



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**CAUSE NO.241 OF 2018**

**JAMES NJUKI MICHUKI.....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

The claimant was employed by the respondent on 2<sup>nd</sup> July, 1987 until 9<sup>th</sup> September, 2015 when his employment was terminated by summary dismissal. At the time the claimant was earning ksh.86, 580 per month.

On 25<sup>th</sup> August, 2015 the claimant was called at the CID offices to record a statement with regard to allegations that he had solicited for a bribe from the respondent's customer. On 26<sup>th</sup> August, 2015 he wrote an email to colleagues in Central Rift Valley region advising them of the allegations levelled against him via internet and media.

On 27<sup>th</sup> August, 2015 an email from the respondent's Integrity and Ethics desk to the effect that he had been arrested together with Peter Wambua, a police officer allegedly wile extorting from kampi ya Moto residents.

On 28<sup>th</sup> August, 2015 the claimant received a show cause letter from the respondent asking him to explain why his employment should not be terminated for soliciting a bribe. The claimant replied vide letter dated 29<sup>th</sup> August, 2015 and explained the source of the money he had received from a friend Mugo on account of his child's illness.

On 3<sup>rd</sup> September, 2018 the claimant was issued with notice to attend disciplinary hearing on the same date. At the meeting, the regional manager, the human resource officer, Nakuru, the human resource manager, Nairobi, the security officer and some members of the management staff were present.

The claimant explained and gave his defence over the alleged taking a bribe. The respondent had not conducted any investigation and instead relied on reports from a third party. At the end the claimant was given a copy of the typed minutes which failed to reflect the explanations he had given and asked for changes and hence refused to sign them.

On 9<sup>th</sup> September, 2015 the claimant appeared before the Chief Magistrates Court in Nakuru Anti-Corruption Case No.6 of 2015 where he took plea against the charges of soliciting a bribe on 21<sup>st</sup> August, 2018. The claimant was released on bail; the regional manager called him and told him to collect a letter at the office which related to summary dismissal dated 9<sup>th</sup> September, 2015 informing him that his employment was terminated with effect from 10<sup>th</sup> September, 2018.

On 18<sup>th</sup> December, 2017, the charges against the claimant were withdrawn.

The claim is that the respondent did not conduct any investigation into the allegations that it levelled against the claimant and used to terminate his employment. There was no evidence presented in support of the allegations made. The claimant was not given time to prepare his defence contrary to the practice of the respondent in similar cases. This resulted in unfair termination of employment after 28 years of service.

The claimant is seeking the following;

- a) Notice pay at Ksh.86,580;

- b) 12 months compensation Ksh.1,058,960;
- c) Payment of costs under section 12(4) of the Employment and Labour Relations Court Act;
- d) Any other orders the court may deem fit.

The claimant testified that he was employed on 2<sup>nd</sup> July, 1987 and his employment terminated on 9<sup>th</sup> September, 2015 by summary dismissal. He was accused of receiving a bribe from customers of the respondent and got arrested with Peter Wambua a police officer. The respondent then issued an email to the public that he was extorting money from Kampi ya Moto Residents thus judging him before investigations.

The claimant was issued with a show cause notice and invited to a hearing but the record taken did not reflect his explanation and hence he refused to sign. He was charged in court over the allegations but was acquitted but his employment was terminated vide letter dated 9<sup>th</sup> September, 2015.

The claimant also testified that he was invited to attend disciplinary hearing on the same date of the notice and had no time to organise his defence. He was given a chance to call another employee but due to the short notice this was not possible. The summary dismissal was on the grounds that he had committed fraud and was of dishonourable conduct and gross misconduct.

The claimant has not cleared with the respondent. He had liabilities not cleared. The stated liabilities in the pay slip for July, 2015 are correct;

- The car loan was at ksh.651,000;
- The safari account is fictitious

#### Defence

The defence is that the claimant was employed on 2<sup>nd</sup> July, 1987 and promoted to different levels as at 1<sup>st</sup> October, 2002 to 10<sup>th</sup> September, 2015 when he worked on permanent terms as a technician grade II (Disconnection and Reconnection Supervisor Field DC/RC Officer II).

The claimant was arrested on 25<sup>th</sup> August, 2015 by the Ethics and Anti-corruption Commission investigators for the offence of soliciting for a benefit of ksh.130,000 contrary to section 39(3)(a) and section 48(1) of the Anti-Corruption and Economic Crimes Act.

By notice dated 27<sup>th</sup> August, 2015 the claimant was invited to show cause why his employment should not be terminated following the allegations made against him and on 29<sup>th</sup> August, 2015 he replied thereof and upon deliberations the management decided to invite him for a disciplinary hearing and there were recommendations that the claimant be dismissed from his employment for loss of trust and negative publicity given to the respondent due to the claimant's gross misconduct of soliciting for a bribe and noting this was not the first incidence involving the claimant to the extent that his employment had been terminated and then reinstated upon appeal vide letter dated 22<sup>nd</sup> September, 2003.

