



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 62 OF 2019**

**RICHARD ANDAI AHONGO.....CLAIMANT**

**v**

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

**JUDGMENT**

1. The questions for determination in this Cause are:

- (i) Whether the termination of the employment of Richard Andai Ahongo (Claimant) was unfair?
- (ii) Breach of contract.
- (iii) Appropriate remedies.

**Unfair termination of employment**

**Procedural fairness**

2. Section 35(1) of the Employment Act, 2007 contemplates written notice of termination of employment, while section 41 of the Act requires the employer to afford the employee an opportunity to make representations before deciding to terminate the contract.

3. Kenya Power & Lighting Co. Ltd (the Respondent) issued a show-cause notice to the Claimant on 26 April 2018, and it set out the allegations the Claimant was required to respond to within 72 hours.

4. The Claimant responded to the allegations, and on 17 May 2018, he was invited to attend a disciplinary hearing on 24 May 2018. The invitation informed the Claimant of the right to be accompanied and to present evidence.

5. The Claimant attended the hearing and made representations. On 25 June 2018, he was informed of the termination of employment.

6. The Court is satisfied that the Respondent complied with the requirements of procedural fairness as envisaged by sections 35(1) and 41 of the Employment Act, 2007.

**Substantive fairness**

7. By dint of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of not only proving, but proving as valid and fair, the reasons for terminating the Claimant's employment.

8. The reason given by the Respondent for terminating the Claimant's employment was: that you connected a customer account 544368 on direct supply and validated the meter without installing it on site.

9. The Respondent called a Regional Manager as a witness to discharge the burden.

10. The witness stated that the Claimant was employed as a Technician, Revenue Protection Unit, Kisumu, and that in respect to the material incident, he booked a metre which he gave to a colleague to install and upon the colleague informing him of the installation, he validated the metre in the system before verifying connection.

11. The witness further testified that the Claimant's duty was to ensure that metres were connected in the correct locations before

validation. To carry out the function, he had been assigned an official vehicle.

12. However, the Claimant's narration was that an employee of the Respondent had detected that a customer was on direct supply, whereupon the customer admitted liability and signed a penalty form.

13. According to the Claimant, he thereafter booked the customer for a new pre-paid metre and because he was one of the two employees covering the area and that he gave the metre to a named junior colleague who called him and informed him that he had fixed the metre and he validated the metre.

14. The Claimant disclosed in the filed witness statement that he did not physically go to the customer's premises to confirm whether the metre had been fixed (it turned out the colleague had not connected the metre, and the Claimant found it under the custody of the junior staff).

15. What emerges from the evidence before the Court is that the Claimant validated a metre before it had been connected to a customer. During the disciplinary hearing, the Claimant confirmed that he was aware of the operational procedures, which required him to establish the connection of a metre before validation.

16. The Claimant's duty was to confirm that the Respondent's procedures were adhered to in connecting customers. He did not, and he explained that he relied on the say-so of a junior employee that the metre had been connected.

17. The Claimant's action was negligent and reckless, and the Court finds that the Respondent had and has proved valid and fair reasons to terminate his employment.

18. Therefore, compensation and damages for loss of employment are not remedies available to the Claimant.

#### **Breach of contract**

#### **Accrued leave**

19. The Claimant sought Kshs 90,000/- on account of accrued leave.

20. The Respondent resisted the head of the claim because under the Human Resources Policy in place, the Claimant was required to have applied for leave, and since he did not demonstrate as much, the leave stood forfeited.

21. Since the Claimant did not demonstrate that he accumulated the leave with the prior approval of the Respondent, the Court finds no breach of contract warranting commutation of the leave into cash.

#### **Unpaid leave allowance for 3-years**

22. The Claimant prayed for Kshs 30,000/- leave allowance for 3-years.

23. With the finding that the Claimant did not have the Respondent's approval to accumulate or carry forward his leave days, the Court is of the view that he would not qualify for payment of leave allowance.

#### **Conclusion and Orders**

24. From the foregoing, the Court finds no merit in the Cause, and it is dismissed with no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF MARCH 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

#### **Appearances**

For Claimant                      Anyumba & Associates

For Respondent                  SMS Advocates LLP

Court Assistant                  Chrispo Aura