



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 63 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2016)**

**HARRISON MUSOGA OBIMBO.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. The Claimant filed suit on 24<sup>th</sup> January, 2015, seeking unconditional reinstatement and salary arrears. He states that he was employed by the Respondent sometime in June 1979 in the position of Trainee Technician and he rose through the ranks, becoming a level 3 Assistant Superintendent at the Respondent's West Kenya Sub Region at the Kisumu Depot.
2. He contends that on 14<sup>th</sup> July, 2014, while on duty he collapsed at the Respondent's premises and proceeded for treatment at the Aga Khan Hospital and two days later he applied for forty days leave to allow him to recuperate which leave was approved allowing him 39 days only to recuperate. Thereafter on 9<sup>th</sup> September, 2014, doctors put him on bed rest for 30 days.
3. It is his contention that on 24<sup>th</sup> September, 2014, he received a letter from the Respondent suggesting that he had absconded from duty from 14<sup>th</sup> July, 2014 to 5<sup>th</sup> September, 2014 and as such his name had been removed from the Payroll as from August, 2014.
4. The Claimant states that his supervisor was aware of his whereabouts at all material times and medical evidence was also provided to the Respondent who cleared his medical bill. He prays for unconditional reinstatement to the payroll and clearance of salary arrears, allowances, benefits and any other legal dues.
5. The Respondent put in a Memorandum of Defence wherein they admit the employment relationship and that by the time of dismissal he held the position of 3<sup>rd</sup> Assistant Superintendent with a monthly salary of Kshs. 184,046. It is their contention that the Claimant absented himself from work as from 14<sup>th</sup> July, 2014, without prior permission or communication.
6. They state that on 3<sup>rd</sup> and 24<sup>th</sup> September, 2014, they wrote to the Claimant asking him to show cause why he should not be dismissed for desertion of duty from 14<sup>th</sup> July, 2014 to 5<sup>th</sup> September, 2014.
7. That the Claimant was invited to a disciplinary hearing at the Respondent's board room on 29<sup>th</sup>

October, 2014, to respond to the charges. That the Claimant was informed of his right to bring a representative of his choice, to bring evidence or witnesses in support of his case to which the Claimant failed to respond nor honor the invitation to the disciplinary hearing only to show up to work on 14<sup>th</sup> November, 2014, to pick up a letter of recommendation.

8. The Respondent prays for the Claim to be dismissed with costs.

9. In evidence the Claimant led evidence as per the Claim and further produced phone records to show that indeed his leave had been approved by the Respondent. He stated that at dismissal he was not given a recommendation or a long service award.

10. RW1 on the other stated that he was the Claimant's immediate supervisor and that he never received any request for leave as alleged but on a later scrutiny of their system they realized that the Claimant had actually requested for leave which was not approved. He stated that the Respondent did not approve leave by way of text message.

11. He further stated that he noticed inconsistencies in the Claimant's attendances that he was not working the normal 8-5 pm hours but instead would work from 6am to 11am. RW1 stated that he noticed that the Claimant could not handle the pressure of work and when called upon to come to the office he did not do so. He however, admitted that there was no communication to the Claimant to this effect. He states that there was reason for dismissing the Claimant and due process was followed.

12. RW2 stated that he was the Human Resource Officer for the Respondent at the station where the Claimant worked. He stated that he was not aware that on 14<sup>th</sup> July, 2014, the Claimant collapsed while on duty but that RW1 had informed him that the Claimant was taken ill while in their premises and was taken to hospital. He denied having been supplied with any documents from the Aga Khan hospital on the Claimant's alleged illness.

13. It was also stated on the Respondent's behalf that a show cause letter was sent to the Claimant and a disciplinary hearing set up but he never showed. They stated that the Claimant was terminated on 14<sup>th</sup> November, 2014, as a result of the foregoing circumstances.

14. In submissions the Claimant submitted that the manner in which he was dismissed violated his constitutional and contractual rights and the Claim should be allowed as drawn.

