



Okemwa & another v Kenya Power & Lighting Co Ltd (Cause 815 & 1509 of 2016 (Consolidated)) [2022] KEELRC 13058 (KLR) (24 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13058 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 815 & 1509 OF 2016 (CONSOLIDATED)**

**AN MWAURE, J
OCTOBER 24, 2022**

BETWEEN

GEORGE ONGUSO OKEMWA 1ST CLAIMANT

ELIUD KIMANI MBUGUA 2ND CLAIMANT

AND

KENYA POWER & LIGHTING CO LTD RESPONDENT

JUDGMENT

Claimant's Case

1. This judgment emanates from Causes Numbers 1509 & 815 of 2016. The claims arose from the same cause of action and were consolidated on April 22, 2021. The 1st claimant in the memorandum of claim dated the May 5, 2016 alleges that he was employed by the respondent in 2003 as a casual worker and subsequently promoted as an artisan mate assistant in 2015. He says he dutifully worked for the respondent until February 18, 2016 when the respondent without any colour of right or notice terminated his services contrary to the [Employment Act, 2007](#).
2. He says that as a result of the dismissal which he deems as illegal he wrote to the respondent through his advocates demanding rescission of the respondent's unilateral decision as the allegations against him were founded on mere malice and the respondent upon receipt of the said letter has not acted on the demands therein.
3. The 1st claimant avers that the termination was unlawful, malicious and in total disregard to the rules of natural justice. He says that having worked for respondent for over 11 years without a single warning by the respondent he did not deserve to be terminated that way and at only on malicious grounds. The claimant avers that due to malicious arrest, detention and subsequent defamatory statement, he has been subjected to shame and psychological torture in person and even his wife and children were



mocked, and humiliated in the society on the ground that the husband and father was a thief. He claims that he as a result he is unable to secure employment as the society sees him as a dishonest person.

4. The 1st claimant prays for the following remedies
 - a. General damages for illegal detention
 - b. General damages for malicious defamation, mental and psychological anguish
 - c. Terminal benefits as set out in paragraph 19 (a-g) above
 - d. Compensation for unlawful dismissal at the equivalent of 12 months gross salary
 - e. Reinstatement to employment thereof
 - f. Costs of the claim
 - g. Interests on the above at court rates.
 - h. The honourable court do issue such orders and give such directions as it may deem fit.
5. The claimants prayed for consolidation of cases No 825/2016 and case no 1509 of 2016 on April 22, 2021 and he same were duly consolidated.

Second Claimants Case

6. The second claimant for his part avers that he was employed by the respondent in 2011 as a driver and worked diligently for the respondent until February 18, 2016 when the respondent without any colour of right or notice terminated his services contrary to the *Employment Act*.
7. He says that the termination was unlawful, malicious and in total disregard of the rules of natural justice. The 2nd claimant avers that having worked for over 5 years without a single warning by the respondent did not warrant termination and the same is founded on malice. The 2nd claimant further states that due to malicious arrest, detention and subsequent defamatory statement, he has been subjected to shame and psychological torture in the sense that his wife and children were mocked and humiliated in the society on the ground that the husband and father was a thief. The prayers for the 2nd claimant are as set out in his claim.
8. The respondent entered an appearance through the law firm of Hamilton Harrison and Mathews on the June 18, 2016 and stated in the memorandum of reply dated the June 18, 2016 that the termination of the claimants was justified and was not actuated by malice and that it followed due process in the termination of the claimants. It is stated that at no time were the claimants discriminated or harassed.
9. The respondent avers that the termination was as provided for by clause 27 of the collective bargaining agreement then existing between the claimant union and the respondent Company. The respondent alleges that the termination of the claimant was on account of gross misconduct following the claimants' involvement in loss of PVC conductors/cables which was the property of the respondent. The claimants' involvement in the loss of PVC conductors/cables, it says, was established through eye witness accounts and following a detailed investigation conducted by the respondent.
10. The respondent asserts that before the termination of the claimants' employment, the respondent explained the reasons why it was considering taking disciplinary action against the claimants and the claimants were then asked to show cause why disciplinary action should not be taken against them. The respondent says that the claimants were then invited for a disciplinary hearing and were then represented by four officials from the trade union. The respondent says that both claimants and the



trade union representatives made representations at the meeting. It is said that the respondent also considered the claimants written representations and decided to terminate the claimants' employment.

