



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 798 OF 2015

EVANS NYANG'WONO MONDA.....CLAIMANT

-VERSUS-

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant brought this suit on 13.5.2015 and amended the claim on 19.5.2016. He averred that the respondent employed him on 3.11.2006 as a Technician III Operations Job Group 10 and on 14.5.2007 she confirmed him to permanent employee earning Kshs. 119974 per month. On 19.1.2012 was suspended and thereafter dismissed and then brought this suit seeking the following reliefs:

- (a) **Unpaid salary half for 5 months**
- (b) **Payment in lieu of notice one month**
- (c) **Leave payment 41 days balance**
- (d) **Severance pay for 15 days of each completed year (5 years).**
- (e) **Payment in respect of the increment (C.B.A. 11%) 2911-2013**
- (f) **Compensation for unlawful and unfair termination (12) months salary.**
- (g) **Unlawful and wrongful summary dismissal and loss of employment compensation for (21) years' salary to retirement.**
- (h) **Lifting of the summary dismissal on grounds that the committee which sat on a staff disciplinary committee held on 20th March, 2012 against the claimant was unlawfully and wrongly constituted against the provisions of the corporation rules and regulations.**
- (i) **A declaration that the summary dismissal was unlawful and reinstatement of the claimant to his job.**
- (j) **Costs and interest of the claim.**

2. The respondent admitted that she employed the claimant but denied that she dismissed him unfairly as alleged. She averred that the claimant was dismissed for negligent and improper performance of his duty under his contract of service, and that he was accorded a fair hearing before the dismissal and also on his appeal. She counter-claimed against the claimant, Kshs. 170,478 being rent arrears, water bill and garbage collection charges.

3. The court heard evidence from both parties whereby the claimant testified alone but the respondent called three witnesses. After the hearing both parties filed written submissions.

Claimants case

4. The claimant testified that he joined the respondent on 3.11.2006 as a Technician and later rose to become a Controller with the role of supervising other technicians. He held a Diploma in Electrical Engineering and a degree in Industrial Technology.

5. He further testified that on 19.1.2012, he was suspended on allegation of theft at his workplace on 16.1.2012. He contended that the place (Tank farm) is fenced with a perimeter wall and is guarded by police and private guards. To access the farm one has to log in, and technicians

must get permit to do repairs.

6. He testified that on 16.1.2017, he reported to work at the control room and found that all was well except meter no. 1 and that a technician, Mr. Wanyoike was assigned to repair the same. He also found him with a work permit and he signed it for him. Thereafter he went to the Tank Farm and found other mechanical technicians there including Mr. Ochieng, Biwot, Musyimi and Kabechu.

7. He testified further that the mechanics removed the rolling arm for meter no 2 and fixed it on meter no. 1 to allow Mr. Wanyoike to check what was wrong with meter no. 1 and Mr. Wanyoike told him to roll the arm but it indicated zero low alarm meaning that no produce was passing though. He contended that upon further check, Mr. Wanyoike discovered a loose cap halfway severed. He then called the Supervisor, Depot Manager and Security Officer Mr. Injane. They all logged in to access the farm.

8. He denied that he had capacity to do electrical installation on the loading system as alleged by the respondent. He further denied that no fuel was lost when the system gave a zero flow alarm. He maintained that the employer had no valid reason for dismissing him and that is why she kept on changing the accusations from the initial one of theft. He contended that the letter inviting him to the disciplinary hearing cited the charges as theft of 1000 liters of jet fuel on 2.1.2012 but he was not asked to explain the same during the hearing. He contended that the Appeal committee also observed that there was inconsistency in the charges communicated. He further contended that the disciplinary committee was not properly constituted because it was chaired by the HR Manager instead of the Technical Manager as required under the company regulations. He contended that he was dismissed by a letter dated 18.5.2012 for reason not contained in the suspension letter or the letter inviting him to the disciplinary hearing. He therefore prayed for the reliefs set out in his statement of claim.

