



REPUBLIC OF KENYA



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**Kenya Power & Lighting Company Limited v Ng’etich (Appeal
E060 of 2021) [2022] KEELRC 37 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 37 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E060 OF 2021
NZIOKI WA MAKAU, J
APRIL 26, 2022**

**BETWEEN
KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT
AND
RASHID KIPKOECH NG’ETICH RESPONDENT**

*(Being an appeal from Judgment of the Hon. Kahuya I. M
delivered on 24th May 2021 in Kajiado CMEL No 1 of 2020:)*

JUDGMENT

1. Aggrieved by the whole Judgment of the Hon. Kahuya I. M delivered on 24th May 2021 in in Kajiado CMEL No 1 of 2020: Rashid Kipkoech Ng’etich versus Kenya Power & Lighting Co. Ltd, the Appellant filed a Memorandum of Appeal dated 4th June 2021 on the grounds that:
 - i. The Honourable Magistrate erred in law and in fact by formulating and determining her own issues of “suspension without pay” yet the same was neither pleaded for in the Claim, it was not raised during hearing and was not submitted on by the Respondent and neither was it an issue for trial by either of the parties.
 - ii. The Honourable Magistrate erred in law and in fact by formulating and determining her own issues of “emotional and mental torment” yet the same were never pleaded for in. the Claim, were not raised during hearing and they were not submitted on by the Respondent and neither was it an issue for determination that was formulated by either of the parties.
 - iii. The Honourable Magistrate erred in law and in fact by assuming without any material evidence and determining on her own motion that the Respondent was required to report to work without pay while under suspension for four months, while the same not pleaded at all.



- iv. The Honourable Magistrate erred in law and in fact by formulating and determining on her own issues of “validity of Applicant’s Disciplinary Policies” and went ahead to recommend amendment of the said policies to include payment of salary during suspension yet the same never raised by the Respondent and thus was not an issue for determination
 - v. The Honourable Magistrate erred in law and in fact by finding that the Applicant’s Disciplinary policies did not provide for payment of salary during suspension yet the alleged policy was not produced in court for examination.
 - vi. The Honourable Magistrate misinterpreted and misapplied the law in awarding the Respondent the sum of Kshs. 300,000 as aggravated damages for emotional and mental torment yet the same was neither pleaded for in the Claim, was never raised during hearing nor was it submitted on by the Respondent and neither was it raised as an issue for determination.
 - vii. The Honourable Magistrate misinterpreted and misapplied the law by awarding aggravated damages contrary to section 49 of the *Employment Act* after finding that the Respondent’s termination was fair, procedural and lawful.
 - viii. The Honourable Magistrate erred in law and in fact by awarding the Respondent Kshs. 300,000 as aggravated damages despite holding that the Respondent’s termination was fair, procedural and lawful.
 - ix. The Honourable Magistrate erred in law and in fact in finding that the Respondent suffered “emotional and mental torment ... during four months he was under suspension” yet the same was never pleaded for in the Claim, was never raised during hearing and was never submitted by the Respondent.
 - x. The honourable Magistrate erred in her Judgment, by finding that the Respondent herein suffered mental anguish, yet the Respondent himself did not plead of any mental anguish and also during examination in chief and cross - examination, the Respondent herein did not allude to any of that.
 - xi. The honourable Magistrate erred in her Judgment by trying to assist the Respondent by awarding him aggravated damages, having found that the remedies for wrongful dismissal and unfair termination as provided under section 49 of the *employment Act* were not available to Respondent.
 - xii. The Honourable Magistrate erred in law and in fact by failing to consider that although the issue of aggravated damages was prayed for in the Claim, the Respondent did not submit on it and neither was particularized in the Claimant’s claim.
 - xiii. The Honourable Magistrate court erred by failing to consider all the evidence on record before allowing the Respondent’s Claim.
 - xiv. The Honourable Magistrate erred by failing to consider all the evidence on record.
2. The Appellant seeks for the Appeal herein to be allowed and that the Judgment of the Honourable Magistrate made on 24th May, 2021 and the resultant Decree be set aside. Further, the costs of the Appeal and those of the Subordinate Court be awarded to the Appellant and that this Honourable Court be pleased to make such further and other orders as it may deem just in the circumstances.
 3. The matter was disposed by way of written submissions. The Appellant submits that it is trite law that issues for determination in a suit generally flow from pleadings and that a Court can only pronounce



