



**Kingola (Suing as the Administrator of the Estate of Joseph K Chemutta  
- Deceased) v Kenya Power & Lighting Co Ltd (Cause 1 of 2017)  
[2022] KEELRC 13123 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13123 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 1 OF 2017  
NJ ABUODHA, J  
NOVEMBER 1, 2022**

**BETWEEN**

**JOAN KAMENE KINGOLA ..... CLAIMANT  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH K  
CHEMUTTA - DECEASED**

**AND**

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

**JUDGMENT**

**Introduction**

1. The original claimant filed this claim on March 2, 2017 against the respondent. An amended statement of claim was filed on March 15, 2019 where he alleged that his termination from service was unfair or wrongful and/or was on baseless grounds. He sought the following reliefs which I replicate verbatim as follows: -
  - a. An order of declaration of the respondent's termination of the claimant from employment is unfair or wrongful.
  - b. Loss of employment, gratuity, loss of promotion, future career, severance pay and other employment terminal benefits as pleaded in paragraph 5(n)(i) to (Viii) above be and are hereby paid by the respondent to the claimant forthwith.
  - c. The respondent be and is hereby ordered to issue certificate of service to the claimant as pleaded in paragraph 5(n)(ix) above
  - d. Costs to the claimant
  - e. Interests on (a) and (b) above at court rates until payment in full



- f. Any other or further relief in favour of the claimant.
2. The respondent filed a memorandum of response on March 21, 2017 alleging that the claimant's services were lawfully terminated in accordance with the terms and conditions of the [Employment Act](#).
3. Unfortunately, the claimant passed on before the matter was heard and he was substituted with the current claimant as the administrator of his estate.
4. This claim was canvassed by way of written submissions.

### **Claimant's Submissions**

5. The claimant in his submissions averred that he was employed by the Respondent on February 8, 2010 as a graduate trainee on profession and training before the claimant's confirmation as a 4<sup>th</sup> Assistant Engineer on permanent and pensionable terms where he was posted to Machakos as such engineer in O&M Department. It was submitted that he was later transferred from Machakos to Makueni vide a letter dated July 29, 2015 which transfer was to be effective from August 1, 2015. He further submitted that he was later informed that there was an allegation that he had authorized withdrawal of poles for non-existent jobs and was personally in the process offloading the poles; that he was invited for a disciplinary meeting on January 11, 2016 which meeting was scheduled for January 14, 2016; that the claimant was not interrogated or given any hearing prior to the investigations. The claimant further submitted that he did not transact any business at Machakos as he was on leave until September 20, 2015. It was the claimant's contention that vide a letter dated October 2, 2015, the transfer was reviewed from Makueni to Nairobi and that the respondent did not even pay the claimant transport allowance. He submitted that he was not issued with warnings, summons notices or investigation reports prior to the disciplinary hearing and as such, he averred that the due process was not followed. The claimant further contended that his gross salary at the time of termination of his employment was Kshs 220,000 and the basic salary was Kshs 130,328. As regard the issue of the reliefs sought, counsel for the claimant particularised the same as;

- i. Severance pay for 5 years of service

$$5 \text{ years} \times \text{Kshs } 130,328 \times 15 \text{ days} = \text{Kshs } 9,774,660$$

- ii. Salary arrears of 24 months from May 2014 to March 2016

$$24 \text{ months} \times \text{Kshs } 130,328 = \text{Kshs } 3,127,872$$

- iii. Compensation/ damages for the remaining 24 years to retirement/loss of future career and promotion. Under this head, the claimant submitted that he was born on October 28, 1980 and employed on February 8, 2010. It was his contention that he was unfairly terminated on March 24, 2016 at the age of 36 years and was to go for retirement at the age of 60 years. The claimant sought for front pay for the 21 years left at the rate of the basic monthly salary of Kshs 130,328 which would amount to 21 years x 12 months x Kshs 130,328 = Kshs 32,842,656

- iv. Loss of employment

$$\text{Twelve (12) months} \times \text{Kshs } 130,328$$



- v. Transfer allowance and travel/transport allowance (from Makueni to Nairobi). Transfer allowance at the rate of two months basic salary -

$$2 \text{ months} \times \text{Kshs } 130,328 = \text{Kshs } 260,656$$

- vi. Transport/ travel allowance Kshs 70,000

- vii. Pay in lieu of three months' notice (underpayments)

$$\text{Three months} \times \text{Kshs } 130,328 = \text{Kshs } 390,984$$

- viii. Damages for unfair termination

In addition, an award of damages as compensation for the unfair termination at the rate of twelve (12) gross months' wages/salary  $12 \text{ months} \times \text{Kshs } 220,000 = \text{Kshs } 2,640,000$

- ix. Certificate of Service

6. The claimant thus submitted that the respondent breached the provisions of the *Employment Act* by terminating the claimant unfairly and failed to prove the reason(s) for such termination.

