



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 301 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 9th October, 2018)

ALEXANDER KASINA MUKALA.....CLAIMANT

VERSUS

KENYA POWER AND LIGHTING COMPANY.....RESPONDENT

JUDGEMENT

A. introduction

1. The Claimant initially filed his claim on 20th November 2008 in the High Court of Kenya Nairobi as HCCC NO 521 OF 2008. On the 3rd of February Hon Lady Justice Joyce Khaminwa ordered this suit transferred to this Court where it was received and registered as ELRC case No.301 of 2012. The Claimant subsequently filed his Amended Memorandum of Claim dated 5th July 2013 through the firm of E. K MUTUA & Company Advocates alleging unfair termination and seeking damages accordingly.

2. Claimant's case

1. The Claimant's case is that he was employed as an Apprentice by the Respondent on or about 27th August 1979. He rose through the ranks to become a foreman as at 18th November 1998. On 20th November 1998, the Claimant signed a further employment contract with the Respondent whose effect was to supersede any prior contracts of employment that the parties may have entered into before.

2. The Claimant stated that sometime in mid-January 2008, he came to learn that one of the team leaders by the name John Kilonzo, had booked him for a one day night out for the weekend of 12th and 13th January 2008. The said Kilonzo then informed the Claimant (after a period of 3 days) that the Claim was not passed as the brother to the Managing Director, one Njoroge Kihui whom the Claimant had transferred to Garissa now held a grudge against him.

3. The Claimant then started investigating the irregular construction line with the information received from Kilonzo who had informed him about. Upon requesting for the reference of the job, the said Kilonzo gave him the said reference number quoted as E25202006090152. The Claimant noted a problem with this particular construction and in exercising due diligence decided to follow it up with the Head of Design and Construction, one George Wambua to check the details of the said construction. The said Wambua informed him that the construction had already been completed although the AV line was an over distance by 1.1 kilometres.

4. When the Claimant tried to press for further details, the said Wambua instructed him to let the matter rest. The Claimant instead opted to initiate investigations and sent various emails requesting for a thorough investigation into the matter. (See pages 14 and 15 of the Respondent's bundle of documents).

5. At the time of termination, the Claimant was in O & M (Operations and Management) Department. He had no authority to prepare a design for Design and Construction Department. Design of New lines was not in his department.

6. The Security Officer, Charles Muchiri Maina spoke to the Claimant about the incident and took down his statement. (See pages 20 and 21 of the Respondent's bundle of documents).

7. In a letter dated 12th February 2008, a notice to Show Cause Letter was addressed to the Claimant alleging that:-

a) He was involved in the erroneous design of the construction reference number: E25202006090152 in 2007.

b) He committed company resources and personnel to a job that had been assigned to a contractor.

c) The Claimant was negligent in his duty and had failed to adhere to laid down procedures.

8. The Notice to Show Cause Letter had a right of reply within 72 hours but that the said letter was withheld until 28th February 2008. (See page 23 of the Respondent's bundle of documents)

9. The Claimant received the Notice to Show Cause Letter more than three weeks later, on 3rd March 2008 and replied and served it upon the Respondent on the same day.

10. The recommendation by the Chief Engineer (O & M , Mt Kenya South), one Wanyoike Mwaura, in a letter dated 8th May 2008 was that the Claimant should be punished. (See pages 24 and 25 of the Respondent's bundle of documents).

11. In a letter dated 9th May 2008, by one Peter Okeri (Regional Manager, Mt. Kenya) was for the Claimant's contract to be terminated on the ground of loss of faith and trust which was adduced mainly from the statements/security report and his conduct (of initiating and compelling the Respondent to investigate the irregularity of the Construction line) during the investigations.

12. In the said letter, the information that the said Peter Okeri based his decision on was the investigation by the security department that was mainly based on two statements from staff of the Respondent (George Wambua and Njoroge Kihuu) alleged that:-

a) The Claimant was involved in the planning and execution of the illegal construction.

b) The Respondent incurred incidental cost from materials, labour, transport and other allowances.

c) The Claimant authorised/initiated and solicited relevant authorisation of the teams and the actual construction of the works.

d) The Claimant gave false information to the investigating team and or senior members of staff including framing some of them with full knowledge that he was doing so under false pretence.

e) The Claimant denied any involvement in the matter thereof.

f) The Claimant uttered fraudulent documents including claims to persons placed in position of authority.

