



Oimeke v Kenya Power & Lighting Company Limited (Cause E079 of 2021) [2022] KEELRC 1588 (KLR) (2 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1588 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E079 OF 2021**

B ONGAYA, J

JUNE 2, 2022

BETWEEN

JULIUS MOCHAMA OIMEKE CLAIMANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim on August 17, 2021 through Mutisya Mwanzia & Company Advocates. The claimant alleged his summary dismissal was unfair in procedure and substance. The claimant prayed for judgment against the respondent for:
 - a) A declaration that the termination of the claimant was unfair and wrongful.
 - b) An order directing the respondent to reinstate the claimant in the service of the respondent with effect from February 4, 2020 in the position held before the termination without a break in his service with full prevailing benefits and to continue in that service until the due date of retirement or lawful separation.
 - c) Consequential to the reinstatement, the respondent be directed to pay the claimant all withheld monthly salaries and allowances from 4th February, 2020.
 - d) In the alternative to the reinstatement, the claimant be awarded the maximum compensation for unfair dismissal and unlawful termination as per section 49 and 50 of the *Employment Act*, that is, Kshs.90, 490.75. x12 months = Kshs.1, 085, 889.00.
 - e) The respondent be directed to issue the claimant with a certificate of service.
 - f) Any further entitlement or order that the Court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the claimant submits on his final filed submissions.



g) The respondent to pay the claimant's costs of the suit.

h) Interest on prayer (d) above from the date of filing the suit until payment in full.

2. The respondent filed a memorandum of response on September 15, 2021 through Irene Walala Advocate. The respondent prayed that the suit be dismissed with costs. Subsequently on October 29, 2021 the respondent file a notice of change of its Advocate to Namasaka & Kariuki Advocates. The respondent filed on January 5, 2022 an amended memorandum of response and counterclaim. The respondent denied that the summary dismissal was unfair, that due process was followed and the reasons for termination were valid. The respondent prayed that the memorandum of claim be dismissed with costs as lacking in merits. The respondent also counterclaimed for Kshs. 12, 960.05 being unpaid bicycle loan advanced to the claimant; and, Kshs. 1, 500.00 being sales for the respondent made by the claimant but not remitted to the respondent. The claimant prayed for judgment against the claimant for the repayment as counterclaimed; costs; and any other relief the Honourable Court may deem fair, just and expedient.
3. The claimant filed on April 28, 2022 the reply to respondent's amended memorandum of response and counterclaim. The claimant denied owing the respondent outstanding bicycle loan or other money as alleged and counterclaimed. Further, the issue of the loan was a commercial dispute and the Court lacked jurisdiction to determine the same. The claimant prayed for judgment as per the statement of claim and the dismissal of the counterclaim with costs.
4. The suit was fixed for hearing on May 5, 2022 and when it came up for the hearing, by consent of the parties' advocates it was ordered that the suit be determined on the basis of pleadings and documents which were admitted in evidence. The final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.
5. To answer the 1st issue for determination the Court returns that there is no dispute that the parties were in a contract of service. The claimant was initially engaged by the respondent from August 13, 2007 as a temporary employee together with 52 other persons. By the letter dated September 20, 2011 the claimant rose to the rank of Art Mate Asst. in O&M department in Likoni, Mombasa. By the letter dated February 11, 2015 the claimant was appointed by the respondent as a cashier in Regional Coordination Division (Finance), Coast Region, Mombasa. By a memorandum of agreement between the respondent's management and the claimant's union known as KETAWU, the claimant was absorbed by the respondent as a permanent employee earning a basic salary of Kshs. 54, 353.00 per month and a house allowance of Kshs. 33, 931.00 per month and effective January 1, 2020.
6. To answer the 2nd issue for determination it is not in dispute that the claimant's employment was terminated by the letter of summary dismissal dated February 4, 2020. The reason for termination was stated thus, "Being part of the network that collected money from customers and denied the company its due revenue, you received Kshs. 84, 795/- from various electricians after processing applications submitted by the electricians."
7. The 3rd issue for determination is whether the summary dismissal was unfair. There is no dispute that the claimant received a letter to show-cause or make explanation, he replied in writing, he attended the disciplinary hearing with a chance to be accompanied by a representative, and subsequently the letter of summary dismissal dated February 4, 2020 issued.
8. The claimant's case is that the summary dismissal was unfair in procedure because his appeal against the summary dismissal was heard and determined by the same persons who were accusing him or conducted the investigations. In particular, one Okoth Khaluoch who was involved in the preliminary investigations and was the same person who was demanding to know how claimant's Mpesa was



