



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 162 OF 2012

SIMON ARASA..... CLAIMANT

v

KENYA POWER & LIGHTING CO LTD.....RESPONDENT

JUDGMENT

1. Simon Arasa (Claimant) was employed by Kenya Power & Lighting Co. Ltd (Respondent) on 21 October 1997 as Technician Trainee. He was later promoted to position of Senior Technician.
2. On 5 April 2011 the Respondent terminated the Claimant's employment effective 7 April 2011. The termination letter invoked clause 13 of the employment agreement (Exh. 2). Clause 13 is to the effect that on completion of probation the agreement is terminable by either party giving one month notice or payment of one month salary in lieu of notice.
3. The termination letter informed the Claimant that he would be paid one month salary in lieu of notice, salary upto 7 April 2011 and 67 accumulated leave days less any liabilities.
4. The Claimant did not agree with the termination and on 21 December 2012 he commenced proceedings seeking a declaration that his termination was unlawful and a nullity, reinstatement, full salaries from date of termination to retirement age of 60 years, retirement benefits and costs.

Claimant's pleadings and case

5. The Claimant pleaded that it was an implied term of the employment agreement that he would work until retirement at 60 years and that by letter dated 5 April 2011 the Respondent wrongfully, unfairly and unlawfully and in breach of the employment agreement terminated his services over alleged fraudulent activities.
6. The Claimant gave five particulars of why the termination was unjustified, unfair and unlawful and these can be collapsed into three, briefly that Respondent failed to consider he was not involved in fraudulent activities, not conducting full and proper investigations and that there were no justifiable or valid reasons.
7. As a result of the termination the Claimant pleaded he had suffered loss and damages.
8. In evidence, the Claimant testified that he had received several letters of appreciation and bonuses (Exhs 3-6) and that at time of termination he was earning a cumulative salary of Kshs 137,743/90.
9. After the termination the Claimant stated he appealed but without success.
10. On the issues surrounding his termination, the Claimant stated that the Respondent sought an explanation from him through letter dated 9 February 2011 (Exh 15) for allegedly presenting a false check metre reading of 864 instead of 359 through email in regard to account no. 434714-01. He gave the explanation through letter dated 23 February 2011 (Exh 16). The initial explanation letter had referred to a wrong account number.
11. Regarding the accusations by the Respondent through letter dated 22 February 2011 for abetting unauthorized recovery of original single phase metre number 431593 and not returning the same

- to the stores and upgrading of a line to 3 phase and installation of metre number 60492491, the Claimant denied the accusations and stated that the metre was taken from the stores by one Mwandaru Mwabakari and he only authorized the same. The Claimant stated that the said metre was still a single phase metre and he produced a bill for October 2010 (Exh 21) and that the bills for the account had been paid up to April 2013.
12. On inflation of metre readings, the Claimant stated the same were due to typographical errors and that no revenue had been lost and in any case there was no complaint from the customer.
 13. On the unfairness of the termination, the Claimant testified that it was unfair and he gave four main reasons. These were that the Respondent did not give him specific details of the accusations as required by Staff Regulations, no reasons were given; he was denied an opportunity to be heard and the appeals were determined without hearing him.
 14. During cross examination, the Claimant stated that the Respondent sought explanations from him on 5 different occasions and he provided explanations and no disciplinary action was taken, and that the Respondent carried out investigations and a report was issued. The Claimant confirmed that he was interviewed by the Respondent's Security Manager.

Respondent's pleadings and case

15. The Respondent pleaded that it suspected the Claimant of being involved in fraudulent activities and on 9 February 2011 it sought an explanation and investigations were carried out by the Internal Audit department/Regional Manager which recommended the termination of the Claimant.
16. The termination, it was pleaded was justifiable because the investigations established beyond doubt that the Claimant was involved in fraudulent activities which amounted to gross misconduct. And that the termination was based on clause 13 of the Employment Agreement and sections 35(1)(c), 41, 43 and 44(4)(g) of the Employment Act. According to the Respondent, the Claimant was given an opportunity to be heard and appeal, but the appeal was unsuccessful.
17. The Respondent called 3 witnesses to buttress its case. The first witness was Peter Mulei, the Chief Security Officer who carried out investigations, interviewed the Claimant and the customer and prepared an investigation report which established that the Claimant had debited a customer 2318 units per month from 2005 while the check meter reading was 650 units despite the fact that the customer had been in the premises only from April 2007 and that the Claimant wanted to extort money from the customer. The witness recommended disciplinary action against the Claimant.
18. Respondent's second witness was Joseph Mkomba, Regional Manager Mombasa. The witness testified that the dismissal of the Claimant was in accordance with clause 13 of the employment contract.
19. On the process leading to the dismissal, the witness stated that on 9 February 2011 he wrote to the Claimant seeking his explanation on his presentation of a false check metre report for purposes of adjusting the bill on account number 434714 (the letter indicated wrong account which was rectified through letter of 24 February 2011) which was actually 359 and not 864 as presented by the Claimant (Res Exh 6). The Claimant gave an explanation which was not satisfactory and inconsistent with an audit report (Res Exh 8).
20. The witness also stated that the Claimant was a supervisor looking after Changamwe and Mariakani zones and not Kongowea where account no 434714 was and that the Claimant had removed an old metre but failed to surrender it to the stores as required by the policies of the Respondent. The witness also narrated previous fraudulent activities the Claimant had been involved in 2008 and 2010.
21. The witness also stated that on 16 March 2011 he wrote to the Chief Manager, Commercial Services recommending the termination of the Claimant as a result of which the Claimant was terminated through letter dated 5 April 2011. The Claimant was to be paid one month pay in lieu of notice, days worked, accrued leave less any liabilities.
22. The Respondent's third witness was George Mbui, Internal Auditor. He carried out and prepared a report (Res Exh 9) in regard to account number 434714-01 in the name of Ikahu Kariuki based in Nyali-Ribe zone.
23. The witness stated that the supervisor in charge of the zone was Mr. Kinyua and not the Claimant,

