



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1502 OF 2010

GRACE WAIRIMU WATENE.....CLAIMANT

VS

KENYA POWER AND LIGHTING COMPANY LTD.....RESPONDENT

AWARD

Introduction

1. The Claimant, Grace Wairimu Watene worked for the Respondent, Kenya Power and Lighting Company from 1989 to January 2009 when she was summarily dismissed. She brought a claim against the Respondent by way of a Memorandum of Claim filed on 3rd December 2010 and amended on 3rd April 2013, seeking compensation for unfair termination of employment.
2. The Respondent filed a Memorandum of Response dated 4th August 2011 and amended on 3rd May 2013. The matter was heard on 11th December 2013. The Claimant testified on her own behalf and the Respondent called its Chief Security Officer, Samuel Patrick Njue. Both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as an Electrical Wire Lady III effective 24th May 1989. In 2005, she was promoted to the position of Inspector IV and later to Inspector III effective 2007. Her salary as at the time she left the Respondent's employment stood at Kshs. 121,735.80.
4. On 17th December 2008, the Claimant was issued with a show cause letter on allegations of theft of aluminium cables from the Respondent's Nairobi South Store. The Claimant responded to the show cause letter on 21st December 2008 and on 28th January 2008, she was summarily dismissed. The Claimant pleaded that prior to her dismissal, she was not subjected to any disciplinary proceedings nor was she convicted of any criminal offence. The Claimant further stated that the letter of her summary dismissal was issued while she was on sick leave.
5. The Claimant claims the following:
 - a. 3 ¼ months' salary in lieu of notice.....Kshs. 395,638.75
 - b. Salary for February to May 2009 less Kshs. 6,851.45 paid in February 2009.....Kshs. 480,089.00
 - c. 12 months' salary in compensation.....Kshs. 1,460,829.60
 - d. Recommendation letter and certificate of service

e. costs and interest

The Respondent's Case

6. In its amended Statement of Response, the Respondent admitted having employed the Claimant on 24th May 1989 in the position of Electrical Wire Lady III at an initial monthly salary of Kshs. 1,240 plus a house allowance of Kshs. 695.
7. On 9th December 2008, investigations by the Respondent's security officers revealed theft of aluminium cables from the Respondent's stores which were later sold to Kenya Ports Authority in Mombasa.
8. The investigations further revealed that the Claimant had introduced her cousin, one Timothy Mureithi Muhia to her business partner, George Ndungu Mungai. Muhia had won a tender to supply electrical materials to Kenya Ports Authority and had approached the Claimant with a view to securing cables from the Respondent. Mungai then went to the Respondent's Nairobi South Store from where the cables were removed.
9. According to the investigation report, the Claimant was the schemer in the removal of 1700 metres of 25 mm aluminium cables from the Respondent's Nairobi South Store to be sold to Muhia for supply to Kenya Ports Authority between 26th May and 13th June 2008. Six members of staff including the Claimant facilitated the theft of the cables.
10. It was also discovered from the investigations that the Claimant and her business partner, Mungai were paid Kshs. 700,000 from the illegal sale.
11. On 17th December 2008, the Respondent issued a show cause letter to the Claimant requiring her to give an explanation regarding the theft of the aluminium cables within 72 hours. On 31st December 2008, the Claimant wrote to the Respondent denying any knowledge of the theft of the aluminium cables and on 28th January 2009, the Claimant was summarily dismissed.
12. It is the Respondent's case that the Claimant's summary dismissal was lawful and fair in accordance with the law and the applicable Collective Bargaining Agreement. She was paid all her terminal benefits. The Respondent denied that the summary dismissal letter was issued while the Claimant was on sick leave. The Respondent further denied that the Claimant was on duty between February and March 2009 since she had already been dismissed.

Findings and Determination

13. The issues for determination before this Court are as follows:
 - a. Whether the termination of the Claimant's employment was justifiable
 - b. Whether the procedure adopted by the Respondent was lawful and fair
 - c. Whether the Claimant is entitled to the reliefs sought

Reason for Termination

14. Section 43 of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the

services of the employee.

15. Section 45 (2) of the Act states as follows:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility;

or

(ii) based on the operational requirements of the employer and that;

(c) That the employment was terminated in accordance with fair procedure.

16. On 17th December 2008, the Respondent issued a show cause letter to the Claimant in the following terms:

“A security investigations report dated 9th December 2008 on the theft of two drums of Aluminium cables from Nairobi South Store and later sold to Kenya Ports Authority refers.

According to the report, it has been discovered that you were the schemer of the theft of 1700 metres of 25 mm aluminium cables from Nairobi South to be sold to a tenderer from Kenya Ports Authority Mombasa between 26th May 2008 and 13th June 2008.

Consequently you were also paid some Kshs. 700,000/= by an unscrupulous tenderer to defraud the company in liaison with other named members of staff.

