



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 782 OF 2011

BETWEEN

KENYA ELECTRICAL TRADES & ALLIED

WORKERS UNION.....CLAIMANT

VERSUS

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

Rika J

CC. Edward Kidemi

Mr. Cyprian Onyony instructed by Onyony & Company Advocates for the Claimant

Mr. Harrison Okeche and Ms. Lorraine Oyombe Advocates, instructed by the Federation of Kenya Employers [F.K.E] for the Respondent

ISSUE IN DISPUTE:UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. This Claim is brought by the Claimant Union, on behalf of its Member Ms. Fauzia Said Faud [Grievant]. She was employed by the Respondent State Company as a General Worker, on 2nd March 1992. She gradually rose to hold the position of Clerk, Grade 5. On 28th July 2008, the Respondent terminated her contract of employment alleging the Grievant engaged in absenteeism, lateness and poor work performance. She disputes the validity and fairness of these termination grounds, and the fairness of procedure. She prays for the following Orders:-

- a. A declaration that termination was illegal, unlawful, unjustified, hence null and void;
- b. A declaration that she was not given a proper opportunity to defend herself, seek appeal and review the Respondent's decision, as envisaged by Section 41 and 45 of the Employment Act 2007;

c. Reinstatement of the Grievant to her position without loss of service and benefits; and

d. Payment of salaries and allowances for the entire period the Grievant was out of employment.

2. The Respondent agrees the Grievant was its Employee. She was employed on the date and in the position, shown in the Statement of Claim. Her contract was terminated by the Respondent on 28th July 2008 on fair and valid grounds. She was guilty of absenteeism and poor work attitude and performance. She was treated fairly, given the opportunity to explain herself on a number of occasions, but offered no acceptable explanation. The dispute was reported to the Minister for Labour. The resultant Conciliator's Report was not helpful to the Parties. The Respondent prays the Court to uphold its termination decision, and throw out the Claim, with costs to the Respondent.

3. Fauzia testified, and closed her case on 10th July 2013. The Respondent gave evidence through its Debt Controller Anne Wangare on 17th February 2014, when the hearing closed. The Learned Counsel for the respective Parties underscored their Closing Arguments on 23rd July 2014. The Award was reserved for 7th November 2014. The date for the delivery of the Award was brought forward, as the undersigned Trial Judge has been transferred to Mombasa.

4. The Grievant told the Court she was first employed as a Storeman in March 1992. She was later moved to Data Entry. In April 2008, she moved to Stima Plaza in Nairobi, as a Debt Controller. She was received there by a Supervisor called Anne Maimba.

5. Anne did not receive Fauzia very well at Stima Plaza. The Supervisor asked the Grievant to report to the Electricity House for redeployment. The Grievant was unwell at the time. On 27th May 2008, the Grievant had just come from the hospital. She was slammed with a letter to show cause why disciplinary action should not be taken against her. Anne alleged the Grievant was not performing her work well. Fauzia replied informing the Respondent her health had been poor.

6. After this, Anne kept tossing the Grievant around. The Grievant was asked to see the Senior Debt Controller Mr. Odero. She was then called by the Human Resource Manager Mrs. Wekulo who asked the Grievant if she was sick. Wekulo saw the wounds on the Grievant and commented, "*too bad we have already cut your head!*" The Grievant was handed the letter of termination.

7. The Respondent had an Attendance Register in place. Fauzia was not told of any date during which she was marked as absent. She could only recall one day in 2005 when she was absent from duty, due to her father's illness. She had applied for leave.

8. She was not accorded a hearing. She is a Member of the Claimant Union. The Union was not involved in the termination process. The Claimant and the Respondent had a Recognition Agreement and a valid CBA in place. There was a warning system in the CBA under clause 26. Letters of warning had a lifespan of 6 months. Letters of warning against the Grievant, shown in the Response, had expired under this warning system. The letters could not be useful in determination of subsequent disciplinary action.

9. The Conciliator issued a certificate of disagreement. It was the finding of the Conciliator that the Respondent did not follow the laid down procedure, and recommended the Grievant be reinstated.

