



**Ogochi v Kenya Pipeline Company Limited (Cause 042 of 2021)  
[2024] KEELRC 13602 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13602 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 042 OF 2021  
DN NDERITU, J  
OCTOBER 17, 2024**

**BETWEEN**

**MICHAEL OGOCHI ..... CLAIMANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a memorandum of claim dated 15<sup>th</sup> July, 2021 filed through Mongeri & Company Advocates the claimant prays for –
  - a. A declaration that the claimant was unfairly dismissed from employment by the respondents.
  - b. An order of reinstatement to the position that he held before dismissal without loss of benefits and salary.
  - c. An order directing the respondents to pay the claimant salary and allowances thereto accruing from the date of dismissal 16<sup>th</sup> February 2012 to the date of reinstatement.
  - d. An order for damages for unfair dismissal.
  - e. Terminal allowances and/or retirement benefits.
  - f. Costs and interest.
2. Alongside the statement of claim were filed a verifying affidavit, a statement by the claimant, a list of documents, and a bundle of copies of the listed documents, all in support of the claim.
3. The respondent entered appearance through Stanley K. Manduku, Advocate, on 27<sup>th</sup> September, 2021 and filed a statement of response to the claim on even date. In the response to the claim the respondent



prays that the claimant's cause be dismissed with costs for want of merits. On 5<sup>th</sup> November, 2021 the respondent changed its legal representation and appointed Karen N. Muriithi, Advocate.

4. The claimant filed a reply to response to the statement of claim on 22<sup>nd</sup> October, 2021 reiterating the averments in the statement of claim and urging that judgment be entered against the respondent as prayed.
5. On 2<sup>nd</sup> November, 2021 the respondent filed a list of four witnesses and their respective written statements and a list of documents with a bundle of copies of the listed documents.
6. This cause came up for hearing in open court on 7<sup>th</sup> March, 2022 when the claimant (CW1) testified and closed his case.
7. The defence was heard on 6<sup>th</sup> March, 2023 with Moffat Maumo (RW1) and Oscar Robert Matano (RW2) testifying. The defence was further heard on 28<sup>th</sup> March, 2023 when Wilkinson Ntwiga (RW3) testified and on 10<sup>th</sup> May, 2023 when Emily Thati (RW4) testified and the respondent's case was closed.
8. Counsel for both parties were directed to address the court by way of written submissions. Miss Moenga for the claimant filed her submissions on 17<sup>th</sup> May, 2023 while Ms Muriithi for the respondent filed on 28<sup>th</sup> July, 2023.

## **II. The Claimant's Case**

9. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence adduced through the claimant (CW1) and the written submissions by his counsel.
10. In the memorandum of claim the claimant avers that he was engaged by the respondent in 2003 as a security guard II and served as such until 18<sup>th</sup> May, 2020 when he was suspended from duty on allegations of colluding with others to steal petroleum products from the respondent's pump-station 26 (PS-26) at Sinendet wherein he was serving as a security guard. The claimant was subsequently charged with various criminal offences relating to the incident in Nakuru Chief Magistrate's Court Criminal Case No. 857 of 2020 (the criminal case/proceedings).
11. It is pleaded that on 14<sup>th</sup> September, 2020 the claimant was issued and served with a show-cause letter to which he duly responded. On 7<sup>th</sup> October, 2020 the claimant was invited for a disciplinary hearing to be held on 15<sup>th</sup> October, 2020. The hearing did not proceed as the claimant was later issued and served with an amended show-cause letter on 22<sup>nd</sup> October, 2020 to which he responded. He appeared before the disciplinary committee for a physical hearing on 1<sup>st</sup> December, 2020.
12. On 19<sup>th</sup> February, 2021 the claimant was issued and served with a letter of summary dismissal. Subsequently, the claimant appealed the dismissal but the appeal was not successful.
13. It is pleaded that the dismissal was unfair and unlawful as the disciplinary proceedings ran parallel to the criminal proceedings purportedly subjecting the claimant to double-jeopardy.
14. In his testimony in court, the claimant relied on his filed statement and reiterated the contents of the memorandum of claim as summarized above. He stated that he was engaged by the respondent vide a letter of appointment dated 16<sup>th</sup> October, 2023. He stated that his troubles with the respondent arose from allegations that in the night of 12<sup>th</sup>/13<sup>th</sup> May, 2020 petroleum products were siphoned from the respondent's terminal PS-26 wherein he was based as a security guard. He stated that on that night he was arrested alongside other persons and subsequently charged as alluded to in the introductory part



