



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 43 OF 2014**

**(Originally High Court Civil Case No. 287 of 2010)**

**DUNCAN KARIUKI KINYANJUI.....CLAIMANT**

**v**

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

**JUDGMENT**

1. Duncan Kariuki Kinyanjui (Claimant) sued the Kenya Power & Lighting Company Ltd (Respondent) before the High Court on 2 November 2010 alleging unlawful termination of employment and seeking a declaration that the termination of employment was unlawful, and lost earnings upto retirement at 60 years.

2. *The Court has noted that the Complaint filed in the High Court had Luka Kimaiyo Chepkonga as the Plaintiff while the supporting affidavit had one Duncan Kinyanjui as the Plaintiff and deponent. Summons was issued in the name of Duncan Kariuki Kinyanjui. The Respondent named the Plaintiff in its pleadings as Duncan Kariuki Kinyanjui and the contractual documents it produced also referred to Duncan Kariuki Kinyanjui.*

3. The Respondent filed a Defence on 16 November 2010. Because the suit was filed before the High Court, the parties commenced compliance with the procedural requirements before that Court.

4. However, on 21 February 2014, Deputy Registrar of the High Court directed, after application by the Claimant that the suit be transferred to this Court for hearing and determination (the Respondent did not raise issue on whether the Deputy Registrar could order the transfer of the suit) and the Court will leave it at that.

5. The hearing of the Cause proceeded on 17 June 2015. After the close of the Claimant's case, Mr. Wamaasa for the Respondent informed the Court that the Respondent would not call any witnesses.

6. Pursuant to directions by the Court, the Claimant filed his submissions on 29 September 2015 (instead of before 30 June 2015 as directed) while the Respondent had filed its submissions on 30 June 2015.

**Claimant's case**

7. The Claimant's case was that he was employed by the Respondent in 1992 as a Foreman/Supervisor and that around 2 November 2007 he received a letter terminating his services.

8. According to the letter, the reason given for the termination was that the Claimant had authorised

payments to certain employees and this warranted summary dismissal but the Respondent had opted to terminate the relationship in accordance with clause 13 of the employment contract (termination on notice).

9. In his testimony, the Claimant stated that after investigations into the issue of the payments, he had been cautioned and was also surcharged the equivalent of the payments and therefore the termination of employment was unfair.

10. He also stated that at the time of termination he was 43 years old and the retirement age was 60 years and therefore he had 16 more years to work and that he was seeking compensation equal to the wages he would have earned but for the unfair termination of employment.

11. In cross examination, the Claimant acknowledged he had been offered payment of pay in lieu of notice, accrued leave and earned wages for November 2007 (but he was not paid because he had liabilities exceeding the dues).

12. The Court has considered the pleadings, testimony by the Claimant and the submissions and identified the issues for determination as, *whether the termination of the Claimant's employment was unlawful and appropriate remedies.*

13. The Court has taken cognisance of the agreed issues filed by the parties before the High Court on 3 July 2012 and will consider them as may be appropriate.

## **Evaluation**

### ***Applicable law***

14. The Claimant's employment was terminated on 2 November 2007. The applicable statutory law was the Employment Act, cap. 226 (repealed by the Employment Act, 2007). This latter Act commenced on 2 June 2008.

15. Question 3 as raised by the parties in the agreed issues is therefore in the negative if the Act meant was the Employment Act, 2007.

### ***Natural justice***

16. The repealed Employment Act did not provide for a hearing before termination or for an employer to prove the reasons for termination of employment.

17. In this regard, the Claimant cannot be heard to complain of failure to comply with the rules of natural justice as pleaded.

18. Any complaint of failure to comply with natural justice could only competently be anchored on contractual grounding but none was presented before Court.

19. The Claimant sought to rely on the case of *Gedo Abdulahi Mohamed v Commissioner of Police & Attorney General* (2015) eKLR, where D.K.N. Marete cited a passage from *Abbot v Sullivan* (1952) 1 KB 189 to the effect that bodies which exercise monopoly in important sphere of human activity with power of depriving a man of his livelihood must act in accordance with elementary rules of natural justice. They must not condemn a man without giving an opportunity to be heard in his own defence and any agreement or practice to the contrary would be invalid.

20. In my view, the decision cannot aid or assist the Claimant because the Police in this country serve under a specific/particular statutory framework, which statutory framework is not one of general application.

21. A long line of authorities in this country has on the other hand held that unless contractually agreed, there was no general statutory right to a hearing in employment contracts.

22. These authorities dealt with the legal framework obtaining before the commencement of the Employment Act, 2007 and include Civil Appeal No. 29 of 1985, *Cyrus Nyaga Kabute v Kirinyaga County Council* and Nakuru Civil Appeal No. 27 of 1992, *Rift Valley Textiles Ltd v Edward Onyango Oganda*, and Nakuru High Court Civil Case No. 56 & 57, *Peter Whitton & Ar v Kenya Educational Trust Ltd*, cited by the Respondent. The authorities are so numerous that I need not cite any more or set out the holdings therein or legal principles enunciated therein.

### ***Reasons for termination***

23. Again, under the regime applicable at the time of the termination of the Claimant's employment, an employer was free to terminate the services of an employee for a bad reason or a good reason. The employer could dismiss without cause, provided the notice agreed was given or pay in lieu thereof tendered. If no period was agreed, the period ought to be reasonable.

24. The legal principles are also captured in the authorities already referred to.

25. The question therefore of bad faith does not arise.

26. In the instant case, though reasons were given, the Respondent also offered the Claimant one month pay in lieu of notice in terms of clause 13 of the contract.

27. The above discussion means that issue 4 as raised by the parties on lawfulness of the termination of employment becomes an academic exercise.

### ***Limitation***

28. An issue identified by the parties but not pursued either during the hearing or in the submissions is the one of limitation.

29. The law governing limitation under the Employment Act, (repealed) was the Limitation of Actions Act. It provided for a limitation period of 6 years in causes of action based on contract.

30. The cause of action herein arose on 2 November 2007 and the same should have been commenced on or before 1 November 2013. The instant Cause was thus not affected by limitation.

### ***Appropriate remedies***

31. Apart from seeking a declaration, the other main relief sought by the Claimant was lost earnings he would have earned upto retirement age at 60 years.

32. No contractual, statutory or other legal foundation for this relief was laid before Court during the hearing or in the submissions.

33. I can only repeat what I stated in *Amos Sasine Kitaika v Masaai Mara University* (2015) eKLR, citing *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 where the Supreme Court of Uganda held that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

### ***Conclusion and Orders***

34. The upshot of the foregoing is that the Court finds no merit in the Claimant's case and orders that it be dismissed with costs to the Respondent, the Claimant having failed to file submissions on time and

without offering any explanation.

**Delivered, dated and signed in Nakuru on this 27<sup>th</sup> day of November 2015.**

**Radido Stephen**

**Judge**

**Appearances**

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

For Respondent    Mr. Wamaasa instructed by Wamaasa & Co. Advocates

Court Assistant    Nixon