



**Kabeyi v Kenya Electricity Generating Company Limited (Cause
726 of 2015) [2023] KEELRC 182 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 182 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 726 OF 2015
J RIKA, J
JANUARY 31, 2023**

BETWEEN

MOSES JEREMIAH KABEYI CLAIMANT

AND

KENYA ELECTRICITY GENERATING COMPANY LIMITED ... RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 24th April 2015. There is on record, 28 Documents in support of the Claim, contained in a list dated 24th May 2017. The Respondent filed its Statement of Response on 2nd October 2015, which is supported by 14 Documents, contained in a list dated 16th April 2019.
2. The Claimant gave evidence before Hon. Judge S. Radido on 5th March 2020. The Hon. Judge Radido was transferred away from Nairobi before he could finalize the hearing. The Claimant himself proceeded for further studies in South Africa. It was not until 14th October 2021, that he was heard before the undersigned Judge, and closed his Claim.
3. Chief Engineer Reuben Wekesa and Chief Human Resource Officer of the Respondent Martin Makallah, both gave evidence on 27th January 2022, when the hearing closed. The Claim was last mentioned on 27th September 2022, when Parties confirmed filing and exchange of their Submissions.

Claim.

4. The Claimant pleads and testified that he was employed by the Respondent as a 2nd Assistant Engineer, on 3rd August 2006. He rose through the ranks, and was Senior Engineer at Kipevu Diesel Power Plant in Mombasa, as at February, 2012. His monthly salary was Kshs. 377,363.
5. He was suspended by the Respondent, on or about 10th February 2012. This was on account of oil spills, which allegedly took place, while the Claimant was in charge of the shift. The Respondent alleged



- that the Claimant was negligent, occasioning the spill which took place on 28th January 2012, at Kipevu 1 Power Station, in Mombasa.
6. The Respondent dismissed the Claimant through a letter dated 24th April 2012. He was advised that termination would take effect on 1st May 2012. He received the notice on 30th April 2012.
 7. Although aware that an oil spill may have occurred, the Claimant avers that the results of investigations on the cause of the spill, were never availed to him. He was involved in the general investigations on the spill, but was never advised that investigations, would mutate into a disciplinary hearing, leading to dismissal.
 8. No charges were presented to the Claimant. There were no findings of negligence against him. There was no warning. He was not heard.
 9. He was called to Respondent's Appeals Committee in April 2013. He enquired and received no answer, from the Appeals Committee, whether it could hear an Appeal before a proper disciplinary hearing had taken place.
 10. Termination was unfair. The Claimant has been out of employment since December 2012, when he secured alternative employment.
 11. He prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. Declaration that reasons stated in the letter of dismissal do not constitute proper grounds for dismissal.
 - c. The Honourable Court awards the Claimant 8 months' salary at Kshs. 3,018,904 being the period it took the Claimant to secure alternative employment.
Alternatively:
 - d. 12 months' salary in compensation for unfair termination at Kshs. 4,528,365.
 - e. Interest.
 - f. Costs.
 - g. Any other suitable remedy.
 12. While he does not include grant of Certificate of Service in his prayers, the Claimant states at paragraph 22 of his Statement of Claim that the Respondent has refused to supply him with the Certificate.

Response.

13. The Respondent's position is that the Claimant was its Employee as pleaded in the Statement of Claim. He was Engineer 1, at the time of dismissal, not a Senior Engineer as pleaded. Termination was due to continuous insubordination and incompetence. His gross monthly salary at the time of dismissal was Kshs. 181,667.
14. Termination was in accordance with the *Employment Act*, and the Staff Policies and Procedures. He was suspended and paid full salary for the period under suspension. He was issued letter to show cause. He ignored the letter. He was accorded an opportunity to defend himself.
15. Dismissal followed a chain of acts of misconduct on the part of the Claimant. They included: -He did not clear with the Respondent while transferred from Garissa to Kipevu on or about 1st January



2010. He carried away the Garissa Station Laptop, and returned it later on 8th July 2010, with a broken screen, after numerous demands made by the Respondent for its return. The Claimant was surcharged Kshs. 70,689 for the laptop screen. He failed to file Financial Declaration Form as required of Public Officers, on or about 18th January 2012. On or about 28th January 2012, while in charge of shift, he acted negligently, resulting in oil spillage and ecological disaster. The Respondent was compelled to pay damages resulting in millions of shillings. He refused or neglected to obey lawful instructions of his Supervisor to record a statement regarding the oil spill. He refused to answer the letter to show cause.