- of this judgment. He stated that he was not involved in the alleged theft and that he did not neglect his duties at all.
15. He stated that he appeared for the disciplinary hearing after responding to the amended show-cause letter but he was allegedly not allowed to question the witnesses.
  16. He further stated that as at the time of his dismissal he earned a monthly gross salary of Kshs120,000/ = but with some variation from month to month due to overtime.
  17. He vehemently denied that he was negligent in performance of his duties and or that he was involved in the siphoning and or theft of the respondent's properties as alleged in the disciplinary process. He also denied deserting duty or leaving work unattended. He also denied making "local" arrangement with other security guards to trade shifts.
  18. He stated that he was paid salary for the period up to 19<sup>th</sup> February, 2019 but he was categorical that no other benefits or terminal dues were paid to him upon the dismissal.
  19. In cross-examination the claimant insisted that he was not negligent in performance of his duties. He stated that he was not aware of the respondent's human resources manual. He stated that he was on duty in the night of 12<sup>th</sup>/13<sup>th</sup> May, 2020 and was arrested the same night. He denied letting into the facility the vehicles mentioned in the amended show-cause letter to facilitate the alleged theft of petroleum products the property of the respondent. He admitted that he was the only security guard on duty that night but alongside administration police officers. He worked at PS-26 from 2017 to 2020.
  20. He admitted to attending the disciplinary hearing and subsequently receiving the letter of summary dismissal. He insisted that the dismissal was unfair and unlawful as he was not guilty of the misconduct as alleged by the respondent. He insisted that he was incapable of siphoning fuel as operating the pumps is a technical endeavour that may only be undertaken by qualified engineers. He produced the copies of the documents in the filed bundle as exhibits 1 to 8.
  21. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

### **III. The Respondent's Case**

22. The respondent's case is contained in the statement of response to the claim and the oral and documentary evidence adduced through RW1, RW2, RW3, and RW4 alongside the submissions by counsel.
23. In the response to the claim, the respondent pleads that it is a state corporation dealing with delivery of petroleum products through a pipeline that runs across the country. It is admitted that the claimant was an employee of the respondent as pleaded in the memorandum of claim. However, it is denied that the dismissal of the claimant was unfair and unlawful as claimed.
24. It is further pleaded that on or about 13<sup>th</sup> May, 2020, the respondent received intelligence on siphoning of its petroleum products from its pipeline at PS-26 wherein the claimant was based. It is pleaded that upon covert investigations it was established that on 20<sup>th</sup> April, 2020 and 12<sup>th</sup> May, 2020 when the claimant was on duty, 12,000 litres of assorted petroleum products had been siphoned from the said pump station.
25. It is pleaded that the criminal investigation, the arrest, and the charging in court of the claimant by the police and his prosecution by the Director of Public Prosecutions (DPP) was not a bar to the internal disciplinary mechanism and process as initiated and executed by the respondent. It is further pleaded



- that the initiation and commencement of the disciplinary process while the criminal case was pending in court did not expose the claimant to double-jeopardy. It is categorically pleaded that the disciplinary process was fair and just and that the claimant was properly subjected to due process and fair hearing.
26. It is further pleaded that during the disciplinary hearing it was established that the claimant was negligent in performance of his duties as a result of which petroleum products were siphoned and stolen as alluded to above. It is pleaded that the claimant was found culpable of gross misconduct and summarily dismissed. The particulars of the neglect of duty by the claimant are pleaded in paragraph 19. It is denied that a demand notice before action was issued and served upon the respondent.
  27. In his testimony in court RW1, a retired senior security officer with the respondent, relied on his filed written statement as his evidence-in-chief. He stated that on 13<sup>th</sup> May, 2020 he received information that petroleum products had been stolen from PS-26 wherein the claimant was on duty as a security guard. He rushed to the scene and found that police officers had already arrived. He allegedly saw a jerrycan and a motor vehicle registration KBB O53B which were not supposed to be within the respondent's facility. He stated that he was the supervisor to the claimant and that the claimant had on that day extended his shift without informing him.
  28. He stated that the claimant was negligent in his duties as a security officer in-charge that night for allowing persons to drive into the station and steal the respondent's product. He stated that the claimant failed to use the biometric system to determine who was eligible for accessing the facility. He stated that upon questioning the claimant alleged that he had left his place of work to go back to his house to check on a sick grandchild.
  29. In cross-examination RW1 stated that the claimant was in-charge of security at PS-26 and used to report to RW1 directly. He stated that the facility was also guarded by armed administration police officers while the claimant was in-charge of all hired guards.
  30. He stated that the claimant was not supposed to be on duty when the alleged theft took place but the claimant allegedly admitted to extending his shift without following the laid down procedures and without obtaining prior authorization. He stated that the claimant was negligent in performance of his duties and either participated in the theft and or allowed and facilitated the theft to take place. He stated that the claimant abused the biometric system and allowed unauthorized persons into the facility.
  31. RW2, a chief-technician, relied on his filed statement as his evidence-in-chief and stated that he is based at Mombasa but was at the material time based in Nakuru region within which PS-26 is situate. He stated that he visited PS-26 on 13<sup>th</sup> May, 2020 on information that theft had taken place there. He noted that the main valve had been opened and was loose and not in place. He stated that the same had been tampered with. He further stated that there was a gunny bag, a pipe, and a jerrycan with traces of petrol. He stated that there were traces of pilferage of petroleum product on the ground and the area around the pump. He stated that those were foreign items at the scene and the security officer in-charge and on duty, the claimant, ought to have noticed the same and taken appropriate action.
  32. In cross-examination RW2 stated that he did not know who had interfered with the system and he did not know if the claimant was involved. He stated that he had testified in the criminal case against the claimant on the basis of what he stated above. He stated that he did not know how much product was lost.
  33. RW3, a former senior security and investigation officer in-charge of intelligence with the respondent, relied on his filed statement as his evidence-in-chief. He stated that he led the investigation to the alleged theft and prepared a report dated 17<sup>th</sup> August, 2020.



