



**Otieno v National Oil Corporation Of Kenya (Cause E636 of 2021)
[2024] KEELRC 1441 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1441 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E636 OF 2021**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

WILLIAM ONG'ARE OTIENO CLAIMANT

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 5th August 2021. He states that he was employed by the Respondent as Depot Assistant, on 7th January 2013. He gradually rose through the ranks, to hold the position of Assistant Manager, Credit Control, earning a gross monthly salary of Kshs. 294,000.
2. He was alleged not to have discharged his role properly. He was issued a letter to show cause, which he responded to, showing that he had discharged his role fully.
3. There was a claim that he had failed to resolve monthly stock reconciliations. He had raised concern with his superiors on this issue. A subcontractor had sold fuel and failed to remit the necessary data to the key account manager, to be transmitted to the Claimant. This failure affected reconciliation.
4. It was alleged that there was loss of stocks at the Respondent's hospitality sites. The Claimant explained that there was no such loss.
5. The clear explanation from the Claimant did not satisfy the Respondent. On 23rd April 2021, his contract was terminated.
6. He was treated unfairly. He was first interdicted. He was reinstated. He was then sent away on compulsory leave, before termination. The Respondent was vindictive, and did not have valid reason, to justify termination.
7. He prays for: -



- a. Declaration that termination was unfair and unlawful.
 - b. 1-month salary in lieu of notice at Kshs. 294,000.
 - c. Compensation equivalent of 12 months' salary at Kshs. 3,528,000.
 - d. Annual leave at Kshs. 147,000.
 - e. Exemplary damages.
 - f. Costs.
8. The Respondent filed a Statement of Response, dated 21st October 2021. It is admitted that the Claimant was employed by the Respondent. He was dismissed fairly and on valid grounds.
 9. The Respondent commissioned a forensic audit, carried out by KPMG, on 17th September 2019. The Claimant was sent on compulsory leave, pending conclusion of internal investigations, in relation to the audit report.
 10. It was revealed after internal investigations, that the Claimant may have committed gross negligence, which necessitated disciplinary action.
 11. Charges were prepared and availed to the Claimant. He was invited for hearing. Through a letter dated 10th March 2021, the Claimant was granted all the necessary documents / assistance, to enable him respond to the charges. He gave a written response dated 15th March 2021.
 12. He personally attended hearing, on 23rd March 2021, accompanied by a colleague, Paul Ondieki. The Respondent found his defence unsatisfactory. His job description required at all times, that he reconciles accounts accurately. He failed to properly and correctly reconcile the system stock, with the physical stock. It was concluded that he was engaged in gross negligence, warranting dismissal under Section 44 [c] of the *Employment Act*.
 13. The Human Resource Policies and Procedures Manual provides for the right of appeal, which the Claimant did not exercise. The Respondent urges the Court to dismiss the Claim with costs.
 14. The Claimant gave evidence, and rested his Claim, on 7th December 2022. Assistant Human Resource Manager, Susan Karimi, gave evidence on 25th July 2023, while Accountant Andrew Ringera, gave evidence on 5th December 2023, closing the hearing. The Claim was last mentioned on 4th April 2024, when the Parties confirmed filing and exchange of their submissions.
 15. The Claimant relied on his witness statement and documents –exhibits [1-20], in his evidence-in-chief. He emphasized that he did not do reconciliation for Kenya Ports Authority [KPA] site. There was a 3rd Party, to manage this site. The Respondent had a contract with the 3rd Party. The 3rd Party failed to avail records, to enable the Claimant reconcile. This is supported by the audit report, pages 100 and 135, which observe that no stock reconciliation reports were availed. The Claimant could not engage the 3rd Party.
 16. The charge that failure to reconcile, resulted in monetary loss to the Respondent, was not established. The Claimant asked for evidence of loss at the disciplinary hearing; none was provided. The audit report did not have evidence of monetary loss. The Claimant did not act negligently.
 17. Cross-examined, the Claimant stated that initially, his role included budget preparation and monitoring, and stock-reconciliation at all sites. The audit report suggested the Respondent lost money, but the Claimant could not confirm loss, without being availed the relevant account records.