13. The Statements relied on were those of the Respondent's Employees who allegedly took part in the job.

3. The first witness was George Wambua, the Construction Engineer who at all relevant times was employed at Embu Depot. (See pages 4 and 5 of the Respondent's bundle of documents). His statement highlighted that the Claimant verbally communicated to him on 26th June 2017 seeking approval for a design for a job reference number:E25202006090152. On 17th November 2008, he allocated the job to a contractor, that is, Lexcam Agencies. The said contractor informed him that the scheme was over-distance. He then halted the construction. He later went to the site and he confirmed that the construction was done.

4. Another witness was Njoroge Kihuu, the driver (See pages 16 and 17 of the Respondent's bundle of documents). The witness stated that at all relevant times he was stationed at Kamburu 220 station. That the Claimant called him on Friday 11th January 2008 to inform him about the construction job headed by Kilonzo for Kawanjara area on 12th January 2008. He was the assigned driver for the job. Kilonzo also called him on 11th January 2008 at 8:00pm. He drove the team to the site. He claimed and was paid by the Respondent for the aforementioned job.

5. The Third witness was John Masili, the Senior Artisan II who at all relevant times was the team leader of O & M Main Team in Embu depot. (See pages 18 and 19 of the Respondent's bundle of documents) His evidence was that Claimant told him about the job on the morning of 11th January 2008. The job was in Kawanjara Area, reference number E25202006090152 in the name of Venanzio. He went to the site with Njoroge Kihuu and other casuals and completed the job. The Claimant told him and Njoroge Kihuu to make the claim for themselves and him. The Claimant denied all these allegations of the Respondent.

6. The Claimant contends that about 15th May 2008 and in breach of the terms of employment contained in the agreement dated 20th November 1998, the Respondent irregularly, unlawfully and illegally without any justification terminated the Claimant's employment.

7. Through the Amended Claim the Claimant's particulars for special damages amounted to Kshs. 11,507,616 as follows:-

i) Damages for wrongful termination equivalent to 12 months gross salary at Kshs. 106,552 per month totaling Kshs. 1, 278,624.

ii) Damages for loss of future earnings for 8 years until the age of retirement at Kshs. 106, 552 per month totaling Kshs. 10,228,992.

B. Respondents case

8. The Respondent filed a Statement of Response on the 15th December 2008 through the firm of Wairagu and Wairagu Advocates. The respondents opposed this claim and they aver that the Claimant was fairly terminated due to gross misconduct. The Respondents further aver that the Claimant was engaged by the Respondent as a trainee at its training school as a Craft Apprentice on 22nd May 1979. He was later employed as an Artisan Grade II in September 1982, and was over the years promoted through the ranks and at the time of his termination was serving as a Senior Foreman in charge of Operations Embu Depot.

9. The Respondents further aver that the Claimant was involved in the design and construction of job Ref No. E25202005090152 Venanzio Gachiengo (hereinafter referred to as "the job"). That turned out to be over distance against the Respondents Policy and Electric Power Act and other pertinent legislation.

10. The Respondents contend that after investigations were carried out and the Claimant afforded the right of reply to the allegations leveled against him, it was recommended that disciplinary action be carried out. A decision was then made to terminate the Claimant's services as opposed to summarily dismissing him based on his length of service with the Respondent. The Claimant in line with the Human Resources Policy of the Respondent appealed the decision. The appeal was reviewed and termination upheld vide letter dated 9th June 2008.

11. The Respondent aver that in the duration of time that the Claimant was in employment with the Respondent he was enrolled to a Retirement Benefits Scheme which monies were paid out to him. That further NSSF remittances were made on behalf of the Claimant as can be deduced from the payslip.

12. The Respondents therefore contend that the Claimant's termination was justified under the provisions of the Employment Act 2003, Cap 226 (now repealed) as the termination was based on the contract terms of engagement and that his dues were also paid up to the date of termination of the contract.