judgment on issues arising from pleadings or issues as the parties' frame for the court's determination. That this position was enunciated by the Court of Appeal of East Africa in *Galaxy Paints Co Ltd v Falcon Guards Ltd* [2000] 2 EA 385 which further added that unless pleadings are amended, parties are confined to their pleadings. Further, the Court of Appeal in the case of *Ann Wairimu Wanjobi v James Wambiru Mukabi* [2021] eKLR cited the case of *Sheikh vs Sheikh & Others* [1991] LLR 2219 (CAK) in which the Court held that "A Judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended." The Appellant also submits that it is trite law that an unpleaded issue can only become an issue in a suit in limited circumstances as enunciated by the Court of Appeal of East Africa in *Odd Jobs v Mubia* [1970] EA 476 as follows:

- "a) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision;
- b) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."

4. The Appellant submits that considering the pleadings filed by parties in the trial court, the Court was confined to pronounce judgment on the issues as framed in the parties' respectful pleadings. To support this position the Appellant cites the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR where the Court of Appeal observed that the court will not grant a remedy which has not been applied for, or determine issues not pleaded by the parties. It is the Appellant's submission that when the Trial Court pronounced in judgment that the Respondent herein was accorded a fair hearing and that his termination was thus fair, procedural and lawful, it determined the issues raised in the matter in favour of the Appellant. The Appellant submits that however, the Trial Court went ahead to determine issues of her own formulation and motion, that had neither been raised during hearing nor submitted upon by parties. The Appellant submits that the subsequent award of aggravated damages at Kshs. 300,000/- was therefore an error in law and fact and that it is a rule that relief not founded on pleadings cannot be given per the case of *Gandy v Caspar Air Charters Ltd* [1956] 23 EACA, 139 cited in the Court of Appeal case of *George W. Omondi v Guilders International Bank Limited* [2015] eKLR. The Appellant submits that although the Respondent prayed for the issue of aggravated damages in its Memorandum of Claim, at no point whatsoever at trial or in the Respondent's pleadings did he submit or particularize the claim and neither did the Respondent to this appeal raise issues of malice on the part of the Appellant. The Appellant submits that the Respondent did not therefore prove the issue of aggravated damages to the degree of certainty and particularity required by law. Further, the Learned Magistrate misinterpreted and misapplied the law by awarding aggravated damages contrary to Section 49 of the *Employment Act* as the clause does not provide for aggravated damages as a remedy. It relies on the case of *D. K. Njagi Marete v Teachers Service Commission* [2020] eKLR where the Court of Appeal held that though the court make an additional award where the circumstances so merit, it found no such special circumstances in that case which would warrant additional compensation in the manner claimed for by the appellant. It is the Appellant's submission that similarly no peculiar/ special circumstances occurred that merited any other order in the matter before the Trial Court. The Appellant also submits that there having been no finding of any wrongdoing on the part of the Appellant means that the award of aggravated damages amounted to unjust enrichment of the Respondent and that the award was made to defeat justice. It prays that the appeal be allowed and the said judgment be set aside.
5. The Respondent submits that the Trial Court considered the issues for determination as raised by the parties, the evidence adduced during trial and the written submissions filed by the respective parties in reaching its decision. The Respondent submits that in determining whether the Respondent herein was unlawfully, unprocedurally and unfairly terminated from employment by the Appellant,



