



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

AT NYERI

CAUSE NO. 197 OF 2016

CYRUS IRERI DANIEL.....CLAIMANT

VERSUS

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

(Before Hon. Justice Byram Ongaya on Friday, 9th June, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 21.09.2016 through Kimathi Kiara & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. An order declaring termination of the claimant from employment wrongful.
- b. An order of the claimant backs to employment and in alternative pay the claimant general damages for wrongful dismissal and terminal benefits.
- c. Costs of the suit.

The response to the claim was filed on 01.12.2016 through Kithinji Marete & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs to the respondent.

It is not disputed that the claimant was employed by the respondent as an Artisan Grade III effective 08.09.1989 and the claimant was deployed to serve at the respondent's Mt. Kenya Region at Nyeri. It is not disputed that the respondent employed the claimant by the letter dated 08.09.1988 and that the claimant was a member of the Kenya Electrical Trades & Allied Workers Union (KETAWU) and the prevailing collective agreement between the union and the respondent governed the claimant's service.

The claimant was dismissed from employment by the letter of summary dismissal dated 26.02.2015. The letter stated that the dismissal was under clause 25 of the CBA and the dismissal was on account of the claimant's desertion from duty effective 15.01.2015. The letter stated that the claimant would be paid salary up to 15.01.2015 and that he owed the respondent **Kshs. 163, 829.08** comprising of motor cycle loan of Kshs. 118, 058.00; and debit salary Kshs.45, and 771.08.

The **main and agreed issue** for determination is whether the termination of the claimant's employment was unfair. It is the claimant's case that the procedure was unfair and the reason was invalid.

The claimant testified that prior to the dismissal he was not given a show-cause notice. The evidence is at the date of the dismissal the claimant was not on duty because he had been arrested and charged in Criminal Case No. 3445 of 2012 at Kiambu in allegations not relating to or initiated by his employer, the respondent. The charge was for 8 counts of obtaining money by false pretences contrary to section 313 of the Penal Code. The claimant was convicted and sentenced for 2 years imprisonment effective 15.12.2014 at a time he was on off duty followed with his annual. The claimant appealed against the conviction and sentence in High Court Criminal Case No. 184 of 2014 at Nairobi. In a judgment delivered on 12.11.2015, the conviction was quashed and the sentence was set aside so that the claimant was set free unless otherwise lawfully held. After the acquittal the claimant reported at work and was given the letter of summary dismissal. The claimant appealed but the respondent rejected the appeal as the summary dismissal was upheld. At dismissal, his gross monthly pay was Kshs.154, 104.30 being the last pay in January 2015.

The claimant testified that he never informed the respondent about the criminal case and it was after the decision on appeal by the High Court that he told the respondent about his predicament. He received the letter at the respondent's Nyeri office and after the acquittal. He admitted that it had been send to his address by registered post but returned to the sender as unclaimed letter.

The claimant further admitted that the letter on desertion dated 09.02.2015 had been send to his address by registered mail but returned to the sender as unclaimed mail and that he knew as much. The letter stated that it had been observed that the claimant had not been on duty effective 15.01.2015 and he was to report on duty within 10 days from the date of the letter failing he was to be deemed to have lost interest in continued employment.

The respondent's witness (RW) was one David Ebatalo Opero. He confirmed that the letter on desertion of 09.02.2015 and the letter of summary dismissal dated 26.02.2015 had been send to the claimant at his known address by registered post but returned as unclaimed mails. Further, RW testified that the claimant made no efforts to notify the office about his predicament despite his spouse and brother working for the respondent at the Nyeri branch or office. RW further admitted that the claimant's spouse and brother were nevertheless not privy to the claimant's contract of employment with the respondent but the two must have known about the claimant's predicament. RW referred to the letter dated 02.09.2016 disallowing the claimant's appeal on two grounds, namely:

- a. The claimant was absent from duty for over 14 days without prior permission.
- b. There was a notable conflict of interest between the business the claimant was doing of selling electrical cables and working with electrical cables in Kenya Power as an Artisan in O&M.

RW confirmed that ground no. 2 was clearly outside the initial reason for the summary dismissal and it was clearly an ambush against the claimant to have the appeal rejected on that ground. RW further confirmed that the claimant had a clean record of service and he had not received warning letters throughout his service.

The claimant was dismissed under clause 25 of the CBA on dismissal. The clause states as follows:

"25.0 DISMISSAL

Where an employee is dismissed by the Company for gross misconduct or is subjected to instant dismissal as provided for in clause 25.0 of this Agreement, he / she shall be paid basic wage and allowances of which he is entitled up to the date of dismissal. He / she shall be given an opportunity to defend himself / herself. For purposes of this clause, gross misconduct shall be as defined in the Employment Act, 2007 and as may be amended from time to time"

The court has considered the provision. It is stated that the employee will be given a chance to defend him-self or her-self in cases of dismissal. It is clear that the claimant was not given a notice and a hearing as envisaged in section 41 of the Employment Act, 2004. As was held in Shankar Saklani –Versus-

DHL Global Forwarding (K) Limited [2012]eKLR a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract.