procured. The respondent at paragraph 6 of the amended memorandum of response and counterclaim has admitted paragraph 9 of the memorandum of claim and which states, “9. Sometimes in 2019, the claimant was summoned from his annual leave by Mr. Okoth Khaluoch who is the respondent’s chief auditor to report to work to clarify a few things to the auditor. The claimant appeared before the said Mr. Okoth Khaluoch who was accompanied by two other auditors, namely Amkasa and Tola. The said auditors showed the Claimant his Mpesa statement and demanded the claimant to explain the M-pesa transactions from Kennedy Keagu, Salim Abdulraham, Juma Jumba, Athman Mwasifa and Raziah Ambani.” By that admission, the Court finds that the said Okoth Khaluoch was involved in the preliminary investigations and the alleged audit. However, the minutes of the disciplinary hearing dated January 14, 2020 do not list the said Okoth as present for those representing the management. The minutes of the appeal hearing are not filed or exhibited. The Court finds that as urged for the respondent, the claimant has failed to show that the said Okoth or other person previously directly and indirectly involved in the case sat at the initial hearing or at the appeal stage. Accordingly, it cannot be found that the respondent failed to adopt a fair procedure as envisaged in sections 41 and 45 of the *Employment Act*, 2007. While the respondent was the custodian of the claimant’s records of employment, there was no notice to produce and the claimant offered no oral testimony to establish the allegation. The Court returns that the procedure the respondent invoked prior to the summary dismissal and at the appeal stage has not been shown to have been unfair.

9. Turning to the fairness or justification of the reasons to terminate, the Court finds that the respondent has failed to establish that the reasons for termination existed as at time of the summary dismissal and as per section 43 of the Act. The respondent has also failed to show that the reason related to the claimant’s conduct, capacity or compatibility and, the respondent’s operational requirements as envisaged in section 45 of the Act. In absence of a witness and in reliance on the documents on record, the Court finds that the respondent has failed to justify the reasons as was its burden to discharge under section 47(5) of the Act.
10. The allegations were that the claimant was part of the network that collected money from customers and denied the company its due revenue, and he received Kshs.84, 795/- from various electricians after processing applications submitted by the electricians. The particulars of the electricians were not disclosed but they appear to be the same persons Okoth mentioned per the claimant’s pleading admitted for the respondent. The letter to explain dated December 18, 2019 referred to an audit report No. 01 – 2019/2020 on rebilling and unprocedural meter change dated December 9, 2019 as the basis of the allegations. That report was not served upon the claimant prior to the disciplinary hearing or at any other stage including the present Court proceedings. In absence of such service of the report, the Court upholds the claimant’s concern that the allegations had not been established at all.
11. In his reply dated December 23, 2019 the claimant denied receiving cash from clients or electricians with intention to deny the respondent due revenues. Further in the prevailing system he had no access rights to do rebilling or processing of applications from the clients – so that he only received applications and forwarded them to RPU for field verification. He had received money by cash and on m-pesa as voluntary contributions from well-wishers at Mbarak Depot when a workmate had died and memos had been placed at his desk for the purpose of those contributions as he attached the memos to his reply – shown to the auditors and also exhibited in Court. On another occasion similar memos were placed on his desk for purposes of collecting contributions for a sick member of staff – which memo is also exhibited in Court.
12. At the disciplinary hearing the claimant explained that the Kshs. 500.00 and Kshs.1, 000.00 was a free will contribution for welfare matters. When asked about the frequency, the claimant explained that he was at the front desk and his boss asked him to collect the money. The claimant stated that he had



