



**Ayako v Kenya Pipeline Company Ltd (Cause E008 of 2023)
[2024] KEELRC 1464 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1464 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E008 OF 2023
CN BAARI, J
JUNE 13, 2024**

BETWEEN

DENNIS ONYANGO AYAKO CLAIMANT

AND

KENYA PIPELINE COMPANY LTD RESPONDENT

JUDGMENT

1. Dennis Onyango Ayako (the Claimant) sued Kenya Pipeline company Limited (the Respondent) vide a Memorandum of Claim dated 27th January, 2023, seeking the following reliefs:
 - i. A declaration that the Respondent discriminated against him contrary to Article 27 of *the Constitution* and Section 5(3) of the *Employment Act* in the manner it conducted the disciplinary proceedings culminating in his summary dismissal.
 - ii. General damages.
 - iii. A declaration that he was not accorded a fair hearing before an independent and impartial body and was not accorded adequate time and facilities to prepare his defence.
 - iv. 12 months compensation for wrongful termination of employment at the sum of Kshs 2,164,272/=
 - v. An order that he be reinstated back into employment, or in the alternative receive salary due to him for the remainder of his term in employment of Kshs 32,464,080/=
 - vi. Costs of the suit plus interest.
2. In reply the Respondent filed a Statement of response dated 12th June, 2023, wherein, it states that the Claimant was summarily dismissed for negligence.



3. In support of their respective cases, the Claimant testified on his own behalf, adopted his witness statement and produced documents filed in support of his case. The Respondent presented the evidence of Stephen Komen and Emily Thathi, who testified in support of its case on 7th of November 2023. The two equally adopted their witness statements and produced documents filed in support of the Respondent's position.
4. Both parties filed submissions in the matter and a judgment date was set for 13th June, 2024.

The Claimant's Case

5. It is the Claimant's case that he was employed by the Respondent on 30th October, 2000 as a Clerical Officer, with his role changing to that of dispatch assistant by the time of his dismissal. It is his further case that he was earning a gross salary of Kshs 180,356/=.
6. The Claimant avers that he was issued with a notice to show cause dated 1st February, 2021, and for which he was expected to respond to in 48 hours, which time was inadequate.
7. It is his case that despite raising the issue of short of notice, the disciplinary committee overruled him and proceeded with the hearing.
8. He contends that it is curious why he was the only one singled out, yet fraudulent fuel request orders would generally involve many individuals. He stresses that a little investigation by the Respondent would have revealed that such a scheme involves a number of people.
9. It is his case that the lack of an investigation report lent credence to the disciplinary action being discriminatory. Additionally, he buttresses that the discriminatory nature of his disciplinary action was evinced by the reinstatement of one Rispah Kiptanui identified for disciplinary action over the same facts.
10. That despite the foregoing misgivings, the Claimant states that the Respondent still went ahead and dismissed him for negligence in performance of his duties.
11. He further avers that the disciplinary committee erroneously recorded that he had admitted to processing orders for petrol at the disciplinary hearing.
12. It is his case that the appeal on his dismissal was upheld, notwithstanding the fact that he had raised the issue of shortness of notice and discrimination. He contends that after his dismissal his union reported the matter to the conciliator who recommended his reinstatement.
13. The Claimant states that despite this recommendation, the Respondent has refused to reinstate him occasioning him untold suffering as he has a young family depending on him.
14. On cross-examination, it was the Claimant's assertion that he did not request for additional time when he was invited for disciplinary hearing. He further confirmed that he processed the fuel orders subject of the show cause letter.
15. It is the Claimant's evidence on cross-exam that he was responsible for verifying fuel orders before processing them for payment.
16. The Claimant further confirmed that he took a loan which he acknowledges is his responsibility to pay.

The Respondent's Case

17. It is the Respondent's case that indeed the Claimant was its employee whom it was forced to dismiss on account of fraudulent activities.



