



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 34 of 2012**

**ALEX KIRIRO MBELLE.....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

The claimant has sued the respondent, his former employer alleging wrongful dismissal from employment and prays for the following reliefs:-

1. Declaration that the dismissal from employment was wrongful.
2. General damages for wrongful dismissal.
3. Reinstatement to employment.
4. In the alternative the respondent to pay him one month salary of Kshs.15,654.00 in lieu of notice plus service pay of Kshs.23,481.00 which total to Kshs.39,135.00.
5. Respondent to issue the claimant with a certificate of service.
6. Any other relief which I consider just to grant.
7. Costs.

The respondent has strongly opposed the claim vide her defence filed on 22.8.2012. She contents that the procedure for dismissal was fair and the reason therefore was valid and as such the relief sought should not be granted.

The suit was heard on 10.12.2012 when the claimant testified as CW1 and the respondent called Joseph Kimeu Mbaluka as RW1.

CW1 testified that he was employed by the respondent on 4.6.2007 as a craftsman and worked continuously until April 2010 when he was summarily dismissed.

That on 7<sup>th</sup> and 8<sup>th</sup> April 2010, he was lawfully off duty and resumed on 9.4.2010 in the morning. That on arrival, a security officer of Kengen (Landlord) stopped him at the gate, detained his phone and asked him to wait outside the gate. That he stayed there until 1.00pm when RW1 came to the station and after talking with the said security guard, came out and gave back the detained phone and orally told him to go home.

That after 3 days the claimant received a show cause letter charging him with fraud to which he responded denying the allegation. That on 28.4.2010, he received a letter for his summary dismissal. He avers that he was never given a fair hearing by his boss and prays for the relief sought to be granted.

On cross examination, he admitted that he was given a show cause letter to which he responded to before being dismissed. He further explained that on the night of 7-8<sup>th</sup> April 2010, he was on a drinking adventure with friends at Kisimani estate. That one of his friends called Gadaffi requested for his (CW1) phone to make a call and that also his (CW1) suspicious wife also used his phone on a witch-hunting expedition the same night.

That his wife called D-RPV using CW1's line, number 0713906881 thinking that it was girlfriend. That it turned out to her that DKPV was his work place at Kipevu.

RW1 testified that he was the Chief Superintendent Coast Region for the respondent in April 2010. He confirmed that the claimant was employed by the respondent at Kipevu station.

That on 9.4.2010, he went to Kipevu station after receiving report from security in charge that there was attempted theft of equipment and that a staff member was involved through use of his phone to alert the security officers to allow a stranger to access the station to steal. That he CW1's phone was used to call security officers as reported on the night of 7 – 8th April 2010. That the Kengen security office then told him to dismiss the CW1 because he was not wanted into the Kipevu station again.

He obliged by sending CW1 home and reported to the respondent and then served a show cause letter on the claimant on 13.4.2010. That the claimant responded on 15.4.2010. That investigation was done by the Kengen security guards not him(DW1). That he then dismissed the claimant by letter dated 28.4.2010.

On cross examination, he admitted that no criminal proceedings were preferred against the claimant. He also confirmed that nothing was stolen but contented that the claimant's phone was used to aid vandals to go and steal. He also confirmed that Dennis was employed by security firm at Kipevu.

I have carefully considered the pleadings, evidence and the submission filed at the close of the trial.

It is not disputed that the parties herein were bound by contract of employment.

The issues for determination are:-

- (a) Whether the respondent breached the said contract by wrongfully and unfairly dismissing the claimant summarily.
- (b) Whether the orders sought ought to be granted.

In answer to the first issue, I have considered the provisions of section 41 and 45 of the Employment Act which require termination only upon valid reason and after a fair procedure. Section 41 in mandatory terms provides that before terminating employment on ground of gross misconduct, an employer must explain the reason in language he understands and in the presence of a colleague or a shop-floor representative of his union and then consider any representations that they may make. It is my view that the dismissal of the claimant was not procedural for failing to comply with the said provision of the law before any action was taken to his detriment.

I believe the evidence of the DW1 that he told the claimant to go home after the security office of Kengen refused to allow him to work at the station. That DW1 reported the matter to the Respondent and served a notice to show cause on the claimant.

I agree with the respondent's submission that fair hearing does not always mean oral hearing. In the present case, the claimant was invited to explain himself in working before dismissal which he did. I have noted that his representations were considered by the employer before the decision to dismiss him was arrived at. I however still find that claimant was denied the right to the kind of hearing as contemplated by section 41 aforesaid especially when he was a member of a trade union.

In addition I find it rather difficult to believe that the reasons for dismissal were valid. The burden is squarely upon the employer to prove that the employee committed the misconduct that is alleged to have occasioned the summary dismissal.

In the present case all the DW1 told the court is that he received a report from a security officer of the respondent's landlord. That is all hearsay. He did not call the said security officer to testify at least to tell the court how he discovered the fraud and substantiate how the claimant was involved.

In my view, there is more than meets the eye in this case. Possibly there was a bad blood between the claimant and the said security officer at the station.

Finally the fact that the allegation of vandalism was very grave and yet no report was made to the police, I am only left with the conclusion that the respondent did not have a clear case backed by reasonable suspicion to warrant summary dismissal. To that extent the summary dismissal was wrongful and unfair.

As regards the second issue, I enter judgment in terms of prayer 1, 4, 5, and 7 of the claim. I decline to order reinstatement in view of the fact that the Respondent does not wish to continue employing the claimant.

I will also not grant the prayer for general damages because the law does not provide for it but I will grant prayer 6 by awarding a 6 month salary for unfair termination.

Consequently, the respondent is ordered:-

1. To pay the claimant:-

(a) One month salary in lieu of notice.....15654.00

(b) Six months salary from unfair termination.....93924.00

109578.00

2. To issue the claimant with a certificate of service.

3. Pay costs and interest.

Orders accordingly.

**Signed, Dated and Delivered** on the 8<sup>th</sup> day of February 2013.

**Onesmus N. Makau**

**JUDGE**