18. He was issued letter to show cause and taken through a disciplinary hearing, in the company of a colleague. He was aware of his right of appeal. He did not appeal.
19. As of 31st July 2017, he had been availed accounting data, and picked out variances. He indicated that there was huge loss at the site. After the losses, money was recovered.
20. The contractor then started withholding or forwarding inaccurate documents, disabling the Claimant in reconciliation. No data was received, between 31st July 2017 and June 2018.
21. The Claimant reported to the Respondent, that the contractor had stopped releasing data, in September 2017. Data was supplied, but it was inaccurate data. Data was cooked, a default that the Claimant reported to his supervisor, and the internal auditor.
22. The contact person between the Respondent and the contractor, was Charles Maina. Data from the contractor passed through Maina.
23. At page 88 of the Claimant's documents, there is communication from the Claimant's stock assistant Martin Nyaga to Maina, complaining about inaccurate data. The inaccurate documents were sent back to Maina, who did not give a response. Nyaga was sent to the site at Mombasa, to peruse the physical documents. The Claimant could not recall on which date. Nyaga did not even find the physical documents.
24. Redirected, the Claimant told the Court that Nyaga was his supervisee. He returned inaccurate data to the contractor, and the Claimant was left with no actionable data. The disciplinary committee recognized that the Claimant was not supplied with accurate data. He was not charged with loss of money.
25. Assistant Human Resource Manager Susan Karimi relied on her witness statement dated 9th May 2022, and documents filed by the Respondent –exhibits [1-7]. She confirmed that the Claimant was employed by the Respondent as pleaded. He was charged with the employment offences, taken through a fair disciplinary hearing, and dismissed on valid ground.
26. Cross-examined, she told the Court that she had worked for 10 ½ years with the Claimant. The Claimant was charged with failure to reconcile accounts. The charges all related to KPA account.
27. KPA had contracted a 3rd party to handle the account. The contract appointing the 3rd party is exhibited. Charles Maina was the 3rd party contact person. Karimi could not confirm that the Claimant, was not involved with the 3rd party contract.
28. The 3rd party was a transporter. It would keep records, do reconciliation daily, which were to be supplied to the Respondent. The 3rd party was in charge of operations at the KPA site. The Claimant could not do reconciliation, without data. If data was inaccurate, outcome would be inaccurate.
29. The Claimant's supervisee Nyaga, e-mailed the contact person Maina, complaining about inaccurate data. The Claimant wrote to Maina calling upon him to urgently respond on supply of accurate data. Karimi was not able to confirm that the Respondent was aware about these reconciliation difficulties the Claimant experienced, without accurate data.
30. There was an internal memo issued by Head of Finance Ngumi, concluding that Finance could not be blamed, for stock variances. Ngumi was the Claimant's supervisor.
31. The Claimant responded to the letter to show cause, explaining where the problem was. The KPMG report, concluded that there was inadequate record-keeping. The 3rd party did not supply accurate data. The disciplinary committee was told that the Claimant sent his supervisee Nyaga to KPA site in



- Mombasa for fact finding, and that he escalated the problem to his supervisor Ngumi. The disciplinary committee observed that the Claimant was hampered by lack of data. All charges against the Claimant, related to reconciliation. Redirected, Karimi told the Court that the Respondent followed its Human Resource Manual, in dismissing the Claimant.
32. Accountant Andrew Ringera, relied on his witness statement, dated 9th May 2022. He had looked at the audit report relating to KPA account. It had variances. The Claimant wrote to the contact person Maina, enquiring about the variances. He only enquired once. He was the Management Accountant. He was to ensure there was full stock reconciliation.
 33. Physical stocks and those in the computer system, should ideally have matched. Reconciliation identified differences, and sought explanation for the differences. If undetected, variances would result in loss to the Respondent. Ringera emphasized that the Claimant is his professional colleague and the two enjoyed a cordial working relationship. He was objective in his evidence.
 34. Cross-examined, he confirmed that the disciplinary charges against the Claimant, were based on failure to reconcile accounts, relating to various sites, including KPA.
 35. KPA site was managed by Great White Investments, a 3rd party. The 3rd party would avail stocks. Reconciliation would not be possible, without data.
 36. The Claimant wrote complaining about high variances between the physical stocks and the stocks captured in the system. He cautioned that the Respondent stood to suffer huge losses. He wrote to the contact person Charles Maina.
 37. Ringera admitted that the Claimant followed up on KPA data, sending his supervisee Nyaga to the site. Ringera accepted that the Claimant told the disciplinary committee that he escalated the issue to his supervisor, Ngumi. He also conceded that Ngumi, wrote a Memo to Internal Audit, explaining that the Finance Department could not be accountable for variances arising from operators and contractors.
 38. The KPMG audit concluded that there was inadequate record-keeping by the 3rd party. The 3rd party did not provide daily reconciliation reports, which it was bound to provide, under its contract with the Respondent. The Claimant would be hampered in reconciling. Ringera suggested that as an Accountant, he would himself have reconciled and flagged out the variances.
 39. Redirected, he told the Court that losses covered a period of 2 years. Reconciliation was to be carried out daily. Lack of, or wrong, data should have been captured upon reconciliation. The Claimant ought to have escalated the issue much earlier, not wait until August 2017.
 40. The issues are whether the Claimant's contract was terminated through fair procedure; whether it was based on valid reason; and whether he merits the prayers sought.