34. He stated that in the night of 12<sup>th</sup>/13<sup>th</sup> May, 2020 vehicles were seen entering PS-26 while the claimant was on duty. He stated that on a tip-off he mobilized security officers and the police and went to the scene. He stated that the claimant refused to open the gate for the security team giving the thieves an opportunity to escape by jumping over the fence but some of them were arrested by the police.
35. He stated that the facility is well fenced and one can only get access using a biometric card and only the claimant had access to such a card that night. He stated that consequently the claimant and others were arrested and charged in the criminal case alluded to above.
36. He stated that the biometric gate was just about 50 metres from the staff quarters. He stated that the claimant was either negligent in performance of his duties and or a party to the theft. He stated that the claimant allowed foreign objects such as a jerrycan and a transparent pipe into the facility and allegedly swapped shifts with one Zablon Otieno without following the laid down procedure and informing the supervisor.
37. In cross-examination, he stated that he summoned and interviewed the claimant who denied involvement in the theft. He stated that he did not establish whose biometric card was used to allow the thieves access the facility. However, he stated that it is the claimant who was on duty that night and was the only one who could have allowed the strangers to gain access into the facility. He stated that he appeared before the disciplinary hearing and testified on 1<sup>st</sup> December, 2020. He stated that he did not know how much product was stolen. He stated that while there were other security officers in the premises during the material night, including the administration police officers, it is only the claimant who could allow access to the facility using the biometric card.
38. RW4, a human resources manager, relied on her filed statement as her evidence-in-chief and produced the documents filed by the respondent as exhibits 1 to 16. She stated that the claimant was employed as security guard in 2003 and served the respondent for 18yrs prior to his dismissal in 2021.
39. In regard to the dismissal of the claimant she stated that the same was fair and lawful. She stated that the claimant was issued and served with a letter of suspension dated 18<sup>th</sup> May, 2022 to pave way for investigation. He was later served with a show-cause dated 14<sup>th</sup> September, 2020. She stated that the claimant responded to the charges in the show-cause in undated letter received by the respondent on 8<sup>th</sup> October, 2020. The claimant was invited for a disciplinary hearing vide a letter dated 7<sup>th</sup> October, 2020.
40. She stated that although the claimant protested the disciplinary process through his lawyers the same had to proceed anyway as the same was independent of the criminal trial that the claimant and others faced. She stated that after the claimant objected to several issues he was issued with an amended show-cause letter dated 22<sup>nd</sup> October, 2020 to which the claimant responded vide a letter dated 2<sup>nd</sup> November, 2020. The claimant was then invited for a physical hearing vide a letter dated 25<sup>th</sup> November, 2020 that took place on 1<sup>st</sup> December, 2020. She stated that she recorded the minutes of the meeting that she produced in court. She stated that the minutes confirm that the disciplinary action involved several individuals who were involved in theft of petroleum products. The claimant attended the hearing accompanied by a union representative but he called no witnesses.
41. She stated that although the claimant alleged to have left duty and gone back to his house during the theft, the evidence availed during the disciplinary hearing did not support that position as the records indicated and confirmed that the claimant was on duty and at no point did he ask for permission or leave to go back to his house as alleged. She stated that the claimant was found culpable of the charges that he faced in the disciplinary hearing and he was summarily dismissed as per the letter of dismissal issued to him. She stated that the claimant did not appeal the dismissal.



42. In cross-examination, RW4 confirmed that she hand-recorded the minutes of the disciplinary hearing and later typed the same. She reiterated that the claimant was subjected to due process and fair hearing and lawfully found guilty of gross misconduct as per the letter of dismissal. She stated that one other employee who was also involved in the theft was dismissed alongside the claimant. She stated that she was not aware of the outcome of the criminal case that the claimant faced in court.
43. She clarified that after the claimant objected to the disciplinary hearing in October, he was supplied with the documents that he asked for before the hearing in on 1<sup>st</sup> December, 2020.
44. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs.

