Kenya Petroleum Oil Workers' Union v K.K. Kerosene Distributors Limited & another (Cause E6448 of 2020) [2024] KEELRC 91 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 91 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E6448 OF 2020

J RIKA, J

JANUARY 31, 2024

BETWEEN

KENYA PETROLEUM OIL WORKERS' UNION ..... CLAIMANT

AND

K.K. KEROSENE DISTRIBUTORS LIMITED ..... 1ST RESPONDENT

K.K. TRANSPORTERS LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The Claimant filed its Statement of Claim on 12th November 2020.

2. The Claim is filed on behalf of George Kariuki, a member of the Claimant [Grievant], who is said to have been employed by the 1st Respondent as an Assistant in 2001, and later in 2014 as a Supervisor.

3. The Claimant states that the Grievant, was summarily dismissed by the Respondents on 29th August 2019. His last salary was Kshs. 20,000 monthly.

4. The Claimant describes the 1st Respondent as a Petrol Station dealing in petroleum products, pumps and kerosene distribution, within Dandora area, Nairobi. The 2nd Respondent deals in petroleum products and truck calibration. The businesses are owned by Kenneth Kinuthia.

5. The Claimant has not pleaded why the Grievant was dismissed, but states that the dispute was reported to the Ministry of Labour. A Conciliator was appointed, who invited the Parties for conciliation meetings on 29th November 2019, 9th December 2019, and 14th January 2020. The Respondents disregarded the meetings, while the Claimant attended. On 12th February 2020, the Conciliator issued a certificate of unresolved dispute, paving way for the filing of the Claim.

6. Again without suggesting the reason or reasons behind the decision to summarily dismiss the Grievant, the Claimant pleads that the Grievant worked diligently for 18 years, without disciplinary complaints. He was not given a hearing.

7. The Grievant was denied annual leave pay of 6 months; holiday pay for 36 months; and overtime over a period of 36 months.

8. The Claimant prays the Court to award the Grievant: -

   a. Declaration that termination was wrongful, un-procedural and unfair.

   b. 1-month salary in lieu of notice at Kshs. 20,000.

   c. Pro-rata annual leave of 6 months at Kshs. 9,894.

   d. Public holiday pays, over a period of 3 years at Kshs. 62,192.

   e. Overtime for 3 years at Kshs. 1,492,992.

   f. 12 months' salary in compensation for unfair termination at Kshs. 294,000.
   Total ...Kshs. 1,879,078.

   g. Certificate of Service to issue.

   h. Costs.

   i. Interest.

   j. Any other suitable order.

9. The Respondents filed their joint Statement of Response, dated 16th December 2020. They state that the Claimant is a stranger to them. They do not have any Recognition Agreement or Collective Bargaining Agreement with the Claimant Union.

10. They state that they are one legal entity, pursuant to a Certificate of Change of Name, registered on 15th October 2013. They deny that they are the property of Kenneth Kimani. There is one company, with multiple directors and managers.

11. The Respondents engaged the Grievant as a Petrol Station Attendant. On 19th October 2015, Dynamic Service Point No. 2, was adopted by all Attendants working for the Respondents. It was clear and unequivocal first, that Attendants must repeat the customer's fuel request, to confirm if the customer's vehicle required diesel or petrol; and second, any Attendant fueling the wrong product, would be dismissed immediately, and no excuses would be tolerated. This policy was well-known to all staff. They were regularly trained on this. The policy was discussed and it was agreed again by all staff, at a meeting held on 13th June 2019, that an Employee fueling the wrong product, would be dismissed immediately. The Grievant was privy to the meeting.

12. On 29th August 2020, the Grievant fueled a matatu motor vehicle registration number KAN 191 A, with super petrol, instead of diesel.

13. The vehicle developed mechanical problems. The Respondents were compelled to flush out the wrong fuel, replace it with the correct one, and cater for mechanical repair. They lost the particular customer, who had been a regular customer.