10. Fauzia testified the Respondent alleged that she was given to disappearing from the office without lawful authority. She did not attend to work consistently. She at the same time was receiving overtime pay and mileage consistently, which she argued, would not be reflective of inconsistent attendance of duty. She had personal differences with her Supervisor. In 2007, the Grievant obtained a loan from the Respondent, for purchase of a Motor Vehicle. Anne said the Grievant did not deserve to have a Vehicle. She had only served for 1 month at Stima Plaza before her Supervisor requested for her redeployment. Fauzia revealed that she lived in the same Housing Estate with her Supervisor Anne. According to her, Anne thought Fauzia was a husband snatcher. The neighbours had warned the Grievant that Anne had vowed she would have the Grievant dismissed.

11. On 26th July 2008, Anne asked the Grievant to go to Electricity House and collect her letter of termination. The Regional Manager, Mr. Masibo, handed the Claimant the letter of termination. The Grievant had medical procedures carried out on her in the years 2007 and 2008. The Medical records were available to the Respondent. The Respondent paid for the Grievant's medical fees.

12. The Respondent alleged the Grievant did not produce a valid medical certificate, as required under the Employment Act 2007, to support her claim to sick leave. She was treated at the Agha Khan Hospital, which had qualified medical practitioners, with the full knowledge of the Respondent. The Grievant testified she was fighting for her life; the medical bill was met by the Respondent; and it was not proper for the Respondent to feign ignorance of the Grievant's condition. Fauzia worked for 17 years. She received promotion on 18th December 2007, and less than a year later, was summarily dismissed. Anne hated the Grievant with a passion. She was the source of Fauzia's problem. The Grievant testified she was paid 3 months' salary in lieu of notice.

13. Cross-examined, Fauzia testified she was not employed as an Office Messenger, but a Storeman. She did not have documents, other than the pay slip, indicating she was a Storeman. She was educated up to O-level. She did not clear her Form 4, but sat as a private candidate later. She acquired her K.C.S.E in 1993. Termination was in July 2008. She improved her profile by acquiring later in life professional certificates in computer, office management and front office.

14. In July 2008 she was coordinating Private Debt Collectors. She would give to them the details of the Customers. She was not involved in the actual debt collection, because she did not have a reserved zone. Termination was based on absenteeism. Fauzia insisted it was driven by personal differences she had with her Supervisor. Anne engineered the Grievant's downfall, claiming the Grievant did not merit the position. Anne thought the Grievant was a husband snatcher, and did not deserve to own a car.

15. The letter to show cause is dated 16th May 2008. Anne wrote a Memo about the Grievant to Odera. Fauzia denied she was absent or late for duty. She replied she always sought permission on going to hospital. She reported to Stima Plaza on 28th April 2008. She worked under the supervision of Anne for 3 weeks. Fauzia corrected this evidence, stating she actually reported to Stima Plaza in April 2007, not 2008, and had therefore worked under Anne for about 1 year.

16. The first warning letter to the Grievant is dated 16th July 2007. It was written by Mr. Thagiichu Kiiru. She was then at Electricity House. Her first evidence that she reported at Stima Plaza in May 2008, was the correct evidence. She was not under Anne when warning letters issued through Thagichu Kiiru on 19th April 2007 and 16th July 2007, and when the letter of caution issued on 25th May 2006.

17. She appealed against termination. She stated she had asked for permission to go to hospital from the Respondent by word of mouth. She suffered from hernia. She could not go to the hospital without the sick-offs. She photocopied the sick-offs and passed them on to Anne through a colleague Mary Masiba. She did not know if Anne gave the sick-offs to the Management. When the Grievant personally took some of the sick-offs to Anne, Anne would be dismissive saying, "*Weka hapo; unakuanga mgonjwa saa yote.*" [Kiswahili for "Drop it there. You are always sick."]

18. The Respondent gave its Employees a booklet with standard sick-off sheets. The Doctor and the Human Resource Officer would sign. Fauzia did not know who signed her sheets from the Human Resource Office. Anne did not believe the Grievant was sick. It was only Kevina from the Human Resource Office, who confirmed on 25th July 2008, that the Grievant had an operation. This after the Grievant lost her job.

