



**Nyariro v Kenya Power & Lighting Co. Ltd (Cause E053 of 2021)
[2022] KEELRC 1475 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1475 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E053 OF 2021
CN BAARI, J
JUNE 30, 2022**

BETWEEN

ARTHUR ALARE NYARIRO CLAIMANT

AND

KENYA POWER & LIGHTING CO. LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimant's Memorandum of Claim is dated 28th July, 2021, and filed in court on 29th July, 2021. The Claimant seeks reinstatement to the service of the Respondent, or in the alternative that the court awards him damages for wrongful termination, pay in lieu of termination notice and the retained sum of the unreturned meters.
2. The Respondent filed a response to the memorandum of claim dated 27th August, 2021 and filed 30th August, 2021, wholly denying the Claimant's claim.
3. The case came up for hearing on 14th March, 2022 - The Claimant testified in support of his case and adopted his witness statement dated 28th July, 2021 as his evidence-in-chief. He further produced his bundle of documents dated 28th July 2021, as exhibits in the matter.
4. The Respondent called two witnesses Ms. Nancy Nyarige and Mr. John Tollar to testify in support of her case. The two adopted their witness statements dated 6th December, 2021, as their evidence in chief, and produced the Respondent's bundle of documents dated 6th December, 2021.
5. Both parties filed written submissions in the matter.



The Claimant's Case

6. The Claimant's case is that he was first employed by the Respondent in the year 2005, as a casual labourer. The Claimant further states that he was put on fixed term contracts between the year 2011 and the year 2016, and thereafter on the 3rd July, 2017, employed on permanent terms of service as an artisan mate assistant.
7. The Claimant avers that he lawfully, faithfully and diligently executed his duties as an employee of the Respondent, and in accordance with his employment contract, and that by the time he was unlawfully terminated he was earning a gross monthly salary of Ksh.118,771.88/=
8. The Claimant avers that sometime in October, 2020, he received a show cause letter dated 22/10/2020, outlining three offences allegedly committed by him as follows;
 - a. That he replaced 246 non-vending meters whose accounts were later contracted to other persons in different locations in an effort to regularize illegal lines.
 - b. That he failed to return 99.02% of the meters he replaced back to stores for onward transmission to Meter Central Lab for testing and repairs.
 - c. That he received Ksh.85,820.00 from private electricians and customers to facilitate irregular metering of customers who had illegal supply.
9. The Claimant avers that he responded to the show cause letter through a letter dated 26/10/2020. He further avers that he was invited to a disciplinary hearing conducted on the 9th November, 2020, through a letter received on the 4th November, 2020.
10. It is the Claimant's case that the employees present at the disciplinary hearing did not have his consent to represent him at the hearing, and that they forcefully attended the hearing with him against his advice. The Claimant further states that at the hearing, the Respondent failed to present the internal audit report, and further failed to produce any evidence to prove the alleged offences and did not consider his defence.
11. The Claimant avers that he dutifully returned the replaced non-vending meters back to stores which were acknowledged by the RPU in-charge.
12. It is the Claimant's case that he was served with a dismissal letter on 30/11/2020, and that he appealed against the dismissal through a letter dated 15/12/2020.
13. The Claimant avers that he was invited for the hearing of his appeal on 26/01/2021, and which appeal was conducted on the same day 26th January, 2021. He states that he attended the hearing but the decision to dismiss him was unlawfully upheld
14. The Claimant avers that he was not afforded reasonable time to prepare for his defence having been afforded only 5 days from the time he was served with the notice inviting him for the disciplinary hearing. He further avers that he was not supplied with the internal audit investigation report which formed the basis of the allegations against him, and his subsequent termination.
15. On cross-examination, the Claimant admitted receiving three warning letters for failing to validate and return meters. He further told the court that the letter inviting him to the disciplinary hearing informed him to attend the hearing accompanied by two representatives of his choice and evidence in support of his case.



16. The Claimant further told the court on cross-examination, that he did not request to be supplied with the documents the Respondent relied on in the case against him.
17. The Claimant further confirmed on cross exam that he attended the disciplinary hearing and thereafter signed minutes of the hearing. He further indicated that he was represented by his union at the disciplinary hearing and that the union representative also appended his signature on the minutes of the hearing.
18. The Claimant confirmed on cross-examination that he received his letter of dismissal, and that his terminal dues were paid at the time of dismissal. He further told the court that the dismissal letter listed the reasons for his dismissal.
19. The Claimant told the court that he was not issued a certificate of service.
20. The Claimant confirmed that he appealed and thereafter sought review of the decision of the Respondent, and that both were disallowed.