#### IV. SUBMISSIONS BY COUNSEL

45. On the one hand, the claimant's counsel submitted on two broad issues – Whether the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful; And, Whether the claimant is entitled to the reliefs sought.
46. On the first issue, it is submitted that the respondent had no genuine reason for dismissing the claimant as demanded by Section 43 of the Employment Act (the Act). It is submitted that there is no evidence that the claimant's biometric card was used in allowing strangers to access the facility that he was guarding. It is further submitted that other than an alleged pipe and jerrycan that were allegedly found within the facility there was no evidence of any theft taking place. It is further submitted that even if the alleged theft took place, which is however denied, the claimant was not involved as he had allegedly gone back to his house to check on a sick grandchild at the time of the alleged theft.
47. It is further submitted that the charges in the amended show-cause letter are at variance with the reasons given in the letter of summary dismissal. It is thus submitted that the action taken against the claimant breached Section 4 of the Fair Administrative Actions Act. Further, counsel cited Mandeep Chauhan V Kenyatta National Hospital & 2 Others (2013) eKLR in laying emphasis on the centrality of natural justice in the overall scheme of administration of justice.
48. On the procedure adopted, it is submitted that the persons who recorded evidence against the claimant were not called as witnesses during the disciplinary hearing and as such the claimant did not get an opportunity to cross-examine them. It is submitted that those witnesses appeared before the disciplinary committee from 13<sup>th</sup> to 16<sup>th</sup> October, 2020 in absence of the claimant. It is submitted that those witnesses included an informer who would have been a crucial witness for cross-examination by the claimant.
49. It is submitted that the procedure adopted by the respondent violated Article 47 of the Constitution, Section 4 of the Fair Administrative Actions Act, Sections 35, 41, 44, and 45 of the Act, and the general rules and principles of natural justice. Counsel cited Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, Pamela Nelima Lutta V Mumias Sugar Co. Ltd (2017) eKLR, and Beatrice Nyambune Mosiria V Judicial Service Commission (2019) eKLR in laying emphasis on the obligation placed on an employer to accord and afford an employee both substantive and procedural fairness before dismissal or termination.
50. It is further submitted that by subjecting the claimant to disciplinary process while at the same time having him prosecuted the respondent exposed the claimant to double-jeopardy. Counsel cited Mathew Kipchumba Koskei V Baringo Teachers SACCO (2013) eKLR wherein the court opined that where an employer takes the view that an employee is guilty of a criminal offence and hence complains to and involves the police and an employee is thus charged with criminal offences, as it happened in



the instant case, it would make good sense to stay the disciplinary process awaiting the outcome of the criminal proceedings.

51. On the foregoing basis, the court is urged to allow the claim and grant all the reliefs sought.
52. On the other hand, the respondent's counsel identified the following issues for determination –
  - a. Whether the reasons for dismissing the claimant from employment were valid
  - b. Whether differences in the charges levelled against the claimant in the amended show cause letter dated 22<sup>nd</sup> October 2020 and reasons for dismissing the claimant in the summary dismissal letter dated 19/2/2021 occasioned the claimant an un fair hearing.
  - c. Whether the claimant was unfairly dismissed from employment by the respondent.
  - d. In terms of the initial procedures in the meetings held on 14<sup>th</sup> and 16<sup>th</sup> October 2020 and the witnesses who testified on the stated dates in the absence of the claimant.
  - e. Whether the claimant was entitled to the reliefs sought.
53. On the first issue, it is submitted that the dismissal was justified and lawful. On substantive fairness, it is submitted that the claimant was negligent in performance of his duties which resulted in the theft and loss of petroleum products belonging to the respondent. It is submitted that based on Sections 43, 45, & 47 of the Act the respondent had genuine, reasonable, and justifiable grounds for taking the disciplinary action against the claimant culminating in his fair and lawful dismissal. In support of this position, counsel cited *Paul Waigiri Muriuki V Nairobi Water & Sewerage Co. Ltd (2015) eKLR* and *Kenya Power & Lighting Company Limited V Aggrey Wasike (2017) eKLR*.
54. The court is urged to note that the test to be applied under Section 43(2) of the Act is subjective considered from the employer's perspective and view. It is vehemently submitted that considering the evidence and circumstances of this cause the respondent had genuine and honest believe that the claimant had committed and was guilty of gross misconduct leading to the disciplinary action and the eventual dismissal. It is submitted that the claimant admitted in his testimony that he left the gates unmanned for over two hours as he allegedly went into his house to take care of a sick grandchild. It is submitted that it is only the claimant who had access to biometrically opening the gate that allowed strangers to access the facility and siphon petroleum products belonging to the respondent.
55. On procedural fairness, it is submitted that the respondent complied with Section 41 of the Act and that the claimant was accorded and afforded fair hearing and due process.
56. On the second issue, it is submitted that the claimant was not in any way or manner discriminated. The court is urged to follow the reasoning and opinion of the Supreme Court in *Samson Gwer & 5 Others V Kenya Medical Research Institute & 3 Others (2020) eKLR*. It is submitted that various provisions of the respondent's human resources manual and the law provide for various forms of punishment once misconduct is established and proved. It is further submitted that the claimant as the in-charge and on-duty security officer on the material date bore the ultimate responsibility for the theft and loss that took place under his watch. It is submitted that each of the persons involved and or connected to the loss and or theft of the respondent's property was punished commensurately in accordance with the law.
57. On the third issue, it is submitted that the criminal charges and proceedings against the claimant were not and did not bar the respondent from undertaking disciplinary action against him. It is submitted that the rule on double-jeopardy applies to criminal matters and it is not applicable to internal disciplinary process. It is submitted that the respondent's human resources procedure manual



expressly provides that institution of criminal proceedings is not an inhibition to internal disciplinary mechanism as the two processes are separate and distinct with completely different objectives and outcomes. The court is urged to follow the reasoning in *Teachers Service Commission V Joseph Wambugu Nderitu* (2016) eKLR, *Daniel Ndung'u V DPP & Another* (2013) eKLR, & *Jeremiah Gitau Kiereini V Capital Markets Authority & Another* (2013) eKLR amongst other decisions cited.

