



**Kaimenyi v Petro Oil Kenya Limited (Cause E915 of 2021)
[2025] KEELRC 122 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E915 OF 2021
MA ONYANGO, J
JANUARY 23, 2025**

BETWEEN

HILDA KAIMENYI CLAIMANT

AND

PETRO OIL KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed the Memorandum of Claim herein on 11th November 2021 through M. T. Adala Advocate. The Claimant prayed for judgment against the Respondent for:
 - a. That this honourable court be pleased to make a Declaratory Order that the Respondent's actions against the Claimant are unlawful, unfair and amount to breach of the Law.
 - b. That the Respondent should forthwith reinstate the Claimant to her employment without loss of any benefits.
 - c. In the alternative, but without prejudice to the various other claims; and Order for payment by the Respondent to Claimant of Special damages being Kshs.425,221.60 as outlined in subparagraphs 13(a), (b), (c), (d), (e) and (f) (inclusive) hereof.
 - d. Compensatory and/or Punitive and or aggravated and/or General damages as may be assessed; qualified, proved and awarded by this Honourable court.
 - e. Such further or other damages as this honourable court may deem fit to grant.
 - f. Interests on Special damages at commercial rates from 24.06.2021 until payment in full.
 - g. Interest on general damages, compensatory damages, punitive damages and aggravated damages at court rates from the date of filing this suit until payment in full.



2. The Respondent filed Response to Claim dated 29th March 2022 through Muthee Kihiko Soni & Associates LLP Advocates denying all averments in the Claim. The Respondent prayed that the claim be dismissed with costs.
3. The Claimant's case was that she was employed by the Respondent on 12th March 2012 as a pump attendant at Ngara Petrol Station in Nairobi. Thereafter, she was promoted to the position of Books Supervisor and later transferred to Meru on promotion as a Senior Books Supervisor. In April 2018 she was promoted to the position of Station In-Charge.
4. The Claimant states that she served the Respondent honestly, diligently and responsibly until 24th May 2021 when she was served with a letter of Summary Dismissal by the Respondent.
5. The Claimant states that she routinely worked overtime, from 6:00am to 6:30pm on the strength of promises of payment for overtime worked but the promises were not fulfilled.
6. The Claimant maintains that there were no previous complaints by the Respondent against her.
7. By letter dated 21st May 2021 the Claimant was served with a show cause letter to which she responded by a letter dated 22nd May 2021.
8. Subsequently, by letter dated 24th May 2021 the Respondent wrote to the Claimant accusing her of performing her duties dishonestly and grossly. She was invited to a disciplinary meeting to be held on 27th May 2021.
9. The Claimant states that she attended the said disciplinary hearing on the 27th May 2021 and gave detailed, comprehensive and reasonable explanations and denied all the allegations of wrong-doing as stated by the Respondent.
10. The Claimant maintains that the minutes of the disciplinary meeting as prepared by the Respondent, left out salient points raised and/or disclosed by her at the meeting.
11. The Claimant categorically denied all the allegations of negligence and losses and stated that the losses were not attributable to any fault or failure on her part and that the losses were normal occurrences in any business similar to the Respondent's business and are/were not as a result of her negligence, personal action or lack of action.
12. On the part of the Respondent, it is stated that the Claimant was employed on 29th March 2012 on a three month contract as a pump attendant and not on 12th March 2012 as alleged by the Claimant.
13. The Claimant's contract was thereafter extended vide a letter dated 12th June 2012.
14. The Claimant was subsequently promoted and transferred to the Respondent's Meru station in 2017 where she was later promoted to the position of station in charge. She served in the same position from April, 2018 up until she was summarily dismissed on 24th June 2021.
15. The Respondent states that during the Claimant's tenure as the station in charge, the Respondent experienced abnormally large product losses at its Meru station.
16. The Respondent states that on numerous occasions it made various efforts to establish the cause of the sudden abnormally large product losses at the station, however the station still recorded product losses.
17. The Respondent made various inquiries from the Claimant in her capacity as the station in-charge on what was occasioning the product losses in the course of her tenure, but the Claimant at all times could not explain why despite all measures put in place by the Respondent, there were losses experienced at her station.



