



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 747 2015**

**PAUL KITEMA.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. This is a Claim for reinstatement to employment and in the alternative the following damages:-

*(a) Compensation for unfair dismissal from employment.*

*(b) 4 months' salary in lieu of notice.*

*(c) Unpaid salary for February to April, 2015.*

*(d) Costs and interest.*

*(e) Certificate of Service.*

2. The respondent admits that she dismissed the Claimant but denies that the dismissal was unfair. To the contrary she avers that the dismissal was fair because it was done on account of the Claimant's misconduct and after following a fair procedure. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 14.12.2016 and 21.3.2017 when the Claimant testified alone but the respondent called three witnesses. Thereafter both parties filed written submissions.

**Claimant's Case**

4. The Claimant testified that he was employed by the respondent on 17.10.1991 as a Clerk at the Customer Service Centre and his last salary was Kshs.137,435.97 per month. On 29.12.2014 he proceeded for his annual leave until 2.2.2015 and reported back to work on 3.2.2015. On 4.2.2015, he was shocked to be served with a dismissal letter terminating his job of 24 years effective from 9.2.2015. The reason cited for the dismissal included absconding work on 5.8.2014 and refusal to receive Show Cause letter dated 11.8.2014, and others dated 16.9.2014 and 4.11.2014 and the letter inviting him to a disciplinary hearing dated 20.11.2014. He denied the alleged absconding from work on 5.8.2014 and produced documentary evidence (**Activity Report for 5.8.2014 7.45 am – 5 pm**) to prove that he was indeed on duty on the said date.

5. He further denied knowledge of the alleged letters dated 11.8.2014, 16.9.2014, 4.11.2014 and 20.11.2014 and contended that he was never served with the same and refused to receive as alleged. He contended that all correspondences to him from the respondent were done through Hand delivery book. He admitted that he was a member of the union (**KETAWU**) but denied that union officials came to convince him to accept the Show Cause letter dated 11.8.2014 or any other. He denied knowledge of David Mwai and Magdalene Ndingi who allegedly went to Kitui to convince him to sign the said letter. He further denied receiving any call from Mr. Kenneth Chege. He concluded by stating that his dismissal was unfair and prayed for reinstatement or in the alternative compensation for the unfair dismissal. He admitted that he was given a cheque for Kshs.235,201 after termination but failed to cash it.

**Defence Case**

6. Mr. Stephen Mwenesi testified as R.W.1. He stated that from 2012 he was the respondent's Branch Business Head in Kitui and between July and August, 2014 he gave the Claimant a verbal warning after receiving complaints from other members of staff that he was deserting work and more particularly 5.8.2014. That on 14<sup>th</sup> August, 2014 he served the Claimant with Show Cause letter dated 11.8.2014 for said absconding but he refused to receive it. R.W.1 further testified that the Senior Human Resource Manager Mount Kenya South invited the Claimant to her office on 24.9.2014 by letter dated 16.9.2014 but again he refused to receive the letter or go to see the Senior Human Resource Manager as instructed. Thereafter the Deputy Regional Manager summoned the Claimant to his office about the refusal to receive the Show Cause letter, by the letter dated 4.11.2014 but the Claimant refused to receive the letter or visit the said manager as summoned. Finally the Claimant was invited to a disciplinary hearing on 27.11.2014 through the letter dated 20.11.2014 but he refused to receive the letter and again failed to attend the hearing. He contended that he and other employees including Fidelis Matothia persuaded him to receive the letter dated 11.8.2014 and 20.11.2014 but he refused.

8. R.W.1 further stated that due to the foregoing matters the Claimant was summarily dismissed by the letter dated 27.1.2015 and given a cheque for Kshs.235,201 as part payment of his Kshs.327,333.60 as terminal dues pending completion of clearance. R.W.1, however admitted that during the disciplinary meeting, the Senior Human Resource Manager called the Claimant to put the phone on loudspeaker reminding him to attend the hearing but the Claimant declined to attend. He further admitted that there was bad blood between him and the Claimant.

