent.

This matter came to court variously until the 11th June, 2021 when it was heard inter partes. The parties at the hearing thereof reiterated their respective cases as pleaded.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was illegal, unfair, inhuman and unlawful?
2. Whether the Claimant is entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue of determination is whether the termination of the employment of the Claimant by the Respondent was illegal, unfair, inhuman and unlawful. The Claimant in his written submissions dated 12th July, 2021 brings out an elaborate case of unlawful termination of his employment.

In buttressing his case the claimant seeks to rely on Section 107 (1) of the Evidence Act which comes out as follows;

“...Any person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person....”

The Claimant further submits that his termination of employment was violation of Section 43 (1) and 45 (1) of the Employment Act, 2007 in that no reason was given for his termination. This comes out as follows;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

A termination of employment by an employer is unfair if the employer fails to prove-

- That the reason for the termination is valid;
 - That the reason for the termination is a fair reason-
 - Related to the employee’s conduct, capacity or compatibility; or
- Based on the operational requirements of the employer; and
- That the employment was terminated in accordance with fair procedure.

The Claimant further posts and submits a case of violation of Section 44(3) of Employment Act, 2007 in that the employer has not adduced evidence in sustenance of his dismissal. On this he relies on the authority of **Pius Machafu Isindu vs Lavington Security Guards Limited (2017) Eklr**, where the court held thus;

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the civil procedure Act/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble....to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.”

She further seeks to rely on the case of **Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR**, where the court held thus;

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination, while procedural fairness addresses the procedure adopted by the Employer to effect the termination....”

The Respondent’s in her written submissions dated 7th July, 2021 restates her case and counters the claimant’s case of unlawful termination of his employment. It is her case that the claimant’s disciplinary case was taken through by an audit and investigation report on the issues raised against him where he was found culpable.

Her case was also brought out and narrated by her witnesses Argwings Kodhek and Ann Siyamo who highlighted the systematic way in which the claimant was dismissed for involvement in irregularities and fraud. This evidence remains uncontroverted.

The Claimant in his testimony reiterated his case as pleaded. This, however, did not controvert or in any way rebut the overwhelming case of the defence. This was not even brought out in his elaborate written submissions.

The Claimant brings out an elaborate case of unlawful and wrongful termination of employment but this ends at that. His case is not illustrative of the claim of unlawful termination of employment. This is because he totally fails to sustain a case of unlawful termination on the background of the overwhelming contra case by the respondent.

The Respondent through and through posits a case of lawful termination of employment. This is by establishing a case of dismissal as a consequence of the claimant's iniquities at the work place. This was through misconduct and involvement in fraud and other schemes detrimental to her interest.

The Claimant cannot be seen to rely on Sections 41 and 43 of the Employment Act, 2007 in support of his case. This is because there is overwhelming evidence showing that he was given and knew the reasons for dismissal. The procedure for such dismissal was open and involving and in compliance with Section 41 above.

In all, the claimant falls short of the requirements of Section 47 (5) of the Employment Act, 2007. This provides as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

He has failed to prove his case on a balance of probabilities. Again, this fails and crumbles even on a test of preponderance of evidence. A case of unlawful termination of employment therefore remains unproven.

I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the Respondent.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mrs.Magua holding brief for Kiboi instructed by Magua & Mbatha Advocates for the Claimant.
2. Mr.Wangira instructed by Wangira & Company Advocates for the Respondent.