19. There were no targets set for the Grievant in performing her duties. The meeting captured in minute 02/2007 mentioned 'target.' There were no targets, as the Grievant did not have an allocated zone. She occasionally gave her outputs to those who had zones. She informed Anne about the second operation. The Respondent was aware. The Respondent was required by the CBA, under clause 26, to inform the Claimant's Union. She was paid 3 months' salary in lieu of notice; salary for July; and pending leave

days. She did not collect the cheque, and has not received her pension. She reiterated her desire to be reinstated.

20. Fauzia closed her evidence on redirection, by pointing out that the termination letter shows 73 days of pending annual leave. This would not be the case if she was given to unauthorized absenteeism. Clause 30 of the CBA required the Union to be involved in the disciplinary process. The Respondent asked for, and was supplied by the Grievant, her academic and professional certificates, on recruiting her. She was computer proficient. The minutes of 12th February 2007 did not show any targets set for the Grievant. Kevina was in the Human Resource Management. She physically observed the Grievant. The Employees registered their time in and out. Anne kept custody of this record. The Grievant was promoted because of her good performance.

21. Anne testified she knew the Grievant well and supervised her. Fauzia was expected to collect debts, following the accounts given to her. The Officers under Anne visited debtors, updated accounts and took the proceedings collected to the Office. Performance of the Officers was evaluated based on this. The Grievant's performance was poor.

22. Fauzia did not update incidents. She roamed around when asked to visit debtors, and her collection levels were low. Anne was asked to forward a report on the Grievant by the Management to the Regional Debt Manager Odero. Fauzia was dismissed. The reasons for this included idleness, absenteeism, and poor performance.

23. She was requested to show cause why disciplinary action should be taken, before dismissal. She wrote saying she had been unwell. She would forward letters to Anne from the hospital, saying she was unwell, and on other occasions, saying she had domestic problems. She once gave to Anne a sick-off sheet, and was later found hawking shoes in the marketplace. She lacked the skills and the commitment. Anne did not recall when the Grievant started working under her supervision, but she worked on aggregate for a short period of time. There were letters issued to her by other Supervisors over time, for the same reasons of absenteeism and poor performance.

24. Anne testified she gave the Grievant sick off, whenever she presented sick-off sheets. Anne did not know where the Grievant lived, and cared less where the Grievant lived. Fauzia once confided in Anne that she had marital problems. Anne told her she also had marital problems, but such problems should have been kept out of the workplace. It was not suggested by the Witness that Fauzia was a husband snatcher.

25. Anne told the Court on cross-examination that she reviewed the Grievant's performance daily, from the debts collected. The Grievant took a long time to dispatch letters. She worked under Anne, and was initially employed as Office Messenger. Fauzia joined the Debt Collection Section in March 2005, and left 24th March 2008. She served the Section for 3 years. Anne could only assess and comment on the Grievant's performance for the 6 months the two worked together. The reasons for termination were absenteeism; lateness; and poor work performance.

26. The letter calling on the Grievant to show cause, did not say when the Grievant was late for work. It was not shown when she disappeared from work without permission. It was not shown which targets she failed to meet. The letter alleged she was negligent; it did not point out what act of negligence she was engaged in.

27. The CBA guided management on the disciplinary process. Clause 26 dealt with warnings. Anne held that the warnings ranging from 1995 were relevant. She did not have an explanation why this was so, given the validity period for warnings, under the CBA. It was not shown that the Grievant was issued 1st, 2nd and 3rd warning letters before termination.

28. Fauzia was promoted on 18th December 2007. Anne was not able to say why she was promoted. The Grievant was paid for overtime work done, and mileage allowance. Anne confirmed the Grievant worked

to be paid these. Anne was not aware that the Grievant received long service award. This would not be based, in any event, on performance. Anne was not able to say when she exactly assessed the Grievant's performance. Fauzia worked under Odero before being placed under Anne's supervision. Odero was aware of the Grievant's performance before he sent her to serve under Anne.

29. Debt controllers had a meeting in Nairobi. The Grievant alleged Anne wanted to have her laid off. Anne did not have access to her file. Fauzia was not the subject of this meeting. It was a regular meeting. Anne learnt there was a dispute between the Parties after the report was made by the Claimant Union to the Minister for Labour.

