



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

CAUSE NO. 19 OF 2017

(Originally Nakuru Cause No. 193 of 2016)

THOMAS KIMUTAI BIWOTT

CLAIMANT

v

KENYA POWER & LIGHTING CO. LTD

RESPONDENT

JUDGMENT

1. Thomas Kimutai Biwott (Claimant) was employed by Kenya Power & Lighting Company Ltd (Respondent) on an undisclosed date in January 1994 as a Metre Reader III.
2. The Claimant was promoted to the position of Metre Reader I, through a letter dated 12 October 1998.
3. On 7 April 2015, the Respondent dismissed the Claimant from employment and the reason given was habitual absenteeism and failure to respond to a *desertion letter* dated 10 March 2015.
4. On 25 May 2016, the Claimant instituted legal proceedings against the Respondent alleging unfair termination of employment.
5. According to an affidavit of service sworn by Vincent Otieno Ogotu and filed in Court on 24 January 2017, the Respondent's Human Resource & Administration Officer, North Rift had acknowledged service of Notice of Summons by stamping on a copy thereof on 9 June 2016.
6. The Respondent therefore had up to 24 June 2016 to file a Response, in terms of the Rules applicable at the time.
7. The Respondent did not enter Appearance or file a Response.
8. On 10 April 2017, the Court directed that this Cause be transferred to Eldoret where a sub-registry of the Court had been opened and hearing (formal proof) was scheduled for 26 June 2017. Because the Court did not sit on that date, hearing was rescheduled to 24 July 2017.
9. The Court having satisfied itself that the Respondent had failed to file a Response within the prescribed time allowed the formal proof to proceed. The Claimant gave sworn testimony and produced exhibits.
10. On 25 July 2017, the Claimant filed written submissions as directed by the Court.
11. The Claimant, had on 30 March 2017 filed the *Issues for Determination* and the Court will consider them, the pleadings, evidence tendered and the written submissions.

Whether Claimant was an employee of the Respondent

12. Although the Claimant did not produce a copy of his letter of appointment, he placed before Court more than sufficient secondary evidence to demonstrate a contractual relationship.

13. These include the promotion letter, copy of pay slip for February 2015, certificates of trainings attended, disciplinary letters and the dismissal letter.

Whether dismissal was unfair

Procedural fairness

14. The Claimant testified that he was not afforded an opportunity to be heard before the decision to dismiss was taken. That testimony was unchallenged/uncontroverted.

15. As to the allegation that the Claimant failed to respond to the desertion notice dated 10 March 2015, he produced a copy of his response dated 18 March 2015.

16. In terms of section 41 of the Employment Act, 2007, the Respondent was under a statutory obligation to comply with the procedural fairness requirements of the section.

17. There is no evidence before Court of compliance.

18. Further, an employer of more than 50 employees is required to have a disciplinary policy in place. It is a notorious fact that the Respondent employed more than 50 employees at the material time.

19. As to whether, it complied with the requirements of the disciplinary policy or human resource manual, the Court was not informed.

Substantive fairness

20. 2 reasons were advanced for the dismissal of the Claimant.

21. These were the reasons the Respondent was expected to prove, and not only prove, but prove as valid and fair reasons to dismiss the Claimant by dint of sections 43 and 45 of the Employment Act, 2007 (the Court has already adverted to the allegation concerning failure to respond to the show cause (desertion) notice).

22. The Respondent however failed to file a Response or attend the hearing to discharge that statutory burden.

23. Despite and in spite of that failure, the Claimant produced medical records to demonstrate his ill health and admission(s) in hospital from 30 November 2014 to 4 December 2014 and hospital attendances during the material period (the records go beyond the dismissal date to demonstrate the Claimant's state of health).

24. These documents suggest that the Claimant had lawful cause to be away from work despite not having secured prior permission. In cases of ill health, an employee can produce medical evidence or certificate as soon as is practicable.

25. The Court therefore concludes that the dismissal of the Claimant was not only procedurally unfair, but devoid of valid and fair reasons.

Appropriate remedies

Reinstatement

26. The Claimant did not disclose his age. He also did not disclose his current health status by production of medical records.

27. In the circumstances, the Court is of the view that reinstatement would not be practical or appropriate.

Salaries and allowances from March 2015

28. The Claimant's contract with the Respondent effectively ended with the dismissal, and with that *fait accompli*, there is no legal basis for awarding him the salaries and allowances he would have earned but for the dismissal.

Compensation

29. Compensation is one of the primary remedies where the Court finds there was unfair termination of employment. The remedy is however discretionary and the factors the Court ought to consider have been set out in section 49(4) of the Employment Act, 2007.

30. The Claimant served the Respondent for about 20 years and considering the length of service, the Court is of the view that the maximum compensation contemplated under section 49(1)(c) of the Employment Act, 2007 would be appropriate and fair (gross wage at separation was Kshs 101,990/13).

Service pay

31. Two reasons lead the Court to disallow the head of claim for service pay.

32. First, the Claimant did not seek service pay in the pleadings. He also did not lead any evidence as to the relief, but introduced the same through the written submissions.

33. Secondly, according to the pay slip produced, the Claimant was a member of a pension scheme and therefore excluded from payment of service pay by dint of section 35(5) & (6) of the Employment Act, 2007.

Conclusion and Orders

34. The Court finds and holds that the dismissal of the Claimant was unfair and awards him and orders the Respondent to pay him

(a) Compensation **Kshs 1,223,881/56.**

35. Claimant to have costs.

Delivered, dated and signed in Eldoret on this 28th day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kibii instructed by Limo R.K & Co. Advocates

For Respondent did not defend

Court Assistant Nixon/Dorcas