The purported show-cause letter of 09.02.2015 was not received by the claimant and the court returns that though the respondent set out to serve the show-cause notice, there is ample evidence that it was not received. The court returns that the dismissal was without due process as per clause 25 of the CBA and there was no notice and a hearing as envisaged in section 41 of the Employment Act, 2001. The dismissal was therefore unfair for want of due process per section 45 (2) (c) of the Act.

While making the finding, the court considers that where an employee is absent and cannot be reached to establish service of a termination notice or the show-cause notice as it is known, it will be open and strictly limited for the employer to stop the salary and other benefits due under the contract of service until the whereabouts or fate of the employee is established ; as the otherwise step, like was done in the present case, of dismissing prior to establishing the employee's whereabouts, would amount to unfair dismissal procedure and may open up employees to dismissal even in circumstances where they may have become deceased or for good and lawful or reasonable cause unable to be present at work or to follow disciplinary proceedings. The court holds that an employer cannot serve a show-cause notice upon a deceased employee and proceed to determine the disciplinary proceedings and dismiss or impose punishment whereby the employee never received the show-cause notice; so that disciplinary proceedings do not commence, continue and cannot be concluded unless it is established that the employee received the show-cause letter or the notice of the termination proceedings.

It was submitted for the claimant that the reason for termination was invalid. The court finds as much and holds that if it is not established that the employee voluntarily admitted the allegation as was levelled and it is established there was no due process to establish the veracity of the allegations, then ***ab initio***, the reasons as advanced for the employer would be invalid. That being the case in the present dispute, the court returns that the reasons were invalid ***ab initio***. The court has nevertheless considered the evidence. It is not in dispute that the claimant was imprisoned and thereby was unable to report on duty. In the opinion of the court, imprisonment by court order is clearly in furtherance of the lawful path of justice and it does not amount to unreasonable or unlawful cause of absence from duty by the affected employee. Needless to state and as was conceded by RW in his evidence, ground no.2 in the decision rejecting the claimant's appeal was outside the initial allegations that were levelled against the claimant and the court returns that the ground was an invalid reason to uphold the initial decision of summary dismissal. Thus the court returns that the summary dismissal was unfair for want of a valid reason for termination as envisaged in sections 43 and 45(2) (a) and (b) of the Employment Act, 2007.

To answer the **main and agreed issue** for determination, the court returns that the termination of the claimant's employment by the letter of summary dismissal dated 26.02.2015 and as upheld by the letter of appeal against termination dated 02.09.2016 was unfair for want of due process and a valid reason.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The claimant prays for an order the claimant backs to employment and in alternative general damages for the dismissal. RW in his testimony stated that the claimant had been replaced. However, there was no evidence on record about the established posts for Artisan III in the respondent's staff approved establishment; the in-post for that establishment was not filed; and there was no evidence of the person appointed to replace the claimant. Thus the court returns that there is no bar to an order that the claimant goes back in the service of the respondent. While making that finding, the court has considered that the claimant substantially contributed to his predicament by failing to inform the respondent about the pending criminal case, the subsequent conviction and sentence by the magistrate, his appeal to the High Court; and only acted after the favourable appeal decision by the High Court. The court has also considered the claimant's otherwise clean and long record of service effective sometimes in September 1989. In consideration of the claimant's said contribution, his long clean service, and his legitimate expectation to remain in service until mandatory age of retirement or lawful termination, the court considers that the following would meet the ends of justice in the case:

1. The claimant is reengaged in the respondent's service as an Artisan Mate III in Operations & Maintenance Department based at Nyeri Branch, Mt. Kenya Region with effect from 15.06.2017 with full benefits and the claimant to report on duty not later than 08.00 o'clock in the forenoon on 15.06.2017 for assignment of duties by the supervisor and without break in service; and the period between the date of summary dismissal 15.01.2015 and the date of reengagement 15.06.2017 be treated as leave of absence without pay.

2. In alternative to (1) above, the respondent to pay the claimant 8 months' gross salaries at Kshs.154, 104.30 per month making Kshs.1, 232, 834.40 for unfair termination by 01.08.2017 failing interest to be payable thereon at court rates till full payment.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the letter of summary dismissal dated 26.02.2015 and as upheld by the letter of appeal against termination dated 02.09.2016 was wrongful, unfair and unlawful.

2. The claimant is hereby reengaged in the respondent's service as an Artisan Mate III in Operations & Maintenance Department based at Nyeri Branch, Mt. Kenya Region with effect from 15.06.2017 with full benefits and the claimant to report on duty not later than 08.00 o'clock in the forenoon on 15.06.2017 for assignment of duties by the supervisor; and the period between the date of summary dismissal 15.01.2015 and the date of reengagement 15.06.2017 be treated as leave of absence without pay so that there shall be no break in the claimant's service with the respondent.

3. In alternative to (2) above, the respondent to pay the claimant 8 months' gross salaries at Kshs.154, 104.30 per month making **Kshs.1, 232, 834.40** for unfair termination by 01.08.2017 failing interest to be payable thereon at court rates till full payment.

4. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 9th June, 2017.**

BYRAM ONGAYA

JUDGE