Management views your action involvement in fraudulent and is contemplating severe disciplinary action against you including summary dismissal from employment.(sic)

However, before any action is taken, you are hereby given a chance to show cause why disciplinary action should not be taken against you.

Yours faithfully

For: THE KENYA POWER AND LIGHTING CO. LIMITED

JOSHUA MWANGI

AG. CHIEF MANAGER, NAIROBI REGION”

17. The Claimant responded to the show cause letter on 31st December 2008 as follows:

“Reference is made to your letter dated 17/12/08 and want to state that I have been diligently working for KPLC for the last 17 years without any fraud related activity and have been saddened to be told of involvement in theft of company materials which I feel I do not know anything about it.(sic)

My introduction of Mureithi to Mungai was in good intention because I told him to look for cables either in East African Cables or any other company since KPLC does not sell cables, I did not tell them to steal from KPLC. Am based in Electricity House Revenue Protection Unit, and could not have done

any such action in the stores, and deeply not in any event receive any amount of money as indicated in the letter. I do not know what went on between them.(sic)

Yours faithfully

Grace Wairimu Watene

S/N 9786”

18. The Claimant was eventually summarily dismissed by letter dated 28th January 2009 which states *inter alia*:

“Reference is made to our Explanation letter to you dated 17th December 2008 on theft of Aluminium cables from Nairobi South Store.

The response you gave has been found unacceptable by Management and in accordance with Clause 25 (Twenty five) of the current Collective Bargaining Agreement on your terms and conditions of employment, we regret to inform you that you have been summarily dismissed from the service of this Company with effect from 28th January 2009.

Yours faithfully

For: THE KENYA POWER & LIGHTING CO. LTD.

Eng. Joseph Masibo

CHIEF MANAGER, NAIROBI REGION”

19. From the correspondence above cited, the reason for the termination of the Claimant's employment was her alleged involvement in the theft of aluminium cables from the Respondent's store in Nairobi South. On her part, the Claimant denied any such involvement.

20. She however admitted, both in her statement to the Police and in her response to the show cause letter, having asked her business partner, George Mungai to assist her cousin Timothy Mureithi Muhia access some cables. The Claimant further stated in her statement that her cousin later told her that the cable he had delivered to Kenya Ports Authority had been confiscated because it had a KPLC label.

21. The Claimant told the Court that because she was not charged with any criminal offence, then the Respondent had no valid reason to dismiss her. In my view, the position taken by the Claimant in this regard is a misapprehension of the nexus between a criminal charge and internal disciplinary proceedings facing an employee.

22. In the case of ***David O. Owino Vs Kenya Institute of Special Education (Industrial Court Cause No 453 of 2012)*** this Court held that:

“a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”

23. To my mind, the burden imposed on the employer by Section 43 of the Employment Act, 2007 is to establish a valid reason that would cause a reasonable employer to terminate the employment of an employee. The standard of proof in this case is not beyond reasonable doubt but on a balance of probability.

24. Having evaluated the circumstances surrounding the Claimant's disciplinary case with specific attention to the Claimant's own statement and that of her business partner, George Ndungu Mungai, I have arrived at the conclusion that the Respondent had a valid reason to terminate the Claimant's employment.

Termination Procedure

25. Having established that the Respondent had a valid reason to terminate the Claimant's employment, I will now examine the procedure used in effecting the termination.

26. Section 41 of the Employment Act, 2007 establishes the procedure for handling cases of misconduct as follows:

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

27. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

28. The Claimant was accused of what is commonly known as gross misconduct and as was held by **Ongaya J** in the case of **Shankar Saklani Vs DHL Forwarding (K) Limited [2012] eKLR** even in cases of summary dismissal a hearing and notification as envisaged under Section 41 of the Employment Act, 2007 is mandatory and necessary.

29. Apart from the notice to show cause issued to the Claimant and her response thereto, there was no further evidence of compliance with the provisions of Section 41. There was also no evidence of the Claimant having been heard in the manner envisaged by the applicable Collective Bargaining Agreement. I therefore find the termination of the Claimant's employment unfair for want of due process.

Reliefs

30. In light of the foregoing findings, I award the Claimant 8 months' salary in compensation for unfair termination of employment. I also award her 3 ¼ months' salary as notice pay as provided in the Collective Bargaining Agreement. The claim for salary for February to May 2009 was not proved and is dismissed. The claim for leave pay raised in the Claimant's final submissions was neither pleaded nor proved and is also dismissed.

31. In the final analysis, I make an award in favour of the Claimant as follows:

a. 8 months' salary in compensation for

unfair termination.....Kshs. 973,886

b. 3 ¼ months' salary in lieu of notice.....Kshs. 395,641

Total.....Kshs. 1,369,527

32. The Claimant is also entitled to a certificate of service and the costs of this case.

33. The award amount will attract interest at court rates from the date of the award until payment in full.

34. This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF
MAY 2014**

LINNET NDOLO

JUDGE

Appearance:

Miss Musembi for the Claimant

Mr. Ouma for the Respondent