16. The Respondent states further that the Claimant was suspended, and was accorded opportunity to appear before various Committees. These 2 events [suspension and opportunity to appear before several Committees], are inexplicably, characterized as part of the Claimant's "adverse behaviour, adverse, to the interest of the Respondent..."
17. The Respondent states that the Claimant was dismissed for gross misconduct, and is therefore, not entitled to the Certificate of Service.
18. The Respondent prays that the Claim is dismissed with costs.

Claimant's evidence.

19. The Claimant restated the contents of his Statement of Claim before the Court, on 5th March 2020. He recalled that on 28th January 2012, an oil spill happened, when oil was being transferred by an Operator from storage tank, to treatment tank. Spill normally occurred. The oil is used for running generators to produce electricity. 4 engines were running. It was a night shift, and there was a handover. The responsibility for transferring oil, fell upon the Operator in the control room.
20. The Claimant's responsibility was in coordination and advising. He inspected the equipment. It took about 3 hours. He was alerted by the Operator, while inspecting, that there was an overflow. He advised that transfer is stopped. Transfer was automated. It could be manualized if there was a problem. The automatic system had an alarm, which did not go off during the overflow. There were instrument engineers who performed maintenance. The Claimant was in operations, not maintenance.
21. There were safeguards to ensure oil did not spill into the sea. Spillage would flow to a receptor [interceptor?] tank. There were other outlet valves. Oil could not therefore flow to the sea, unless the valves were opened. The Chief Engineer retained the keys to the valve. It was not the Claimant's responsibility to maintain the valve.
22. There were logs kept by the Respondent, on opening and closing of the valve. It had details on opening and closing of the valve, and was accessible to everyone. At the material time, the valve was closed.
23. Investigations followed the spill. The Claimant participated in the investigations. There were several Committees convened over the spillage. There was an Area Committee, headed by Instrument Engineer; a 2nd Investigations Committee formed by the Head Office; and a 3rd by the relevant Ministry. The Claimant appeared before the 3 Committees.
24. The Claimant was not taken through a Disciplinary Committee. The Security Manager told him that Investigations were complete. He invited the Claimant to discuss the findings. After attending discussions, he was dismissed. The investigations Findings were not availed to the Claimant, until he filed this Claim.
25. The Respondent has a Human Resource Manual. It provides for Staff Advisory and Disciplinary Committees. The Claimant did not appear before either of these Committees. After dismissal the Claimant was advised to make a complaint about the way he was handled. He did so on 2nd May 2012.



- He did not know what he had been accused of. He asked for the Investigations Reports and received no response.
26. After 1 ½ years, he was called before an Appeals Committee. He appeared and asked to be availed the Investigations Reports. He was told that the Appeals Committee did not have the Reports. He was before the Committee for about 20 minutes. Other Employees who had been dismissed over the incidence were all reinstated.
 27. The Appeals Committee noted that there was instrument failure. The main drainage valve was leaking, and it was noted that it was the responsibility of the Chief Engineer, to ensure it was closed and locked.
 28. Cross-examined, the Claimant told the Court that he was acting as Engineer 1. He was not a Senior Engineer 1, at the time of termination. In his shift were 5 Officers- himself, 2 Senior Operators and 2 Operators. The Officers were in 2 control rooms, overseen by the Claimant. His colleagues were involved in operations. The Claimant was not. His role was advisory. He ensured that the machines were sufficiently oiled; that the tanks had sufficiently treated oil; and generally, ensured that machines were running well. His colleagues reported to him, and he was accountable to his Seniors. Once the shift was over, there was discussion with the incoming team. There was handover, involving 10 Officers. Everything was documented.
 29. The pumping machine had 2 modes – automatic and manual. It was supposed to be automatic, on starting. Operator was free to go manual, when automatic went low. There were signals which the Operator relied on, when the machine moved from manual to automatic. The Operator had the discretion to change from automatic to manual. The Claimant did not instruct Operators on changing the mode.
 30. On the material day, Claimant's shift started at 8.00 p.m. The outgoing team told him that the levels were not showing. 3 hours into the nightshift, the Claimant was called by an Operator, who told him that a Security Guard had reported that he smelt oil. The Claimant rushed to the tank and found it overflowing. He called the control room. The team was to contain the overflow. They were to secure the valve. The valve is at the gate. The key was retained by the Chief Engineer. The Claimant called the Chief Engineer and reported the occurrence.
 31. The Claimant and his team stopped the pumping immediately. His shift ended at 8.00 a.m. He confirmed that the flow had stabilized in the receptor tank. He sent an Operator to confirm there was no spill into the sea.
 32. He received the letter asking him to explain the incident. He explained his position. There were Committees convened by the Respondent and Energy Regulatory Authority, which investigated the incident. The Claimant appeared before the Committees. The Committees were of a technical nature. Termination was on account of negligence. The Claimant appealed. He asked for the Investigations Reports, but was supplied none.
 33. Redirected, the Claimant told the Court that he was never shown the relevant Investigations Reports, before he filed this Claim. He knew nothing about the conclusions made in the Investigations. He was not told that the Technical/Investigations Committees, were Disciplinary Committees, when he appeared before them. He was not issued a letter to show cause by the Respondent's Human Resource department. The 1st letter he received from the Respondent was the dismissal letter. When he called the Chief Engineer, he did not get through to him. Operators also called him. If controls failed, it was guesswork, whether to go manual or automatic. The Claimant's colleagues who were involved, are still at work.



