



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

CAUSE NO. 31 OF 2017

ISAAC KIPLAGAT KIRWA

CLAIMANT

V

KENYA POWER & LIGHTING CO. LTD

RESPONDENT

JUDGMENT

1. The Claimant commenced legal proceedings against the Respondent on 27 April 2017 and the *Issues in Dispute* were stated as

- a. Whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent;
- b. Whether the reason given by the Respondent for the termination of the Claimant amounts to a FAIR REASON;
- c. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this Memorandum of Claim;
- d. Whether the Claimant is entitled to an award of a certificate of service;
- e. Who should pay costs and interests of the suit?

2. According to an affidavit of service sworn by one Joseph O. Ochieng and filed in Court on 5 September 2017, service of Notice of Summons and the Memorandum of Claim were effected upon the Respondent's Human Resource secretary on 8 May 2017, and the service was acknowledged by stamping (stamp is for Human Resources & Administration Officer, North Rift).

3. Despite the service, the Respondent did not enter Appearance or file a Response within the prescribed time.

4. On 25 September 2017, the Court scheduled hearing/formal proof for 30 October 2017.

5. According to an affidavit of service sworn by Joseph Onawa, a hearing notice was served upon the Respondent through registered post on 25 September 2017.

6. The Claimant testified on 30 October 2017 and on 31 October 2017.

7. The Court has considered the evidence and will evaluate the Claimant's case in terms of the Issues as framed.

Whether termination was unfair

Procedural fairness

8. The initial burden placed upon a Claimant alleging unfair termination of employment is located in section 47(5) of the Employment Act, 2007.

9. The Claimant contended that the termination of his employment was unfair because the reasons given by the Respondent were not valid as motor bike KBJ 386J was not assigned to him and therefore he could not have been responsible for fuelling it or having its work ticket signed/authorised.

10. On the allegation regarding motor bike KBR 146U, the Claimant testified that being a high cc motorbike, its fuel consumption was expected to be high and that in any event, the Respondent's Transport Office could only issue new work tickets after surrender of the previous work ticket(s).

11. The testimony by the Claimant remained unchallenged/uncontroverted, and consequently the Court can conclude that the Claimant discharged the burden placed on him by section 47(5) of the Employment Act, 2007.

Substantive fairness

12. An employer has a statutory obligation to prove the reasons for terminating the services of an employee (section 43 of the Employment Act, 2007) and that the reasons were valid and fair (section 45 of the Employment Act, 2007).

13. Having failed to file a Response and/or attend the hearing, the Court finds that the burden placed on the Respondent was not discharged, thus the termination is found to have been substantively unfair.

Whether Claimant worked overtime without pay (normal and public holidays)

14. The Claimant had initially not filed any copies of his pay slips and did so only after the Court asked about the pay slips in order to determine the veracity of overtime pay.

15. The pay slips produced by the Claimant indicate that his contract was of a temporary nature, and that in the months of March 2014 and August 2014 he was paid overtime.

16. The pay slips for January 2014, March 2014, April 2014, May 2014, July 2014, August 2014 and October 2014 show the Claimant was paid some monies under item *standby*. The Claimant did not explain what the *standby* meant.

17. Considering the overtime pay in the pay slips for March and August 2014, and the failure to explain what *standby* meant, the Court is of the view that it is more probable that the Claimant was paid for any overtime work.

Leave

18. The Claimant's testimony that he did not go on annual leave from 2011 to time of separation remain unchallenged and the Court finds in his favour.

Appropriate remedies

Pay in lieu of notice

19. With the conclusion that the termination of the Claimant's employment was unfair, the Court holds that he is entitled to the equivalent of 1 month basic salary as pay in lieu of notice (Kshs 16,871/-).