11. The respondent maintained that the termination of the claimants was justified and was not actuated by malice and did not amount to discrimination as alleged. The respondent also says that the claimants were given a breakdown of their terminal dues up to the date of termination. Furthermore the respondent says the claimants deserved to be summarily dismissed but were served normal termination.

Claimant's Evidence In Court

12. Claimant witness 1 George Onguso Okemwa gave sworn testimony and said that he joined the respondent, KPLC in the year 2003 August as a casual worker. He says he was terminated on February 23, 2016. He adopted the witness statement dated May 5, 2016 as part of his evidence in chief. The witness said that he was accused of stealing cables of electricity and later asked to show cause why he should not be terminated. He testified that he gave his side of the story denying the allegations which the respondent did not agree with. He says they were not charged in court and have not been arrested.
13. CW 1 further gave evidence that he was not satisfied with the disciplinary committee which was biased against him and minutes were not taken as per his explanation. He says that he had no warning and had no disciplinary issues but had a problem with security guards as his child was bitten by a dog owned by one Salim who was a guard and he had then to pay for his son's treatment. So the guard had a grudge against the 1st claimant.
14. Upon cross-examination the claimant said that he was summarily dismissed by the letter of February 18, 2016 and was entitled to one month salary in lieu of notice. He said that he took the conductors and was told to leave them at site and collect them the following day. The conductors according to him were taken to the company and nothing was lost. He further mentioned that his child was bitten by a dog manned by the security men who are responsible for accusing him of theft. The witness in answer to the question of overtime answered that he did not make overtime form and the supervisor was to sign the form. He said the supervisor signed the form on the side but he had other documents showing that the supervisor signed.
15. The 1st claimant on re-examination said he was entitled to overtime payment. He said that there is no statement from KPLC denying the overtime form. The disciplinary hearing was not fair as he was not given an opportunity to defend himself.

Respondent's Evidence In Court

16. Respondent's witness 1 Joyce Kosgei gave sworn testimony and adopted her witness statement dated the February 25, 2020 as her evidence in chief. The list of documents dated April 29, 2020 were also produced by the witness as exhibits together with the statement of Eliud Kimani dated May 31, 2017 and the memorandum of reply filed on the September 29, 2017.
17. She testified that disciplinary action was taken against the claimant because they received an investigation report which showed the claimant was stealing conductors from KPLC. She says that the claimants after receiving some conductors they went to Ruiru depot and the 1st claimant parked his car and put the conductors in his car. She testified the 1st claimant's car was used to ferry the conductors and so she took disciplinary action against the claimants who were involved in that transaction.
18. She further testified that she was present during the disciplinary hearing and that the claimants were not compelled to sign the minutes. She mentioned that there were union officials present during the hearing who represented the claimants. She said that the claimants appealed and a committee



was formed which dismissed their appeal after the hearing. She took issue with the overtime form produced by the claimant saying that the attendance sheet produced was not signed and approved by the immediate supervisor as should have been the case.

19. The witness in answer to the question of gratuity said that the claimant was not entitled to gratuity as gratuity is for employees on three year contracts and that also unpaid leave allowance claimed was payable only if employee took 15 days leave. She added that the claimants must have applied and taken leave and that the claimants in the termination letters were asked to complete the clearance form before they could receive any payment. She said the claimants had not returned the clearance forms
20. The incidents leading to the termination according to her was captured by the security officials who took photos but says she does not know what they used to take the photographs or the person who took the photos. Upon being asked whether there was a report made to the police the witness indicated that she never made the report but here was a police officer who participated in all the investigations. The witness also said that she never discriminated against the claimants as the action she took was purely on the basis of the investigation report she received.
21. On re-exam she said that she did not recommend Michael's dismissal as he was not present when the conductors were being loaded in the car

Respondent's Case 2 (RW2)