9. On cross examination he admitted that the suspension letter accused him of theft and offered half salary during the period of suspension. He further admitted that he appeared before a committee for disciplinary hearing and he gave his evidence. He also admitted that he was found liable and he was given a dismissal letter indicating what was payable to him.

10. He admitted further that he went to the Tank Farm to plant check and also proceeded to the loading bay. He also admitted that he asked his colleague, Mr. Nyaga to swap shifts. He reiterated that the composition of the disciplinary committee was not correct but admitted that HR Manager was supposed to be a member of the committee.

Defence case

11. Mr. Lewis Wanyoike Gichuhi, is a Control Technician for the respondent. He testified that on 16.1.2012 Ms. Simiyu, the Controller on duty called him and reported a problem with loading arm at P9. He arrived there at 4 p.m. and Ms. Simiyu, told him that there was a zero floor alarm. According to Mr. Wanyoike the alarm could be caused by no count from the meter or if control valve fails to open.

12. He further testified that he filled a work permit and went to get details of the repairs needed at the Tank Farm. At the entrance he filled the log book specifying that he was going to the loading arm 1. He stated that he logged in as no. 17 while the claimant who went ahead of him had logged as no. 15 and indicated that he was going to plant check. He however found the claimant at the loading area loading. He also found four mechanical personnel there.

13. He further testified that he went back to the control room with the claimant and returned to test the arm after the mechanical personnel fastened the arm. He asked the claimant to load 10000 liters but the computer recorded zero flow. He checked the control valve but it was okay. He realized that the junction box had been interfered with by introduction of a foreign switch in the box. According to him, when the foreign switch was switched off the pulse transmitter died. As a result of the said discovery, he called the claimant's supervisor Mr. Change who called in Security Manager to handle the matter and he left. The following day, he returned to plant farm and did two test loading when the foreign switch was off and when it was on. The system repeated a zero flow alarm when the switch was off but it loaded 10000 liters when the switch was on.

14. Mr. Wanyoike further stated that the intention of installing the foreign switch was to deny accurate capture of volumes. He further stated that mechanical personnel had no knowledge of installing the said switch and contended that the installer had knowledge in electrical engineering. He however admitted that he could not tell how long the switch had been there.

15. On cross-examination Mr. Wanyoike stated that he has worked for the respondent since 2002. He further stated that Ms. Simiyu called him at 2.00 p.m but the zero flow alarm started at 11.00 a.m. He admitted that the claimant was not on duty when the problem started and as such he could not say that it is the claimant who started it. He further admitted that he was given work permit by the claimant a few minutes after 4.00p.m. He admitted that he first went into the Tank farm without work permit but he could not touch any equipment before getting a permit.

16. He further contended that the claimant entered the farm at 4.10 p.m. to plant check and admitted that loading was part of his work. He admitted that zero flow meant that there is no flow.

17. Mr. Jacob Injane testified as RW2. He stated that he is a security officer for the respondent and he investigated the illegal installation of a control switch at the Accu load System. He did the investigation with Mr. Chesaina and prepared a security report. He contended that he interviewed several people including the claimant who admitted that he requested Mr. Nyaga and not the immediate to swap shifts.

18. He further testified that he found the claimant's conduct suspicious because immediately after taking over from Ms. Simiyu as Controller, he signed the logbook at 4.14 p.m. indicating he was going for plant checking and instead went to load yet he had two officers under him whom he could have delegated the work of loading.

19. RW1 further testified that the investigations also established that on 3.1.2012 the claimant reported to afternoon shift at 16.20 hours entered the tank farm for plant check, went for loading product to a truck and failed to indicate the time when he ended loading. He produced

the security report dated 30.1.2012 as an exhibit. He contended that the report indicated that a foreign illegal switch had been installed and recommended for disciplinary action against the claimant. He further testified that the claimant was invited to a disciplinary hearing and where he had also appeared as a witness.