18. The Respondent's states that during a routine check-up of payments to pre-qualified fuel service providers, it unearthed suspicious invoices from M/S Wakaha Enterprises for payment, pursuant to which, the Respondent commenced internal investigations after reporting the matter to the DCI.
19. The Respondent's further case is that internal investigations revealed that the Claimant had made fraudulent payments of fuel invoices in the transport section on 8th and 15th November, 2019, 16th April, 2020, 5th, 6th, 7th, 8th, 9th, 11th, 27th and 28th May, 2020. It avers that on further inquiry through interviewing drivers, it turned out that none of its vehicles were fuelled at Wakaha Enterprises.
20. Additionally, the Respondent contends that the drivers had not filled the morning check forms that enables the Claimant to create fuel requests in the Systems Application Programme (SAP).
21. It is the Respondent's case that on further review, it came to the realisation that the Claimant had not ascertained the status of the motor vehicles before processing the fuel in the SAP.
22. According to the Respondent, investigations had revealed that the Claimant was the creator of fuel request orders and as Dispatch Assistant Clerk, he colluded with Wakaha Enterprises to create fake fuel orders.
23. The Respondent's further states that the Claimant was the last person to process manual fuel order numbers 013951-01400, used to fraudulently fuel stationary vehicles.
24. On the back of these allegations it is the Respondent's case that a show cause was issued as the Claimant's action amounted to gross misconduct. It contends that the Claimant's response dated 5th February 2021 was not satisfactory making it imperative that a disciplinary hearing be carried out.
25. It is the Respondent's case that the disciplinary proceedings were above board and the Claimant even attended with a representative.
26. The Respondent asserts that the Appeals Committee upheld the disciplinary committee's decision after finding the appeal unsatisfactory.
27. It is the Respondent's case that it did not adhere to the conciliator's recommendation on the basis that the trade dispute was not resolved within 30 days as required by the Trade Disputes Act, and that there was no settlement agreement in writing signed by both parties as required by the Trade Disputes Act. The Respondent further avers that the Conciliator did not issue a certificate of unresolved issue as required by the Trade Disputes Act.
28. On cross-examination, RW1 (Stephen Komen) confirmed that the investigation report was not availed to the Claimant. He further states one Rispah Kiptanui was also charged with similar accusations, she appeared for disciplinary hearing and was cleared.
29. RW2 told court on cross-exam that the Claimant complaint to the committee on the short notice. She further testified that Rispah and the Claimant faced different charges and that the disciplinary committee evaluated responses given by each individual in arriving at their decision.
30. It is the Respondent's evidence that the Claimant was a unionisable employee and that the Collective Bargaining Agreement (CBA) provides for a two (2) weeks period for notification of charges.

The Claimant's Submissions

31. The Claimant filed submissions dated 9th January 2023. He submits that the period of 48 hours within which he was to reply to the notice to show cause was extremely short, given the volume of material constituting the allegations.



32. It is his contention that the time given contravened the Respondent's Human Resource Policy and Procedures Manual, specifically clause 11.4.1(b) on adequate time to present cases, and Article 50(2) (c) of *the Constitution* on the right to adequate time and facilities to prepare a defence.
33. It is the Claimant's submission that the Respondent's decision to proceed with the hearing in spite of the show cause being defective, amounted to procedural unfairness. He placed reliance on the Court of Appeal decision in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, where the court was of the opinion that even in the presence of a valid reason for termination the court must interrogate the propriety of the procedure used.
34. The Claimant further submits that the Respondent falsely recorded at the disciplinary hearing that he had admitted to negligence and fraud. For this reason, the Claimant submits that the decision to terminate him was based on evidence that was not credible.
35. It is the Claimant's submission that he was targeted and discriminated against entitling him to aggravated damages. He contends that the Respondent's fuelling procedure involved a number of people, and thus any fraud would involve collusion. He avers that one of his colleagues named Rispah Kiptanui who is an actor in the fuelling process was not disciplined despite being adversely mentioned.
36. In further support of the allegation of discrimination, the Claimant contends that the Respondent failed to provide evidence of reporting the matter to the police. He reiterates that the Respondent's action of disregarding the conciliator's report which cited gaps in the disciplinary proceedings, was further proof of discrimination.
37. On his entitlement to the prayers sought, the Claimant submits that due to the Respondent's high handedness, he is entitled to damages of Kshs 10,000,000/= for discrimination based on the holding in *Ol Pajeta Ranching ltd v David Wanjau Muhoro* [2017] eKLR.
38. It is the Claimant's submission that the 20-year of service, and the unfair termination procedure entitles him to the maximum award of 12 months' salary.
39. It is his submission that having been terminated on 9th March, 2021, he is within the three years within which he can be reinstated under the law. He sought to rely in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company* [2014] eKLR where the court in consideration of the Claimant's long service and the termination being within the 3 year statutory period, ordered for the Claimant's reinstatement.