18. Convinced that the losses were as a result of the Claimant's gross negligence the Respondent issued a show cause letter to the Claimant dated 21st May 2021.
19. In response to the show cause letter, the Claimant wrote a letter dated 15th April 2021. The Respondent states that the same did not offer any explanation to the loss in fuel. Instead the Claimant acknowledged the shortages experienced but claimed not to know the cause despite being in charge of the station.
20. Being dissatisfied by the Claimant's response, the Respondent invited the Claimant for a disciplinary meeting vide a letter dated 24th May 2021 and by said letter, the Respondent notified the Claimant of her right to bring along another employee or a shop floor union representative of her choice to the disciplinary meeting.
21. The disciplinary meeting was held at the Respondent's offices on 27th May 2021 where the Claimant was in attendance but opted not to be accompanied by a colleague or a union representative.
22. The Respondent states that during the meeting the Claimant was given a chance to state her case and explain the product losses experienced at her station and the minutes of the meeting were recorded. After the meeting the Claimant was given a chance to confirm the minutes recorded as accurate, which she did and signed every single page of the 7 paged printed out minutes.
23. The Respondent states that having found the Claimant's explanations unsatisfactory, it summarily dismissed the Claimant vide a letter dated 24th June 2021 on account of gross misconduct.
24. The Respondent states that at the time of the Claimant's termination, she had no pending leave days. That on the contrary she had taken leave days in surplus. That during the pendency of the Claimant's employment she was paid for every hour she worked overtime on the days she worked overtime, which payment reflected on her payslip for the month.
25. The Respondent maintains that the Claimant's services were terminated procedurally and fairly and all her dues paid. That she is therefore not entitled to any of the claims sought.

Analysis and Determination

26. With consent of the parties, the suit was disposed of by way of pleadings, documents and witness affidavits/sworn statements. The parties filed their respective submissions which the court has considered. The issues arising for determination from the parties' respective cases are the following:
 - a. Whether there was valid reason for the summary dismissal of the Claimant;
 - b. Whether there was fair procedure before summary dismissal;
 - c. Whether the Claimant is entitled to the remedies sought in her claim.
27. The main facts of this case are not in contention. The Claimant was employed by the Respondent as a pump attendant by letter dated 29th March 2012 which indicates that the effective date of the contract is 20th March, 2012. The parties however disagree on the date of employment in their pleadings, the Claimant stating the start date was 12th March, 2012 with the Respondent insisting the effective date of employment was 29th March, 2012. This is not a material difference and the court will go by the date in the letter of appointment.
28. The Claimant was summarily dismissed on 24th June 2021. The reason for dismissal is as stated in the letter of dismissal reproduced below:

Hilda Kaimeny



C/o Petro Oil Kenya Limited

Meru – Station

Dear Ms. Kaimenyi

Re: Summary Dismissal

We refer to the abnormally large Meru Station product losses, which have been going on during your tenure as the station in-charge.

The company is convinced that the losses have been occurring as a result of your gross negligence/or theft of product at the station. As a result the company has suffered massive financial losses.

We refer also to the disciplinary meeting held on 27th May, 2021, during which your presentation was heard and considered, regrettably the company found it unsatisfactory.

In light of the above, you;

Performed your duties dishonestly or grossly.

Please note, the above offences are gross in nature pursuant to the Employment Act 2007 Section (44) (40)(c) &(g) and they are punishable through severe disciplinary action.

in view of the above, you are hereby summarily dismissed in accordance with the aforementioned statute. You are therefore required to start a detailed handover process of all the company's property within your possession to your immediate supervisor.

This will facilitate your terminal dues payment which will be paid to you as follows;

Days worked in the month of May; 2021 = Full month's salary
Days worked in the month of June, 2021 = 24 days up to and including 24th June, 2021
Leave days earned and not taken as at 24th June, 2021 = Nil
Less: Statutory deductions
Less any other monies owing to you by the company in form of loans, advances etc. if any = (above payment will be retained by the company as partial payment for losses).
You will also get a Certificate of Service.