20. On cross examination RW2 contended that the offence occurred on 16.1.2012 and the defect was discovered at 12.30 p.m. by Ms. Simiyu who was in charge of control. He contended that the claimant was not to be on duty that day but he requested Mr. Nyaga and swapped shift without involving their supervisor.

21. RW2 contended that when Ms. Simiyu discovered the defect, she called mechanical department and Mr. Musyimi was called to transfer the hose to arm no. 2. He admitted that the claimant was not present that time but he reported at 4 p.m. He confirmed that when the claimant entered the tank farm he found Mr. Machira, Mr. Kituku and Mr. Kiarie. He admitted that the said people told him that they never saw the claimant interfere with the pump but only went straight to load trucks.

22. He admitted that the claimant had the right to enter the tank farm as the supervisor but contended that he was required to indicate the purpose. He admitted that the investigation team made a finding that the foreign switch was installed on 19.10.2011 but contended that the correct date of installation was 16.1.2012. He further admitted that the claimant requested for shift swap because he had a medical emergency. He admitted that Mr. Nyaga indicated that he reported the swapping of shift to the supervisor Mr. Change.

23. Mr. Ezekiel Cheptumo is respondent's former Senior HR and Industrial Relations Officer for the respondent. He testified as RW3 and stated that an issue of illegal installation of a foreign switch at the Accuload System and siphoning of produce to a local truck at PS 9 on 16.1.2012 was reported and the shift Controller (claimant) was suspended to pave the way for investigations. Thereafter the investigation team recommended for disciplinary action against the claimant and he was invited to a hearing on 20.3.2012 vide the letter dated 15.3.2012. The letter gave him the option of being accompanied by a colleague.

24. RW2 testified that the disciplinary committee heard the claimant but found his explanation unsatisfactory and recommended for his dismissal by the Managing Director. The claimant appealed under the HR rules and his appeal was heard but rejected.

25. As regards the counter claim, RW3 stated that the claimant continued to occupy the company house after the dismissal without paying rent as required for 13 months and as at 6.7.2013, the rent due was Kshs. 156000. He further contended that the respondent incurred cost of repair totaling to Kshs. 14000/-

26. On cross-examination, RW3 contended that the claimant was suspended on an initial report that there was suspected theft of product on 16.1.2012. He contended that investigations done and meter reading indicated that there was loss of 1000 litres. He contended that the letter dated 15.3.2012 indicated all the charges the claimant was to answer at the hearing. He however, admitted that the Appeals Committee found that there were inconsistencies between the letter inviting the claimant for disciplinary hearing and the suspension letter.

27. RW3 admitted that the letter dated 15.3.2012 set out two charges, namely, illegal installation of a control switch at p5 No 9 Accuload, and dispensing more than 1000 litres of jet A1 fuel on 3.1.2012 to a local truck KAY 316J/ZB. He denied that he installed the said illegal switch contending that the investigations report indicated that it was installed on 19.10.2011. He further contended that zero flow alarm started on 19.10.2011 when Mr. Juma Tella was on duty. He further admitted that Rachael Simiyu was the controller on duty on 16.1.2012 when the zero flow alarm was noted followed by the discovery of the illegal switch later that day. He further admitted that the claimant was suspected because he was the only officer with the knowledge of installing that switch.

28. RW3 contended that the reasons cited in the dismissal letter were the same as those in the letter summoning the claimant to the disciplinary hearing. He admitted that swapping of shifts by the staff was normal and denied that the claimant was dismissed for swapping shift. He contended that the reasons for dismissing the claimant was the incident that occurred on 16.1.2012 because he was supposed to be at the control room but he went to load a truck at the tank farm. Finally, he further admitted that the claimant cleared with the company.