14. The Respondents dismissed the Grievant with effect from 30th August 2020. He was paid all his terminal dues. He was paid a standard rate of Kshs. 500, whenever he worked on Public Holidays. He did not work overtime. He was dismissed summarily for gross misconduct, and is not entitled to notice. His contract was fairly and lawfully terminated. He is not entitled to compensation.

15. The Grievant gave evidence on 21st July 2023, while Director Kenneth Kinuthia gave evidence for the Respondents on 27th September 2023, closing the hearing. The Claim was last mentioned on 27th September 2023, when the Parties confirmed filing and service of their Closing Submissions.

16. The Claimant relied on the Witness Statement of the Grievant on record, and Documents contained in a list dated 10th November 2020. The Grievant restated his employment history, and his terms and conditions of service. He repeated that he worked for 18 years. He told the Court that on 29th September 2019, he fueled a matatu with super petrol, instead of diesel. He removed the wrong fuel, and refueled correctly. He was issued the letter of summary dismissal, without the benefit of a warning. Policy on wrong fueling was that the Attendant's contract, would be terminated. He testified that he was however, entitled to a hearing, which was not given.

17. He did not know what the Respondents' policy on Public Holidays was. He had pending annual leave days. He worked 24 excess hours per week. He was paid salary for the month of dismissal.

18. Cross-examined, he told the Court that he joined the Claimant many years back. He could not remember the exact date. His membership card is dated 5th March 2018. He paid union subscription fees directly to the Claimant. He was paid Kshs. 500 by the Respondents as shown in his pay slips. He did not know what this represented. It was not for public holiday work. He conceded that he fueled the wrong product. He was trained and experienced. It was the Respondents' policy, for the Attendants to ask the customer 2 to 3 times, what type of fuel was needed. The fuel pump was colour-coded. Petrol was red, and diesel black. It was to ensure there was no confusion. Attendants were trained regularly, 3 to 4 months. There were written instructions that request of the type of fuel, is put to the customer twice. The Grievant signed the instructions. It was indicated that wrong fueling would lead to immediate dismissal of the concerned Employee. The policy was clear. He was not aware that the Respondents' licence could be revoked by the industry regulator, for wrong product fueling. He was not aware that many petrol stations, had been taken to Court, over wrong fueling. There were previous complaints against the Grievant, which had been settled. He did not have his computation of overtime, claimed at over Kshs. 1 million. He did not specify the public holidays worked.

19. Redirected, he told the Court that he paid trade union subscription fees directly to the Claimant. He was not advised that Kshs. 500 paid was holiday pay. He expected to be paid double daily rate for public holiday work. He was not able to specify the days, without the attendance register. He made the error on fueling, because he was tired, having worked for 12 hours at the time, without a break.

20. Kenneth Kinuthia relied on his Witness Statement and Documents filed by the Respondents, exhibit 1-6. He restated that the Claimant is a stranger to his businesses. Attendants were well-trained about fueling. They were to ask the customer what type of fuel was required, before fueling. The fuel noozles were all clearly marked, leaving no room for error.

21. The Respondents were given franchise by oil companies. Energy and Petroleum Regulatory Authority [EPRA] licensed the Respondents. Wrong fueling would result in loss of franchise and the licence, if reported. The Attendants signed instructions on fueling. The policy was pinned on the petrol station doors. Wrong fueling would lead to dismissal of the concerned Attendant. The Respondents held a meeting with all staff on 13th June 2019, where this policy was emphasized.

22. The Grievant fueled super petrol in a diesel engine. The customer complained. The Respondents took the vehicle to the garage. The wrong fuel had to be flushed out and replaced with the correct fuel. The regular customer was very angry and never returned. The Grievant was dismissed and paid his terminal dues.

23. Kinuthia told the Court that the prayer for overtime was not specified. The Respondents closed at 10.00 p.m. because of insecurity. The pumps were calibrated. Employees worked for 2 days, and took a break of 24 hours. Every public holiday, there was a cash refund of Kshs. 500. The Grievant did not complain about this rate of holiday pay. He did not have outstanding annual leave days. Kinuthia did not receive any communication from the Ministry of Labour, on conciliation.

