



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.35 OF 2019**

***(Before D.K.N.Marete)***

**JOHN WANJOHI NYAGA.....CLAIMANT**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

This matter was originated by way of a Memorandum of Claim dated 31st October, 2019. It does not disclose an issue in dispute on its face.

The Respondent in a Memorandum of Response dated 2nd December, 2019 denies the claim and prays that this be dismissed with costs.

The Claimant's case is that at all material times to this cause, he was an employee of the respondent.

The Claimant's case is that on 22nd May, 2018, the respondent terminated his services for allegedly ferrying concrete poles whereas she had authorised this.

The Claimant's case is that he appealed against the dismissal but the respondent refused to reinstate him. This termination of his employment too was irregular and against the Employment Act, 2007. This is as follows;

*9. The respondent's dismissal of the claimant was unjustified and unfair to the claimant and as such the termination/dismissal of the claimant was wrongful.*

*10. The respondent is obliged by law to accord the claimant a fair hearing before terminating his job arbitrary.*

He prays as follows;

*A. An order declaring termination of the claimant from employment wrongful.*

*B. An order of reinstatement of the claimant back to employment and/or alternatively pay the claimant general damages for wrongful dismissal.*

*C. Costs of the suit.*

The Respondent's case is an adoption of her documents in support of her case as follows;

*5. The claimant hereby adopts his Statement filed on 7<sup>th</sup> November, 2019 and wishes to rely on it as his Testimony in Chief.*

*6. The Claimant hereby also wishes to produce the list of documents dated 5<sup>th</sup> November, 2019 as Claimant's Exhibits 1-8.*

*7. The Claimant also hereby wished to produce the list of further bundle of documents dated 22<sup>nd</sup> June, 2020 as Claimant's further Exhibit 1-8.*

The Respondents further case is that the termination of the claimant's employment was lawful and for the following reasons;

a) Paragraph 5 of the Respondent's Memorandum of Response dated 2<sup>nd</sup> December 2019, it is averred that the Claimant's services were terminated as a result of the construction of an illegal line and unauthorized ferrying of concrete poles by the Claimant.

b) In paragraph 6 of the said Respondent's Memorandum of Response, it is averred that the Claimant was the supervisor when 18 concrete poles went missing. That the claimant also signed work-tickets for the construction of an illegal line in Maralal.

c) It is also the Respondent's case as per paragraph 7 of the said Memorandum of Response that the Respondent had numerous Disciplinary issues as follows;

i) On 22<sup>nd</sup> December 1999 he was issued with a caution letter for refusal to perform delegated responsibilities.

ii) On 12<sup>th</sup> April 2006 he was issued with a show cause letter for negligence of duties. He was issued with a caution letter on 18<sup>th</sup> May 2006 and suspended on 20<sup>th</sup> June 2006.

iii) On 12<sup>th</sup> June 2007 he was issued with a letter to show cause for negligence of duties.

iv) On 11<sup>th</sup> October 2007 and 20<sup>th</sup> March 2007, he was issued with a show cause letter for participation in the fraudulent hire of team transport and the forgery of work-tickets in relation to a particular lorry. On 15<sup>th</sup> February 2008, he was issued with a final warning letter.

v) On 27<sup>th</sup> April 2011, he was issued with a show cause letter for failure to follow company safety procedure. On 8<sup>th</sup> June 2011, he was issued with a warning letter.

vi) On 26<sup>th</sup> March 2013 he was issued with a show cause letter regarding lack of maintenance on feeders. On 31<sup>st</sup> May 2013 he was issued with a caution letter.

vii) On 27<sup>th</sup> May 2013 he was issued with a show cause letter regarding absenteeism without authority from supervisor. On 12<sup>th</sup> June 2013 he was issued with a caution letter.

viii) On 28<sup>th</sup> January 2014, he was issued with a show cause letter regarding failure to meet the deadline of clearing 1632 pending connections in Nyeri as at 23<sup>rd</sup> December 2013. On 17<sup>th</sup> February 2014 he was issued with a caution letter.

ix) On 10<sup>th</sup> February 2014, he was issued with a show cause letter for authorization of excess payments for various jobs for Laikipia Eco Lodge.

8. That the Respondent in paragraph 8 of the said Memorandum of Response avers that the Claimant during the Appeal hearing, did not give compelling reasons to justify his actions and did not prove his innocence before the appeal. That the Claimant's Responses at the hearing amounted to mere denial of the facts.

9. According to Paragraph 9 of the Memorandum of Response, the Respondent avers that the basis for the termination of the Claimant were legal and proper in the circumstance AND that all the requisite procedure prior to, during and subsequent to the termination were adhered to by the Respondent and further that the dismissal was bona fide.

10. That in paragraph 10 of the said Memorandum of Response, the Respondent asserts that the Claimant was granted a fair hearing before an impartial panel and was given prior notice to this. That the Claimant was also granted an appeal before a different impartial panel whereby his case was heard and determined.

The matter came to court variously until 11th February, 2021 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the Claimant wrongful, unfair and unlawful?
2. Is the Claimant entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether the termination of the employment of the Claimant was wrongful, unfair and unlawful. The Respondent did not furnish any written submissions in support of his case.

The Claimant in her written submissions dated 10th March, 2021 narrates the respective cases of the parties.

She further submits and emphasizes a case of unlawful termination of the employment by way of denial of the allegations of authorizing an illegal power line and ferrying concrete poles to a hotel belonging to Captain (RTD) Lengas at Maralal.

The claimant further submits default in his termination of his employment and cites the following reasons;

- No report was made to the police on the alleged loss of poles.
- Some departments did not produce their report complaining that they lost poles and a stores representative was not brought in as witness.
- Samuel Ariithi did not implicate the claimant but his accusers, Peter Agunda and Elijah Bas Bas.
- The security officer, one Samuel Ariithi was not availed as a witness.
- The security guard did not produce the security register to counter check the people who had collected concrete poles.
- CCTV footage of Maralal sub-station was not availed.
- The alleged work tickets that he signed for Lorries KBQ 894Q and KBU 022T was not availed.
- The alleged lorries are not real in accordance with NTSA log books.
- Work tickets monitor parastatal vehicles not private ones.

The claimant's case above does not take into account that he was taken through disciplinary proceedings at the work place. The issues now raised were available as a defence and even on appeal, if he chose to. Disciplinary proceedings are elementary in nature. They are never intended to carry the facilities of a trial as in this case. This defence is therefore not available to the claimant as it was not raised at the appropriate forum. A case of unlawful termination of employment therefore does not arise.

A look at the respective cases of the parties brings out a case in favour of the respondent. Her case overwhelms that of the Claimant. She demonstrates a clear situation where the termination of the employment pursued all legal procedure in so doing. At all times, the Claimant was alerted of the reasons for disciplinary process and allowed time to answer and walk through the process. He never raised the denial now expressed in defence.

This therefore comes out as a case of lawful termination of employment and I hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim.

**DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2021.**

**D.K.NJAGI MARETE**

JUDGE

Appearances

1. Mr. Maina instructed by Karanja Maina & Company Advocates for the Claimant.
2. Mr. Gacheru holding brief for Mr. Odhiambo instructed by Murugu, Rigoro & Company Advocates for the Respondent.