22. RW2 George Odhiambo Mbogoh gave sworn evidence. Mr Mbogoh said he worked as security officer for the respondent. He adopted the witness statements dated the March 25, 2020 and filed on the May 19, 2020 as his evidence in chief for George Okemwa. The witness adopted the statement dated the November 22, 2016 and filed on the February 27, 2017 for the case against 2nd claimant Eliud Kimani. He testified that he investigated the incident of theft of conductors belonging to the respondent and made a report based on the findings on the photographs, witness statements and field visits and then came up with the investigations report.
23. He mentioned that there was a statement by Fredrick Mbithi who was a security officer with a company known as Hatari security services. The said company was contracted by the Respondent. The witness says that the guard saw the claimants carry away the conductors. The witness further says that the said Fredrick Mbithi passed away and his death was reported *vide* OB 48/18/2017. He said that he also interviewed Salim Juma a colleague of Mbithi who he says declined to testify citing security as he feared death of Mbithi was connected to this case.
24. On cross-examination he said that the police handled the matter though there was no OB number nor investigation report. On the photos adduced as evidence the witness said that they were taken by Mbithi and another girl who was with him. He said that the security guards reported to him as they knew the items were being stolen when they saw the items being put on a private car which was parked near the Company truck.
25. On re-examination he said that the case was reported and booked at security OB of KPLC. The witness admitted the photos of the conductors produced in court are not clear as they were taken using a mobile phone.

Claimant's Submission

26. The claimants submitted that from the evidence adduced, it is clear that the claimants were victimized for no apparent reason. That the three individuals were assigned duties of recovering rotten power poles and power conductors from Kahawa Wendani and there is no document produced to show



the quantity that was recovered from the site and also to confirm the quantity that was delivered at the respondent's Thika depot. The claimants contend that the said conductors were loaded in the respondent's motor vehicle registration number KBB 833S and there is no report from the respondent's Thika Depot to show that the recovered power conductors and rotten poles were never delivered at the site.

He says there is no evidence of offloading the conductors from the vehicles of the 1st claimant or evidence that the conductors did not get to the respondent's Thika depot.

27. The claimants also submitted that they were never accorded a fair hearing as the chief security officer and the Human Resource Manager were part of the disciplinary committee and therefore the respondent was the complainant, the prosecutor and the judge at the hearing of the claimants' case and gave no chance of an appeal. The claimants argue that an essential component of the rule of natural justice is the right to be heard which requires that a person whose right would be affected by a decision be given the opportunity to present his case.
28. The claimants relied on the case of *David Onyango v the Attorney General* Civil Appeal No 152/1986 where the court articulated that natural justice applies:-

Where ordinary people would reasonably expect those making decisions which would affect others to have acted subjectively and arbitrarily. A decision in breach of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.

29. The claimants submitted that the respondent violated this right and further gave no chance of appeal in case the claimants were dissatisfied with the disciplinary committee's decision. They contend that respondent's allegations that the claimants were dishonest and irresponsible was founded on malice and purposely meant to have them out of employment. The claimants therefore submitted that they were entitled to the remedies which they prayed for on their claim.

Respondent's Submissions

30. The respondent on their part submitted that investigations established that on the October 27, 2015 the claimants had been seen offloading conductors from one of the company trucks registration number KBB 833S and loading the material onto a private saloon car registration number KAL 628D. The investigation officer was also informed that the two employees had left in a saloon car with the conductors and had driven towards Ruiru town. The respondent then started the investigations. The respondent says that investigations later established that the conductors which were stolen by the claimants were those recovered from a redundant line at Kahawa Wendani line at Kahawa Wendani area.
31. The investigations report according to the respondent later confirmed that upon reaching the Ruiru transmission the claimants loaded the conductors into the car R/G KAL 628 D belonging to Mr Okemwa 1st claimant. This, it says, was witnessed by two guards of Hatari Security engaged by the respondent to offer security services.
32. The respondent further submitted that the second claimant Eliud Kimani in his statement to the police stated that in his opinion the conductors found at the lorry are the ones they had taken from Kahawa Wendani but appeared to be less with some metres. The 2nd claimant did not testify in court but authorised the 1st claimant to testify on his behalf. Respondent contends that this is a confirmation that indeed some conductors were missing.