Claimants submission

29. The claimant submitted that there was no valid reason for his dismissal. He contended that the allegation that he installed an illegal switch in the Accuload and stole fuel was false allegation which has not been proved by the respondents. He contended that when the zero flow alarm started on 19.10.2012 he was not on duty just like on 16.1.2012. He contended further that the investigation report indicated that the illegal switch was installed on 19.10.2011 and not 16.1.2012. He further contended that no investigation report or audit report was produced to prove the alleged loss of 1000 liters of fuel and maintained that Mr. Wanyoike who discovered the illegal switch admitted in evidence that when the system recorded zero flow, no product was dispensed from the pump to the truck.

30. As regards the procedure followed, the claimant submitted that he was subjected to an unfair process because the respondent kept on changing the charges he was facing and in the end the reasons cited for the dismissal were different from the ones he was invited to defend himself at the disciplinary hearing. For emphasis, he relied on several precedents to urge that his dismissal was unfair both substantively and procedurally and prayed for the relief's sought.

31. As regards the respondents counterclaim, he urged the court to dismiss with costs because he cleared with respondent and the clearance forms did not indicate any outstanding debt.

Respondent's submissions

32. The respondent submitted that the claimant and four (4) other employees were suspected of the illegal installation of the switch which resulted in zero flow error and product being discharged without being metered. She therefore denied that the claimant was unlawfully

targeted. She further submitted that although the claimant was not on duty when the zero flow error occurred, his conduct was suspicious because he swapped shift with Mr. Nyanga without consulting his supervisor and when the reported to work, he went to the tank plant to plant check but instead went to load a truck. She contended that reasons used by the claimant to swap shifts was not an emergency at all and the letter for booking appeared suspicious to her.

33. The respondent further submitted that RW2 stated that the person who installed the illegal switch had knowledge in electrical engineering and the claimant admitted in evidence that he held a Diploma in Electrical Engineering. She therefore concluded that the claimant was the most culpable because he had the knowledge and opportunity to install the foreign switch. In addition he contends that the claimant had suspicious behaviors and failed to prove valid or reasonable explanations.

34. As regards the procedure followed, the respondent submitted that a fair procedure was followed because the claimant was invited to a hearing in the company of union official and thereafter his appeal was heard by an Appeal Committee. She therefore denied that the claimant is entitled to the reliefs sought.

35. On the other hand, she submitted that the claimant remained in occupation of the company house for 13 months without payment of rent and as such she asks the court to condemn him to pay the money sought in the counter claim.

Issues for determination

36. There is no dispute that the claimant was employed by the respondent from 2006 to 18.3.2012 when he was summarily dismissed for gross misconduct. The issues for determination are:

- a. Whether there was a valid and fair reason to justify the dismissal.
- b. Whether a fair procedure was followed.
- c. Whether the claimant is entitled to the beliefs sought.
- d. Whether the counter claim should be allowed.

Reason for termination

37. Under section 43 (1) of the Employment Act, in every legal proceedings challenging termination for employment by the employee, the employer has the burden of proving the reasons for the termination and in default the termination is unfair within the meaning of section 45 of the Act. Section 45 provides that termination of an employee's employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employees conduct capacity and compatibility or based on the operation requirements of the employer.

38. In this case the respondent suspended the claimant on suspicion of theft of products on 16.1.2012 at Ps-9 Embakasi. After investigations she invited the claimant to disciplinary hearing vide letter dated 15.3.2012 to answer charge of illegal installation of a control switch at Ps-9 Embakasi Accuload; and unprocedural dispensing of over 1000 liters of Jet A-1 fuel on 3.1.2012 to a local truck no. KAY 316J/ZB. However, the reasons cited for dismissal in the dismissal letter were quite different.

39. The dismissal letter dated 18.5.2012 stated as follows:

Reference is made to your appearance before the Central Region Staff Disciplinary Committee on 20th and 21st March 2012 during which you were required to shed light on the illegal installation of a control switch at P5-9 Embakasi Accuload System.