never taken money from the respondent and he was loyal to the respondent. The Court has considered the proceedings and finds that there is no reason to doubt the record of the disciplinary proceedings and nowhere was the claimant indeed found or shown culpable as had been levelled against him. The claimant has exhibited all the memos showing the contributors by well-wishers on diverse dates such as for medical bill of Kenga's wife who was a casual at New Connection Department; for Joela Beatrice Wamalwa (deceased) list of contributors returnable by February 27, 2019; and, one for medical bill of John Yongo S/No. 19256 New Connection Department who had an eye surgery for three times and now needed assistance to offset medical bills. In view of that evidence, there is no reason to doubt that the claimant had been assigned (by his supervisor as a front desk employee) to receive the well-wishers' contributions and which appears to have turned out to be the cause of his predicament.

13. The Court therefore finds that the respondent has failed to justify the reasons for the termination. The submissions made for the claimant are upheld in that regard.
14. The 4th issue for determination is whether the claimant is entitled to remedies as prayed for. It is submitted for the claimant that he has made out a case for reinstatement in view of the provisions of section 49 of the Act. In particular, it is submitted that the claimant has established as follows:
 - a) He wishes to be reinstated.
 - b) The remedy as sought is within the attached statutory time frame.
 - c) The summary dismissal was based upon valid or justifiable reasons.
 - d) The position held is still existing and the respondent has not demonstrated any reasons why the claimant cannot be reinstated to the position he was before the termination - it is not even alleged for the respondent that the position was abolished.
 - e) The claimant had served for 13 years faithfully and that should be a good and an exceptional reason for his reinstatement as was held in *Mary Chemweno Kiptui – Versus- Kenya Pipeline Company Limited* [2014] eKLR that the claimant's long service with the respondent that was diligent and faithful amounted to an exceptional case for an order of specific performance to issue.
 - f) The claimant submits that the Court of Appeal in *National Bank of Kenya – Versus- Samuel Nguru Mutanya* [2019] eKLR affirmed *Alex Wainaina t/a John Commercial Agencies – Versus- John Mwangi Wanjibi* [2015] eKLR where it was held that where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so and that both reliefs cannot be granted in blanket form. It was submitted for the claimant that reinstatement with consequential payment be awarded as prayed and in alternative, compensation be awarded at maximum 12 months' salary.
 - g) In urging 12 months' salaries in compensation it was submitted for the claimant as follows. He worked for the claimant for a long time of 13 years. Further he has established a case for reinstatement as there was no valid reason for termination.
15. For the respondent, it was submitted that there was a total breakdown of the employment relationship between the parties in view of the claimant's actions. It would not therefore be practical to reinstate the claimant to continue working as assigned prior to summary dismissal.
16. The Court has considered the submissions. The evidence is that the claimant received contributions from well-wishers in support of the respondent's staff within full knowledge of the respondent as he was assigned to do so by his supervisor. The claimant's explanation in that regard appears not rebutted at all. It is an aggravating factor for the respondent to encourage a practice of benevolent contributions



at the place of work and turn around to punish the employee involved as duly assigned to do so. It should be doubtful that such practice is ethical and must be discouraged at work stations. Nevertheless, in the instant case, the respondent has failed to establish the alleged reason for termination. Taking into account all circumstances of the case, the Court upholds the submissions made for the claimant for award of the prayers of reinstatement or compensation in alternative. The Court considers that the respondent will have the last option in deciding which remedy should prevail.