The Respondent's Case

21. The Respondent's case is that she employed the Claimant as an artisan mate assistant in Regional Coordination Division, Design and Construction, Western Region on 1st January, 2016.
22. It is the Respondent's case that in 2020, she received information that several illegal service lines had been connected in West Kenya Region and metered irregularly through replacement of non-vending meters that were issued out for metering in a 2014 scheme.
23. The Respondent further states that arising from the information, their internal auditors proceeded to carry out an investigation which revealed that the Claimant had replaced 246 non-vending meters whose accounts were later contracted to other persons in different locations in an effort to regularize illegal lines.
24. The Respondent states that the investigation further indicated that the Claimant had failed to return 99.02% of the meters replaced back to stores for onward transmission to Meter Central Lab for testing and repairs, and finally that the Claimant had received Kshs.85,820.00 from private electricians and customers to facilitate irregular metering of customers who had illegal supply.
25. The Respondent states that after the investigations, their internal auditors recommended that appropriate disciplinary action be taken against the Claimant for being part of a network that aided illegal connections through irregular replacement of non-vending meters and irregular contracting.
26. The Respondent states that the Claimant was issued with a show cause letter dated 22nd October, 2020, to explain why disciplinary action should not be taken against him for the acts of misconduct enumerated herein.
27. The Respondent states that on 26th October, 2020, the Claimant responded to the show cause letter, and indicated that he neither accesses the system nor queries any non-vending/vending account and that he has never changed any account or metered an illegal line. The Claimant further indicated that he deposited all the faulty meters to store and does not remember receiving money worth Ksh.85,820.00 for the purpose of metering illegal lines.
28. It is the Respondent's case that the Claimant's explanation was found not be cogent and that it was deemed necessary that a disciplinary hearing, be convened for further clarification and decision making.



29. The Respondent avers that on 4th November, 2020, she invited the Claimant for a disciplinary hearing, and the hearing proceeded on 9th November, 2020. The Respondent states that the Claimant attended the disciplinary hearing in person accompanied by a representative of his own choice as his witness during the disciplinary hearing.
30. The Respondent states that after the hearing, the disciplinary committee recommended that the Claimant be dismissed from employment, and was subsequently issued a dismissal letter dated 30th November, 2020, and informed of his right of appeal.
31. The Respondent avers that the Claimant proffered an appeal and subsequently a request for review of the decision to dismiss him, which were both heard and dispensed with. The Respondent further states that the Respondent disallowed both the Claimant's appeal and review application.
32. It is the Respondent's case that the Claimant was granted a fair hearing in which he participated actively, and thereafter, appended his signature to the minutes of the meeting confirming that the minutes were a true reflection of what transpired during the appeal hearing.
33. The Respondent states that the Claimant had previously been given show cause letters, one dated 18th February, 2016 and another of 17th May 2016 for failing to validate 68 and 19 meters respectively that were in his possessions, which resulted in the Claimant being given warning letters.
34. The Respondent states that she gave the Claimant a fair hearing and seeks that this suit be dismissed with costs.

The Claimant's Submissions

35. It is submitted for the Claimant that for a termination to be valid, it must meet the requirements of substantive and procedural fairness. The Claimant sought to rely on the holding in [*Felix Mbolonzi Kiok v Director of Public Prosecutions*](#) (2020) eKLR to buttress this position.
36. The Claimant submits that he was not afforded a fair hearing in accordance with Section 41 of the [*Employment Act*](#) and Section 4 of the Fair Administrative Actions Act.
37. It is submitted that the reasons for the Claimant's dismissal were neither valid nor reasonable rendering the dismissal unfair.

The Respondent's Submissions

38. It is submitted for the Respondent that the Claimant breached his contractual duty and hence the Respondent had sufficient grounds to terminate his employment contract. They had reliance on the holding by Hon. Lady Justice Wasilwa in [*Charles Njagi V Air Connection Limited*](#) (2016) eKLR to support this position.
39. The Respondent further submitted that she established reasonable cause for disciplinary action, and that she accorded the Claimant procedural fairness by adhering to the rules of natural justice. She further submits that the Claimant did not exonerate himself from the findings of the Respondent's investigation report.
40. It is submitted for the Respondent that the actions of the Claimant watered down the trust between her and the Claimant. The Respondent further submits that there was a breach of trust between the Claimant and the Respondent and their employer-employee relationship had irretrievably broken down.



41. The Respondent submitted that the Claimant is not entitled to any of the reliefs sought in his memorandum of claim dated 28th July, 2021.