In dismissing the claimant the respondent was guided by clause 11 of the employment contract and the law. The same was fair, lawful and in accordance with fair procedure.

The claim should be dismissed with costs.

Daniel Rotich testified that he is the senior human resource and administration officer at the head office and at the subject period, he was the regional officer of the respondent. The claimant was a technician and supervisor in charge of connections and disconnection. His work performance was fair and had a history of misconduct and the case leading to summary dismissal was the third incident.

The first case was in 1995 where the claimant failed to submit readings for a meter and was reprimanded severely. He was issued with a notice to show cause and upon his response; he was issued with a caution letter.

The second case related to misconduct. The claimant was in Mount Kenya region based at Embu and in the year 2003 he was given duty to transport cash to pay casuals and on his way from Nyeri he claimed he had an accident and lost the cash. The respondent conducted investigations and was not satisfied there was a genuine accident and that there was theft by servant and the claimant was charged at Nyeri. The claimant was suspended pending the criminal case. He was acquitted and the suspension was lifted. He was recalled and for tainting the image of the respondent his employment was terminated and on appeal he was reinstated.

This is the third case whereby in the year 2015 the respondent got a written report by the EACC that the claimant was caught soliciting for a bribe from its customers. The respondent lodged internal investigations by a security team and based on the two reports by EACC and internal security report the claimant was issued with a notice to show cause why his employment should not be terminated. The claimant replied and was then invited to a disciplinary hearing, the policy of the respondent required each participant to sign the minutes but the claimant declined on the grounds he needed to make corrections. This was an afterthought as he had attended the hearing and did not note any challenge.

The disciplinary committee made recommendations for the dismissal of the claimant and by letter dated 10<sup>th</sup> September, 2015. He has not

cleared with the employer for the payment of his final dues. The claimant had liabilities not settled before payment of his terminal dues.

Mr Rotich also testified that on the work history, the summary dismissal was proper and lawful and the suit should be dismissed.

Geoffrey Mulli, the regional manager Central Rift testified that the claimant was employed as a technician and upon his invitation to attend disciplinary hearing he chaired the panel. There were media reports on the claimant and a police officer who were arrested by EACC for soliciting for a bribe from a customer.

The EACC called the witness to send staff to assist with investigations on the claimant and the CID officers.

Following investigations the claimant was invited for disciplinary hearing at the Nakuru office where he attended in person. As chair he signed but the claimant refused to sign the minutes on the grounds he wanted to make correction. All other members signed. There were both audio and video records of the disciplinary hearing.

Following the hearing, the committee recommended summary dismissal of the claimant through the general manager, human resource's office and there was no appeal.

The witness also testified that following media reports the respondent initiated investigation. The media had indicated that the claimant was found with ksh.150, 000 but this was not true and there was an exaggeration to sell. There was no direct complaint to the respondent over the matter and on 26<sup>th</sup> August, 2015 the chief security officer made his report to the regional manager. There was a report from Ngata farm but to EACC and not the respondent.

At the close of the hearing both parties filed written submissions.

The issues for determination are;

Whether termination of employment was unlawful or unfair;

Whether the remedies sought are due;

Whether costs are payable.

On the issue as to whether there is unlawful or unfair termination of employment, section 47(5) of the Employment Act, 2007 (the Act) requires the employer to justify the grounds of termination, Section 43 of the Act under which the employer has to prove the reasons for termination, Section 45(2)(a) & (b) of the Act that requires an employer to prove that the reasons for termination were valid and fair reasons, and Section 41(2) of the Act that obligates the employer to hear and consider any representations an employee may wish to make where summary dismissal is envisaged for fundamental breach of contractual obligation or gross misconduct; the respondent submitted that the appellant did not discharge its obligations under the Act. See **Muthaiga Country Club versus Kudheha Workers [2017] eKLR**.

Under Section 43(2) of the Act,

***43(2) 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.***

Hence the employer must give the employee a hearing and allow the employee to give his defence. The rationale is set out in the case of **Alphonse Maghanga Mwachanya versus Operation 680 Limited [2013] eKLR** that;

*Section 41 of the Employment Act, 2007 has now created a statutory obligation on an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity to explain to the employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a representative present. This is what is now referred to in employment law and practice as procedural fairness.*

Though the claimant has mixed up his dates with regard to various occurrences with regard to his employment and particularly matters leading to termination of employment, the records filed by both parties are clear.

By letter dated 21<sup>st</sup> October, 2015 the EACC informed the respondent through the regional office Nakuru that on 25<sup>th</sup> August, 2015 the claimant was arrested by its investigators for the offence of soliciting for a benefit of ksh.130, 000. The EACC further informed the respondent that;

*To progress investigations, kindly facilitate an officer from your Personnel Department, to authenticate the current substantive designation of the officer, by providing certified copies of the employment records in regard to the above mentioned officer [James Njuki Michuki].*

This communication was received by the respondent on 26<sup>th</sup> October, 2015.