Respondent's evidence.

34. Engineer Reuben Wekesa told the Court that the Claimant was the Shift Engineer, on the material day. He was to manage all operations, meet all parameters, and ensure all engines were running well. Once shift ended, he was the accountable Officer. There were 4 others under him. He had the duty to report any incident to the Chief Engineer.
35. The system is automated. If there is any challenge, the Officer calls the maintenance team. If an Officer goes manual, there are risks associated with that. Oil transfer is both automated and manual. There are precautions on going manual. Someone must be on hand periodically, to check if there is an overflow of oil. The Shift Engineer is supposed to assign someone this role. On change of shift, the Shift Engineer must communicate to the incoming Shift Engineer, all issues / challenges. The Claimant did not communicate to Chief Engineer Reuben Wekesa, about any incident taking place during his shift. He did not inform the incoming Shift Engineer, or the Operations Engineer. He was not accountable. He did not show responsibility. He should have been alarmist, shout, in case of an unusual occurrence. He should have taken all precautions, once he went manual.
36. Cross-examined, Chief Engineer Wekesa told the Court that the Respondent has structures to cater for incidents such as took place on the material day. Design of tanks includes draining mechanism, bund wall, and sprinklers. The bund wall prevents oil from spilling into the environment. There is a storm drain valve. If the valve is open, oil ends up in the ocean. The Technical Committee Evaluation Report states that the valve should fully be closed. It is handled by senior staff. The Report states that the Chief Engineer should close the valve. It states that the valve was leaking. Wekesa was the Chief Engineer. He confirmed that the valve was closed. The key was in the control room. The Report states that the valve was partially open. Wekesa insisted that it was closed, but he stated at the same time, that he was not disagreeing with the Report of the Technical Evaluation Committee.
37. Wekesa further told the Court under cross-examination that the Report states once on manual mode, there was need for close monitoring. Operator Maina left the pump running. He had the responsibility of monitoring. The Operator turned on the pump, and only went back when told it was overflowing. The fuel transmitters were faulty. It was the Claimant's responsibility to invite the maintenance team. The Claimant stated in his reply to the letter to show cause, that overflow was part of his handover. The Report states that the valve was partially open. Redirected, Wekesa told the Court he could delegate his mandate to the Shift Engineer. There was no communication from the Claimant to Wekesa, reporting that the valve was partially open. The Shift Engineer is trained on operations. Competence test is done. The Claimant was negligent.
38. Makallah told the Court that the Claimant was engaged in an act of gross misconduct. He was issued letter to show cause, and investigations were carried out. He was found to be negligent and summarily dismissed. He appealed but did not prosecute his Appeal. Dismissal was upheld. He instructed his Advocates to demand a re-hearing. He was invited for re-hearing, but did not take up the opportunity.
39. Cross-examined, Makallah told the Court that prior to 2012, the Claimant did not have any disciplinary issues. The oil spill was the only reason for dismissal. The Respondent relied on various reports, to conclude that the Claimant was negligent. Makallah did not have evidence, to show that the Claimant was negligent. The Respondent picked the offence of negligence from the *Employment Act* and the Human Resource Policy. Makallah did not state in his Witness Statement, that the Claimant was taken through a disciplinary process. He however stated that indeed, the Claimant was taken through such a process. Makallah has over 20 years' experience in human resource management. A show cause letter, is not the totality of a disciplinary process. The Respondent's Human Resource



