



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 946 OF 2015

DAVID KANYORO NJOROGE.....CLAIMANT

VERSUS

KENYA ELECTRICITY GENERATING COMPANY LTD.....RESPONDENT

JUDGMENT

1. On 16 May 2012, the Operations Director, Kenya Electricity Generating Co. Ltd (Respondent) issued a *show-cause* notice to David Kanyoro Njoroge (Claimant) asking him to respond to allegations of falsifying *Tender Evaluation Committee* meeting minutes.
2. The Claimant responded to the *show-cause* on 24 May 2012 and on 25 June 2012, he was notified of the termination of his employment.
3. Dissatisfied, the Claimant instituted these legal proceedings against the Respondent on 2 June 2015 and he stated the Issues in Dispute as
 1. Unlawful and Unfair dismissal.
 2. Breach of constitutional and statutory rights.
4. The Respondent filed a *Reply to Memorandum of Claim* on 29 July 2015, and the Cause was heard on 1 November 2019.
5. The Claimant and the Respondent's Chief Human Resource Officer testified (they also adopted their witness statements and produced documents).
6. The Claimant filed his submissions on 21 January 2020 (should have been filed and served before 29 November 2019). The Respondent filed its submissions on 9 January 2020. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Statutory procedural fairness

7. The Claimant was issued with a *show-cause* notice and he responded before the decision to terminate his employment was made.
8. In Court, he contended that he was not afforded an opportunity to be heard.
9. Section 35(1)(c) of the Employment Act, 2007 contemplates *written notice of termination of employment*. The Claimant was issued with a *show-cause* which warned him of contemplated disciplinary action.
10. Section 41 of the Act envisages affording the employee an opportunity to make representations before termination of employment.
11. The Claimant was requested to make written representations, which he did.
12. The Court is satisfied that the Respondent was in substantial compliance with the statutory requirements on procedural fairness.

Contractual procedural fairness

13. The Respondent also had *Human Resources Staff Policies and Procedures* which afforded its employees additional protections in disciplinary cases.

14. Clauses 1.8.1 and 1.9 of the *Policies and Procedures Manual* provided for a *Staff Advisory and Disciplinary Committee* with a mandate to deliberate on all cases of serious offences which could lead to summary dismissal.

15. There was no evidence or even suggestion that the Claimant's case was taken through or deliberated upon by the *Staff Advisory and Disciplinary Committee*, and on that account the Court finds that the termination of the Claimant's employment though meeting the statutory threshold on procedural fairness did not comply with the Respondents Internal protections as the Claimant was not afforded an opportunity to be heard by the *Staff Advisory and Disciplinary Committee*.

Substantive fairness

16. Pursuant to the provisions of sections 43 and 45 of the Employment Act, 2007, an employer is under a statutory obligation to not only prove, but prove as valid and fair, the reasons leading to the termination of an employment contract.

17. The reason leading to the termination of the Claimant's employment was falsification of *Tender Evaluation Committee* minutes. The tenders were worth Kshs 38,059,716/- and Kshs 103,417,461/-.

18. The particulars of the falsification was that the Claimant included the names of some 2 named employees as having participated in the tender evaluation process.

19. The Respondent caused an audit/investigation of the tender(s) to be done and a copy of the report was produced in Court.

20. The audit established that there was no *Tender Evaluation Committee* appointed as required and that the Claimant single-handedly carried out the evaluation. The purported *Tender Evaluation Committee* members purported to have evaluated the tender denied in writing that they carried out an evaluation of the tender(s).

21. During cross examination the Claimant admitted he was familiar with the procurement/tender processes. He also conceded that he was not appointed as a member of the *Tender Evaluation Committee*.

22. The Court is satisfied that the Claimant falsified *Tender Evaluation Committee* minutes by purporting that a Committee evaluated the tenders in question when the responsible authority had not appointed members of the Tender Evaluation Committee, and that he colluded with a supplier to defraud the Respondent.

23. The Respondent, in the view of the Court, had and has proved that there were valid and fair reasons to terminate the employment of the Claimant.

Appropriate remedies

Compensation

24. The Claimant sought Kshs 3,840,000/- as compensation for unfair termination of employment.

25. *Compensation* is a discretionary remedy.

26. Considering that the Respondent is a public utility company, and that the conduct of the Claimant would have led to massive losses had the tender been successful, the Court declines to award compensation despite finding contractual procedural impropriety in the process leading to termination of employment.

Lost income

27. The Claimant did not lay any evidential or contractual foundation to the claim for the loss of income/earnings he would have earned had he served to retirement.

28. As for the legal availability of the remedy, the Court endorses the reasoning by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

29. The relief is declined.

Gratuity

30. On account of gratuity, the Claimant sought Kshs 10,240,000/-.

31. The letter of termination of employment advised the Claimant that his benefits under the *Staff Retirement Benefits Scheme* would be communicated later.

32. The Claimant did not disclose whether he followed up with the Scheme.

33. The relief is declined.

Breach of Constitutional rights

34. The Claimant sought general damages for alleged violation of his rights to fair administrative action and fair hearing. He did not lead any evidence or prove that these rights were violated by the Respondent.

35. Relief is declined

Conclusion and Orders

36. From the foregoing, the Court finds that although the Respondent did not grant the Claimant a hearing as envisaged under the *Human Resources Policies and Procedures Manual*, the Claimant is undeserving of any relief.

37. The reliefs sought are declined.

38. Costs to the Respondent.

Delivered, dated and signed in Nairobi on this 24th day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Simiyu instructed by Lubulellah & Associates Advocates

For Respondent Mr. Gathuka instructed by Sichangi & Co. Advocates

Court Assistant Fred