33. The submissions of the respondents further are that both the claimants gave an explanation in a response to the show cause and were then invited for a disciplinary hearing. The respondent submits that none of the claimants complained that they had been given insufficient time to respond. The respondent further contends that the claimants participated in the hearing and were represented by union officials who gave presentations as well on behalf of the claimants.
34. The respondent submit that the decision to terminate claimants was not taken by Ms Joice Koskei but by Eng Daniel Kamau as the Regional manager of North Eastern region where the claimants were based. The allegation of bias against the claimants is therefore unfounded according to the respondents.
35. The respondent also argue that the 1st claimant never produced documents for the 2nd claimant and so his case is unproven and ought to be dismissed on this ground. Reliance has been placed on the case of [*Kenneth Nyaga Mwige v Austin Kiguta and 2 others*](#) [2015] eKLR where it is said the court held that:

“admissibility and proof of a document are to be determined at the time of production of a document as an exhibit and not at the point of marking it for identification.”

The respondent submit that it is fatal mistake for the 2nd claimant not to have produced his documents. They aver that Mr Kimani’s documents therefore are not produced and so his case is unproved and ought to be dismissed.

Issue for Determination

- a. Whether on a balance of probabilities the respondent had reasonable grounds to believe that the claimants engaged in the alleged malpractice of stealing conductors entitling it to terminate the contracts of employment.
 - b. The remedies, if any, the claimants are entitled to.
36. Section 41(1) of the [*Employment Act, 2007*](#) provides as follows: -

“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.”

37. Section 43 provides as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of the section. Section 43(2) enacts that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

38. Section 45 of the [*Act*](#) provides in part as follows: -

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove: -



- (a) That the reason for the termination is valid;
- (b) That the reason for the termination is a fair reason:-
 - Related to the employees conduct, capacity or compatibility; or -Based on the operational requirements of the employer; and
 - That the employment was terminated in accordance with fair procedure.”

39. Section 47(5) of the Act provides as follows: -

“For any complaint of unfair termination of 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.”

40. Section 44 (4) (g) of the Act decrees that: -

“ Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:- (g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”

41. The respondent’s account of the events leading to the termination of the claimants is that on the October 27, 2015 the claimants were among the personnel who were tasked with recovering poles and conductors from a redundant line in Kahawa Wendani in the Company of other employees.

42. It is reported that the claimants loaded the material into the Company truck Reg No KBB 833S. On arrival at Ruiru, the claimants went with the Company truck up to Energy Transmission’s Gate leaving behind one Duncan Omondi and 2 other casuals at the emergency yard. The claimants then entered into the compound where staff houses were and then the 1st claimant, George Onguso Okemwa, drove his saloon car upto where the truck was parked and together with the 2nd claimant and Michael Gitau off loaded the PVC conductors from the company truck into the saloon car which they then drove towards Ruiru Township. The respondent says the guards at the premises witnessed the incident. This account is of course denied by the claimants.

43. The court would wish to note at the outset that the claimants adopted witness statements dated May 5, 2016 for the claimant George Onguso Okemwa and May 15, 2016 for Eliud Kimani Mbugua. Neither in those statements, and the memorandum of claims has a specific account been given by the claimants as to what actually transpired on the events on the 2October 7, 2015 leading to the termination. There is general denials but no specific account of what transpired.

44. The RW2 says the alleged theft was witnessed by one Fredrick Mbithi who was the security officer of a contracted security firm and one Salim Juma who was a guard. Mr Fredrick Mbithi has since died whilst Mr Salim Juma declined to give evidence fearing that the death of Fredrick Mbithi had something to do with the case. Mr Salim Juma did, however, record a statement supportive of the account given by the respondent. He mentioned seeing three people removing the respondent’s wires and putting them in a small car. They then locked the boot and drove away but later on came and drove the lorry.