Policy Manual creates a Staff Advisory Committee and a Disciplinary Committee. These are different from the Technical Investigation Committees convened on the oil spill. There is no evidence that the Claimant appeared before the Committees created by the Human Resource Policy Manual. Makallah conceded that the Technical Committee Report, would have been canvassed at the Disciplinary Committee. The Claimant was involved at the Investigations. He appealed. He was invited at appeal hearing. He had already been dismissed. He could not go back to the disciplinary hearing. The Appeals Committee stated that the Claimant asked for the Investigations Report. It was not supplied. The Claimant was not alone in his shift. All his colleagues were reinstated. They were found to be without blame. Procedure was fair.

40. Makallah clarified on redirection that the Claimant's colleagues were reinstated after they appeared before the Appeals Committee. They prosecuted their Appeals. The Claimant did not.
41. The issues are whether termination was procedurally and substantively fair under Sections 41, 43 and 45 of the *Employment Act*; and whether the Claimant merits the remedies pleaded.

The Court Finds

42. The Claimant was employed by the Respondent on 3rd August 2006 as a 2nd Assistant Engineer. He rose to the position of Senior Engineer. As of February 2012, he held this position and was stationed at Kipevu Diesel Power Plant, in Mombasa.
43. He was suspended on 10th February 2012, following 2 incidents of oils spills at the Plant. He was dismissed with effect from 1st May 2012, on the ground that he was negligent, and therefore involved in an act of gross misconduct.
44. Fair Procedure. There were 2 oil spills at Kipevu. The first was on 28th January 2012 at Kipevu Thermal Station. The second, happened on 6th February 2012 at Utility House Kipevu, within the same Plant.
45. Following the spills, there were 2 Internal Committees convened to investigate the incidents by the Respondent. The Claimant names them as The Kipevu Committee and The Operations [Director Operations Ngugi Committee]. The 3rd was external, which is identified as The Energy Regulatory Commission Committee, comprising Officers from the Energy Regulatory Commission, the Oil Industry and National Environment Management Authority [NEMA].
46. A system audit was also carried out, to establish the status of instrumentation and control.
47. The Claimant appeared before these Committees.
48. He was issued letters to show cause, dated 31st January 2012 and 8th February 2012. The first letter related to the first spill, the second issued after the second spill. The second alleged that the Claimant had refused to submit a report, after the first spill. The Claimant was alleged to have committed an act of gross misconduct, namely, insubordination.
49. He was suspended over the 2 incidents, through a letter from the Operations Director, Engineer Richard Nderitu, dated 9th February 2012. The Operations Director cited clause 1.10.1 of the Respondent's Staff Policies and Procedures. Suspension was indefinite.
50. On 20th April 2012, the Human Resources and Administration Director, B.M. Soy wrote to the Respondent's CEO recommending termination of the contracts of employment, of members of shift B, who included Plant Operator Morris Maina, Technician Daniel Limo, Auxiliary Plant Operator Peter Kangwana, Senior Plant Operator Joseph Maguru, and the Shift Engineer Moses Kabeyi, the Claimant herein.