58. On the reliefs, the court is urged to find and hold that since the claimant was fairly and lawfully found guilty of gross misconduct he is not entitled to any of the reliefs sought or at all. The court is urged to dismiss the cause with costs.

#### **V. Issues For Determination**

59. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for both parties, the court identifies the following issues for determination -
- a. Whether the disciplinary process against the claimant during the pendency of the criminal proceedings amounted to double-jeopardy.
  - b. Whether the claimant was wrongfully, unfairly, and unlawfully dismissed.
  - c. Whether the claimant is entitled to the reliefs sought.
  - d. Costs.

#### **VI. Employment**

60. The facts on employment and the terms and conditions thereof are not in dispute. The claimant was engaged by the respondent as a security guard II on 16<sup>th</sup> October, 2003. He worked and served with the respondent until 18<sup>th</sup> May, 2020 when he was suspended from duty and subsequently summarily dismissed on 19<sup>th</sup> February, 2021 as alluded to in a foregoing part of this judgment. The evidence on record is that his last monthly gross salary was Kshs144,821.25.

#### **VII. Double Jeopardy?**

61. The circumstances preceding and culminating in the summary dismissal of the claimant are also not in dispute. On the night of 12<sup>th</sup>/13<sup>th</sup> May, 2020 the claimant was on duty as the guard in-charge in the respondent's facility known as PS-26 when what the respondent considered to be a security breach occurred. The evidence on record is that "foreign materials namely; a hose pipe with product, a jerrycan, as well as gunny bag were recovered from the plant area". This is as per the letter of summary dismissal dated and issued to the claimant by the respondent on 19<sup>th</sup> February, 2021.
62. Based on the incident, the respondent reported the matter to the police and the claimant alongside other persons were charged with various criminal charges in Nakuru Chief Magistrate's Court Criminal Case No. 857 of 2020. From the copy of the charge sheet availed in court as evidence by the respondent, the claimant and his co-accused persons faced charges of interfering with pipeline and stealing petroleum products contrary to Section 99 of the *Petroleum Act*, stealing by officers of companies contrary to Section 282 of the Penal Code, neglect to prevent a felony contrary to Section 392 of the Penal Code, among other charges.
63. During the hearing of this cause the court was not informed of the outcome of the criminal proceedings stated above. However, while the claimant was facing the charges above the respondent commenced disciplinary action against him and proceeded as enumerated elsewhere in this judgment culminating



in his summary dismissal. It is the claimant's position that the simultaneous disciplinary process to the criminal proceedings subjected him to double-jeopardy.

64. The court finds and holds that the claimant was not subjected to double-jeopardy as claimed. The court agrees with the submissions by the respondent's counsel that the two processes are separate and distinct. Under Article 157 of *the Constitution* and the various provisions in the *Office of the Director of Public Prosecutions Act* the power to institute criminal charges and to prosecute is the preserve of the Director of Public Prosecutions (DPP). The function of investigating crime is preserved for the National Police Service (NPS) under Articles 243 to 247 of *the Constitution* as read with provisions in the *National Police Service Act*.
65. Further, the procedure and consequences of the two processes – internal disciplinary process and criminal proceedings in court – are independent and distinct. Various courts have pronounced themselves on this issue and held that criminal proceedings are not a bar to internal disciplinary process – see Joseph Wambugu Nderitu V Teachers Service Commission (supra) & Gladys J. Cheronu V Board of Trustees NSSF & Another (supra).
66. However, as shall be discussed below, an employer who takes out disciplinary action against an employee simultaneous to criminal proceedings by the DPP runs the risk of reconsidering its decision in case of an acquittal. Hence, as shall be discussed below, it should make good sense for an employer to stay disciplinary proceedings against an employee where an employer decides to report the matter to the police and follow up in support of criminal prosecution of an employee.