the Learned Magistrate cited the case of *Donald C. Avude v Kenya Forest Service* [2015] eKLR and found “his suspension from work for an indefinite period without pay while still being expected to report to work as unfair and inhuman”. The Respondent submits that notably, the issue of indefinite suspension was raised when parties gave evidence in court on 24th February 2021 and the Appellant did not offer any rebuttal and that indefinite suspension goes to the root of procedural fairness which issue he raised in his list of issues for determination. That this means that the termination of his employment was in total disregard of the procedure and was therefore unfair and unlawful. It is the Respondent’s submission that the Appellant is thus misleading the court to believe that the trial Magistrate formulated and determined her own issues which were never raised by parties as issues for determination nor were they submitted on by parties. The Respondent submits that the Court in the case of *Veronica Gathoni Mwangi & Another v Samuel Kagwi Ngure & Another* [2020] eKLR held that “the trial Court had the right to exercise its discretion as provided under Order 15 rule 2 of the *Civil Procedure Rules*, to frame its own issues as derived from the contents of the documents produced by either party”. He invites the Court to disregard the authority cited by the Appellant of *David Sironga Ole Tukai supra* since there is an exception to that rule as was held by the Court of Appeal in *Nyaga Cottolengo Francis v Pius Mwaniki Karani* [2017] eKLR thus:

“We have considered the appeal fully. On the outset we agree with the appellant on the objective of pleadings in an adversarial system that the court can only lawfully determine issues that are specifically pleaded and proved before it and that the court cannot base its decision on an unpleaded issue. This has been restated times without number but we take it from *Gandy v. Caspair Air Charters Ltd.* (1956) 23 EACA 139 where Sir Sinclair, V-P, said:-

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

However, there are exceptions to that rule even under the strict adversarial system where the court was generally warned against descending into the arena of litigation lest it is blinded by the dust of it. The exception was noted in the case of *Odd Jobs v. Mubia* [1970] EA 476 where Duffus P. while considering the question whether an unpleaded issue can form the basis of a decision, rendered himself as follows:-”

“Generally speaking pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties.”

6. The Respondent submits that the Court in the case of *Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa* [2004] eKLR held that aggravated damages need not be specifically pleaded or included in the prayer for relief and that if any of the defendant's acts will have worsened the plaintiff's damage by injuring his feelings of dignity and pride, the same may also be considered in awarding aggravated damages in compensation. The Respondent submits that the Trial Court's decision to award him aggravated damages was also informed by the evidence adduced by parties and the case of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR. The Respondent submits that the Court found his suspension from work for an indefinite period without pay as unfair and inhuman and held



that he was thus deserving of aggravated damages for the emotional and mental torment he underwent for the four months he was under suspension.

7. It is the Respondent's submission that the Appellant has not demonstrated that the award of Kshs. 300,000/- for mental anguish is inordinately high as to be a wholly erroneous estimate of the damages suffered or that the Learned Magistrate applied wrong principles in assessing damages. That this test was considered in the case of *Joseph Henry Rubui v Attorney General* (Nairobi HCCA No. 701 of 2001) citing the statement of Law J. A. in *Butt v Khan* (1977) 1 KAR. The Respondent asserts that it is apparent that the Learned Magistrate did not misdirect herself in her finding and instead delivered a well-reasoned opinion which cannot be faulted. He submits that the Appellant's appeal lacks merit and should be dismissed with costs to the Respondent.
8. The Appellant is correct in its surmise that aggravated damages do not lie in employment cases. The Claimant in the lower court was therefore not entitled to an award of Kshs. 300,000/- under this head. The sum is therefore not payable. In relation to the consideration of evidence it would seem the decision went beyond the parameters of evaluation of evidence and the Learned Trial Magistrate thus erred. In the final analysis there was no basis for the award of any dues to the Respondent herein as the Appellant took the Respondent through the disciplinary process and established there was cause to dismiss as it correctly did. The Appeal succeeds to the extent that I substitute the orders issued by the Learned Magistrate with an order dismissing the suit with no order as to costs.
9. Appeal allowed and each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

NZIOKI WA MAKAU

JUDGE