17. The Court follows its opinion in the judgment delivered on May 13, 2022 in [*Paul Nyamai Musau – Versus- Kenya Power & Lighting Company Cause E071 of 2021*](#) at Mombasa (not yet reported) thus, “The Court has found that the claimant has prayed for reinstatement but has as well established a case for maximum compensation under section 49 of the [*Employment Act*](#), 2007 and as urged for him. The Court is alert that reinstatement is not always expected to be a pleasant thing every time the employer is visited with such an order. In that consideration the Court may seek to offer an optional breather window by way of granting compensation in alternative to an order of reinstatement. Thus, an employer who may have serious antagonism and which may be unforeseeable to the Court when the order is made, but apparently comes up when the employer is implementing an order for reinstatement, may justify an employer to legitimately opt not to keep the employee. In that way, the Court considers that the employer may in a proper case be allowed to have a last optional say on whether to keep the employee or to separate but, without undermining the employee’s entitlement to compensation towards purging an established unfair termination.
18. The Court considers that in the instant case the claimant when reinstated should be able to perform satisfactorily and his immediate supervisors will think of him favourably or neutrally. The respondent is a public body and after reinstatement the Court does not consider that the claimant will suffer systematic actions and omissions of persecution or victimisation from the respondent by itself or by its agents, managers and directors. In any event, the Court does not envisage the respondent would engage in such persecutions or victimisation of the claimant after the reinstatement order especially in view of the respect ordinarily expected to be shown to Court orders. The Court has highlighted these considerations to demonstrate practicability and suitability of an order of reinstatement in the instant case.
19. Nevertheless, in the current case the claimant has prayed for and established a case for award of maximum compensation. Accordingly, the Court will let the respondent have the last optional say on whether to pay the maximum compensation or to implement reinstatement....” The Court will therefore allow the respondent an option to reinstate or pay full compensation as submitted for the claimant. No submissions were made on the prayer for certificate of service and which is deemed abandoned or satisfied as per respondent’s case. As the claimant has substantially succeeded in his case, he is awarded the costs.
20. The 5th issue is whether the counterclaim was established. First, the claimant’s case that the Court lacks jurisdiction because the bicycle loan was a commercial transaction was unfounded and is deemed abandoned as no submissions were urged in that regard. Second, as submitted for the claimant, the loan documents were not exhibited at all. Third, in the respondent’s own submissions, per sections 107 and 108 of the [*Evidence Act*](#), one who alleges must prove. While it is true that the letter of summary dismissal referred to the bicycle loan of Kshs. 12, 960.05 and employee sales of Kshs.1, 500.00, the same had not been part of the disciplinary proceedings. The Court finds that their inclusion in the letter of summary dismissal was not only unfair and irregular, but further, the claimant’s silence or failure to reply did not absolve the respondent’s burden to prove the allegation as asserted for it. The Court finds that in absence of the necessary evidence, the counterclaim is liable to dismissal with costs.
21. In conclusion judgment is hereby entered for the claimant against the respondent for:



- 1) The declaration that the termination of the claimant was unfair and wrongful.
- 2) The order directing the respondent to reinstate the claimant in the service of the respondent with effect from February 4, 2020 in the position held before the termination without a break in his service with full prevailing benefits and to continue in that service until the due date of retirement or lawful separation, and the respondent to exercise the option to reinstate by deploying the claimant not later than August 1, 2022.
- 3) Consequential to the reinstatement, the respondent is hereby directed to pay the claimant all withheld monthly salaries and allowances from February 4, 2020.
- 4) In the alternative to the reinstatement by opting not to redeploy the claimant by August 1, 2022 per order (2) above, the claimant be and is hereby awarded the maximum compensation for unfair dismissal and unlawful termination as per section 49 and 50 of the Employment Act, that is, Kshs.90, 490.75. x12 months = Kshs.1, 085, 889.00 (Less PAYE) payable by August 1, 2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 5) The counterclaim is dismissed with costs.
- 6) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS THURSDAY 2ND JUNE, 2022.

BYRAM ONGAYA

JUDGE

