



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 115 OF 2013**

**(Formerly Cause No. 1678 of 2011 at Nairobi)**

**EDWARD ALIELA MUSAMBAYI.....CLAIMANT**

**-VERSUS-**

**KENYA POWER AND LIGHTING COMPANY LIMITED.....**  
**RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20<sup>th</sup> September, 2013)

**JUDGMENT**

The claimant **Edward Aliela Musambayi** filed the statement of claim on 03.10.2011 through Mwinamo Lugonzo & Company Advocates. The claimant prayed for an award against the respondent for:

- a. **A declaration that clause 13 of the Employment Agreement between the claimant and the respondent is unconstitutional and in breach of the Employment Act.**
- b. **The claimant be reinstated to his former employment without any loss of benefits and seniority.**
- c. **A declaration that the claimant's employment services with the respondent were wrongly terminated, unlawfully summarily dismissed and unfairly.**
- d. **Termination benefits and gratuity for the twenty six years (26) the claimant worked.**
- e. **Earnings for fourteen years (14) the claimant would have worked at the rate of Kshs.182,115.30 per month.**
- f. **Service pay.**
- g. **Three months salary in lieu of notice of termination of employment.**
- h. **Costs of the claim and interest.**
- i. **Any other or further relief that this honourable court may deem fit and just to grant.**

The respondent Kenya Power and Lighting Company Limited filed the memorandum of defence on 01.11.2012 through Harrison Okeche Advocate, the Senior Executive Officer of the Federation of Kenya Employers. The respondent prayed that the court finds that the termination was lawful and fair and to

uphold the decision to terminate the services of the claimant and for the suit to be dismissed with costs.

The case was fixed for hearing on 17.7.2013 when the parties agreed that the case be determined on the basis of the documents on record and the parties' final submissions that were subsequently filed.

The facts and circumstances of the case are as follows. The claimant was engaged by the respondent since 8.5.1985 as a trainee and subsequently absorbed into the permanent and pensionable status with effect from 1.07.1988.

The parties concluded an employment agreement dated 1.9.2008 and effective 1.12.2007 under which the claimant was appointed to the position of a foreman. The agreement stated the date of the current engagement to be 1.07.1988.

By the letter dated 6.5.2010, the respondent suspended the claimant from employment in view of a theft of certain transformers from the respondent's workshop that occurred on the night of 27.04.2010. The suspension letter implicated the claimant because, as stated in the letter, the claimant was in possession of one set of keys to the workshop. The respondent subsequently reported the alleged theft to the police. The claimant and two other workmates were accused in criminal case No.2692 of 2010 in the Chief Magistrate Court at Eldoret. The court found that the prosecution had failed to establish a *prima facie* case and the claimant together with the co-accused workmates were acquitted on 16.12.2010 and under section 210 of the Criminal Procedure Code.

By the letter dated 28.12.2010, the respondent lifted the claimant's suspension effective 28.12.2010; obviously in view of the decision in the criminal case. By the letter dated 29.12.2010 the respondent terminated the claimant's employment with effect from 30.12.2010. The termination was in accordance with clause 13 of the employment agreement which provided, thus **"On completion of your probationary period, this agreement may be terminated by either party by giving one month's notice or one month's salary in lieu of notice."**

The claimant appealed against the dismissal citing the court decision in the criminal case and stating that the termination was suspicious in the circumstances. The respondent determined the appeal by upholding the termination.

The issues for determination in this case are as follows:

- a. **Whether clause 13 of the employment agreement was unconstitutional.**
- b. **Whether the termination was an unfair labour practice under Article 41 of the Constitution.**
- c. **Whether the termination was unfair.**
- d. **Whether the claimant is entitled to the prayers made.**

For the claimant, no submissions have been advanced to establish that clause 13 of the employment agreement was unconstitutional. The court considers that the averment and the corresponding prayer were abandoned by the claimant. The relevant prayer will therefore fail. Further, the court finds that the clause as agreed between the parties was valid in so far as it defined the length of the termination notice as opposed to a reason for termination. For the first issue, the court finds that the clause was constitutional in so far as it defined the termination notice.

The next question for determination is whether the termination was unfair labour practice. The court has considered the respondent's elective decision to investigate the claimant through the criminal justice system in view of the alleged misconduct. The respondent's pleadings and submissions are clear that the main reason leading to the claimant's termination were the allegations of theft and the termination was made in obvious disregard of the decision in the criminal case. The court finds that the respondent was bound by the decision in the criminal case and further that the respondent never accorded the claimant a hearing as envisaged in section 41 of the Employment Act, 2007. The court finds that it was an unfair labour practice to invoke the termination notice clause devoid of due process in a case of alleged misconduct and in disregard of the decision in the criminal case on the alleged misconduct. The court

holds that employment relationship is one of utmost good faith and the respondent was bound to conclude the disciplinary case in line with the findings in the criminal case and without fishing around to underhandedly end the claimant's employment. Accordingly, the court finds that the termination was unfair.

The respondent has opposed the prayer for reinstatement because the claimant has fallen out of favour of the respondent. The court has evaluated the material on record and finds that there is no sufficient basis for reinstatement. In the circumstances of this case, the court finds that the claimant is entitled to:

- a. A declaration that the termination was unfair.
- b. One month's pay in lieu of notice being Kshs.61,273.10.
- c. Gross salary for December 2010 being Kshs.182,115.30 at the rate of last pay of May 2010.
- d. Pay for 64 due leave days as computed by the respondent.
- e. Payment of retirement benefits under the agreed Retirement Benefits Scheme.
- f. 6 months gross pay being Kshs.1,092,691.80 at the gross pay of Kshs.182,115.30 in May 2010, the last pay. In making this award, the court has considered that the claimant is also entitled to the agreed retirement benefits under the permanent and pensionable terms of service.

There was no counterclaim and evidence on the alleged claimant's liability to the respondent.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant Kshs.1,336,08.20, plus pay for 64 due leave days as computed by the respondent, and payment for retirement benefits under the agreed Retirement Benefits Scheme.
- c. The respondent to pay the amounts in (b) by 1.12.2013 failing interest to be payable at court rates till full payment.
- d. The respondent to pay costs of the case.

**Signed, dated and delivered in court at Nakuru this Friday, 20<sup>th</sup> September, 2013.**

**BYRAM ONGAYA**

**JUDGE**