13. The Parties herein filed their respective submissions, which I have also considered. The issues for determination are as follows:-

1. Whether the issues under consideration should be considered under the provisions of the Employment Act Cap 226(now repealed) or under the current Employment Act 2007.

2. Whether the termination of the Claimant's contract of Employment followed the due process of the law and was in compliance with the law.

3. Whether the Claimant is entitled to the reliefs sought.

14. On the first issue, I note that the Claimant was terminated as stated vide a letter dated 15th May 2008. The current Employment Act 2007 on the other hand commenced on the 2nd June 2008. It is therefore apparent that at the time the cause of action occurred, the Employment Act cap 226 was the operative law and the Employment Act 2007 cannot retrospectively be applied in the current suit. The submission by the Claimant that section 41 of the Employment Act 2007 was not followed cannot stand.

15. On the second issue, the Claimant has averred that he was unfairly treated and was not accorded due process. The Claimant submitted that in conducting the disciplinary process the Respondent failed to adhere to the strict rules of procedural fairness in undertaking investigations and subsequently recommending termination of the Claimant.

16. The Claimant further submitted that the conclusion of the investigations done were entirely based on verbal circumstantial testimony given by three employees of the Respondent Company, that is George Wambua, Njoroge Kihui and John Masili. There was no documentary or substantive evidence that was produced. Apart from giving his statement to the Respondent's Investigator. The Claimant was never called upon to give his side of the story of the allegations levelled against him. The alleged investigations proceeded without the Claimant's involvement or the Claimant being given an opportunity to defend himself on the serious allegations of gross misconduct.

17. The Claimant indicated that despite initiating investigation using correspondence to the Respondent and subsequently drawing their attention to irregularities to the job in question, the Respondent failed to give any due consideration to the Claimant's said response. A cogent response of a forensic accounting audit was absent, consequently the Respondent had no basis for making any finding of irregularity against the Claimant.

18. The Claimant further submitted that the Respondent's witness DW1-Charles Muchiri Maina, the Security Officer confirmed that the Claimant was indeed in Operations and Maintenance Department and his duties were **"to make sure power was flowing and maintaining damaged lines"** and **not designing or constructing new lines.**

19. The Claimant averred that DW1 further admitted that it was indeed the Claimant who complained about the line and it is he who alerted the Human Resource Management and Security to investigate the matter. He further confirmed that the Claimant commenced the process of investigations about the disputed line reference number **E25202006090152.**

20. The Claimant submitted that DW1 confirmed that the Claimant was supervised by Ndegwa and he could not work without approval. He also confirmed that between the Claimant and Wambua, Wambua was his senior. DW1 also confirmed that in a motor vehicle team, the team leader, who was Kilonzo, was the authorizing officer for the motor vehicle.

21. The Claimant further submitted that DW2 in his testimony confirmed that the Claimant was never given a fair hearing. He also failed to

explain how LEXKAM Agencies was given the contract of the aforementioned scheme and there was no explanation by DW2 as to why the other employees were not held accountable although he confirmed that the scheme was approved by one George Wambua and the Driver, Njoroge Kihui (DW3) and Head of the Project John Musili took part in the project and whose night claims were honoured.

22. The Claimant asked the Court to find that there was no due process and find his dismissal was unfair and unjustified and is linked to his efforts in trying to follow up as to why his name appeared in a design which he neither designed nor was part of his duties in Operation and Management (O & M) Department. The Claimant's agitation for his rights led to him being penalized. It is the Claimant's submission that had the Respondent acted in a fair and just manner and complied with the law in relation to the disciplinary action taken it would have arrived at a different decision.

23. The Claimant submitted that he was never involved in the planning and execution of the alleged illegal construction. The Respondent Company never incurred incidental loss in form of materials, labour, transport and other allowances. The Claimant never authorised or initiated and/or solicited relevant authorization of the teams and the actual construction of the works.

24. There is also no evidence from the Respondent that the Claimant gave false information to the investigating team and or senior members of staff of the Respondent nor did he frame any of them as was alleged by the Respondent. There is further nothing shown by the Respondent Company that the Claimant uttered fraudulent documents including claims to persons placed in positions of authority. George Wambua, and the alleged Pastor Kilonzo who played very vital roles in the irregular construction of the line were not called to testify.