The committee observed that you flouted the loading procedures by failing to indicate on 3rd January 2012 when the truck loading ended and failed to fill the entries in the AV2 form as required. It was noted that your swapping arrangement to be on duty at 1600 hours that day was suspect and that you had 2 no. staff under you in your shift but decided to go for loading, a responsibility you were expected to have supervised.

In view of the above it is therefore decided that you be summarily dismissed with immediate effect in line with the SSR Clause 8.F.3 and CBA clause 40

(c) which states:

“if an employee willfully neglects to perform work which it was his duty to have performed, or if he carelessly an improperly performs any work which form its nature is was his duty, under his contract to have performed carefully and properly.”

40. The claimant denied the reason cited in the dismissal letter just as he denied the two charges he faced before the disciplinary committee. The dismissal letter indicated the reasons for dismissal as an incidence that occurred on 3.1.2012. There was no evidence tendered to the committee and before this court that supports the offence cited by the dismissal letter.

41. According to RW3, he sat in the Disciplinary Committee and the dismissal of the claimant was due to the incidence that occurred on 16.1.012 and it was not due to swapping. Since the dismissal was grounded on incidence that occurred on 3.1.2012, it is obvious that the reason cited for dismissal in the dismissal letter was not valid.

42. I therefore, agree with the claimant that the respondent has failed to prove a valid and fair reason to justify his summary dismissal on 18.5.2012. The employer, did not after investigations, get any evidence to prove that the claimant stole any products on 16.1.2012. She also did not adduce any evidence before the disciplinary committee and before this court to prove that the claimant installed the illegal foreign switch in the Ps-9 Accuload, or that he dispensed over 1000 liters to KAY 326J/ZB on 3.1.2012 unprocedurally or at all.

43. It appears to me that the employer was desperate to sack the claimant but failed to get any valid reason to do so. As a result she resorted to a fishing expedition to get even the remotest reason to send the claimant home. However, section 45 of the Act requires that an employer shall not dismiss his employee unfairly but only in accordance with equity and justice. In other words, the law now demands that termination of employee's contract of service must be substantively and procedurally fair.

Procedure followed

44. Section 41 of the Employment Act requires that before an employer terminates the services of an employee, he shall first explain the reason for which termination is being considered. The explanation must be in a language of the employees' understanding, and in the presence of another employee or shop floor union representative of his choice. Finally the employee and his companion are entitled to air their representations in defence which must be considered before the termination is decided.

45. In this case the court is not satisfied that the claimant was accorded a fair hearing before the dismissal as required under section 41 of the Act. The reason for the foregoing view is that the reason cited for dismissal was not cited in the letter dated 15.3.2012 which invited him to the hearing. The letter did not require him to explain loading procedures or swooping of shift on 3.1.2017. Such reason was obviously an afterthought and the claimant was not given opportunity to prepare his defence.

46. In **Mary Chemweno Kiptui v. Kenya Pipeline Company Limited**[2014]eKLR Mbaru J held that:

“Invariably before an employer can exercise the right to terminate the contract of an employee, there must be a valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representations made by the affected employee.”

47. In **County Assembly of Kisumu & 2 others v. Kisumu County Assembly Service Board & 6 others** [2015]eKLR the Court of Appeal expressed itself as follows on the right to a fair hearing:

“Where as the right to fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person is entitled to what, in legal practice is referred to as the right to “notice and hearing”. That means he must be given a written notice which contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.”

48. With the notice of the charges an employee will face the employer, the employer is not allowed to introduce new charges at the hearing or after the hearing, which were not stated in the earlier notice. In **National Cereals and Produce Board v. John Kirui Tongorei**[2017]eKLR the Court of Appeal held that:

“When the respondent was summoned to an administrative employment meeting, allegations were made notice of which had not been served upon the respondent. This was wrong. The appellant should have adhered to fair administrative action by notifying the respondent in advance of new allegations and giving him ample opportunity as required by the law to prepare and present a response or defence to the allegations and to be represented by a representative to the meeting if he so wished. This the appellant failed to do and in the process the respondent was denied a fair hearing. By terminating respondent's service for reasons that were different from the reason given in the suspension letter, the appellant breached the respondent's right and the learned judge was right to find that termination of the respondent's employment was unfair.”