24. Cross-examined, Kinuthia told the Court that his business did not have labour contracts with the Claimant. The Grievant did not sign the document dated 19th October 2015, exhibited by the Respondents. The fuel policy was availed to all Employees. It was displayed on the door. There is no document showing that policy was displayed on the door.

25. The Respondents did not issue the Grievant a letter to show cause. There was no disciplinary hearing. Reporting time was 6.00 a.m. Employees worked for 2 days. They would then take off-duty day. They were required to leave at 10.00 p.m. They did not work overtime. Past complaints against the Grievant had been settled. The Respondents did not file documents explaining payment of Kshs. 500 made to the Grievant. There were no documents filed showing when the Grievant took annual leave. There was no evidence showing that the Respondents financed flushing out of the wrong fuel. There is no evidence of customer complaints. The Grievant did not collect his Certificate of Service from the Respondents.

26. On redirection, Kinuthia emphasised that fueling policy was displayed on the premises' doors. There was no letter to show cause or disciplinary hearing, because policy on wrong fueling, was that the concerned Employee is summarily dismissed. Pump timer went off at 10.00 p.m. and on at 6.00 a.m. There were 2 days off, compensating any overtime worked. Holiday pay was Kshs. 500.

27. The issues are whether the Claimant has locus standi in the dispute; whether the Grievant's contract was terminated on valid ground under Sections 43 and 45 of the *Employment Act*; whether termination was executed fairly, under Sections 41 and 45 of the *Employment Act*; and whether the remedies sought are merited.

    The Court Finds: -

    Employment of the Grievant and status of the Respondents.

28. The Respondents were confirmed by Director Kenneth Kinuthia, to be the same business, incorporated as K.K. Kerosene Distributors Limited, as shown in the Certificate of Change of Name, issued by the Registrar of Companies, on 15th December 2015.

29. The Court does not think that the joinder of the 2nd Respondent is wrong, the 2nd Respondent being indicated as the entity which summarily dismissed the Grievant, through the letter dated 29th August 2019.

30. It is not disputed by the Respondents' Director Kenneth Kinuthia, that the Respondents' business employed the Grievant. The legal and business form, under which the Respondents operated, is not material to the dispute.

    Locus standi.

31. The Claimant has locus standi in the dispute. The dispute is a continuation of the dispute reported to the Ministry of Labour by the Claimant Union, representing the Grievant, pursuant to the *Labour Relations Act*, 2007. The Court took cognizance of the dispute, upon the grant of the certificate of unresolved dispute by the Conciliator. The Claimant was the initiator of the dispute, and its locus standi was not disputed by the Respondents at conciliation.

32. The Grievant is a member of the Claimant Union, and holds a membership card. He paid his subscription directly. The Claimant is entitled to represent him, under its constitution, and the *Labour Relations Act*. Advancement and protection of legal rights and interests of workers, is an obligation imposed on their trade unions, through the trade union constitution and the *Labour Relations Act*.

33. There is no requirement under the law, that the Claimant should have any form of a labour contract with the Respondents, to have locus standi in representation of its members in Court. Recognition Agreement enables the Union to collectively bargain with the recognizing Employer. It is not the instrument through which the legal capacity to sue of behalf of members, is given.

34. Validity of reason. The Respondents had valid reasons, under Sections 43 and 45 of the *Employment Act*, to justify termination.

35. The Grievant fueled a customer's matatu vehicle, with super petrol, instead of diesel.

36. His recollection of the incident is boldly self-incriminating. He told the Court on cross-examination that: -I concede I fueled the wrong product.I was trained and experienced.We would ask the customer what type of fuel to use.I would ask 2 to 3 times.Fuel pump is colour-coded. Petrol is red. Diesel is black. It will ensure there is no confusion.We were trained regularly, 3 to 4 months.We signed instructions.It was stated that wrong fueling would lead to dismissal.Consequences were clear for the staff.

37. The fueling policy, according to this evidence by the Grievant on cross-examination was clear, and stated in red and black [or in black and white for lingual purists].

