



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 45 OF 2014**

**(ORIGINALLY NAIROBI CAUSE NO. 1606 OF 2012)**

**DANIEL MAINA WANYOIKE**

**CLAIMANT**

**V**

**KENYA POWER & LIGHTING CO. LTD**

**RESPONDENT**

**JUDGMENT**

1. Daniel Maina Wanyoike (Claimant) was employed by Kenya Power & Lighting Co. Ltd (Respondent) through a letter dated 16 April 1986 as a General Worker grade II and he rose through the ranks to position of Artisan 1.
2. On 14 October 2003, the Claimant was appointed as a team leader (Construction team) and on 8 February 2005, he was assigned duties in the distribution function within the Naivasha Narok sub-region.
3. On or around 18 March 2009, an accident occurred at the Naivasha Country club as a result of which a contract employee died.
4. As a consequence of the accident, the Respondent's Branch Business Manager- Naivasha wrote a show cause letter to the Claimant on 9 April 2009, to explain within 72 hours why disciplinary action should not be taken against him for having *failed to follow safety procedures as required... Negligence of duty and failure to adhere to the laid down procedures.*
5. The Claimant responded to the show cause letter through a letter dated 17 April 2009.
6. The Respondent, through its Chief Engineer, O & M-Central Rift replied to the Claimant's explanation through a letter dated 27 April 2009 and marked 1<sup>st</sup> Warning, and informed him that his explanation had been found unacceptable by the Management and consequently he was **WARNED** and *advised to desist from such behaviour and take note that a repetition of a similar offence in future will lead to a more severe disciplinary action.*
7. On or around 10 November 2009, another fatal accident involving one of the Respondent's day casual employees at Naivasha DCK Substation occurred.
8. On 18 November 2009, the Respondent's Branch Business Head-Naivasha wrote to the Claimant to show cause within 72 hours why disciplinary action should not be taken against him. It was alleged that the Claimant had *failed to follow safety procedures as required... management views this as negligence of duty and failure to adhere to the laid down procedures.*
9. The Claimant again responded to the show cause notice through a letter dated 21 November 2009.
10. In the meantime, the Respondent's Regional Safety Engineer, Security Officer and Regional Manager, West carried out investigations and prepared a report dated 17 November 2009.
11. On 8 December 2009, the Claimant was served with a Disciplinary Enquiry Notification which requested him to attend a disciplinary hearing on 10 December 2009. The notification informed the Claimant that he could be accompanied by a fellow employee of his choice.
12. On 7 January 2010, the Senior Human Resources & Administration Officer, Central Rift

- recommended to the Chief Manager, Human Resources and Administration that the services of the Claimant be terminated, and 2 other employees be warned over the incident.
13. On 8 January 2010, the Respondent terminated the services of the Claimant and advised him that he would be paid three months salary in lieu of notice, salary up to 8 January 2010 and any pending leave days less any liabilities.
  14. On 12 January 2010, the Claimant appealed to the Respondent's Regional Manager against the termination.
  15. After the termination of the Claimant's contract, the Respondent and a Union of which the Claimant was a member, Kenya Electrical Trades and Allied Workers Union (KETAWU) attempted to resolve the dispute pursuant to the agreement in place between the Respondent and the Union.
  16. The Dispute Resolution Committee met severally and recommended that the termination of the Claimant's services be sustained.
  17. The Claimant was not satisfied and on 19 October 2010, he wrote an appeal to the Respondent's Managing Director. The Respondent rejected the appeal and communicated to the Claimant through a letter dated 17 November 2010.
  18. KETAWU also reported a trade dispute to the Minister for Labour and a Conciliator was appointed. However, the parties disagreed and a Certificate of Disagreement was issued on 13 September 2011.
  19. On 11 September 2012, the Claimant commenced legal action against the Respondent and the issues in dispute were stated as

- 1) Unlawful, unfair and premature termination for (sic) Daniel Maina by the Respondent Company.

- 2) Denial and or refusal of payment of termination (sic) benefits.

20. The Respondent was served with Summons and on 15 September 2013, it filed a Response through the Federation of Kenya Employers.
21. On 16 May 2014, Ongaya J directed that the Cause proceed to hearing on 27 November 2014. The date was fixed in the presence of Mrs. Gatei holding brief for Mr. Onyony for the Claimant and Mr. Kibet holding brief for Mr. Njiru for the Respondent.
22. On 27 November 2014, when the Cause was called for hearing, only the Claimant and his counsel were present in Court. Mr. Onyony informed the Court that the date was fixed by consent and after satisfying myself that this was so, I directed that the hearing proceeds.
23. In the event, the Cause proceeded *ex parte* and the Claimant gave oral testimony and called one other witness.
24. The Court has considered the pleadings, the documents filed, the testimony and submissions filed by the Claimant and identified the issues for determination as, *whether the termination of the Claimant's services was fair and appropriate relief* including statutory/contractual entitlements.