- who was in charge of Changamwe/Mariakani zone and that the Claimant went to a customer outside his zone and changed the metre on 15 October 2010. The Claimant was acting without authority and did not even surrender the old metre he removed.
24. In the course of carrying out the audit, the witness informed the court that he asked the Claimant to write a statement which he did (Res Exh 14). The witness recommended stern disciplinary action against the Claimant and that on 5 April 2011 the Claimant was dismissed.

Questions for determination

25. There are two key questions for determination and these are whether the termination of the Claimant was unfair and if so, appropriate remedies.

Whether the termination was unfair

Procedural fairness

26. Section 41 of the Employment Act requires an employer before terminating the services of an employee to explain to the employee the reasons for which termination is being considered and to hear any explanations by the employee. The employee is entitled to have another employee or union representative present.
27. The Claimant produced through his Reply to Respondent's Response an extract from the Respondent's Staff Regulations on Disciplinary Procedures Staff Rules and Regulations, Revised on 15 June 2001.
28. I will therefore discuss the question of procedural fairness based on the Staff Regulations and section 41 of the Employment Act.
29. The Respondent's Staff Regulations (an extract Exh 39 was produced) require investigations to be carried out in disciplinary cases. Around 9 December 2010 the Respondent's Internal Audit Unit received a request to investigate allegations touching on the conduct of the Claimant in regard to account number 434714-01 and it commenced inquiries. The audit team interviewed and took statements from 3 persons including the Claimant. On 14 March 2011 a draft audit report was forwarded to the Respondent's Managing Director while the final report was completed and submitted on 5 April 2011.
30. The Respondent's Regional Manager, Coast had written to the Claimant on 9 February 2011 seeking his explanations in regard to allegations of presenting a false check metre report in relation to account no. 435558 (this number was wrong but was later rectified through letter of 24 February 2011). The letter was explicit that the Respondent was contemplating taking disciplinary action against the Claimant. The Claimant responded to the letter on 23 February 2011.
31. The Respondent's Staff Regulations require investigations to be carried out and written statements taken from witnesses and employees facing disciplinary process. This was done in the present case. The Regulations also provide for explanation letters. The Claimant received an explanation letter request and gave explanations (Exhs 6, 8, 19, 20 and 27).
32. I am satisfied that the process adopted by the Respondent was substantially in compliance with the requirements of section 41 of the Employment Act and the Respondent's Staff Regulations.

Substantive fairness

33. Section 43 of the Employment Act obliges an employer to prove the reasons for terminating the services of an employee while section 45(2) of the Act require the employer to prove that the reasons were valid and fair reasons. Section 47(5) of the Act on the other hand requires the employer to justify the grounds for termination.
34. The letter terminating the services of the Claimant did not give any reason. The letter merely made reference to clause 13 of the employment contract. Clause 13 provided for termination by either party by giving one month's notice or pay in lieu of notice.
35. This clause taken alone would be illegal under the framework of the Employment Act, 2007. It is what used to be referred to as termination without cause but on notice. Under the present legal framework, an employer must prove the reasons for termination and that the reasons are valid and

- fair.
- 36.The parties did not address me on what would be the legal effect of an employer relying on this type of clause in a situation where an employee had been taken through a disciplinary process but the reasons are not encapsulated in the termination letter. I say no more on the issue.
- 37.In the present case, the Claimant had been taken through a process and he knew that disciplinary action was in the offing.
- 38.The immediate cause and reason of the dismissal of the Claimant was in respect allegations involving a customer Ikahu Karioki and removal of old metre number 60396874 SRN 434714-01 situated within Nyali/Ribe zone.
- 39.One of the reasons proffered in the pleadings and testimony was that the Claimant had moved to purportedly perform duties within the Nyali-Ribe zone when he knew that he was expected to perform his duties within Changamwe/Mariakani zone.
- 40.The Claimant did not deny that he installed a check metre number 60612270 within Nyali/Ribe zone. He also did not deny removing the old metre number 60396874. Data/readings on the check metre installed in respect of the account were manipulated. The Claimant's explanation was that these were typographical errors. He never challenged the Respondent's witnesses on this singular fact nor was there any explanation why he went to perform duties in an area which was not under his jurisdiction.
- 41.I am satisfied that the Respondent has proved the reasons for terminating the services of the Claimant and that it has proved that the reasons were valid and fair.

Conclusion

- 42.In conclusion it is my finding and I hold that the dismissal of the Claimant was not unlawful and was fair because the Respondent has proved the reasons for dismissal and that the reasons were valid and fair.
- 43.I dismiss the Cause herein without any order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 1st day of November 2013.

Radido Stephen

Judge

Appearances

Mr. Omwenga instructed by

Mogaka, Omwenga & Mabeya Advocates for Claimant

Mr. Nduna instructed by Federation of Kenya Employers for Respondent