### VIII. Dismissal

67. The claimant's case is that the dismissal lacked both in substance and procedure. The respondent's position is that the dismissal was fair and lawful in all the material aspects. The jurisprudence on what constitutes fair and lawful dismissal or termination is now somehow settled. There are two elements or ingredients – substantive and procedural fairness – or simply what is known as due process. Substantive fairness has to do with the reason or foundation or basis for the action taken. Procedural fairness has to do with the propriety of the procedure adopted from the initiation of the process to the conclusion. Both ingredients are founded on the general principles of natural justice as ingrained and enshrined in various provisions of *the Constitution*, statutes, and precedents.
68. Articles 41, 47, & 50 of *the Constitution*, Section 4 of the Fair Administrative Actions Act, Sections 35, 41, 43, 44, 45, & 46 of the *Employment Act* (the Act) are some of the provisions that readily come to mind when considering substantive and procedural fairness. This court (ELRC) has pronounced itself on this issue in a multitude of decisions – see for example Kenya Power & Lighting Company Limited V Aggrey Lukorito Wasike (supra), Mandeep Chauhan V Kenyatta National Hospital & 2 Others (supra), and Pamela Nelima Lutta V Mumias Sugar Co. Ltd (supra).
69. It is the foregoing scale that the court has to apply in weighing and determining whether the respondent was justified in acting against the claimant as it did, culminating in his summary dismissal.
70. In terms of substance, the respondent took out disciplinary proceedings following an alleged theft and loss of petroleum products in PS-26 following alleged criminal trespass into the facility by some strangers for which the respondent held the claimant responsible alongside other employees. The evidence on record is that the claimant, who was in-charge and on duty when the incident occurred in the night of 12<sup>th</sup> /13<sup>th</sup> May, 2020, was arrested alongside others and charged with various criminal offences as alluded to above.



71. It is the finding and holding of the court that under those circumstances and based on the evidence availed through RW1, RW2, RW3, and RW4 the respondent had genuine and honest grounds and believe upon which to found the disciplinary process as demanded under Section 43(2) of the Act. However, as it shall be discussed below, the respondent run the risk of reconsidering the decision that it reached in case the claimant was ultimately acquitted of the charges he faced in the criminal court arising from the same incident. It is in the criminal trial that the subjective test that the respondent applied in taking the disciplinary action was to face an objective test.
72. It is for the foregoing reasons that in *Mathew Kipchumba Koskei V Baringo Teachers SACCO (2013) eKLR* the court opined that it should be reasonable for an employer to await the outcome of the criminal proceedings where such proceedings run parallel or are simultaneous to internal disciplinary process because if and where an employee is acquitted of the criminal charges the employer may have to revoke or reconsider the conclusion made and action taken in the disciplinary process. I do agree with that position and fully associate therewith. Being the complainant, an employer is deemed and ought to have knowledge of the criminal proceedings and be able to follow the same to logical conclusion.
73. Out of abundance of caution the court has checked and established that the claimant was on 24<sup>th</sup> May, 2024 acquitted of all the charges in the criminal trial. The acquittal was made under Section 210 of the Criminal Procedure Code as the prosecution failed to establish a prima facie case against the claimant and his co-accused persons. As stated elsewhere in this judgment, both parties and counsel did not shed light on this aspect although the court has established that as at the time of the hearing hereof the criminal trial was still pending in court. However, the court shall be failing in its duty as an impartial arbiter and dispenser of justice if it did not take judicial notice of that outcome in the criminal trial.
74. The evidence on record is that the respondent did not have details of the product that was stolen and the quantities thereof. In the circumstances, while the respondent may have had good and reasonable grounds for initiating the disciplinary action it should have made good sense to await the outcome of the criminal case because the acquittal of claimant on all the charges shifts the ground and somehow vitiates and creates doubts on to validity and efficacy of the disciplinary proceedings against the claimant. The fact that the evidence of the acquittal was not presented in court does not render the claimant guilty of the charges. The court shall thus take judicial notice of the acquittal as stated above.
75. It is never too late for justice and fairness to be rendered. Upon the acquittal, and the respondent knew or ought to have known of the same, it should have made good sense for the respondent to reconsider its earlier decision and somehow arrest this judgment. The effect of the acquittal in my view is that once the subjective test vested upon the respondent under Section 43(2) of the Act was subjected to objective test in the criminal trial it failed and the respondent ought to have reconsidered its position. And it is for this very reason that it is advisable for an employer to stay disciplinary proceedings awaiting the outcome of a criminal trial when and where both processes are initiated simultaneously. The court knows and takes judicial notice that criminal trials are likely to take some time and an employer may run the risk of being accused of placing an employee on suspension or compulsory leave for far too long. For example, the criminal trial against the claimant and his co-accused persons lasted from May, 2020 to May, 2024.
76. To remedy the jeopardy that presents to both an employer and an employee, where disciplinary action is running simultaneously with a criminal trial over the same subject matter, I recommend that the criminal court ought to be informed so that the criminal trial may be fast-tracked.
77. The net effect of all the above is that while the disciplinary action against the claimant may have been based on genuine subjective believe on the part of the respondent, the subsequent acquittal of the claimant rendered it lacking in substance. While the law cited above provides for a subjective test on



the part of the respondent, the subsequent acquittal of the claimant on criminal charges over the same incident demonstrates that the disciplinary action was unreasonable and misguided. While the court is mindful that the standard of proof in the criminal case is higher, beyond reasonable doubt, as opposed to the subjective one in disciplinary proceedings, the ultimate acquittal turns the tables and convenience in favour of the claimant.

78. The court finds and holds that in view of the subsequent acquittal of the claimant on all the charges, for lack of prima facie evidence, the disciplinary proceedings against the claimant and the subsequent dismissal lacked substance. The outcome of the criminal proceedings had a direct relevance to this cause – see Section 169 of the *Evidence Act*.
79. Although the court has found and held above that the claimant was not subjected to double-jeopardy in facing both internal disciplinary process and the criminal trial over the same subject matter, the respondent ought to have considered the protestations by the claimant that the two processes would collide and they indeed ultimately contradicted upon his acquittal.
80. In terms of the procedure adopted, the letter of suspension dated 18<sup>th</sup> May, 2020 read as follows –

Ref: Staff/Ogochi/3197 Date: 18<sup>th</sup> May 2020

Mr. Michael Ogochi,

Senior Security Guard, Grade KPC 12,

PS 26,

SINENDET

Thro, Ag. Security Manager,

NAIROBI

Thro, Depot Manager (PS 25)

NAKURU

Dear Mr. Ogochi,

RE: SUSPENSION FROM DUTY

Reference is made to your being arraigned before a Nakuru Court on 14<sup>th</sup> May 2020 for alleged involvement in offences that took place at your work station while you were on duty on the night of 12<sup>th</sup>/13<sup>th</sup> May 2020, details of the charges of which are within your knowledge.

In order to facilitate carrying out of more in-depth investigations into the matter and in line with the Company's Human Resource Policies and Procedures Manual Clause 11,13, it has been decided that you be suspended from duty with immediate effect.

In line with Clause 38 of the Collective Bargaining Agreement, while under suspension you will draw full salary and benefits. Further, during the suspension, you will not be expected to enter any of the Company's premises unless authorised to do so though you will be expected to be accessible when required and should arrange to provide a permanent contact address/ telephone number through which you can be reached anytime by your employer when need arises.

Yours sincerely,

T. M. NGIRA



For: MANAGING DIRECTOR

Copy to:

MD, Ag. CS, Ag. OM, Ag. HRM, CFM, Ag. SM, Ag. ICTM – For information and necessary action.

The National General Secretary

KPOWU

O Box 10376-00400

NAIROBI - For information

81. The show-cause letter dated 14<sup>th</sup> September, 2020 made the following allegations against the claimant –
- i. You colluded with others to siphon petroleum products from the plant area occasioning the Company to lose approximately 23 cubic meters of product on diverse dates in the month of April 2020 as indicated here below:
    - Date of the alleged incidences
    - Motor vehicle registration number used to transport siphoned product
    - 12<sup>th</sup>/13<sup>th</sup> April 2020
    - KBB 053B, KAW 002H, KBC 279N
    - 20<sup>th</sup> /21<sup>st</sup> April 2020
    - KBB 053B, KAW 002H
  - ii. You failed in your responsibility, on the dates stated above, to ensure that persons accessing the station and by extension the plant area were authorised to do so and more importantly observe the safety, environmental and security requirements.
  - iii. You swapped duties with your colleague i.e. “local arrangements” without following the shift change over work procedure and without informing your supervisor.
  - iv. Whereas it was your responsibility to protect Company property under your jurisdiction, the investigations established that the product vent at the station i.e. PS 26 plant area facility was damaged under your watch.
  - v. You tampered and destroyed evidence i.e. event logbook entry.
82. In undated response received by the respondent on 8<sup>th</sup> October, 2020 the claimant denied all the allegations made against him. The claimant was thereafter invited for a hearing vide a letter dated 7<sup>th</sup> October, 2020 to be held on 15<sup>th</sup> October, 2020.
83. However, the hearing did not proceed as projected as the claimant was served with an amended show-cause letter dated 22<sup>nd</sup> October, 2020 that made the following allegations against the claimant –
- i. You colluded with others to siphon petroleum products from the plant area occasioning the Company to lose petroleum product of approximately over 300 litres on diverse dates in the months of April and May 2020 as indicated here below:



Date of the alleged incidences	Motor vehicle registration number used to transport siphoned product
12 <sup>th</sup> /13 <sup>th</sup> April 2020	KBB 053B, KAW 002H, KBC 270N
20 <sup>th</sup> /21 <sup>st</sup> April 2020	KBB 053B, KAW 002H
12 <sup>th</sup> /13 <sup>th</sup> May 2020	KBB 053B, KAW 002H, KBC 270N