30. Anne testified that the Conciliator concluded Section 41 and 45 of the Employment Act 2007 were not followed. It was recommended the Grievant be reinstated. Anne did not know why the Grievant was not. Fauzia consulted Anne one time, about Fauzia's husband. It was not true that the two ladies knew each other very well. She mentioned about her medical problems to Anne. It was the same time Anne found Fauzia hawking shoes in the streets.

31. The Employees were given in-service training. There was no evidence of training given to Fauzia. It would be wrong to say Anne was malicious. Anne did not assign the Grievant a debt collection zone. She wanted to observe her first.

32. Anne concluded her evidence on redirection with the evidence that she was not the custodian of the Parties' CBA, but had an idea what it contained. It was not known to Anne if the Grievant was heard or not. The sick-off sheets presented to Anne by the Grievant, did not relate to the same dates relating to the allegations against her, on absenteeism. Overtime was paid if an Employee was consistently present. It was not an indicator of good performance. She would not be paid mileage if she was absent. Warning letters need not be numbered as 1st, 2nd and 3rd.

33. In her Closing Arguments, the Grievant submits that her Trade Union was not involved in her disciplinary process. There was no hearing as contemplated under Section 41 of the Employment Act 2007. Termination was procedurally unfair. There was no substantive justification. Fauzia's performance was not wanting. There was no appraisal carried out, with specific performance targets. Whenever the Grievant was absent, it was because she was in hospital. Medical bills were met by the Respondent, and the Respondent knew of the Grievant's whereabouts. No medical certificate would be required. The Claimant asks the Court to uphold the Claim, and reinstate the Grievant.

34. The Respondent submits there were valid and fair reasons for termination. The Grievant was absent. She alleged she was sick and attending hospital. She did not satisfy Section 30 of the Employment Act 2007. She gave no medical certificate. In her appeal against dismissal, she stated she was ill, and informed her Supervisor through phone. Her employment record was tainted. She had a long history of absence without leave. She was given an opportunity to explain herself. She did not do so. Her receipt of overtime pay did not show she was a good performer; she was merely compensated for excess hours worked. She chaired debt control meetings where targets were discussed. She does not deserve reinstatement

The Court Finds and Awards:-

35. The Grievant was employed by the Respondent on 2nd March 1992. The Respondent states she was an Office Messenger, while the Claimant states the Grievant was a General Labourer. The letter of appointment dated 27th February 1992 designated the Grievant as an Office Messenger.

36. There is no dispute that she rose to become a Storeman, and eventually became a Debt Controller. She was a Member of the Claimant Union, and her terms and conditions of service, subject to the CBA concluded between the Claimant Union and the Respondent.

37. The Respondent issued the Grievant a letter to show cause dated 16th May 2008, alleging the Grievant

did not report to work consistently; she on occasion reported late; and had a tendency of disappearing from Office without authorization. The letter went on to say that Management viewed this as negligence.

38. The Grievant replied on 22nd May 2008. She denied being negligent. She pointed out her health had not been very good. She had a surgical procedure in 2007 and was due to have another on 23rd May 2008 [day following her reply]. She attached an admission letter. She stated she had always asked for permission, which was granted verbally, any time she left for hospital.

39. The Respondent wrote the letter of termination on 24th May 2008, explaining that the response by the Grievant was unacceptable. Termination was effective from 28th July 2008. She was offered salary up to and including 28th July 2008; three and quarter month's basic salary in lieu of notice; and pay for 73 days of annual leave.

40. Section 43 and 45 of the Employment Act 2007 requires the Employer to establish valid and fair reason or reasons for termination. Section 41 and 45 requires the decision is made following a fair procedure. The CBA under clause 25 required Employees dismissed for gross misconduct, as defined under the Employment Act Cap 226 [and as amended from time to time], are given the opportunity to defend themselves. Clause 26 contained a gradual warning system for offences other than gross misconduct. The validity period for the first letter was 6 months; 9 months for the second; and 9 months for the third and final warning.