The Respondent's Submissions

40. The Respondent submits that the disciplinary process was above board. It contends that the Claimant did not object to the 48-hour notice to respond in the notice to show cause. Additionally, the Respondent submits that if the Claimant felt aggrieved by the timelines he still had the chance to address the allegations at the disciplinary hearing almost three weeks later. It submits further that the Claimant cannot plead inadequate opportunity to present his case.
41. The Respondent asserts that Section 41 of the *Employment Act* only stipulates the issuance of a notice to show cause outlining allegations or charges against the employee. It cites the case of *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR.
42. The Respondent further submits that the Human Resource Policy Procedures Manual provides for an appeals procedure which the Claimant only exercised 59 days later.
43. In response to the Claimant's assertion that the Respondent's proceeded on the strength of a defective charge sheet, the Respondent avers that it was only the accusation of stealing which was defective.



- Additionally, the Respondent submits that the Claimant had not provided any evidence of false information being captured in the minutes as alleged.
44. On whether the Claimant should have signed the disciplinary committee minutes, the Respondent submits that there is no legal stipulation that the Claimant should sign disciplinary hearing minutes.
 45. It is the Respondent submission that the Claimant had not proved discrimination. On the flipside, it avers that the Claimant has only affirmed that he was not alone in the fraudulent processing of fuel orders.
 46. The Respondent stresses that the Claimant's supervisor Rispah Kiptanui was disciplined and was demoted, hence it was not right for the Claimant to state that she was spared. Furthermore, the Respondent submits that the Claimant had not provided particulars of different treatment in proof of discrimination. It relies on the cases of Peter Waweru v Republic [2006] eKLR and Nyarangi & Others v Attorney General [2008] KLR 688 where the common thread was that discrimination involves according someone different or less favourable treatment.
 47. On whether the fraud ought to have been reported to the DCI, the Respondent submits that it was not obligated to ensure the DCI does its work. It submits further that it is not precluded from carrying on its internal disciplinary proceedings. It had reliance on the case of David O. Owino v Kenya Institute of Special Education [2013]eKLR where the court held that a criminal trial and internal disciplinary proceedings initiated by an employer are two distinct processes with different procedural and standard of proof requirements.
 48. The Respondent relied in Kenya Shoe & Leather Workers Union v Modern Soap Factory [2015] eKLR for the holding that conciliation must come to an end after 30 days unless parties agree to extend the period, in support of its non-compliance with the conciliator's recommendations.
 49. The Respondent submits that the Claimant was not discriminated against and that the substantive reasons for the dismissal had not been challenged.
 50. The Respondent conversely submits that in the unlikely event the court disagrees with it, it should adopt the reasoning in Lilian W Mbogo Omollo v Cabinet Secretary Ministry of Public Service and Gender & another [2020] eKLR where a nominal amount of Kshs. 1 was awarded after the court found the Petitioner to have benefitted from the proceeds of crime.
 51. The Respondent finally urges that the court dismisses the Claim on the basis of the evidence on record.

Analysis and Determination

52. After a careful analysis of the pleadings, testimonies and submissions by both parties, the issues that present for determination are: -
 - i. Whether the Claimant was discriminated against;
 - ii. Whether the Claimant was unfairly dismissed; and
 - iii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant was discriminated against.

53. It is the Claimant's assertion that his right under Article 27 of *the Constitution* read with Section 5(3) of the *Employment Act*, 2007, was infringed upon. His assertion is premised on the reason that one Rispah Kiptanui, a fellow employee then, was equally charged on the same facts but was taken through disciplinary hearing and reinstated back to work, while he was summarily dismissed.



54. The Black's Law Dictionary, 9th Edition defines "discrimination" as
- (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".
55. Further, the court in Peter K Waweru v Republic [2006] eKLR, defined discrimination as: -
- "a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."
56. It must however be borne in mind that not all differentiation in treatment amounts to discrimination. Discrimination as gleaned from the definitions will arise where equal classes of people are subjected to different treatment, without objective or reasonable justification.
57. It was the evidence of RW2 (Emily Thathi) that the Claimant and the said Risper Kiptanui faced different charges, and that the disciplinary committee evaluated both employees' responses to the charges and arrived at different decisions.
58. Two people undergoing a disciplinary process for similar charges, resulting in different outcomes, does not in my view as a matter of course amount to discrimination. Different outcomes may result from the employee's level of contribution to the acts of misconduct as well as their response/defence to the charges levelled against them.
59. The Claimant was thus under duty to show that the circumstances under which the misconduct subject of the disciplinary action was similar and so was their level of culpability. In Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, the Supreme Court stated: -
- "...the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement... plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."
60. Further, it is the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to persons of the same class or category to amount to real discrimination. In this case no such evidence has been provided other than mere mention of the fact that Rispa Kiptanui was reinstated.
61. For the reasons foregone, this court finds that the Claimant's allegation of discrimination has not been proven.