9. On cross examination he admitted that the Claimant reported to work on 5.8.2015 at 7.45 am but contended that he left at 8.35 am and returned at 11.00 am. He further admitted that there was clock-in Register at the office which he never produced as exhibit. He further admitted that he did not receive any complaints against the claimant in writing. Finally, R.W.1 contended that there was no need to summon the Claimant before termination because he had refused to attend previous summons. He maintained that the dismissal of the Claimant was the right disciplinary action because there was a reason to terminate and the correct procedure was followed.

10. Joyce Koskey, respondent's Senior Human Resource Officer testified as R.W.2. She stated that on 4.8.2014 she received an email from R.W.1 reporting that he had received complaints from customers that the Claimant was habitually absconding duty whenever he (R.W.1) was away from the office. As a result she issued him with a Show Cause letter dated 11.8.2014 through R.W.1 but the latter told her that the Claimant had declined to receive the letter. As a result she travelled to Kitui and personally told the Claimant to take the letter but again he declined in the presence of R.W.1 and three union officials.

11. R.W.2 further testified that when the Claimant declined to receive all the letters served to him by her and the Regional Manager, she invited him to a disciplinary hearing on 27.11.2014 by the letter dated 20.11.2014 but he declined to receive the letter and when she called him over the phone on the day of the hearing, he said that he was not aware of the said hearing. She maintained that there was good reason for dismissing the Claimant and the right procedure was followed. She however admitted that she did not know whether the letter dated 20.11.2014 was received in Kitui after dispatch from her office.

12. Mr. Fedilis Matothia testified as R.W.3. He stated that he is Team Leader Engineer at the Respondent and also a union official. He further stated that in August, 2014 he was called by the Claimant to report that R.W.1 had a letter for him and requested him to be present while he receives it. The following day R.W.1 called him and the Claimant but the claimant refused to receive the letter. He verified from other clerks that the accusation of absconding duty leveled against the Claimant were true.

13. R.W.3 admitted that he was never given a copy of the said letter and further confirmed that he never saw any other letter after that. He further admitted that he could not remember the date when the Claimant called him about the said letter, and that he never stated in his written statement that the Claimant called him to be present when receiving the alleged letter.

### **Analysis and Determination**

14. There is no dispute from the evidence and submissions presented herein that the Claimant was employed by the respondent until 9.3.2015 when he was dismissed. The issues for determination are:-

*(a) Whether the dismissal was unfair.*

*(b) Whether the reliefs sought should be granted.*

### **Unfair Dismissal**

15. Under Section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid and fair reason is one that relates to employee's conduct, capacity and compatibility or employers operational requirements. Fair procedure on the other hand mainly refers to the process of explaining to the employee the reason for the intended termination and thereafter according him a chance to defend himself.

### **Reason for the Dismissal**

16. In this case, the reason for the dismissal was cited as absconding duty on 5.8.2014 and refusal to receive Show Cause letter dated 11.8.2014 and other subsequent letters including the one dated 20.11.2014 inviting him to a disciplinary hearing on 27.11.2014. The Claimant had denied all the alleged acts of misconduct first by producing documentary evidence to prove that he was indeed on duty on 5.8.2014. Secondly, he denied the ever being served with the alleged Show Cause letter dated 11.8.2014 and the other subsequent letters including the invitations for disciplinary hearing dated 20.11.2014. He further denied ever seeing any union officials coming to convince him to receive the said letters.

17. R.W.1 admitted that the Claimant attended work on 5.8.2014 at 7.45 am but went out until 11.00 am when he returned. He however did

not produce any attendance clock-in register to prove the alleged absconding from duty. He also never adduced any written complaint from employees or customers to prove the alleged perennial absconding from duty. He also did not prove that he served the Show Cause letter dated 11.8.2014 and the subsequent letters on the Claimant. He never stated the date when he served the letters on the Claimant. R.W.2 alleged that she met Claimant, R.W.1 and 3 Union officials at Kitui and personally told the Claimant to take his Show Cause letter but he refused. She also never stated the date when she did that and the names of the 3 union officials who were present at the alleged meeting.