38. Even assuming that the Grievant gave this self-incriminating evidence of wrongdoing, under the intense heat of cross-examination, it is noted that he told the Court on examination-in-chief, under no pressure at all, that ''On 28th August 2019, I was at work. A matatu came for fueling. I fed in the wrong fuel. ''

39. The fueling policy was clear. It was widely displayed to the Attendants. It was known. The Grievant was well trained, and experienced. It is difficult to understand why, upon enquiring from the matatu driver 2 to 3 times which fuel to feed in, having been told which fuel was needed, and having the benefit of the pump colour-coding, in contrasting black and red, the Grievant still fueled super petrol, instead of diesel.

40. The result was that the Respondents lost their regular customer, their business reputation was tainted, and they sustained financial loss, by repairing the damaged diesel engine, and replacing super petrol with diesel.

41. There were far-reaching implications. The Respondents risked loss of franchise and operating licence.

42. The Grievant was placed in a position which required he performs his role carefully and properly. Every resource was expended by the Respondents, in ensuring that the Grievant understood his role and discharged it carefully and properly. In the end he was careless and discharged his role improperly, supplying the customer's matatu with super petrol in place of diesel. The Respondents suffered material and reputational damage.

43. It was pointless for the Claimant, to demand from the Respondents' Witness on cross-examination, that he proves that the Respondents financed repair of the matatu and refueling. The Grievant conceded in clear terms that he supplied the customer with wrong fuel. The result of this wrongful act, would not be expected to be anything other than what the Respondents stated it was.

44. Termination was based on valid reasons under Section 43 and 45 of the *Employment Act*.

45. Procedure. It was conceded by the Director that the Grievant was not issued a letter to show cause, and was not taken through a disciplinary hearing. This would on the face of it, appear to have been far short of the procedure contemplated under Sections 41 and 45 of the *Employment Act*.

46. A disciplinary hearing however, would only have been necessary, if the reasons over which the Grievant was dismissed, were contested. It would not be necessary to try facts, which were not disputed. The Parties were in agreement that the Grievant supplied a customer with super petrol in place of diesel. It was common ground that this was wrong and contrary to policy and instructions in place. It was agreed that wrong fueling would result in summary dismissal. What facts were to be investigated and established, through a letter to show cause and a disciplinary hearing? What purpose would presentation of charges, which the Grievant had conceded, and an elaborate hearing in line with Section 41 of the *Employment Act*, serve? Nothing would have been served by such a hearing. The end result would have been the same. The Attendants, including the Grievant, executed a policy document, which stated the punishment for wrong fueling, was summary dismissal. Once there was an admission that wrong fueling took place, no amount of show cause and disciplinary hearing, would have altered the outcome.

47. Procedure cannot be faulted, considering that the reason justifying termination was commonly known to the Parties, and unequivocally admitted by the Grievant. There were no disputed facts to be tried through an elaborate disciplinary hearing.

48. Remedies. Termination was fair and notice is not payable. Compensation is not merited. The Grievant was not able to support his computation of overtime, at Kshs. 1,492,992. He worked for 18 years. He did not establish during what period, in these 18 years he worked overtime. He was not able to point to the specific public holidays worked. He told the Court that he could not do this without the attendance register. He did not seek the production of the relevant attendance register by the Respondents.

49. The prayer for pro-rata leave of 6 months has been established on a balance of probability, and in view of no disputation through documentary evidence by the Respondents. Section 74 [1] [f] the *Employment Act* requires Employers to keep a written record of an Employee's annual leave entitlement, days taken and days due, as specified in Section 28. In case there is a dispute on annual leave, an Employer should not make heavy weather of availing annual leave records, to prove its position or disprove the oral evidence of the Employee. The prayer for pro-rata leave of 6 months at Kshs. 9,894 is allowed.

50. Certificate of Service to issue.

51. No order on the costs.

52. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

It Is Ordered:

a. The Respondents shall pay to the Claimant pro-rata leave of 6 months at Kshs. 9,894.

b. Certificate of Service to issue.

c. No order on the costs.

d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER PRACTICE DIRECTION 6[2], OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2024.

JAMES RIKA

JUDGE