The Court Finds: -

41. The Claimant was employed by the Respondent as a Depot Accountant, on 13th December 2012. He subsequently was promoted to the position of Assistant Manager, Credit Control, earning a monthly gross salary of Kshs. 294,000.
42. He was interdicted for 3 months, effective 21st December 2018. The letter of interdiction states that Management had noted approximately 2 million litres of premium moor spirit and automotive gas oil, belonging to KPA, could not be accounted for. The Respondent alleged that the Claimant was responsible for stock reconciliation and needed to step aside, to enable the Respondent conduct full investigations.



43. He was subsequently advised that audit had been carried out, and it was necessary to place him on compulsory leave for 1 month, ending 28th February 2021. The period was extended to 31st March 2021.
44. On 2nd March 2021, he was presented with disciplinary charges, comprising 4 counts, all relating to failure to reconcile stocks.
45. He wrote a letter dated 3rd March 2021 answering the charges. He wrote at length explaining his position, and urging the Respondent to dismiss the charges.
46. He was heard by a disciplinary committee on 23rd March 2021. The Respondent's CEO, Leparan Gideon ole Morintat, wrote to the Claimant on 23rd April 2021, informing him that Management had "returned a verdict of 'not satisfactory,' on both your written and oral defense." He was advised that his employment had been terminated with immediate effect, but that he would be paid 1-month salary in lieu of notice.
47. Procedure. The Court has not seen anything in the procedure adopted by the Respondent, that fell short of the minimum statutory standards of fairness, prescribed under Section 41 of the [Employment Act](#). The Respondent relied also, on its Human Resources Policies and Procedures Manual. Specific clauses were cited at every turn, and a copy of the Manual availed to the Claimant.
48. He was interdicted. Investigations including external audit were carried out. He was interdicted on 21st December 2018. Investigations resulted in the Claimant being placed on compulsory leave over 2 years later, on 1st February 2021.
49. The disciplinary charges were communicated to the Claimant on 2nd March 2021. He was given adequate chance to give written responses. He sought clarifications on the charges, which were provided.
50. He was invited to the hearing, which he attended in the company of a colleague. He was heard, and a decision to terminate his contract communicated through a letter dated 23rd April 2021. He told the Court that he was aware of his right of appeal, but opted not to appeal. The process was slow, deliberate and fair. The Claimant was granted adequate facility to conduct his defence.
51. Procedure was fair, in accordance with Sections 41 and 45 of the [Employment Act](#), and the Human Resources Policies and Procedures Manual.
52. Reasons. The Respondent did not establish valid reasons, to justify termination, as required under Sections 43 and 45 of the Employment.
53. The Court has no difficulty in reaching this conclusion, owing largely to the evidence given by the 2 witnesses for the Respondent, Assistant Manager Human Resources Susan Karimi and Accountant, Andrew Ringera.
54. Karimi told the Court that: -KPA had contracted a 3rd party, Great White Investments Limited, to handle its account. Charles Maina was the 3rd party's contact person. The 3rd party was the transporter and would keep account record. The 3rd party did daily reconciliation, which would then be passed onto the Respondent. The 3rd party was in charge of operations at the KPA site. The Claimant could not do reconciliation without data. If data is incorrect, the outcome cannot be correct. The Claimant wrote to Charles Maina, calling for supply of data urgently, to facilitate reconciliation. The Respondent was aware about the problems surrounding supply of data to the Claimant, regarding KPA account. Head of Finance Ngumi, who was the Claimant's supervisor, wrote a Memo to the Internal Auditor, pointing out that his department, could not be held accountable for the variances. KPMG audit report,