### **Respondent's Submissions**

7. The respondent on its part maintained that the dismissal of the claimant from employment was fair. The respondent submitted that the grounds for termination in the claimant's letter of termination of service dated March 24, 2016 were that the claimant authorised withdrawal of poles for non-existing jobs and that the claimant was personally involved in the process of offloading the poles. Counsel for the respondent submitted that the above grounds amounted to misconduct and going against the company policy.
8. It was further submitted that numerous investigations were carried out before the respondent came up with names of individuals who were involved in the illegal acts and that the claimant was one of them. According to the respondent, the report by the senior security officer dated November 2, 2015 showed that approval for the materials was issued using the claimant's password. It was also submitted that one Francis Odhiambo Ongalo a tele logger operator in Machakos stores stated in the investigations report that the claimant had approached him and informed him that he required the poles to finalize a project that was left pending when he got a transfer, the said Mr Ongalo then reported the same to the supervisor. It was also submitted that a guard by the name Martin Munywoki Syengo also confirmed that he saw the claimant going to the store on September 22, 2015 at 4pm where he met the tele logger operator and later saw a vehicle coming to collect the poles.
9. The respondent's counsel averred that the aforementioned report recommended that the claimant amongst three other staff members were liable and for disciplinary action to be taken against them.
10. According to the respondent, based on the investigation report, the claimant was issued with a show cause letter and after the response was found not to be satisfactory, he was invited for a disciplinary hearing.
11. It was thus submitted by the respondent that the claimant was terminated after the committee members of the disciplinary hearing came up with a detailed report after considering the evidence where the claimant was found to have been involved in alleged theft of the poles.
12. The respondent maintained that he had discharged its onus as it had explicitly shown that the termination was lawful and the reasons for termination were valid and fair.



13. On the issue of the reliefs sought by the claimant, the respondent submitted that the claimant is not entitled to the said reliefs as he was fairly terminated from employment.
14. Further, it was the respondent's averment that the claimant was exhaustively paid all his terminal dues being three month's salary in lieu of notice, salary up to and including March 31, 2019 and 29 accumulated days to a tune of Kshs 117,129.
15. In the end, the court was urged to find that the respondent had valid and sufficient grounds to take disciplinary action against the claimant and to eventually terminate his services.

### **Determination**

16. After considering the pleadings on record and the rival submissions, I consider the main issues for determination to be;
  - a. Whether the claimant was unfairly and unlawfully terminated from employment.
  - b. Whether the claimant is entitled to the reliefs sought
16. It is now settled that before an employer terminates the services of an employee, the threshold that must be met is procedural fairness as stipulated under sections 41 and 45 of the Employment Act and substantive justification for the termination as provided under sections 43 and 45 of the Employment Act.
17. This therefore means that for a termination of employment to be considered lawful and fair, the employer must establish that an employee's employment was terminated on the basis of valid and fair reasons and upon following a fair procedure.
18. In the instant case, the reason cited for terminating the claimant's employment was gross misconduct where the claimant was accused of authorizing withdrawal of poles for non-existing jobs.
19. Section 44 (4) (g) of the Employment Act stipulates as follows: -

“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.”
21. The court has given due consideration to the material placed before it and particularly the investigation report dated December 15, 2015 where the claimant's colleagues Francis Odhiambo Ongalo and Martin Munywoki Syengo confirmed that the claimant was involved in the illegal transactions. The court has further perused the minutes of the disciplinary hearing, the disciplinary hearing committee's report and the letter of termination and the court is satisfied that the respondent had a valid reason to terminate the claimant's employment.



22. As regard the procedure followed, section 41 of the *Employment Act* provides:

“(1) 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

23. In the instant case, the claimant in his submissions averred that he was not interrogated or given a hearing prior to the investigations and that due process was not followed.

24. I do not think that it was incumbent upon the respondent to interrogate the claimant over the allegations before carrying out the investigations. Different companies have different procedures that are followed when dealing with a disciplinary cases and it is not for the court to determine which procedure a respondent should follow unless the same is explicitly provided for in the letter of contract and the said contract has been tabled before court.

25. From the record, it is evident that the claimant was issued with a show cause letter, and later on he was invited for a disciplinary meeting. I find that the respondent has proved that a fair procedure was followed before termination the claimant’s employment in line with the provisions of section 41 of the *Employment Act*.

26. Having found that the respondent has demonstrated that there was a valid reason for terminating the claimant’s employment and further that a fair procedure was followed, it is my holding that the termination was fair and lawful within the meaning of section 45 of the *Employment Act* and as such, the claimant is not entitled to the reliefs he is seeking.

27. In conclusion the claim is found without merit and is hereby dismissed however considering the claimant has since passed on and the claim pursued by his widow, on humanitarian grounds, there would be no order as to costs

28. It is so ordered

**DATED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2022**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**