25. The Claimant thus prays for judgement against the Respondent and that this Honourable Court grants an award of the maximum damages of twelve months salary awardable under the law and further, it awards damages for loss of future earnings for 8 years considering the Claimant has no prospects of future employment after having dedicated his entire adult life to working for one (1) organization faithfully.

26. I have already stated that the applicable law in this cause is the repealed Employment Act Cap 226. The Repealed Act did not have any provision on the right to a hearing before termination but on payment in lieu of requisite or reasonable notice.

27. *Section 14 (5)(iii) of the Repealed Act provided as follows:-*

(5) Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be:-

(iii) where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing

Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

28. *Section 16 of the Repealed Act provided as follows:-*

Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.

29. **Clause 13 of the Employment Contract** dated 20th November 2011 at Clause 13 (Paginated 1 in the Statement of Response) provided for termination of the contract by either party by one months' notice or payment in lieu of such notice.

30. Vide letter of termination of service dated 15th May 2008, the Respondent among other terminal benefits paid to the Claimant one month's salary in lieu of Notice as envisaged in the law and Contract of employment which the Claimant acknowledged receipt of on the said letter and confirmed the same in chief examination.

31. The Claimant was additionally paid his salary for days worked in the month of May 2008 the same is evidenced by salary advice (paginated 2 in the Respondents Statement of Response).

32. The Claimant's accumulated leave days totaling to an amount of Kshs. 32,403.28 were deducted from the Claimant liabilities owed to the Respondent as demonstrated in the termination letter dated 15th May 2018.

33. This issue has not been without litigation. In Duncan Kariuki Kinyanjui v Kenya Power & Lighting Company Ltd [2015] eKLR the Court rendered itself thus:-

"14. The Claimant's employment was terminated on 2 November 2007. The applicable statutory law was the Employment Act, cap. 226 (repealed by the Employment Act, 2007). This latter Act commenced on 2 June 2008.

16. The repealed Employment Act did not provide for a hearing before termination or for an employer to prove the reasons for termination of employment.

17. In this regard, the Claimant cannot be heard to complain of failure to comply with the rules of natural justice as pleaded.

18. Any complaint of failure to comply with natural justice could only competently be anchored on contractual grounding but none was presented.

21. A long line of authorities in this country has on the other hand held that unless contractually agreed, there was no general statutory right to a hearing in employment contracts before Court.

23. Again, under the regime applicable at the time of the termination of the Claimant's employment, an employer was free to terminate the services of an employee for a bad reason or a good reason. The employer could dismiss without cause, provided the notice agreed was given or pay in lieu thereof tendered. If no period was agreed, the period ought to be reasonable.

25. The question therefore of bad faith does not arise.

26. In the instant case, though reasons were given, the Respondent also offered the Claimant one month pay in lieu of notice in terms of clause 13 of the contract".

34. The Respondent herein submitted that they were cognizant of the principle of fair hearing and rules of natural justice and afforded the Claimant a right to be heard on the allegations leveled against him. I do not find this to be the correct position because there is no indication that the Claimant was accorded an opportunity to appear before a disciplinary panel and present his side of the case. He was condemned through the notice to show cause and the process of discipline proceeded in his absence. The rules of natural justice envisage that a man should not be condemned unheard. It is my finding that because the Claimant was not accorded a fair hearing, his termination was unfair.

35. The Respondent found the Claimant culpable and found him guilty of gross misconduct. However as indicated by the Regional Manager Mt. Kenya Region in report dated 9th May 2008 and testimony of Elijah Kosgey the Respondent opted to terminate the Claimant's services instead of summarily dismissing him on the grounds of length of service with the Respondent.

36. Having found that the Claimant's termination was unfair, but bearing in mind that the Respondents had a valid reason to terminate him and also paid him all his dues, I award him six months' salary as compensation for the termination which is = **6 x 106,552=637,312.**

37. Plus costs and interest.

Dated and delivered in open Court this 9th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Githinji holding brief for Nyambura for Respondent – Present

E.K. Mutua for Claimant – Present