41. The issues for consideration are, as traditionally is the case with Claims for unfair termination, whether the Respondent satisfied the demands for substantive and procedural justice, and if not, whether the Grievant should be reinstated as is her preference, or compensated under Section 49 of the Employment Act and Section 12 and 15 of the Labour Institutions Act 2007.

42. The Grievant provided the Court with letters from the Respondent, promoting or rewarding her performance in other ways, issued over the years. She started off in 1992 as an Office Messenger, and after 17 years, left in the position of Debt Controller.

43. The promotion and redesignation letters would suggest to the Court, particularly in the absence of any record of performance appraisal showing otherwise, that the Grievant played her role satisfactorily. She was given a letter of promotion on 18th December 2007, about 6 months before termination. The explanation by Anne that she evaluated Fauzia daily from the debt collection returns, and found her wanting, was not substantiated. There were no documents supporting this poor performance. There would have to be other valid and fair reasons to justify termination, other than poor performance.

44. The Respondent alluded to negligence in the letter of termination. The details of negligence were not revealed in the letter of termination, or in the evidence marshaled by the Respondent. Negligence is an employment offence under Section 44 [4] of the Employment Act 2007. An Employer alleging an Employee was negligent must provide the Court with details of omission or commission, comprising the offence of negligence. No such details are captured in the pleadings, evidence and submissions of the Respondent. Negligence was not a valid or fair termination reason.

45. The last substantive ground in justifying termination was given by the Respondent to be the Grievant's persistent absence without leave from work. She was also said the report to work late. There was a recording of reporting and departing time done by the Respondent. These records were not made available to the Court. The Grievant confirmed she signed time-in and time-out. The only way to establish the validity of lateness for duty, as a ground for termination, was for the Respondent to supply the Court with the time register, indicating dates when the Grievant reported to work late. This ground was not established.

46. Most of the substantive justification revolved around the charge of absence from duty without authorization. The Respondent alleged the Grievant did not provide medical certificate from a qualified medical practitioner, to support her explanation that she was away on treatment, as required under Section

30 of the Employment Act 2007.

47. This law requires an Employee, to be entitled to sick leave with full pay, to notify or cause to be notified the Employer, as soon as practicably reasonable, the Employee's absence and the reason for it.

48. There were medical certificates issued by the Agha Khan Hospital showing the Grievant was hospitalized on various dates. She had surgery on different occasions, and the Respondent was made aware, and even paid the bills. The sick – offs were delivered to Anne, and the absence of the Grievant from duty could not be said to be unlawful or without reasonable cause. Even on the date the Grievant was asked to show cause why disciplinary action should issue, she had already been booked for umbilicoplasty on 24th May 2008. She attached a letter of admission. The Respondent appears to have ignored this and gone ahead to dismiss the Claimant on 28th July 2008. What manner of an Employer dismisses an Employee who has hardly recovered from a surgical procedure, on the allegation that the Employee was absent without authorization or lawful cause, while such absence is clearly attributable to the Employee's illness and hospitalization?

49. The past warnings from as far back as 1995 issued to Fauzia, long ceased to have validity under Clause 26 of the CBA, and could not be useful in justifying termination, whether before the disciplinary, or judicial forum.

50. There was a strong hint from the evidence of the Parties, that a certain degree of malice was present, in the process leading to the termination decision. Much of this revolved around the relationship between Anne and Fauzia. The Court believed the evidence of the Grievant that her Supervisor thought she was a husband snatcher. The two ladies lived in the same neighbourhood, and were familiar with each other, occasionally discussing, and confiding in each other, about their disappointing husbands. It is believable that as this relationship unfurled, distrust in each other's motives arose, and permeated the employment relationship.

51. The Grievant purchased a car through a loan from the Employer; her Supervisor felt the Grievant did not deserve this, and turned green with envy. Fauzia worked for only about 6 months under the supervision of Anne. Her 17 years of commendable service were turned on their head, in a span of 6 months.

52. She would take the sick-off sheets to Anne. Anne was dismissive, telling Fauzia '*Weka hapo; Unakuanga mgonjwa saa yote!*' The atmosphere was poisoned. When she went to the Human Resource Office, the wounds on the Claimant were still visible to the Human Resource Manager Mrs. Wekulo. Very lacking in empathy, and displaying an attitude that bordered on the bizarre, Mrs. Wekulo simply told the Grievant, '*too bad we have already cut your head!*' and handed the Grievant the termination letter.