45. Equally there is no credible evidence adduced by the respondent to show that the claimants loaded the conductors in their vehicle. There is no evidence as to the destination of those conductors and how they were offloaded from the claimants' vehicle. The respondents have not given evidence whether they lost all conductors loaded in the vehicle and if not how much did they lose. There is no substantive evidence of this claim of theft by the respondents.
46. The 1st claimant however in his evidence in court says the conductors were about 200 metres and cannot fit in a boot of a small car. That is an indication the conductors could not fit in the car in question Toyota saloon and so they never loaded them. The photographs produced in court show the items and cannot clearly verify if there are conductors. And even if they are conductors are they the ones the respondent is alleging were stolen.
47. The respondents alleges some conductors were found in some abandoned site and at the same time allege the respondent lost some conductors/PVC cables due to the theft by the claimants. Indeed there seems to be a lot of hazy evidence by the respondents as to the identification of the alleged lost conductors. Respondents have not shown how they were stolen and how many if at all were stolen. There are many unanswered questions.
48. The respondents gave names of various eye witnesses and produced their statements but apart from Mr Mbogo they did not call Juma and the other witnesses who apparently witnessed the claimants loading the conductors. The alleged witnesses even took photos of the said conductors already loaded in the claimants vehicle yet they did not testify in court.
49. Section 43 of the *Employment Act* provide that the employer must prove reason or reasons for termination and where employer fail to do so the termination will be deemed to have been unfair.
50. The case before me seems to have a lot of speculation as to what transpired and there is no concrete evidence that the two claimants stole the conductors from the respondents.
51. The trite law is that an employer must establish both substantive justification as well as procedural justification before termination of the employment of an employee. In this case the court finds that the respondent failed the test on substantial justification as provided in the case of *Walter Ogal Anuro v teachers Service Commission* Cause No 955 of 2011 where the court held that for termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness. Further section 43 of *Employment Act* obligated an employer to prove the reasons for termination of employment and where employer failed to do so the termination was deemed to have been unfair.
52. In the case of *Kenfreights (EA) Limited v Benson K Nguti* [2016] eKLR the court held that no reason at all was given to the respondent why his services were terminated and that he was not informed of his transgressions. In the present case the respondent informed the claimants that they were guilty of gross misconduct. The vague and unclarified explanation was stealing of PVC conductors/cables of the respondents. But as earlier said these are mere allegations and even if the respondent avers they conducted investigations there is no forensic evidence or clear evidence adduced to give validity to that claim.
53. The respondent also in its submissions claimed there was no documents produced to support the claim of the 2nd claimant, Eliud Kimani Mbugua. It is in court's records that the two cases 815/2016 and 1509/2016 were consolidated by the order of the honourable court dated April 22, 2021. Both the parties consented to the consolidation as they said the pleadings of the two claimants were similar. As well even the submissions by both the claimants and the respondent are presented jointly the same



documents and pleadings applicable to the 1st claimant as well apply to the second claimant since the consolidation of the two cases. I do not therefore find the allegation of the respondent to dismiss the claim of the 2nd claimant is meritorious on those basis and so I reject it accordingly.

54. Having considered the pleadings, exhibits and submissions of the respective parties, I find the respondent has failed to give a valid or valid reasons to justify the summary dismissal of the two claimants.
55. Having said so the court must commend the respondent for it complied with the procedure under section 41 of the *Employment Act*. By their letter dated November 10, 2015 he invited claimants to show cause why they should not be dismissed. They responded and were thereafter invited for a disciplinary hearing and participated in the hearing. The hearing took place and claimant seem to have participated with their union representatives. On that score he court appreciates the respondent for having passed the test of procedural justification as earlier explained.
56. That notwithstanding the trite law is that the employer must comply with the twin tests of substantial and procedural justification and in the absence of one of them the respondent fails. The respondent followed the procedural test fairly well but the test of giving a valid reason fails. The court is satisfied the claimants were unfairly terminated and so judgment is entered in their favour.

Remedies 1st Claimant

57.

- (a) The prayers for compensation for general damages for illegal detention, defamation and mental anguish are all covered sufficiently in compensation for 8 months' salary as prayed in No (iv) but court is unable to calculate the figures as the claimants salary is not provided. Court orders the claimant to supply the court with evidence of his monthly salary at termination.
- (b) The terminal benefits prayed in (iii) above are not clarified and so cannot be awarded.
- (c) The prayer for reinstatement is overtaken by events as is over 3 years since the termination of employment contrary to section 12(vii) of *Employment and Labour Relations Court Act, 2011*.
- (d) The 2nd claimant is awarded 4 months equivalent of salary but all what is provided above for the 1st claimant is also provided for the 2nd claimant.
- (e) Costs are awarded to the claimants.
- (f) Interest is awarded at court rates from date of judgment till full payment.
- (g) The claimants to be given their certificate of service within 14 days from today's date.
- (h) The case to be mentioned on November 23, 2022 for the claimants to bring their payslips or any other proof of their salary at termination to enable court calculate the final awards.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24TH OCTOBER, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER



In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this court had been guided by article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the *Constitution* and the provisions of section 1B of the *Civil Procedure Act* (chapter 21 of the laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE

