REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPLICATION NO. 519 OF 1979

ARPHAT W.NJERU...PLAINTIFF

VERSUS

AGIP(K) LIMITED...DEFENDANT

JUDGMENT

On July 22, 1978 Mr Wilson Ondieki Marube (Marube), DW 3, a job group 10 employee of the defendant company connected the off loading valves of a tank wagon containing gas oil (or diesel) with the valves of a storage tank containing ordinary petrol and off-loaded the diesel into that storage tank thereby contaminating the petrol and rendering it worthless. The company had to send the contaminated petrol back to the refinery at Mombasa for refining and thereby suffered a loss of Kshs 50,832.24. The incident was followed by suspension and dismissal of the plaintiff who was at the time the depot manager at Gilgil with over 14 years of service.In answer to the plaintiff's claim for various damages arising out of his summary dismissal on September 4, 1978 without any reason or cause the company in its defence cited the above incident as evidence of contravention of express or implied instructions to warrant dismissal in addition to instances of contravention of such instructions and mismanagement found on July 26, 1978 in connection with handling of cash and recording of stock which also warranted his dismissal. The company had further pleaded lack of reasonable competence in performance of duties on the part of the plaintiff which had warranted his dismissal particulars of which were given as follows:

(a)Failing to transmit regularly as required to the company's head office the fuel stock position at Gilgil;

(b)Being habitually neglectful in the performance of his duties;

(c)Failing to perform duties with due care and attention;

(d)Being unfaithful to the company. The company counter-claimed for Kshs 51,352.90 for loss suffered by it in consequence of the aforesaid matters.

On the question of contamination of the petrol in the storage tank the plaintiff claimed that Marube had acted on his own and without any instructions from him, the plaintiff. His evidence was that he had given instructions for Mr Jotham Achara (Jotham DW 1) a grade 6 employee, and Marube to come earlier that morning. It was a Saturday and they were closing at 12 noon. That day, July 22, 1978, a railway tank wagon containing gas oil had arrived. At 7.00 am the plaintiff and Marube checked the fuel levels by dipping in order to take stock of fuel in the storage tanks. After that when Jotham came at about 7.30 am he gave instructions to both Jotham and Marube to load the 5 delivery trucks with gas oil from the main

tank as they had an order to deliver 20,000 litres of gas oil. His intention was to empty the main gas oil tank in that manner in order to make room to receive the gas oil from the tank wagon which had arrived that day. He told them that after the trucks had left to deliver the gas oil they would start off-loading the tank wagon. About 15 minutes later after two lorries had already left Marube on his own started off-loading the tank wagon without asking Jotham. He connected the off-loading pipe of the tank wagon to the tank containing regular petrol. After realizing his mistake Marube reported to him of what he had done.

It is common ground that Marube was not to be allowed to load or unload fuel or even to take dipping recordings of the fuel in the tank alone. He could do so only under the personal supervision of either Jotham (DW 1) or the plaintiff himself. In fact according to the letter of his appointment dated April 27, 1979 (Ex 1) he was still a grade 10 employee and as such as per the terms of general jobs descriptions grade 10 (page 109 – Ex J) he was to be promoted to grade 9 on completion of 3 months satisfactory probationary period which had commenced on May, 1, 1978.

The plaintiff's account of what had happened is not very convincing. According to his account he had left Marube with Jotham with instructions first to fill up the five tanks with gas oil from the main gas oil storage tank and thereafter to unload the gas oil from the tank wagon into the main gas oil storage tank. If Marube went and connected the tank wagon's off loading valves with those of the storage tank for the regular petrol then he must have done so while he was still working under the supervision of Jotham because the five tanks had still not been filled. Only two of them had so far left with gas oil when the mishap occurred. How could Marube have left his work he was doing with Jotham in order to go and do a completely different job? And how did Jotham, under whose supervision according to the plaintiff he was working, let him do so? Why did the plaintiff not lay any blame on Jotham for having failed to exercise proper supervision over Marube? After all according to the plaintiff he had instructed both of them to first load in the five tanks with gas oil. Marube, a job group 10 employee was at that time working under supervision of Jotham a job group 6 employee.

Jotham's evidence was that on that day he reported a little late at 7.30 am. He found the plaintiff with Marube on top of one of the four storage tanks. Jotham opened both the loading and off-loading valves of all the four storage tanks. Then he waited for the plaintiff and Marube to come down and certify the figures of the fuel in the tanks. After the plaintiff finished and went back into his office the clerk Martin gave him, Jotham, the loading order and he started loading the trucks. In cross-examination he confirmed that Marube was helping him in loading the lorries. He did not know how many he had loaded by about 9.00 am but that time he obtained permission from the plaintiff to go and see his wife off home. When he left the depot for 30 minutes he said (in cross-examination) that Marube was at that time making tea. On returning he found that the tank wagon carrying diesel (gas oil) had been connected to the petrol storage tank. He called Marube who had done the connection and took him to the plaintiff. They all three came out of the office to where the fuel had been contaminated. The plaintiff asked Marube why he had made that connection. Marube answered that he forgot. Jotham clarified that the procedure was for the plaintiff to give instructions to off-load.

Marube (DW 3) gave evidence four years after the plaintiff and DW 1 had given their evidence. He said his duties were to weed flowers, make tea and go to post office. His job group was grade 10. Discharging fuel oil from tank wagon was not one of his duties but he used to do that work under supervision of Jotham or the plaintiff. He had never off-loaded any tank wagon or a storage tank before on his own. He had never asked the plaintiff if he could off-load a tank wagon in the absence of Jotham. It was the duty of Jotham to off-load the tank wagon. The presence of either the plaintiff or Jotham was necessary before the witness could do any unloading.

That Saturday morning after he and the plaintiff had together taken the storage tank fuel readings the plaintiff went to his office. Jotham opened the valves of the storage tanks and then took the loading orders in respect of 3 or 4 lorries already prepared in the office. At that time there was one vehicle which had come to take oils. The witness, Marube, gave out oil drums to this vehicle after which he went back to the office. There the plaintiff told him to prepare tea. Jotham was not in the office then but the plaintiff told him that Jotham had gone to see his visitors off. By the time he finished making tea Jotham had not come

back. So he attended to some further loading orders. He was filling up vehicles with diesel. He filled up about 2 vehicles. After that he came back into the office.

The plaintiff then called him to his office and told him that one of the two tank wagons contained diesel and the other contained regular petrol. He told him to connect both the tank wagons to the storage tanks. The plaintiff added that it was Saturday and time was short. The witness, Marube, went and connected the diesel tank wagon to the storage tank. These tank wagons did not have the usual labels to show what oil was in them. After doing the connection the witness came to the plaintiff and told him that he had done the connection. The plaintiff did not come to check the connection and instead told him to open the valves. Following the plaintiff's instructions the witness opened the valves, switched on the electric pump and the diesel from the tank wagon started flowing into the storage tank.

After about half an hour Jotham came, saw the connection, called the witness and asked him to stop the pump. The witness, Marube, did so. They went to the plaintiff where Marube told him what had happened. All the three came back to the tank wagon, The witness said that he told the plaintiff that he had made a mistake.

The evidence of Jotham and Marube is not only corroborative of each other but have high-lighted a significant incident about which the plaintiff had made no mention at all in his evidence. That incident is that when Jotham took leave and left the premises to see off his wife Marube at that time was making tea in the office. He was nowhere near the tank wagon or the storage tanks. Both of these Saturday morning in a simple and straightforward manner. Neither was he cross-examined on his evidence as to what Marube was doing when Jotham left the premises. I accept their evidence and I am satisfied and find that when Jotham left the premises Marube was at that time making tea in the office.

If Marube was making tea in the office and Jotham was no longer on the premises then to my mind it was very unlikely for an employee like Marube to go and start playing about with the valves or connecting pipe of a tank wagon or a storage tank. He was a grade 10 employee – the lowest grade. His duties were of the simplest nature like making tea, tending to flowers in the garden and that of a messenger and, according to Jotham DW 1 to help any one in his work who needed his assistance. He was employed on May 1, 1978 and the incident took place on July 22, 1978. It is extremely unlikely for an employee of 2 months and 21 days and who is a complete novice to start doing such a job independently and on his own initiative. On balance I am satisfied and find that the plaintiff had told him in the office to go and connect the tank wagon and the storage tank and that after Marube had done so he had informed the plaintiff of that and that the plaintiff thereafter instead of going and checking if the connection had been done correctly, instructed Marube to open the valves. I find that Marube in connecting the tank wagon to the storage tank, and thereafter opening the valves and switching on the electric pump had on that day, on specific instructions of PW 1, acted without any physical supervision at all by either the plaintiff or Jotham. I am satisfied that the plaintiff was grossly negligent in failing to exercise supervision over the work of Marube when the latter was engaged in off-loading the gas oil (diesel) from the wagon tank into the storage tank. The plaintiff in instructing Marube to do that job of off-loading had failed to obey and abide by the defendant company's express instruction that a general hand – grade 9 (or 10) like Marube was not to be used for off-loading petroleum products. On that ground alone I am satisfied that the plaintiff's suspension and eventual dismissal were justified.

Mr Surriel Mbai Nyambok (DW 2) who was the assistant technical manager of the defendant company at the time gave evidence of the loss that was caused by the contamination of oil on account of the aforesaid off-loading into the wrong storage tank. He said that the value of the quarantined product was Kshs 241,347.95 being the value of Kshs 56.604 cubic metres of regular petrol and 39.887 cubic metres of gas oil. However, the customs allowed a rebate in respect of sales tax and duty and that reduced the loss to Kshs 50 832.24 incurred in transport to Mombasa refinery and in its refining. These figures were not seriously challenged by the defence. I accept them as correct and find that the plaintiff caused that loss to the defendant company through his gross negligence and the company is entitled to claim the same from the plaintiff.

Mr Nyambok (DW 2) gave evidence as to other instances of irregularities and failure to observe the laid

down procedure on the part of the plaintiff. He said that every time cash is given out from the safe the depot manager that is the plaintiff, was required to enter the details on a suspense account document to be signed by the payee which the depot manager had to keep in the safe. On July 25, 1978 when he visited Gilgil depot he found that Kshs 522.75 had been paid out but there was no suspense account document to support that cash had been removed from the safe and for what purpose and to whom it had been issued. He said that the explanation given by the plaintiff was that the money had been paid for purchase of sealing wires. But on inspection he had found sealing wires in stock to last depot operations for 3 months.

The plaintiff said that he had given Ksh 500 to one Mr Mungai an operator of an Agip petrol station, to get sealing wires and sealing nuts from Nakuru as these were not available at Gilgil. He did not take a receipt from Mr Mungai but he had noted the payment on a piece of paper so that when he got the things he would post an entry in the cash book. He denied that there were eight rolls of sealing wire found in the store at the time of stock taking on July 25, 1978 and said that only 2 or 3 wire rolls were found. However, he agreed in cross examination that the payment of Kshs 500 to Mr Mungai was in contravention of the company's laid down regulations and procedure. The plaintiff also agreed that the auditor's report with stock taking at handing over (EA) had also stated that there had been no supporting document in respect of Kshs 500 and of Kshs 22.75 which the plaintiff said he had given to the driver to go and collect the company's lorries from Nakuru and for which he had not obtained signed receipts from the said two drivers.

DW 2 admitted that Kshs 500 had been refunded by the plaintiff. The defendant did not claim for Kshs 22.75. But I am satisfied that these two instances showed that the plaintiff had not followed the defendant company's laid down regulations and procedure in respect of disbursements being made from the company's cash.

As regards irregularities observed in the keeping of stocks the plaintiff agreed that at the time of stock taking it was found that in cases of some types of lubricants there was an excess stock and in cases of some other types of lubricants there was a shortage in the stock. The defendants have not however added the value of the unaccounted stock in the sum of Kshs 51,352.99 claimed by way of counter-claim. But the disparity between the actual physical stock and that entered in the stock records is clearly evidence of lack of care, attention and supervision. The plaintiff also agreed that in 1974 he had received a warning letter after 4000 litres of kerosene were stolen during the night after their arrival from Mombasa. Although he said he had replied to that letter stating that he had not been at fault he did not produce any copy of that letter. He also admitted that against instructions he had accepted a cheque for Kshs 9,353.15 from Gonden Enterprises Ltd and that the cheque was later dishonoured.

From the above incidents I am satisfied that the plaintiff had not been reasonably competent to perform his duties, had been habitually neglectful in the performance of his duties, had failed to perform the same with due care and attention and had been unfaithful to his employers, the defendant company. I am satisfied that the defendant company had good grounds to dismiss the plaintiff and that his dismissal was justified. I am also satisfied that the plaintiff is liable for damages and loss caused to the defendant company through his negligence. The defendant company's counter-claim of Kshs 51,352.99 is made up of Kshs 50,832.24 being loss incurred on account of contamination of fuel and of Kshs 522.75 which the plaintiff said he had given out for purchase of wire rolls and for transport to drivers to go to Nakuru. DW 2 had admitted that Kshs 500 had been refunded.

He did not say whether or not Kshs 22.75 had been refunded or was later accounted for. But the fact that the defendant company did not claim this sum in their letter of June 12, 1979 before they filed the defence and the counter claim and that in that letter also they had mentioned the figure of counter-claim as Kshs 50,832.24 only for loss on account of contamination I am satisfied that the defendant company must have prior to the plaintiff's dismissal received satisfaction in respect of this sum. The defendant company, therefore, succeeds in its counter-claim in respect of Kshs 50,832.24 only. The plaintiff's suit is dismissed with costs. Judgment is given for the defendant company for Kshs 50,832.24 with interest at court rates and costs.

Read out in the presence of Mr Kaai and Mr Mohammed.

Dated and Delivered in Nairobi this 9th day of July 1986.

A.M.COCKAR

JUDGE