Your faithfully,

Signed

Carolyne Mulili

Human Resources officer

29. As stated in the letter, the reason for summary dismissal is “performed your duties dishonestly and grossly”. The letter states that the Respondent was convinced that the abnormal product losses at the Meru station during the Claimant's tenure as station in charge were as a result of the Claimant's gross negligence and or theft of product at the station.
30. The same reasons are given in the notice to show cause letter dated and in the letter inviting the Claimant for disciplinary meeting dated 24th May, 2021.
31. In the minutes of the disciplinary hearing at pages 19 to 25 of the Respondent's bundle, there is no finding or evidence of dishonesty on the part of the Claimant. The word “grossly” as used in the letter of dismissal is vague and was not substantiated.
32. Section 43 of the Employment Act provides that:
 43. Proof of reason for termination



- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

33. In the instant case the Respondent did not prove that the Claimant stole any products or that she was dishonest. There was no investigation report to prove dishonesty on the part of the Claimant. All that it proved was that there were product losses during her tenure as station in charge. What this may have proved is either incompatibility with the role and/or poor performance. These grounds would have required to be handled by the Respondent in a different manner.

34. The Court of Appeal discussed the procedure for handling poor performance as follows in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR:-

The reason advanced by the Bank for terminating the respondent's employment was poor performance. In *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK)* (September, 2013) the court observed as follows;

- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
- b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
- d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."
- e. The Claimant relied on the cases of *Daniel Mbuti v Express Automation Limited* [2014] eKLR and *Maina Mwangi v Thika Coffee Mills Limited* [2012] eKLR on the need for the employee to be placed on performance improvement programme prior to a determination being made on poor performance. The Claimant



submitted that the employer failed to demonstrate the steps taken to check the performance of the employee. The Claimant submitted that from testimony adduced, it is obvious no law was followed in the termination, and that where there was an attempt to do so, it was just cosmetic compliance. The Claimant submitted that the provisions of the law have been couched on mandatory terms and it gave no room for discretion to the Respondent. The Claimant submits that therefore, this court must return an adverse finding that the Claimant was unfairly and unlawfully terminated. The Claimant submitted that having demonstrated that the Respondent disregarded the law, there was basis for grant of relief. The Claimant submitted that because he was dismissed both unfairly and unlawfully, he is therefore entitled to compensation pursuant to section 49(1)(c) of the *Employment Act*. The Claimant submitted that the court should exercise its discretion and award maximum compensation. He submitted that he believed that would be justifiable on the grounds that this court should take judicial notice of the fact that unemployment is generally a serious problem in this country and that the Claimant has little chance, if any of securing alternative employment. Further, the Respondent had no regard to the law, and proceeded to terminate Claimant without any cause and the same should be punitive. The Claimant submitted that the amounts pleaded should be awarded and costs be paid by the Respondent.

35. On the procedure adopted, the Respondent complied with section 41 of the *Employment Act* as the Claimant was issued with a notice to show cause which she responded to. She was thereafter invited for a disciplinary hearing and advised of her right to be accompanied by a fellow employee or union official but opted to attend the disciplinary hearing unaccompanied.
36. Section 45 of the *Employment Act* provides that for termination to be fair there must be both fair procedure and proof of reason for termination. See *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR and *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* [2017] eKLR.
37. Having held that the Respondent did not prove the reasons for the Claimant's summary dismissal, I find and hold that the termination of the Claimant's employment was unfair lack of valid reason for termination.

Remedies

38. The Claimant prayed for several remedies at paragraphs 12, 13 and in the prayers.
39. The termination of the Claimant's employment having been unfair, she is entitled to pay in lieu of notice as per her contract of employment which provided for one month's notice or pay in lieu thereof. I award the Claimant the sum of Kshs. 35,222 being one month's gross salary in lieu of notice.
40. The Claimant prayed for reinstatement. Taking into account the manner and reasons for termination of her employment and further considering that she has been out of employment for more than 3 years, this remedy is not available to her.
41. The Claimant prayed for overtime. No evidence was adduced in respect of the same. The prayer is declined as it has not been proved.



42. The Claimant did not prove that she had any leave earned but not taken. The prayer for annual leave is declined.
43. The Claimant prayed for expenses incurred while attending disciplinary hearing. The same is declined as it was not specified or proved.
44. The Claimant prayed for compensation for unfair termination. Taking into account her length of service of about 9 years, the circumstances and reasons for termination of her employment and all other relevant factors under section 49(4) of the *Employment Act*, I award the Claimant 6 months' salary as compensation for unfair termination of her employment in the sum of Kshs. 211,332 (35,222x6).

Conclusion

45. In conclusion, I find the summary dismissal of the Claimant's employment unfair and award her Kshs. 246,554.
46. The Respondent shall pay the Claimant's costs for this suit.
47. Interest shall accrue from date of judgement.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 23RD DAY OF JANUARY, 2025.

M. ONYANGO

JUDGE