## **Whether the termination of Claimant's services was fair**

### ***Procedural fairness***

25. The Respondent issued to the Claimant a show cause letter dated 18 November 2009. The show cause letter stated out the charges/allegations against the Claimant.
26. The Claimant was requested to make representations within 3 days. He wrote an explanation dated 21 November 2009.
27. On 8 December 2009, the Claimant was served with a notice to attend a hearing. The notification informed him of the right to attend with a colleague. The Claimant attended the hearing in Nakuru as scheduled.
28. From the documentation annexed to the parties' pleadings and those filed later, the Court is satisfied that the termination of the services of the Claimant was procedurally fair. It was in compliance with the requirements in section 41 of the Employment Act, 2007.

## ***Substantive fairness***

29. The Employment Act, 2007 has radically or fundamentally altered the employment relationship in our jurisdiction.
30. Pursuant to section 43 of the Act, an employer is under a statutory obligation to prove the reasons for terminating an employee's contract.
31. But that is not all. Section 45 of the Act on its part further requires an employer to prove that the reasons are valid and fair. In a sense, this section has granted ordinary employees security of tenure.
32. The Respondent advanced the reasons for terminating the services of the Claimant in the Statement of Response. But it did not attend Court during the hearing to discharge the onerous burden placed upon it by sections 43 and 45 of the Employment Act, 2007.
33. Pleadings are merely statements of facts constituting the cause of action. Although the rules of this Court allow parties to plead evidence, where a party fails to appear for the hearing, and in light of oral testimony from the other side, such testimony remains unchallenged and untested and the Court does not have much option but to accept such unchallenged testimony.
34. The Claimant denied he was negligent or that he failed to follow the safety procedures. He stated that he followed all the procedures and that he was getting instructions from the Controller.
35. In this regard, the Court finds that the Respondent having failed to prove the reasons for the termination, and that the reasons were valid and fair, the termination was substantively unfair.
36. Before discussing appropriate remedies, the Court notes that although the Claimant has referred extensively to provisions of the Evidence Act, those provisions did not apply strictly in proceedings before the Court at the time of hearing.

## **Appropriate remedies**

### ***Lost Income***

37. The Claimant sought Kshs 8,894,340/- being the income he would have earned upto retirement at 60 years. But he did not lay any contractual or statutory basis for this relief. It is declined.

### ***Service pay***

38. Under this head of claim, the Claimant sought Kshs 1,368,360/- at the rate of 30 days pay for each completed year of service. He worked for 24 years.
39. The Claimant annexed a copy of his December 2009 pay slip. According to the pay slip, he was a contributor to the National Social Security Fund. The pay slip also shows that he was making contributions to a pension scheme.
40. The Claimant would not be entitled to service pay by dint of section 35(5) and (6) of the Employment Act, 2007. This relief is also declined.

### ***12 months compensation for unfair termination***

41. Under this head, the Claimant sought Kshs 684,180/- (this must have been calculated on the basis of basic and not gross wages).
42. Compensation of a sum equivalent to not more than 12 months' gross wages is one of the primary remedies for unfair termination.
43. The remedy is however discretionary and the discretion is fettered by the factors set out in section 49(4) of the Employment Act, 2007.
44. The Claimant served the Respondent for 24 years. Considering the length of service, the Court would award him the equivalent of 6 months' gross wages assessed at Kshs 871,446/- (gross pay according to the exhibited pay slip was Kshs 145,241/96).

### ***Incorporeal loss***

45. No evidential, contractual or statutory basis was laid for this claim quantified at Kshs 1,000,000/-

and it is declined.

### ***Loss of earning capacity***

46.The Claimant sought another Kshs 1,000,000/- under this head. He did not lay any legal foundation or basis for it and it is equally declined.

47.In any case, the Claimant did not suffer any disability stopping him from earning an income.

### **Conclusion and Orders**

48.The Court finds and holds that

a) the termination of the services of the Claimant was procedurally fair

b) The Respondent has failed to prove the reasons for the termination and that the reasons were valid and fair and so the termination was substantively unfair, and awards the Claimant and orders the Respondent to pay him (a) 6 months gross wages as compensation **Kshs 871,446/-**

49.All the other heads of claim are dismissed.

50.The Claimant to have costs of the Cause.

**Delivered, dated and signed in Court in Nakuru on this 20<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant                      Mr. Onyony instructed by Onyony & Co. Advocates

For Respondent                      Federation of Kenya Employers