



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION NUMBER 4 OF 2018

IN THE MATTER OF: COLLECTIVE BARGAINING AGREEMENT BETWEEN THE KENYA POWER & LIGHTING CO. LIMITED AND KENYA ELECTRICAL TRADES AND ALLIED WORKERS UNION;

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, 2015;

BETWEEN

KENYA ELECTRICAL TRADES &

ALLIED WORKERS UNION.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Chamwada & Company Advocates for the Applicant

Kiarie Kariuki & Company Advocates for the Respondent

JUDGMENT

1. In this Application filed on 30th November 2018, the Applicant seeks the following Orders:-

- a) An order of certiorari to bring to this Court, the decision of the Respondent contained in Respondent’s letter dated 21st November 2018, and to quash the said decision.
- b) An order of mandamus, to compel the Respondent to reinstate George Simuyu Wanyama [Grievant] under the same terms and conditions.
- c) Costs of these proceedings.

2. The Application is based on the Affidavit of Rodgers Kweyu, Applicant’s Coast Branch Secretary, sworn on 29th November 2018.

3. Kweyu explains that the Parties have a Collective Bargaining Agreement [CBA]. The CBA governs terms of engagement and disengagement of all Unionisable Employees. A copy of the CBA is exhibited.

4. Clause 29 of the CBA requires that where an Employee is charged with an offence involving Respondent’s interest, the Employee shall be

suspended from duty without pay, until the criminal case is heard and determined. The Respondent shall not discipline an Employee on complaints made by 3rd Parties until such complaints have been determined in Court, unless the complaints involve Respondent's interest.

5. The Grievant was arrested and charged on 20th September 2018, in Chief Magistrate's Court Mombasa, Criminal Case Number 1634 of 2018, with the offence of obtaining money by false pretence, from one Mwanatumu Ali Mwashaka.

6. On 2nd October 2018, based on the criminal proceedings commenced against the Grievant, the Respondent initiated disciplinary proceedings against the Grievant, through a letter to show cause. The Applicant replied on behalf of the Grievant, pointing out the contents clause 29 of the CBA to the Respondent.

7. The Respondent did not agree with the position of the Applicant, and summarily dismissed the Grievant, through the letter dated 21st November 2018.

8. The decision contained in that letter, is the subject of this Application for Judicial Review, through which the Applicant seeks to have the Grievant reinstated.

9. The Respondent opposes the Application through a Replying Affidavit, sworn on 29th January 2018 by Senior Human Resource & Administration Officer, Elijah Kipkemei Kosgei.

10. Kosgei confirms that Parties have a CBA; the Grievant was employed by the Respondent as an Artisan Mate Assistant on 1st January 2015; he was arrested and charged as stated in the Application; and was subjected to the disciplinary process as stated in the Application.

11. Parties agreed in Court on 14th February 2019, that the Application is considered and determined based on the Affidavits, Documents and Submissions filed by the Parties. They confirmed filing of Submissions on 26th March 2019.

The Court Finds:-

12. The Parties agree their relationship is governed by a valid CBA.

13. They both have exhibited the CBA.

14. It is not disputed that the Grievant was covered under the CBA. His terms and conditions of employment were negotiated and agreed upon by the Parties, as captured under the CBA. His Application is based on what he deems to be violation of clause 29 of the CBA by the Respondent.

15. Clause 39.0 of the CBA states:-

“ It is incumbent upon the Company and the Union to ensure that the forgoing terms and conditions of service are understood by all Employees of the Company, and are observed by all the Parties. Should differences arise between the Company and its Employees, or the Union, as to the interpretation or application of, or compliance with the provisions of these terms of service, earnest efforts shall be made to settle such matters in accordance with the negotiating procedure laid down in the Recognition Agreement and in the Labour Relations Act.”

16. Clause 30.0 contains the Dispute/ Grievance Resolution Procedure. It involves consultations at the Shop floor level, Branch level and Labour Office. If there is no settlement, the dispute is escalated to the Central Joint Council. If no settlement is found there, the dispute is taken to the Cabinet Secretary for Labour, who invokes the Trade Disputes Settlement Machinery under the Labour Relations Act. The dispute would only come to the Employment and Labour Relations Court, under the Labour Relations Act, pursuant to clause 30 and 39 of the CBA.

17. Judicial Review under the Civil Procedure Act and the Fair Administrative Action Act, invoked by the Applicant in this Application, is not the dispute resolution mechanism selected by the Parties in their CBA. It is not a mechanism contemplated under the Labour Relations Act. There are many routes to a remedy in cases of violation, but where the Parties have opted for a particular route, they must abide by that route. The Parties herein have positively rejected all other mechanisms outside their CBA and the Labour Relations Act.

18. The Application for Judicial Review is made contrary to the CBA, and is unsustainable.

IT IS ORDERED:-

a) The Application is declined.

b) Costs to the Respondent.

Dated and delivered at Mombasa this 13th day of June 2019.

James Rika

Judge