51. Soy wrote to the Claimant the letter of dismissal dated 24th April 2012. She states that investigations had taken place, and that the Claimant was given an opportunity to explain himself, and his explanation found unsatisfactory. She cites Sections 41 [2] and 44 [4][c] of the *Employment Act*, the Staff Policies and Procedures, as well as the Claimant's contract of employment, in justifying termination.
52. The Claimant wrote to Soy, on 2nd May 2012, protesting that dismissal was unfair. He underscored that he had only appeared before the Investigation Committees; he did not receive the findings and recommendations of the various Committees; and expected to be taken through a disciplinary hearing.
53. The Respondent has a comprehensive Staff Policies and Procedures Manual. Clause 1.8 states that it is important, that proper disciplinary procedures are carried out, in all cases. Serious offences which are likely to lead to summary dismissal, are referred to the Chief Manager, Human Resources, through the relevant divisional head, who then presents the case to the Staff Advisory and Disciplinary Committee.
54. Although the Respondent convened various Investigations Committees, in which the Claimant appeared, there was no disciplinary hearing, in accordance with the Respondent's own Staff Policies and Procedures Manual. The Staff Advisory and Disciplinary Committee has specific terms of reference under clause 1.9.1 which include: to listen to the Employee involved and review evidence presented against the Employee; determine under what clause in the Staff Policies and Procedures [or CBA in case of Unionisable Employees] the offence falls; determine if there are other factors that may have played a role, in the misconduct; and issue appropriate guidelines, on action to be taken by Human Resources Division.
55. The Staff Advisory and Disciplinary Committee was not called into the process, and did not discharge its mandate outlined above, with regard to the Claimant.
56. The flaws on the procedure are shown through the evidence of the Respondent's witness, Makallah. He stated on cross-examination that: -The Respondent relied on various reports to conclude that the Claimant was negligent. I do not have evidence to show that the Claimant was availed the Reports. The show cause letter, was sufficient in terms of details. I have not stated in my Witness Statement, that the Claimant was taken through a disciplinary process. There is a Staff Advisory and Disciplinary Committee. It is different from the Technical Investigation Committee. There is no evidence that the Claimant appeared before the former. I agree, Report of the Investigation Committee would have been canvassed at the Disciplinary Committee.
57. It is clear from the evidence adduced by Makallah, that the Claimant was not availed procedural justice, as required by the Respondent's own Human Resource Policies and Procedures Manual, and Sections 41 and 45 of the *Employment Act*.
58. There is no evidence of specific charges presented at a disciplinary forum.
59. In his letter to Soy dated 2nd May 2012, which the Respondent appears to have translated to be an Appeal, the Claimant complained that he had not been taken through a disciplinary hearing. He had not been availed the Investigation Report [s]. He was not making an Appeal, but requested to appear before a Disciplinary Committee, to answer specific charges.
60. Makallah conceded that no Report was availed to the Claimant. No disciplinary hearing took place. Procedurally, the Claimant could not appeal, without having the initial hearing.
61. Clause 1.11 and 1.11.1 regulate Appeals after dismissal. The Employee is required to set out the Grounds of Appeal in full. The Chief Manager is supposed to meet the Employee where the Grounds of Appeal are presented. The Staff Advisory and Disciplinary Committee will hear the Appeal, and the Chief Manager Human Resources, will be the Secretary to this Committee.



62. It is not clear under this procedure, why the Staff Advisory and Disciplinary Committee, which presides over the initial hearing under clause 1.9.1 of the Manual, is again involved on Appeal, under clauses 1.11 and 1.11.1.
63. The Claimant as observed above, was not given a first hearing, and there would be no basis for an Appeal.
64. The record indicates that an Appeals Committee was convened. The Report of the Committee shows it was made up of 6 Directors of the Respondent, the Human Resource Manager and the Chief Human Resource Officer.
65. The Claimant, though invited to the Appeals Committee, did not attend, believing correctly, that he had not been heard in the first instance, and would have no basis attending hearing on Appeal. The Appeals Committee notes in its Report that the Claimant wrote a letter protesting unfair dismissal, but that the letter, was not an Appeal against the decision. The Appeals Committee concluded rather unfairly, that the Claimant refused to be heard before it, and therefore, “ remains dismissed.” An Appeals Committee, exercising its mind reasonably, would have deemed it proper, to direct that the Claimant is granted an initial disciplinary hearing, before the appellate process kicked in. Why conclude that the Claimant “remains dismissed,” while there was no finding by a Disciplinary Committee, that the Claimant is dismissed, in the first place?
66. Employees who were in the Claimant’s shift during the oil spill, including Maguru, Maina, Kangwana and Limo were all reinstated. Shift B had 5 Officers, who included the 4 named above, and the Claimant. The Appeals Committee in reinstating the 4, found that: -It seemed unclear the amount of liability which could be attributed to the Employees. There seems to be understaffing at Kipevu 1 Power Station. There seems to be understaffing at Kipevu 1 Power Station, which is affecting operations.
67. These were common findings, applicable to the whole shift team B, so why was the Claimant excluded from the findings, notwithstanding that he had not formally appeared before the Appeals Committee?
68. The Claimant was not availed procedural justice. Most glaringly, he was not heard. He was not availed the Investigation Report[s] compiled by various Committees, which were the foundation of his dismissal. When he wrote a protest letter, it was casually rejected by the Appeals Committee, while all his Shift colleagues were reinstated mainly for lack of evidence on their liability for the spill. When he asked to be granted a first hearing in accordance with the Respondent’s own Procedures and Policies, he was not heard, but told by the Appeals Committee that he “remains dismissed.”
69. The Court is convinced that procedure was glaringly flawed, under Sections 41 and 45 of the *Employment Act*, read together with the Respondent’s own Procedures and Policies Manual.
70. The Respondent acknowledges that it did not accord the Claimant a hearing, but urges the Court that the Claimant is undeserving of relief, invoking the decision in E&LRC Cause Number 946 of 2015 Daniel Kanyoro Njoroge v Kenya Electricity Transmission Company Limited, where it was stated that, “ although the Court finds that the Respondent did not grant the Claimant a hearing, as envisaged under the Human Resources and Procedures Manual, the Claimant is undeserving of the relief.”
71. This Court cannot uphold such a position, with respect to the dispute at hand. If a wrong has been committed against an Employee by an Employer, it cannot be without relief. Every employment wrong, ought to be remediable. To deny the Claimant a relief, would result in abrogation of his employment rights, protections and guarantees, available under the *Employment Act* and the Constitution of Kenya.