53. There was no evidence provided by the Respondent to establish the case for absenteeism, lateness, negligence, or poor performance. Termination was unfair for want of substantive justification.

54. The procedure did not meet the standards for fairness laid out under Section 41 and 45 of the Employment Act 2007. The letter to show cause gave the Grievant general accusations. There were no specific dates when she went to work late or avoided work altogether. No details of negligence were stated. Section 41 requires the Employee is given specific charges to be able to make a proper response.

55. The Grievant responded on 25th May 2008. She was at the time being prepared for theatre, and the Respondent was aware of this. She denied accusation of negligence and explained her absence was due to her illness, authorized and with lawful cause.

56. The Respondent did not hear her. There was no disciplinary session, before any disciplinary forum, where the Grievant was heard in the manner prescribed under Section 41. The Respondent went on with the process knowing the Grievant was ill and undergoing surgery. This was against the rules of fairness, equity and natural justice envisaged by Section 45 of the Employment Act 2007.

57. In the end, the Respondent terminated the Grievant's contract with effect from 28th July 2008. It was stated in a general way, that the response given by the Grievant in her reply to the letter to show cause, was unacceptable. It was not said why the response was unacceptable. The Grievant appealed. There is no record of an appeal hearing.

58. These departures from the minimum statutory procedural standards of fairness were of a fundamental nature, as convince the Court to conclude termination was unfair on account of breach of procedure. The Respondent went against the standards established on procedural fairness in the Employment Act and the CBA.

59. The Claimant urges the Court to order for reinstatement of the Grievant. The Conciliator appointed by the Minister recommended as much. Termination took place in 2008, some 6 years ago. Although the Employment Act 2007 and the Labour Institutions Act did not place a limit of 3 years from the date of termination on the Court, in awarding the remedy of reinstatement, as is presently the case under the Industrial Court Act 2011, the decisions of the Industrial Court have long established that reinstatement is not a suitable remedy to issue, where long periods of time have lapsed, from the date of termination. Employment relationships are dynamic, and workplaces fast evolving. Beside this, Fauzia was a long serving Employee, having worked for 17 years as at the time of termination. She had received a long service award, and though not ripe for retirement, would clearly be said to have enjoyed a longstanding relationship with the Respondent. It would not add to her professional development to send her back to the Respondent. Conversely, she would not add value to the Respondent, in an atmosphere of mutual trust and confidence. After 6 years of interruption in the relationship, it would be difficult to reconstruct the values of mutual trust and confidence. Reinstatement is neither reasonable, nor practicable in the circumstances and is declined.

60. The Grievant earned a basic salary of Kshs. 35,569 and house rent allowance of Kshs. 7,500. Other allowances such as mileage were variable allowances. Adopting the consolidated sum of Kshs. 43,069 as the gross pay, ***the Court grants to the Grievant 10 months' gross salary at Kshs. 430,690 as compensation for unfair termination.***

61. ***The termination is declared unlawful and unfair.*** Other declarations sought are of no use to the Grievant, the Court having commented *obiter dictum*, on the grievances these other declarations are meant to redress. These are general declarations which would have no executory purpose and are rejected.

62. ***The Respondent shall pay to the Grievant salary up to and including 28th July 2008; three and a quarter months' basis salary in lieu of notice; and annual leave pay of 73 days, as offered in the letter of termination dated 24th July 2008. There shall be no order on the costs and interest.*** In all:-

- a. ***Termination was unfair both on substantive and procedural grounds;***
- b. ***The Respondent shall within 30 days of the delivery of this Award, pay to the Grievant 10 months' gross salary in compensation for unfair termination, calculated at Kshs. 430,690;***
- c. ***The Respondent shall within the same period, pay to the Grievant salary up to and including 28th July 2008, three and a quarter months' basic salary in lieu of notice, and annual leave pay of 73 days, as offered in the letter of termination dated 24th July 2008; and***
- d. ***No order on the costs and interest.***

Dated and delivered at Nairobi this 18th day of September 2014

James Rika

Judge