- concluded that there was inadequate record-keeping by the 3rd party. The disciplinary committee was told that the Claimant sent his supervisee Nyaga to KPA site to look into physical records, and escalated the problem to his supervisor Ngumi. The disciplinary committee observed that the Claimant was hampered by lack of data.
55. Ringera testified: -KPA account was handled by a 3rd party Great White Investments Limited. The Claimant did not manage sites. Reconciliation would not be possible, if either physical or system stocks, were not available. The Claimant wrote, stating that variances were high. The Claimant wrote to Charles Maina, highlighting data inaccuracies. Head of Finance, who was the Claimant's boss, concluded that the Finance department could not be blamed for the variances. KPMG concluded that there was inadequate record-keeping by the 3rd party, and the 3rd party failed to avail daily stocks reports, in accordance with its contract. The Claimant sent his supervisee Nyaga to site and escalated the matter to Ngumi, Head of Finance. It was not possible for the Claimant to carry out reconciliation, without data.
 56. This evidence by the Respondent corroborated in full, what the Claimant told the Respondent from the inception of the disciplinary process – that he was not availed data by the 3rd party with regard to KPA account, and could not carry out reconciliation, without such data.
 57. In his own evidence before the Court, the Claimant emphasized that the charges against him all related to failure to do reconciliation at KPA site. There was no data availed to him to reconcile. He relied on the contract between the 3rd party and the Respondent, dated 31st October 2016. Clause 5.8 of this contract clearly affirms the evidence of the Claimant, as well as that of Karimi and Ringera, that “ the transporter [3rd party] shall as part of stock management services, do daily stock reconciliation and provide daily stock reports to the National Oil at their costs.”
 58. There was absolutely no reason, to hold the Claimant responsible for the contractual failure of the 3rd party, in stock management services. It was quite unreasonable of the Respondent to dismiss the Claimant, based on failure of a contractual responsibility which was vested in a 3rd party. Without the 3rd party doing daily stock reconciliation, and providing the daily stock reports to the Respondent, there was no way the Claimant could do his own reconciliation.
 59. He brought this problem to the attention of his supervisor Ngumi. Ngumi wrote a Memo to the Internal Auditor, absolving his department. So why was the Claimant in the end, still blamed for the variances, while he was a mere cog within the department of Finance?
 60. The Claimant not only looked up, in searching a solution to the problem created by the 3rd party, by contacting Head of Finance Ngumi; he looked down and instructed his supervisee Nyaga, to visit KPA site, for physical examination of the stock records. Nyaga did not even find the records at KPA site, which confirms the failures of the 3rd party, to discharge its contractual obligation.
 61. Rather than the Respondent pursuing the 3rd party Great White Investments Limited, for breach of contract, the Respondent went after the jugular of its Employee, alleging he had fundamentally breached the contract of employment, warranting dismissal.
 62. There was no valid reason or reasons, to justify termination, as required under Sections 43 and 45 of the [Employment Act](#).
 63. Remedies. It is declared that termination was unfair for want of valid reason or reasons.
 64. The Respondent states in the letter of termination that it would pay to the Claimant 1-month salary in lieu of notice. There was no evidence from the Respondent on payment of notice. The prayer for notice pay at Kshs. 294,000 is granted.



65. The Claimant worked from 7th January 2013 to 23rd April 2021, a period of 8 years. He was permanent and pensionable, and expected to work until retired. There was absolutely no ground to justify termination. Although he did not tell the Court if he secured alternative employment, he told the Court that he is an accountant, the presumption being that he is actively practicing accounting, and earning an income. He did not cause or contribute to the circumstances leading to termination of his contract. He is awarded equivalent of 11 months' gross salary at Kshs. 3,234,000, in compensation for unfair termination.
66. He did not give evidence on pending leave days and the amount claimed under this head, at Kshs. 147,000 is unsupported and unsustainable.
67. There is no case made out for grant of exemplary damages, in addition to the compensatory award made for unfair termination.
68. Costs to the Claimant.
69. Interest granted at court rate from the date of Judgment, till payment is made in full.

In sum, it is ordered: -

- a. It is declared that termination was unfair and unlawful.
- b. The Respondent shall pay to the Claimant notice at Kshs. 294,000; and compensation for unfair termination, equivalent of 11 months' gross salary at Kshs. 3,234,000 – total Kshs. 3,528,000
- c. Costs to the Claimant.
- 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 AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