72. Validity of reason. The primary reason given by the Respondent in justifying termination, is that the Claimant as the Shift Engineer, was negligent. Negligence, from the evidence of Makallah, was gleaned from the Investigation Report[s]. The Reports are detailed, and very technical in nature, involving oil engineering.
73. The Report of the Investigation team convened by the Respondent, led by Joel Kemei, states that Kipevu 1 Power Station comprises 6 Diesel Generators. They are driven by Industrial Diesel Oil and Heavy Fuel Oil.
74. All major fuel tanks are located in a common area, designated as tank farmyard. The farmyard is surrounded by a bund wall. The bund wall is expected to contain inadvertent oil spills. The outlet from the bund wall is routed to an oil interceptor mechanism, prior to final release to the environment, through a normally closed storm drain valve. The storm drain valve drains any storm water collecting in the bund wall. The valve is the last interface with the environment, and is therefore supposed to be closed, and padlocked.
75. The Committee observed inter alia, that pre-treatment tank fuel level transmitters and associated indication alarms are faulty; the Shift Engineer [Claimant] was redeployed in November 2011 from Maintenance and Operations, and was still familiarizing with current operations systems, and therefore overly reliant on his juniors; there was a communication problem and Officers did not adequately brief each other in case of a problem; the fuel transfer process was carried out manually, as opposed to automatic; the Operator was suspected of not monitoring the pump closely, after he had turned to manual mode, leading to oil spill; it was accepted that some instrumentation and control systems may have had problems; and there was weakness in the control and tracking operations of the storm drain valve.
76. On the cause of the first spillage incident, the Committee states that the Operation Staff suspected that the frequent start/stop of the pump was due to problems with the DCS remote operation, hence resort to manual operation. Manual operation required physical monitoring. Plant Operator Maina, left the pump running and told the Auxiliary Pump Operator Kangwana to check it.
77. On the second incident, the Report states that the fuel oil centrifuge C, was out service. The maintenance team, did not communicate availability of centrifuge D to Operations. When the need arose for additional fuel oil centrifuge, Operations Officer appears to have erroneously switched on the feed pump for centrifuge D. The sludge tank filled up and resulted in the second oil spill.
78. The Report does not seem to nail, what was the negligence, attributable to the Claimant, leading to dismissal. It is not shown what he was supposed to do, and did not do, in his role as the Shift Engineer, leading to the spillage. In both incidents, blame is largely placed on Operations Officers and failing instrumentation.
79. The general recommendations, were focused on the Respondent's systems including ISO awareness training; total review of sludge management; all keys for critical areas to be deposited in one control safe-box; and all fuel transfers be carried out automatically. It was recommended also, that Shift B be reconstituted. It was concluded that the Claimant handled the spills casually. Disciplinary action was recommended against the Shift Team B. Technical recommendations by far outweighed the human resource recommendations. The Detailed Technical Evaluation Report similarly found failures in the system, rather than in any one Officer. It recommends inter alia, that there was need for full restoration of the fuel oil transfer system through replacement of the fuel oil level transmitters; instrumentation systems to be restored or upgraded to reduce reliance on relatively unreliable manual human intervention; storm drain valve be included in the maintenance schedules; sludge centrifuge