15. The Respondent in submissions states that the Claimant absconded from duty and did not give a reasonable excuse for his absence. They state that the Claimant is not entitled to payment for the days not worked. They cite section 19(1) (c) of the Employment Act which provides:

***“Notwithstanding section 17(1), an employer may deduct wages of his employee:-***

***(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work.”***

16. The Respondent further submits that the Claimant is not entitled to reinstatement for the reason that he absconded duty and is guilty of desertion and absenteeism which amounts to gross misconduct as provided under Section 44(4) of the Employment Act.

17. The Respondent concludes by stating that the suit be dismissed with costs for failing to meet the threshold set out in section 49(4) of the Employment Act. Further that trust between the Claimant and Respondent has irretrievably broken down and as such reinstatement is not practical. In addition the Respondent states that the Claimant has attained retirement age and has no capacity to work.

18. They further rely on the case of **Abdalla Mohamed Abdalla Vs. Independent Electoral and Boundaries Commission (2015) eKLR** wherein it was stated:

***“Reinstatement is a premier remedy uniquely available in this court to be granted in very exceptional circumstances. In Dr. Joseph Maingi Maitha Vs. Permanent Secretary Ministry of Medical Services and Another (2015) eKLR this Court held that reinstatement or reengagement is not available to an employee with a negative employment record.”***

19. The Respondent prays for the Claim to be dismissed for being untenable and contrary to the employment laws.

20. I have considered the evidence and submissions of both parties. I note that the Claimant indeed absented himself from duty at one point but he was unwell and evidence of his being sick had been produced in Court.

21. The Claimant testified that he had been sick and was given permission to be away from work either on sick off/bed rest or annual leave.

22. During the period of the illness, the Respondent paid for claimant’s medical bills as his employer.

23. There was contention as to whether the Claimant obtained relevant leave before being absent but DW1 admitted seeking leave application from the Claimant in the system but he never dealt with him directly.

24. The Claimant was able to produce evidence that on 15/8/2014 he received an sms approving his leave. He produced the report from the Police Directorate of Criminal Investigation confirming the same.

25. The report show that S/No 961 at page 7 was an sms from Phone No. [...] from one Makoko Electricity House to Claimant’s No. [...] stating that 39 days leave had been approved with effect from 16.7.2014.

26. With such evidence it is evident that the Claimant’s leave was approved. The Respondent avers that this was not the normal way of approving leave.

27. It is my finding that though this was not normal way of approving leave, the leave was however given by Claimant’s supervisor and he relied on it and cannot therefore be victimized. It is for this reason that I find there was no valid reason to terminate the services of the Claimant.

28. On issue of due process, the Claimant has told Court that he was never served with a show cause letter but they sent him a desertion notice on 16.10.2014 when he returned to work. He also stated that he never received Respondents Appendix 3 and 4 which is a show cause letter dated 24.9.2014 and the disciplinary hearing to be conducted on 29.10.2014.

29. Indeed the Appendix 3 has no forwarding address and Appendix 4 is not signed as received by the Respondent. It was also received in Kisumu where claimant works on 23.10.2014 but it is not forwarded to the Claimant.

30. It is my finding that indeed the Claimant as submitted never received any show cause letter nor was he subjected to any disciplinary hearing as expected under Section 41 of Employment Act. Section 41 of Employment Act states as follows:

1. ***“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:***

***a. Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of***

*redundancy;*

*b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*

*c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*d. Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*e. The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*

*f. The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

*g. The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

31. The Respondents have averred that they took the Claimant through the disciplinary process and therefore terminated his services. The Claimant denies receiving any letter of termination. The Respondents have also not displayed any termination letter. But it is apparent that the Respondent removed Claimant from the pay roll.

32. Having found as above, I find that the Respondent's action of removing the Claimant from the pay roll without proper reasons and without following due process is unfair and unjustified. It is tantamount to an unfair and unjustified termination.

33. I therefore find for Claimant and I order the Respondent to reinstate him to the payroll and pay him all his outstanding salaries and allowances from the time of removal today.

34. The Respondent had at one point indicated that the Claimant had reached his retirement age and if that is the position then he should be allowed to retire in the normal course of work.

35. The reinstatement should be done within 14 days from today.

36. The Respondent to pay costs of the suit.

Read in open Court this 20<sup>th</sup> day of December, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Azenga holding brief for Odera for Claimant – Present

Kilonzo holding brief Miss Kanyiri for Respondents – Present