18. The said testimony contradicted with the testimony by R.W.1 and R.W.3 who never stated that they met with R.W.2 and the Claimant at Kitui office. R.W.1 stated that after the Claimant refused to receive the letter, R.W. 2 wrote the letter dated 16.9.2014 inviting him to her office in Thika but he declined to go. On the other hand R.W.3 stated that he was called to meet R.W.1 with the Claimant on an unspecified date. The testimony of R.W.3 under oath sharply contradicted with his written statement by stating that he was called by the Claimant to be present while receiving a letter from R.W.1 yet in the written statement, he had stated that it is the R.W.1 who in August, 2014 requested him to persuade the Claimant to accept the Show Cause letter.

19. Considering the said loopholes in the said inconsistent testimonies from the three defence witnesses, I find and hold that the respondent has failed to prove on a balance of probability that the Claimant misconducted himself in the manner stated in the dismissal letter, that is, by absconding duty on 5.8.2014 and refusing to receive Show Cause letter dated 11.8.2014 and others including the one dated 20.11.2014 inviting him to a disciplinary hearing on 27.11.2014. The failure by the Claimant to receive the said letters was because he was never served with the same by RW1 who admitted under oath that they were not in good relationship. That the invitation letter for hearing was not served because RW1 said it was not necessary because he had refused to receive the other letters. Under Section 43(1) and 45(2) of the Employment Act, the burden of proving valid and fair reason for terminating an employee's contract rests on the employer and the failure to discharge that burden renders the termination unfair.

### **Procedure Followed**

20. Under Section 41 of the Employment Act, before dismissing an employee on account of misconduct, poor performance or physical incapacity, the employer shall first explain to the employee, in a language he understands, the reason for which termination is considered and during the said explanation the employee shall be entitled to have another employee or shop floor union representative of his choice present, and the two shall have the right to air their representations for considerations before the termination is decided.

21. In this case, R.W.1 and R.W.2 alleged that the Claimant was served with the Show Cause letter dated 11.8.2014 and letter dated 20.11.2014 inviting the Claimant to a disciplinary hearing in the company of another employee but he declined. However, I have already held herein above that service of the said letters on the Claimant was not proved. Consequently, I find and hold that the procedure provided under Section 41 of the Act was not followed before dismissing the Claimant. In addition the Claimant was not issued with a Certificate of Service as required by Section 51 of the Act.

22. In view of the finding herein above that the respondent has failed to prove that the Claimant committed the alleged misconduct, and that the fair procedure provided by Section 41 of the Act was followed, I return that the dismissal of the Claimant from employment by the letter dated 27.1.2015 was unfair within the meaning of Section 45 of the Employment Act.

### **Reliefs**

23. Under Section 12 of the Employment and Labour Relations Court Act, reinstatement cannot be done after the lapse of 3 years from the date of separation. I therefore decline to award the prayer for reinstatement under Section 49(2) of the Employment Act and proceed to grant the alternative prayer for damages under subsection (1). I award the Claimant 4 months' salary in lieu of notice because under Clause 3.9 of the Collective Bargaining Agreement, he was entitled to a notice of 4 months before termination due to his long service of over 20 years. In addition I award him 12 months gross salary as compensation for the unfair dismissal considering his length of service and the fact that he may not have good chances of getting an alternative job due to his advanced age and ill-health. In addition he will get salary for the 9 days upto 9.2.2014 when his contract ended. I will compute the said awards based on the Claimants salary of Kshs.81,833.40 basic pay plus Kshs.23,750 House Allowance equaling to Kshs.105,583.40 as per the payslip for December, 2014.

### **Conclusion and Disposition**

23. I have found that the dismissal of the Claimant was substantively and procedurally unfair. I have also found that 3 years have since lapsed since the date when the dismissal was done and as such reinstatement is barred by Statute. Consequently, I enter judgment for the Claimant against the respondent as follows:-

**Salary in lieu of notice 4x105,583.40 = Kshs. 422,333.60**

**Compensation 12x105,583.40 = Kshs.1,267,000.80**

**Unpaid salary 9/26 x 105, 583.40 = Kshs. 36,548.10**

**Total: Kshs. 1,725,882.50**

The said sum shall be paid less statutory deductions. The Claimant will also have costs plus interest at Court rates from the date hereof.

It is so ordered.

**Dated, Signed and Delivered in Open Court at Nairobi this 2<sup>nd</sup> day of November, 2018**

**ONESMUS N. MAKAU**

**JUDGE**