- be restored to service condition; and due to the global nature of safety issues, there was need for reorganization of the structure to allow the Safety Engineer to report directly to the Area Manager.
80. The Investigations Report do not highlight that the oil spills took place, because of the Claimant's negligence. Negligence denotes failure to take proper care over something. It was not the responsibility of the Claimant to maintain the Plant, and train its Staff to ISO standards. His colleagues in the Shift, and who may have borne the greater responsibility, were absolved in the end on the understanding that there was no evidence, showing their liability. Maina, Maguru, Kangwana, and Limo were all reinstated, after they explained that the spills were caused by malfunctioning pumping system. These were systemic issues, and the Technical Investigation Committees stated as much. There was no reason why the Respondent's Appeal Committee, seized of the facts contained in the Investigation Committees' Reports, and the explanations given by the Claimant's colleagues in Shift B on Appeal, would maintain that the Claimant, "remains dismissed."
 81. Chief Engineer Wekesa told the Court on cross-examination that the storm drain valve was closed, and that he ensured the valve was closed. The Investigation Committees found that the valve was partially open. He stated that it was his duty, as the Chief Engineer to close the valve. Further, Wekesa confirmed that fuel transmitters were faulty. Why did all blame shift on the Shift Engineer?
 82. There is no valid reason, or reasons, shown by the Respondent, to justify termination. Termination was flawed under Sections 41, 43 and 45 of the *Employment Act*.
 83. Remedies: Ideally, the Claimant ought to have been reinstated, like his shift colleagues were. The Respondent failed to maintain its Plant, and train its Staff to internationally certified standards, and when the system failed in quick succession, found a fall guy in the Claimant. Ideally, the Claimant ought to be reinstated, but has not applied to be reinstated, and considerable number of years have passed, since the Claimant was dismissed.
 84. He has not shown that his gross monthly salary, was Kshs. 377,363 by the time he left employment. The Respondent states that the Claimant's gross salary was Kshs. 181,667 monthly, by the time of termination. The pay slips for January, February and March 2012, suggest that callout and shift allowances were variable allowances, not to be included in the gross pay, for purposes of compensation. Callout allowance is akin to overtime pay, defined as standby or on-call allowance, made to Employees who are asked to be available for work outside their normal hours. These 2 allowances were not consistent. They were not fixed monthly amounts. They were variable allowances. The amount stated in the Statement of Response- Kshs. 91,667 [basic], Kshs. 40,000 [house allowance], Kshs. 35,000 [transport] and Kshs. 15,000 [other allowances] - total Kshs. 181,667, appears to the Court to be the correct gross monthly salary.
 85. Compensation for unfair termination is not based on the period an Employee takes to secure alternative job, from the date of termination, to the time of securing the alternative job. The prayer for 8 months' salary based on this unsupported method at Kshs. 3,018,904 is declined.
 86. The Court does not have to make an order, declaring that the reasons stated in the letter of dismissal, do not constitute proper grounds for dismissal. The Court has stated so in its findings. This does not have to be an order of the Court.
 87. Termination was flawed on procedure as well as lack of valid reason. The Claimant worked for about 6 years. Although the Respondent alluded to a litany of incidents said to have comprised a poor disciplinary record, none of these incidents was fleshed out. He was in a permanent and pensionable position. His shift colleagues were all reinstated. He did not create the circumstances leading to



dismissal. He secured alternative employment after 8 months. He is granted compensation for unfair termination, equivalent of 12 months' salary, at Kshs. 181,667 x 12 = Kshs. 2,180,004.

88. Costs to the Claimant.

89. Interest granted at court rate, from the date of Judgment till payment is satisfied in full.

In Sum, It Is Ordered: -

- a. It is declared that termination was unfair.
- b. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs. 2,180,004.
- c. Costs to the Claimant.
- d. Interest granted at court rates, from the date of Judgment, till payment in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.

JAMES RIKA

JUDGE