Analysis and Determination

42. I have considered the rival pleadings, oral testimonies and the submissions filed by both parties. The issues for determination are:
- i. Whether the Claimant's termination was unfair
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated.

43. The question of whether a termination is fair or not, is deduced from the Employer's adherence to the twin requirements of procedural fairness and the substantive justification for the termination/dismissal.
44. On the issue of Procedural fairness, the court's focus is on the Employer's compliance with the requirements of Section 41 of the *Employment Act*, 2007. Section 41 states:
- “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.”
45. Section 41 of the *Employment Act*, obligates an Employer to show as a matter of factual evidence that he/she explained to the employee the reason(s) she/she is considering termination/dismissal, allow an employee to be represented by a representative of his choice and hear and consider any explanations by the employee. None compliance with any of these statutory provisions renders the disciplinary action unfair. This position was buttressed in the case of *Angela Wokabi Muoki v. Tribe Hotel Ltd* (2016) eKLR, where the court held that the process of hearing and ensuring that an employee is given a fair chance to know the allegations against him, is a mandatory requirement of the law.
46. The Court of Appeal affirmed this position in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, where the Court stated:
- “Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.”
47. The Claimant both in his pleading, and during the hearing, admitted receiving a show cause letter and further confirmed that he responded to the show cause.
48. The Claimant again confirmed being invited and attending the disciplinary hearing, and further confirmed being informed to attend the hearing in the company of two representatives of his choice. He confirmed having been represented at the hearing by an official from his union. In the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.



49. Guided by the provisions of Section 41 of the *Employment Act*, there is no doubt in my mind that the Respondent adhered to the tenets of fair procedure in arriving at the decision to dismiss the Claimant. I thus return that the Claimant's dismissal met the procedural fairness test.
50. The second question in determining fairness of a dismissal, is whether the Respondent had valid, fair and justifiable reasons for dismissing the Claimant.
51. Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair, and prove that the reasons are justified. (See *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR)
52. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee. Courts have held that the decision to dismiss ought to be hinged on an objective test, such as whether a reasonable employer in similar circumstances, would have dismissed the employee. In *British Leyland v Swift* (1981) I. R. L.R. 91, Lord Denning describe the test of what a reasonable employer could or could not do in the following words:
- “The correct test is: was it reasonable for the employers to dismiss? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.....”
53. The Respondent's evidence is that an internal audit investigation revealed that the Claimant had replaced 246 non-vending meters whose accounts were later contracted to other persons in different locations in an effort to regularize illegal lines. The Respondent further states that the investigation further indicated that the Claimant had failed to return 99.02% of the meters replaced back to stores for onward transmission to Meter Central Lab for testing and repairs.
54. It is the Respondent's further case that the Claimant had received Kshs.85,820.00 through his phone from private electricians and customers to facilitate irregular metering of customers who had illegal supply.
55. The Claimant in response to the charges, simply indicated that he neither accesses the system nor queries any non-vending/vending accounts and that he has never changed any account or metered an illegal line. The Claimant further indicated that he deposited all the faulty meters to store and does not remember receiving money worth Ksh.85,820.00 for the purpose of metering illegal lines.
56. In my view, the Claimant's defence is a mere denial. Kshs.85,820/- is not loose change that the Claimant would not notice when it hits his M-pesa line.
57. The Claimant admitted having previously faced disciplinary action for failing to validate meters and confirmed that he received warning letters in relation to the charges.
58. Considering that the Respondent is a public entity that frequently faces cases of illegal connections, and the circumstances leading to the Claimant's dismissal, I find and hold that the Respondent met the test of legality and reasonableness, and hence the Claimant's dismissal is substantively fair and proper.

Whether the Claimant is entitled to the reliefs sought

59. The Claimant seeks reinstatement to the service of the Respondent, and in the alternative that the court awards him damages for wrongful termination, pay in lieu of termination notice and the retained sum of the unreturned meters.



60. The reliefs sought, are all tied to a finding of an unfair dismissal. The Claimant's dismissal has been held to be both procedurally and substantively fair. The issue herein, thus falls by the way side. The Claimant is not entitled to any of the remedies sought.
61. In whole, I find the Claimant's dismissal both procedurally and substantively fair. Consequently, the Claimant's Memorandum of Claim dated 28th July, 2021, and filed in court on 29th July, 2021, is dismissed in its entirety.
62. The Claimant shall bear the costs of the suit.
63. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30TH DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Okoth present for the Claimant

Ms. Abobo present for the Respondent

Christine Omollo- C/A

