



**Kenya Petroleum Workers Union v Ngamu Limited t/a National Oil Chania & another
(Cause 1538 of 2018) [2023] KEELRC 1446 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1446 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1538 OF 2018**

B ONGAYA, J

JUNE 16, 2023

BETWEEN

KENYA PETROLEUM WORKERS UNION CLAIMANT

AND

NGAMU LIMITED T/A NATIONAL OIL CHANIA 1ST RESPONDENT

DR. FRANCIS JOEL NGARU 2ND RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on November 19, 2018 in person. The claimant alleged unfair termination of its member one Francis Otieno Oluoch, the grievant. The claimant's case is that the 2nd respondent owns the 1st respondent.
2. The claimant further pleaded as follows. He was employed by the respondent on January 2, 2006 as an oil attendant at monthly salary of kshs 9,000.00. He was promoted to Station Supervisor initially at kshs 16, 168.00 per month raising to kshs 30, 750.00 per month effective January 2015. By letter dated September 12, 2017 one Moses Mwanja wrote to the claimant about outstanding audit issues. They included Lubes stock loss kshs 65, 718.00; LPG stock loss kshs 52, 840.00; debtors' summary as at August 31, 2017 kshs 1, 765, 077.00; unaccounted cash per the cash dropping book with help of forecourt cashiers kshs 5, 340, 688.00; abnormal fuel stock loss for 2015 and 2016 was kshs 1, 393, 663.00 and kshs 1, 064, 056.00 respectively; and the total amount to be recovered was kshs 9, 682, 042.00. The claimant was to sign off 7-days leave to allow smooth follow-up of the issue. Leave was effective September 12, 2017 and the claimant signed acknowledging receipt.
3. The grievant respondent by his letter dated September 13, 2017 addressing the audit issues as follows. He admitted it was his responsibility to ensure forecourt lubes were adequately stocked and it was his responsibility to restock but something went wrong during stock transfer from store to forecourt. He requested for 10 months to repay the kshs 65, 718.00 in issue. For the LPG he denied per his tabulation



that an amount of kshs 52, 840.00 had been lost and instead it was only kshs 8, 590.00 which he would pay by November 2017. On outstanding debtors, the management had allowed and approved some customers to lift products on credit and pay up within 30-days. The collection of debts was a collective role of management. On unaccounted cash per dropping book, some were marked x depicting they were not dropped. Others were marked x and actually dropped. He needed all dropping notes or papers to verify so as to have a fair chance to explain. The forecourt cashiers were also helping him identify all unpaid debts so as to compare the figures. The documents included customer payment summary. The abnormal fuel stock loss was due to short delivery, over dispensing and meter tampering. They are operational losses.

4. After the compulsory leave the grievant reported back on September 20, 2017, worked for 8 days, and was verbally told to take his annual leave which he commenced on September 28, 2017 ending on November 13, 2017 and which he signed on 04.10.20. The pending leave days were 132 per leave form also signed by the respondent's officer. The claimant union wrote on September 18, 2017 demanding end of the compulsory leave. By letter dated October 24, 2017 the grievant opted to resign effective October 30, 2017 he noted that he had taken five annual leaves for the 11 years served thus outstanding leave was for six years. One of the leaves would be applied to cover for due resignation notice of one month. By the letter dated October 30, 2017 the respondent declined the resignation due to audit process and pending the conclusion of the process. Further, per leave form completed, the claimant was expected at work on November 14, 2017. by letter dated January 25, 2018 the claimant wrote requesting for grievant's terminal dues.
5. By letter dated January 29, 2018 the grievant wrote to the respondent repeating his earlier reply to the audit queries. He requested his final dues be computed less kshs 74, 308.00 which he took liability for per his explanation to the audit queries.
6. The claimant reported a trade dispute on February 9, 2018 and a conciliator appointed. A certificate of unresolved dispute is dated July 30, 2018.
7. The claimant prayed for orders:
 - a. Reinstatement without loss of benefits effective January 2018. In alternative:
 - b. Notice pay for 1-month.
 - c. Leave not taken 132 days kshs 156, 120.00.
 - d. Rest days for 11 years kshs 1, 248, 923.00.
 - e. Maximum compensation $30, 750 \times 12 =$ kshs 369, 000.
 - f. Total claim kshs 1, 894, 793.00.
 - g. Any other relief or award.
 - h. Certificate of service.
 - i. Costs of the suit borne by the respondent.
8. The claimant subsequently appointed Onyony & Company Advocates to act in the matter. The claimant testified to support his case.
9. The respondents filed the memorandum of response on July 13, 2019 through Maloba & Amalemba Advocates. The respondent pleaded that they were distinct legal persons. The employer was the 1st respondent and the 2nd respondent was not a proper party.



10. The respondent pleaded as follows. It employed the grievant and he was promoted to the rank of Station Supervisor. He received the letter of employment dated March 10, 2011 effective March 1, 2011. He held same position from March 1, 2011 earning basic salary of kshs 20,000.00 per month until exit with a house allowance of kshs 2, 300.00. subsequently parties agreed upon a consolidated monthly salary of kshs 36, 750.00. the respondent admit correspondence about the audit queries as pleaded for the claimant. The respondent states the claimant wrote to answer to the queries prematurely as investigations were underway. All subsequent correspondence is admitted as pleaded for the claimant. The conciliator issued a certificate of disagreement at a time the respondent had requested to consult its counsel. The grievant was never dismissed but that he resigned. The respondent prayed that the suit be dismissed with costs.
11. The claimant filed the reply to memorandum of response dated February 15, 2022 and alleged constructive termination of the grievant.
12. The Court has considered all the material on record. The Court returns as follows.
13. To answer the 1st issue there is no dispute that parties were in a contract of service. The grievant worked as a pump station supervisor and his last monthly consolidated pay was agreed at kshs 36, 750.00.
14. To answer the 2nd issue for determination the contract of employment terminated by the grievant's letter of resignation dated October 24, 2017 and effective October 30, 2017. The grievant confirms as much per his letter dated January 29, 2018. The resignation was voluntary and even the grievant offered to offset notice payment due with one month of the outstanding leave days. The Court finds it was misconceived for the claimant to allege unfair constructive termination as his resignation was never attributed to the respondent's fundamental breach of the contract of service. The claim for compensation for unfair termination as urged for the claimant will collapse.
15. The claim for reinstatement is found inconsistent with the resignation. The claimant cannot have wanted to separate and then claim reinstatement.
16. The claim for off days over 11 years of service appears unjustified. The claimant never pleaded the particulars of rest days the grievant may have served. Further, the base for calculating such payment was never suggested in circumstances that the grievant's monthly payment kept moving over time of the service. In the resignation letter the grievant never mentioned such claim. The Court finds it was a pure afterthought, baseless, and not due especially there was no reported grievance in that regard throughout the period of service.
17. The claimant is entitled to a certificate of service per section 51 of the [Employment Act](#).
18. Notice pay is not due as claimed. The grievant in his resignation letter clearly set out whatever he thought was due and correctly offered a set off of one month leave accrued but not taken as in lieu of termination notice. His claim in that regard is found unjust.
19. The leave not taken per leave form exhibited was 132 days and the claimant is awarded kshs 156, 120.00 as submitted.
20. The Court has considered the amounts the claimant conceded to owe the respondents by reason of the audit queries. In the circumstances each party to bear own costs.

In conclusion judgment is hereby entered with orders:

1. The respondent to pay the grievant kshs 156, 120.00 by August 1, 2023 failing interest to be payable thereon at Court rates.



2. The respondent to deliver the grievant's certificate of service by August 1, 2023.
3. Each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 16TH JUNE, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