- ii. As the Senior Security Guard on duty, on the dates states above, you failed in your responsibility to ensure that persons accessing the station and by extension the plant area were authorised to do so and more importantly observe the safety, environmental and security requirements.
  - iii. As the Senior Security Guard on duty, on the night of 12<sup>th</sup>/13<sup>th</sup> May 2020, you failed in your responsibility, to ensure that persons accessing the station and by extension the plant area were authorised to do so and more importantly observe the safety, environmental and security requirements while you were on duty. Foreign material to wit, a horse pipe, a jerrican and gunny bag were recovered from the plant area under unexplained circumstances.
  - iv. You swapped duties with your colleague Mr. Zablun Otieno on the night of 12<sup>th</sup>/13<sup>th</sup> May 2020 i.e. “local arrangements” without following the shift change over work procedure and without informing your supervisor leading to a lapse in security coverage leading to loss of product.
  - v. Whereas it was your responsibility to protect Company property under your jurisdiction, the investigations established that the product vent at the Line 3 pig hatch at the station i.e. PS 26 plant area facility was damaged while you were in charge.
84. The claimant responded to above letter vide his letter of 2<sup>nd</sup> November, 2020 denying all the allegations made against him. Vide a letter dated 25<sup>th</sup> November, 2020 he was invited for a physical that took place 1<sup>st</sup> December, 2020. The hearing proceeded as projected. The court has gone through the minutes of the disciplinary hearing and the recommendations made by the disciplinary committee. Generally, the court takes the view that the procedural steps taken by the respondent in the disciplinary hearing were fair and reasonable and the claimant was given a fair hearing.
85. However, the court further takes the view that in absence of any evidence establishing the claimant’s involvement in the siphoning and or stealing of the respondent’s property and without the evidence of how much petroleum products was stolen or lost, and further in view of the subsequent acquittal, the summary dismissal of the claimant was too severe and draconian. While the court is apprehensive not to interfere with the management of human resources at the workplace, I find and hold that the respondent, even without the subsequent acquittal, ought to have given the claimant a second chance in view of his long service spanning a period of over 18 years.
86. Further, the acquittal of the claimant in the criminal trial vindicated him of any criminal conduct. The court notes that one of the charges that the claimant faced in the criminal trial was neglect to prevent a felony, which in parlance amounts to neglect of duty in employment law and human resources management, yet he was acquitted of the same.



87. The court has said enough in demonstrating that although the disciplinary process commenced by the respondent against the claimant may initially have been subjectively genuine, the same subsequently failed the test of objectivity upon acquittal of the claimant in the criminal trial. The respondent ought to have reconsidered its action upon the acquittal notwithstanding that the same came late. Further, the court finds and holds that the dismissal of the claimant was too draconian, oppressive, and unfair in the entire circumstances of the matter and the same was thus wrongful, unfair, and unlawful.

## **IX. Reliefs**

88. Having found and held that the dismissal of the claimant was wrongful, unfair, and unlawful, the court shall proceed to assess each of the reliefs sought.

89. The first prayer is for a declaration that the dismissal was unfair. The court has found and held that the dismissal of the claimant was wrongful, unfair, and unlawful and a declaration shall issue to that effect.

90. The second prayer is for an order of reinstatement of the claimant to the position that the claimant held without loss of benefits, salary, and other benefits. The court's hands are tied by the limitation in Section 12(3)(vii) of the *Employment and Labour Relations Court Act* and hence this request is denied.

91. The third prayer is for an order of payment of salary arrears, allowances, and other accrued benefits ostensibly upon reinstatement. In view of the finding and holding in the immediate paragraph this prayer is hereby denied.

92. The fourth prayer is for damages for unfair dismissal. No specific damage was pleaded or proved. The court has to reiterate for the umpteenth time that the loss that an employee incurs from unfair and unlawful dismissal or termination is loss of salary and other benefits that he/she should have earned bar the dismissal or termination. The reliefs that are available to such an employee are mainly located in Section 49 of the Act and Section 12 of the *Employment and Labour Relations Court Act*.

93. The court has considered and evaluated the evidence and the circumstances that led to the dismissal of the claimant. In his response to the amended show-cause letter alluded to elsewhere in this judgment, the claimant admitted to leaving his workplace unattended and going to his house to check on his grandson who was allegedly sick. He also admitted to dozing off while in his house from 11pm to 3am in the night of 13<sup>th</sup> /14<sup>th</sup> May, 2020. Although the claimant was acquitted of all the charges that faced him in the criminal trial, including that of neglect to prevent a felony, he nonetheless contributed to his misfortune and gave fodder to the respondent to taking the disciplinary action against him. While the court has found that the dismissal was draconian and too severe in the circumstances, it is not lost that the claimant somehow contributed to his dismissal.

94. In the circumstances, the court awards the claimant a sum equivalent to his eight months gross salary amounting to Kshs1,120,000/= based on a monthly gross salary of Kshs120,000/=.

95. The fifth prayer is for "terminal allowances and/or benefits". Those allowances and benefits have not been itemized or specified either in the memorandum of claim or in the submissions by counsel and the same were not proved during the hearing. It is not enough for a party to plead and throw its case to the face of court and expect the court to award the same without proof. The court decries this form of pleading and litigation as it adds no value to a cause. This request is hereby denied and dismissed.

## **X. Costs**

96. The claimant is awarded costs of the cause and interest on the amount awarded.



## **XI. Disposal**

97. In the disposal of the cause the court issues the following orders:

- a. A declaration be and is hereby issued that the summary dismissal of the claimant was wrongful, unfair, and unlawful.
- b. The claimant is awarded a total of Kshs1,120,000/= in compensation for the wrongful, unfair, and unlawful dismissal. This award is subject to statutory deductions.
- c. Costs of the cause to the claimant.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**DAVID NDERITU**

**JUDGE**