Whether the Claimant was unfairly dismissed

62. In determining whether an employee was unfairly dismissed, the court's duty is to interrogate adherence by the employer with both the tenets of procedural fairness as well as satisfaction of the substantive justification test.
63. Section 41 of the *Employment Act*, 2007 demands that before terminating an employment contract on the grounds of misconduct, poor performance or physical incapacity, the employer should grant the employee an opportunity to make representations, in the presence of a colleague or shop floor representative.



64. From the record, it is evident that the Claimant was issued with a notice to show cause dated 1st February 2021. The notice to show cause outlined the allegations levelled against the Claimant and the timeline within which his response was to be received (48 hours).
65. It is not disputed that the Claimant responded to the show cause, despite the short notice, was invited for disciplinary hearing vide a letter dated 18th February 2021 and further that he attended the hearing accompanied by a representative of his choice. It is also the evidence of both parties that the Claimant appealed against the decision to dismiss him and that the appeal was heard albeit without success.
66. In the case of Philip Kimosop v Kingdom Bank Limited (2022) eKLR, the Court opined that the Respondent’s action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing, constituted fair procedure. The Court emphasized that all these steps taken by the Respondent prior to terminating the Claimant’s employment, qualified as following due procedure as contemplated by Section 41 of the *Employment Act*.
67. Further in Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR, the Court observed as follows:
- “The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
- Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
- Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”
68. It is my view that the procedure adopted by the Respondent in dismissing the Claimant met the procedural fairness threshold, and which renders the dismissal procedurally fair and so I hold.
69. On the question of substantive fairness, Section 43 of the *employment Act*, places the onus on the employer to prove the reason or reasons for the termination, failing which, the termination shall be deemed to be unfair.
70. In Nyeri Civil Appeal No.97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another, the Court of Appeal held:
- “In a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. See Section 47(5) of the *Employment Act*...”
71. The reasons for the Claimant’s summary dismissal were stealing of petrol order book No. xxxx-xxxx and plucking leaflets therein with the intent to defraud and presenting false documents to the finance department knowing full well they were fraudulent.



72. In support of the reasons for termination the Respondent presented the Security Officer and the Senior Human Resource Officer. RW1 Stephen Komen told court that the Claimant was the last person to process manual fuel orders using leaflets from order book No. xxxx-xxxx.
73. It is the Respondent's evidence that leaflets numbers xxxx and xxxx had been used to fraudulently fuel stationary motor vehicles and that vehicles whose drivers were away on leave and out of Nairobi, were indicated as having been fuelled in Nairobi.
74. The Senior Human Resource Officer Emily Thathi on her part stated that investigations had found the Claimant culpable for processing fuelling orders using leaflets from the order book No.013951-01400 stolen from the Respondent's ambulance.
75. At the disciplinary hearing as discerned from the minutes, the Claimant denied stealing the book but acceded to processing petrol order book numbers xxxx and xxxx. He equally acknowledged having access to the store where the books were kept.
76. Additionally, the Claimant acknowledged that it was his duty to check serial numbers of the leaflets and record the last number in order to curb fraud.
77. The Court of Appeal in Kenya Ports Authority & another v Joseph Makau Munyao & 4 others [2019] eKLR while addressing the issue of validity of reason of disciplinary action and quoting Selwyn in Selwyn's Law of Employment, 6th Edition, paragraph 7.23 suggested the following threefold test for proof of reason for dismissal.
- i. That the employer must establish that he genuinely did believe the employee is guilty of the misconduct;
 - ii. that belief must have been formed on reasonable grounds; and
 - iii. the employer must have investigated the matter reasonably.
78. The court further stated thus: -
- “Putting it differently, the question is not whether or not the trial court or this Court is satisfied that the respondents were guilty but whether it is satisfied that the 1st appellant had reasonable grounds for believing that the respondents had committed the offences and had acted reasonably in disciplining them in the manner it did. See Section 43 (2) of the [Employment Act](#).”
79. In light of the foregoing, I am convinced that going by the evidence adduced, the Respondent had ample and reasonable basis to believe that the Claimant committed acts of misconduct that justified his summary dismissal.
80. In the final analysis, I find and hold that the Claimant's summary dismissal was both procedurally and substantively fair.
81. The Claim therefore lacks merit and is dismissed with costs to the Respondent.

Judgment of the Court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF JUNE, 2024.

C. N. BAARI



JUDGE

Appearance:

Mr. Geoffrey Odongo present for the Claimant

Mr. Nelson Odongo present for the Respondent

Anjeline Wanjofu - C/As