Earlier on by letter dated 27<sup>th</sup> August, 2015 the respondent wrote to the claimant directing him to explain why on 21<sup>st</sup> August, 2015 he solicited and received benefits and involved in fraudulent activities involving the company interests within 72 hours. The claimant replied and explained that he had received monies from friends over various personal matters.

There was a disciplinary hearing on 4<sup>th</sup> September, 2015 which heard the claimant on his defence and made a recommendation for dismissal from employment for *loss of trust and the negative publicity given to the company*.

The disciplinary proceedings related to alleged *soliciting for a bribe from Mugo*.

By letter and notice dated 9<sup>th</sup> September, 2015 issued to the claimant by the respondent to the effect that;

*DISMISSAL*

*In exercise of the rights reserved under Clause 11 of your Employment Agreement, you are hereby dismissed from the services of this company with effect from 10<sup>th</sup> September 2015 on the grounds of soliciting for a bribe from a customer. ...*

Clause 11 of the Employment Agreement relates to *summary dismissal* that;

*The company reserves the right to terminate your service without notice if in its opinion you wilfully disobey the lawful orders and instructions of the company or be a party to fraud or dishonourable act or be guilty of any other gross misconduct.*

There is a disconnect.

Whereas the EACC alerted the respondent of the alleged misconduct of the claimant vide letter dated 21<sup>st</sup> October, 2015 from the evidence of Mr Rotich there was no complaint made to the respondent against the claimant. Why did the respondent commence its internal investigations? What was the motivation? The alert by EACC only came after the fact of termination of employment.

There is the internal investigation report by the respondent dated 26<sup>th</sup> August, 2015. This followed the arrest of the claimant and arraignment in court in CMCC No.2 of 2015 Anti-Corruption Case, Nakuru. This also arose before the EACC communication to the respondent.

The matters at hand the claimant was required to answer to at the disciplinary hearing related to;

*That on Friday 21<sup>st</sup> August, 2015 you solicited and received benefits contrary to section 39(3) (A) as read ...*

The recommendation thereof of the disciplinary committee that the claimant be dismissed *for loss of trust and the negative publicity given to the company* were not matters brought to the claimant at the disciplinary hearing to directly address and defend himself. These are not matters addressed directly in his employment agreement. There is no policy and or practice document submitted by the respondent that required the claimant to address matters of publicity of the company. The court reading of clause 11 of the Employment Agreement does not stretch to matters where the claimant was required to address *for loss of trust and the negative publicity given to the company*. To allow such a requirement would be an overkill of this clause.

Even where such provision was to be understood as such and that the claimant was required to be mindful of the publicity of the respondent, these are not matter(s) addressed with him in the notice to show cause or at the disciplinary hearing.

Even where the respondent was faced with serious matters relating to the claimant's conduct and alleged soliciting for a bribe from its customer(s) the due process of section 41, 43 and 45 of the Act required the claimant be accorded a fair hearing. The reason(s) for termination of employment must be valid, fair, and which the employer genuinely believes to exist at the time employment terminates as held in

**Water Ogal Anuro versus Teachers Service Commission [2013] eKLR.**

In this case, the court finds the respondent had no genuine reason for terminating the claimant's employment in light of the foregoing. Even where there procedural requirements are followed, there must exist substantive grounds leading to termination of employment under section 41 and 43 of the Act. in this regard, employment terminated unfairly.

The claimant is entitled to compensation and notice pay.

In assessing compensation, section 45(5) of the Act requires the court to consider that;

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—*

*(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

*(b) the conduct and capability of the employee up to the date of termination;*

*(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

*(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

*(e) the existence of any previous warning letters issued to the employee.*

In the letter terminating employment the claimant past work record was put into account. Indeed he had a chequered disciplinary history and these records are filed with the court. these taken into account, appropriate compensation is hereby awarded at three months gross pay [basic Ksh.86, 580 + house allowance Ksh.34, 488 + electricity allowance Ksh.3, 200 x 3] at Kshs. 372,804.

Notice pay is assessed at ksh.124, 268 gross salaries.

The claimant admitted he had liabilities not settled with the respondent. pursuant to section 17 and 19 of the Act, these liabilities shall be deducted from the dues herein and upon the clearance process.

The claimant has pleaded for costs under the provisions of section 12(4) of the Employment and Labour Relations Court Act, 2011. The grant of costs being discretionary, the court herein considers it fit and necessary to award the due costs.

**Accordingly judgement is hereby entered for the claimant against the respondent in the following terms;**

- (a) Declaration that employment terminated unfairly;**
- (b) Compensation awarded at ksh.372,804;**
- (c) Notice pay Ksh.124,268;**
- (d) The dues above (b) & (c) shall be paid less the liabilities/dues owed to the respondent and subject to section 49(2) of the Act;**
- (e) The claimant is awarded costs.**

Delivered at Nakuru this 27<sup>th</sup> day of February, 2020.

**M. MBAR?**

**JUDGE**

In the presence of: .....