49. Again in **CMC Aviation Limited v. Mohammed Nour** [2015]eKLR the Court of Appeal held that:-

“Further it was clear that, that purported ground of termination was introduced at the disciplinary

hearing or report and then in the termination letter without prior notice to the claimant in that regard so that it was without adherence to the due process of a notice as envisaged in section 41 of the Act.”

50. In view of the foregoing binding precedent, I must return that the introduction of new allegations or reasons for dismissal at the disciplinary hearing or in the dismissal letter after the hearing amounts to violation of fair hearing as envisaged under section 41 of the Employment Act and renders the dismissal of the claimant on such new grounds unfair within the meaning of section 45 of the Act.

Reliefs to the claimants

51. In view of the finding above that the claimant has proved and the respondent has failed to rebut that the reasons for his dismissal were not valid and the procedure followed was unfair, I have no option but to declare that the dismissal was unfair, wrongful and unlawful within the meaning of section 45 of the Employment Act. The time lapse after the dismissal is over three (3) years and as such, reinstatement is not

allowed.

52. Accordingly, by dint of section 49 read with section 50 of the said Act, the claimant is entitled to salary in lieu of notice and compensation for unfair, wrongful and unlawful dismissal. The claimant served for about six (6) years and although he had been previously charged with misconduct, he exonerated himself after disciplinary hearing. Consequently, I award him six months salary as compensation for the said wrongful and unlawful dismissal. In addition I award him one month salary in lieu of notice in terms of his contract of service as contained in the letter of appointment dated 3.11.2006 and clause 39 of the Collective Agreement for 2011 to 2013.

53. Having found that the dismissal of the claimant was unlawful, I grant the prayer for half salary that was withheld during his suspension from January 2012 to May 2012. However, the claim for severance pay must fail because the separation was not through redundancy under section 40 of the Employment Act.

54. The claim for 41 leave days was not specifically disputed by the respondent either in her pleadings or evidence. I therefore grant it as prayed. The claim for salary arrears arising from salary increment under the 2011 to 2013 CBA is dismissed because the alleged increment of 11% was effective on 1.7.2012 according to clause 28 of the CBA.

55. Finally, the claim for 21 years salary which the claimant would have earned before normal retirement is dismissed for lack of merits and legal basis.

Counterclaim

56. The respondent counterclaimed against the claimant, Kshs. 170,478 made up of rent arrears, water bill and garbage collection charges. The said debt was incurred between 18.5.2012 when the claimant was dismissed and 6.7.2013 when he vacated the staff house. The claimant denied the said claim and averred that he cleared with the respondent and her estate manager certified that he owed no debts to the company.

57. However, I am not satisfied with the claimant's explanation because he has not rebutted the evidence by RW3 that he continued to occupy the staff house for 13 months after the separation. Consequently, I allow the counterclaim as prayed being Kshs. 170478 – less 44025 paid according to RW3 leaving a net of Kshs. 126,453. The basis of the foregoing awarded is the memo dated 20.8.2015 produced by the respondent as an exhibit.

Conclusion and dispensation

58. I have found that the summary dismissal of the claimant was unfair, wrongful and therefore unlawful within the meaning of section 45 of Employment Act. I have further found that the claimant is entitled to compensatory damages and accrued benefits under the contract of service.

59. Finally, I have allowed the respondent's counterclaim on merits. Consequently, I enter judgment for the claimant as follows:

NoticeKshs. 119,974.00

CompensationKshs. 490,044.00

LeaveKshs. 128,973.60

Unpaid salaryKshs. 204,185.00

Kshs.943,176.60

Less counterclaimKshs.126,453.00

Total Kshs. 816,723.60

60. The award is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE