



**Kariuki v Kenya Pipeline Company Limited (Cause 2273 of 2016)
[2023] KEELRC 2412 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2273 OF 2016
SC RUTTO, J
OCTOBER 6, 2023**

BETWEEN

GEORGE WAWERU KARIUKI CLAIMANT

AND

KENYA PIPELINE COMPANY LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim, dated 3rd November, 2016, the Claimant avers that he was employed by the Respondent as a Technical Operator with effect from 3rd November, 2006. He further avers that he was summarily dismissed from employment through a letter dated 29th February, 2016. The dismissal letter cited him for negligence in the performance of his duties. Terming his termination unfair and unlawful, the Claimant seeks the following reliefs against the Respondent:
 - i. Damages for wrongful and unlawful termination;
 - ii. Compensation for one year salary;
 - iii. Interest thereon on (i) and (ii) above;
 - iv. In the alternative the Claimant to be reinstated to his former employment at the same terms and benefits and be paid salary from the date of dismissal until determination of this suit.
 - v. Any other relief the court deems fit to grant in the circumstances.
2. Opposing the Claim, the Respondent contends that the dismissal of the Claimant was in accordance with the provisions of the *Employment Act* and general international standards established under the International Labour Organisation. Terming the Claimant's suit as frivolous, vexatious and an abuse of the court process, the Respondent has asked the Court to dismiss the same with costs.



3. The matter proceeded for part hearing on 13th February, 2023 and subsequently on 24th April, 2023 when the defence side closed its case, thus marking the end of the trial.

Claimant's Case

4. The Claimant testified in support of his case. At the outset, he adopted his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his Claim, as his exhibits before Court.
5. It was the Claimant's testimony that his work included but not limited to control room duties, taking samples to avoid interference and loading trucks.
6. He recalls that on 10th July 2015, he reported on duty at 11:00 am and was assigned duties at island number one which deals with export trucks. At around 12:45 pm, he went for lunch and reported back at around 1:25 pm whereby he relieved Mr. Owenga who was at island number two which deals with local trucks. He worked at island number two up to 8:00 pm when they closed down operations.
7. He stated that throughout his session, all the trucks that were on the queue were loaded without any incident being reported or detected. According to the Claimant, there are many trucks that are loaded on any single day and he cannot remember all of them.
8. On 15th July 2015 at around 3:00 pm, he was called by the security officer at the depot and asked to explain what happened on 10th July 2015 while he was loading. He explained to him briefly how he worked that day but emphasized that it was not possible to remember each and every detail regarding the said day and the trucks loaded.
9. On 24th July 2015 while on duty, he received a letter of suspension from the management of the Respondent citing that he was being suspected of loading truck KBU 512X that was also released with another company's gate pass and he was asked to stay away pending investigations.
10. He was categorical that he was not responsible for gate pass issue during the ingress and egress of the trucks. He was taken through a disciplinary process and he explained to the Committee that he loaded truck KBU 512X with 10,000 litres of diesel.
11. Subsequently, he received a letter of summary dismissal and despite his plea of innocence, the dismissal was confirmed. In his view, he was unfairly dismissed as he had not done anything wrong.
12. Closing his testimony in chief, the Claimant asked the Court to allow his claim as prayed.

Respondent's case

13. The Respondent called oral evidence through Mr. Wilkinson Ntwiga and Ms. Emily Thathi who testified as RW1 and RW2 respectively. Mr. Ntwiga was the first to go. He identified himself as a former employee of the Respondent. He told Court that he was an investigator at the Respondent company. Similarly, he started by adopting his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.
14. According to RW1, the Respondent received a complaint from East Africa Gas Oil Limited (EAGOL) that a product had been drawn from its account purporting that it was drawn by them but it was by an unknown vehicle.
15. He recalled that around July 2015, the Respondent company assigned him to investigate the incident in which 10,000 litres of Automotive Gas Oil (AGO) had been lost as a result of illegal and unauthorized loading of a wrong truck that did not belong to the Company.



16. He conducted the investigations and prepared the report which was presented to the disciplinary committee.
17. It was his evidence that after a review of the system, the duty roster for the period and log-in details, he made the conclusion that the Claimant indeed, loaded the truck with the oil. The system positively identified him as the person who was manning the loading island at the time of the incident. The Claimant's supervisor also confirmed that it was him who was on duty at that particular time.
18. RW1 further stated that the Claimant's shortcoming was that he failed to check the physical identification of the motor vehicle to be loaded and the driver's particulars as indicated in the loading order and the FAN ticket.
19. RW1 maintained that in this case, the truck that was loaded was not the one that was to be loaded.
20. He was called to testify and present the report before the disciplinary committee on 24th November 2015. The evidence that the Respondent had was overwhelming and hence the Claimant was called to explain the circumstances.
21. According to RW1, the investigations were carried out over a long time and they were comprehensive and this is what informed the disciplinary committee's decision. He termed whole process as fair and stated that it was carried out in a procedural manner and in compliance with all laws relating to employment.
22. Ms. Emily Thathi who testified as RW2, identified herself as the Respondent's Senior Human Resource Officer. Similarly, she adopted her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.
23. It was RW2's evidence that the Respondent had basis to dismiss the Claimant, for the reason that on 10th July, 2015, he loaded a truck not authorized or recognized by the Respondent, with 10,000 litres of AGO. This was not procedural and in any case illegal, as the truck which was not known to the Respondent left the loading island, being the loading station under circumstances not known to the Respondent, thus resulting in theft of the above mentioned amount of oil.
24. That by a letter dated 14th July 2015, East African Gasoil Limited wrote to the Respondent, reporting a case involving fraud at its Eldoret Depot, and requiring the Respondent to conduct investigations into the manner in which the unknown truck was loaded with oil.
25. The Respondent commenced investigations into the matter and prepared a comprehensive report on the incident. The Claimant was advised that there was need for him to be placed on suspension, in order to facilitate effective investigations, and he was issued with a letter to that effect.
26. The investigation report identified the Claimant as the one who actually loaded the truck at the loading island and was required to have confirmed the truck details before loading.
27. The Claimant was issued a Notice to Show Cause dated 29th October 2015. By a letter dated 3rd November 2015, the Claimant responded to the Notice to Show Cause, attempting to explain the incident unsuccessfully.
28. Considering the unsatisfactory nature of the Claimant's response, the Respondent by a letter dated 19th November, 2015, invited the Claimant to appear before its Staff Disciplinary Committee.
29. Following the findings and recommendations of the investigations, the Respondent proceeded to convene a Staff Disciplinary Committee Hearing on 24th November 2015.



30. During the hearing, the Claimant was given a plain chance to explain the obvious substantive and procedural errors in loading the wrong and unintended truck with 10,000 litres AGO.
31. The Committee found that the Claimant was negligent in the performance of his duties for reason that he failed to confirm and match the details in the loading order and those of the truck that he loaded, leading to the loss of the AGO. Furthermore, the Claimant did not dispute the fact that he was the officer who loaded the truck illegally, thus aiding the fraud leading to the loss of the oil.
32. The Committee reached the decision to dismiss the Claimant from employment and communicated the reasons for the decision vide the letter dated 29th February, 2016. The Claimant was informed of his right to appeal the decision to dismiss him. He put in a letter of appeal dated 10th March 2016, which the Appeal Committee considered and found no satisfactory reason had been provided warranting the setting aside of the Disciplinary Committee's decision to dismiss the Claimant.
33. The decision of the Appeal against Summary Dismissal was communicated to the Claimant by a letter dated 30th May, 2016.
34. RW2 further stated that, the Respondent addressed the issue of settlement of the Claimant's final dues in the letter of dismissal, being one month's basic salary in lieu of notice and his salary up to and including 1st March 2016, subject to clearance from the Company.
35. According to RW2, the Claimant was dismissed from employment by the Respondent, for good reasons which were communicated to him, after a thorough investigation and due process and in a fair and procedural manner, in compliance with all laws relating to employment.

Submissions

36. It was submitted on behalf of the Claimant that the totality of the evidence given brings out a classic example of an unfair termination of employment as no valid reasons for termination were proved. It was further submitted that the Respondent has failed to prove that the Claimant was negligent in exercise of his duties or that any operation requirement was breached as none was produced in Court. In support of the Claimant's submissions, the Court was invited to consider the determinations in Angela Wokabi Muoki vs Tribe Hotel Limited (2017) eKLR, Mary Chemweno Kiptui vs Kenya Pipeline Company Limited (2014) eKLR and Benson Amwoga Juma vs Kenya Pipeline Company Limited (2017) eKLR.
37. At the time of writing this Judgment, the Respondent's submissions were missing from the Court's physical record and were not traceable on the online portal. In any event, as per the Court's directions issued on 27th June, 2023, the same were to be filed by 4th July, 2023.

Analysis and determination

38. I have considered the pleadings by both parties, the evidentiary material placed before me, as well as the submissions on record and isolated the following issues for determination:
 - i. Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?



Valid and fair reason?

39. Sections 43(1) and 45 (2) (a) and (b) of the *Employment Act* (Act) are significant in resolving this question. First, an employer is required to prove the reasons for an employee's termination and failure to do so, such termination is deemed to be unfair. That is not all. In terms of Section 45 (2) (a) and (b) of the Act, an employee's termination from employment is unfair if the employer fails to prove-
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
40. It is also instructive to note that the question of fairness and validity is quite subjective and can only be determined on a case by case basis. Indeed, in terms of Section 43 (2) of the Act, the reasons resulting in an employee's termination must be matters the employer genuinely believed to exist at the time of termination.
41. Turning to the instant case, the Claimant was terminated from employment on grounds of negligence of duty. From the record, it is apparent that the Claimant's termination stemmed from an incident which occurred on 10th July, 2015 at the Respondent's depot at Eldoret. This was following an allegation that the Claimant had loaded an undisclosed truck illegally with 10,000 litres of Automotive Gas Oil (AGO). It was further alleged that the truck later exited the station under unclear circumstances. In this regard, the Claimant was alleged to have performed his duties negligently in that he failed to confirm and match the details in the loading order and those of the truck he loaded at 1610 hours hence leading to loss of the product that was in the Respondent's custody.
42. The disciplinary process against the Claimant was triggered by a complaint dated 14th July, 2015 from East Africa Gasoil Limited (EAGOL) which reads in part:
- “Re: Unauthorized Loading and Release of 10,000 Litres From KPC Eldret Depot (loading No. 7026)
- We wish to report a case involving fraud at KPC Eldoret depot. Our staff raised a loading order No. 7026 liters local AGO on 8th July, 2014, the same was loaded on 10th July, 2015.
- As our staff waited to confirm receipt of funds in order to release the truck (KBU 512X) the truck was released without our knowledge using a gate pass from a different oil marketer (Tosha) that was altered to reflect the truck registration numbers and quantity on our loading order.
- KPC has deducted our stock that was not duly authorized to be released and we therefore demand that the deduction be reversed to our stock balance. We are concerned and as thus we would also like to know the manner in which the KPC officer released product loaded under our instruction with a gate pass belonging to another marketer, so as to avoid a repeat of the same.”
43. It is apparent that following the complaint by EAGOL, the Respondent through RW1, undertook investigations into the issue and as such, several persons including the Claimant, were interviewed and they recorded statements. The Respondent exhibited a copy of the investigation report as part of its evidence.



44. According to the investigation report, the Claimant stated that he verified the documents of all the trucks he loaded on 10th July, 2015 and did not notice any anomaly. This is the same position he maintained in Court.
45. Among the persons who were also interviewed during the investigations was Mr. Philip Lamai who identified himself as the driver of truck KBU 512X. He stated that on 8th July, 2015, he was to lift the product on account of EAGOL for Matecha Petrol Station in Lodwar. That while at the inspection yard on 9th July, 2015, he was informed by a Mr. Bett, an agent of Matecha Petrol Station, to load on account of Oilibya instead of EAGOL. The order was processed and at about 1400 hours, he was cleared and he left for Lodwar. He arrived in Lodwar on 10th July, 2015 at about 1200 hours. He offloaded the product and at 1900 hours, he left Lodwar for Kitale. He was categorical that he did not lift the product on 10th July, 2015 using truck KBU 512X.
46. The information given by Mr. Philip Lamai was corroborated by Mr. Boniface Mahero an agent of Kijari & Sons Enterprises that owns truck KBU 512X. He told the investigating team that he knows that the truck was in Lodwar on 10th July, 2015. He further stated that the truck loaded an order for Oilibya on 9th July, 2015 and left for Matecha Petrol Station in Lodwar and was driven by Mr. Philip Lamai. That when he spotted the truck number on the Respondent's QMS queue no. 35 on 10th July, 2015, he knew the truck was in Lodwar and he called Mr. Philip Lamai who confirmed that he was still in Lodwar. He further stated that they do not have in their pool of drivers, a driver by the name Mr. Philip Langat.
47. This information was further corroborated by Mr. Patrick Kimaiyo Bett, an Eldoret based agent working with Matecha Petrol station, who confirmed that truck KBU 512X was loaded on account of Oilibya and the truck left for Lodwar on 9th July, 2015.
48. In addition, when interviewed by the investigators, Ms. Angela Cheptoo from EAGOL confirmed that she spoke to Mr. Bett and the truck KBU 512X was still in Lodwar on 10th July, 2015 hence she did not expect it to be loaded although the order was still on the Respondent's QMS queue. She further confirmed that on 10th July, 2015, the driver of truck KBU 512X did not present any bill of lading for issuance of a gate pass by EAGOL.
49. In his testimony before Court, the Claimant was categorical that he loaded truck KBU 512X on 10th July, 2015 and did not notice any anomaly in the documentation presented to him. In his testimony, he stated that upon receiving the loading orders, he checks the Filling Advice Notice (FAN) tickets against the particulars of the truck to be loaded as well as the identity of the driver.
50. In this case, the loading order in question is dated 8th July, 2015 and was issued by EAGOL. It identifies Mr. Philip Lamai as the driver, the truck registration number as KBU 512X, the transporter as Kijari & Sons Enterprises and the customer's name as Matecha Petrol Station. On the other hand, the corresponding FAN ticket dated 10th July, 2015 with regards to truck KBU 512X identifies the supplier as EAGOL, the customer as Maliki Services and the driver's name as Mr. Philip Langat. As it is, the loading order and the FAN ticket are at variance.
51. Indeed, if the Claimant's version is to be believed, it follows that the information in the loading order and in the FAN ticket would have tallied. However, this is not the case. The lingering question is how the Claimant could have loaded the same order using a FAN ticket with different particulars, especially the identity of the driver?
52. During cross examination, the Claimant stated that it is Mr. Philip Lamai who gave him the documents in respect of the order. This assertion is not supported by the evidence on record. Here is why. The



- investigation report bears that the representative of the operators of truck KBU 512X, that is, Kijari & Sons Enterprises, was categorical that the said truck was at the time in Lodwar offloading a product order by Matecha Petrol Station and was being driven by Mr. Philip Lamai.
53. It is also notable that during the investigations, Mr Tobias Okeyo, a security guard at the Respondent's company stated that he was on duty on 10th July, 2015 and confirmed that he is acquainted with truck KBU 512X and that he knows the driver Mr. Philip Lamai as he usually goes to the depot for loading more often. He did not see the truck on 10th July, 2015. He further told the investigating team that he knows Mr. Philip Langat as a squad driver who is not assigned to any truck.
 54. The investigation report bears that the information by Mr. Tobias Okeyo was corroborated by another security guard going by the name Mr. Ambrose Simiyu, who confirmed that he was on duty on 10th July, 2015 and that he knows Mr. Philip Lamai as the driver of truck KBU 512 X. He further stated that he did not see the said truck or Mr. Philip Lamai on 10th July, 2015.
 55. In light of the foregoing, it is highly probable that the driver of truck KBU 512X, was Mr. Philip Lamai and not Mr. Philip Langat. Hence how did the name of Mr. Philip Langat end up in the FAN ticket? And further, how did the Claimant load the product despite the variance on the driver's identity in the loading order and the FAN ticket?
 56. In addition to the foregoing, the Respondent exhibited an invoice dated 9th July, 2015 issued with regards to KBU 512X by Oilibya. Further exhibited was a Kenya Revenue Authority (KRA) gate pass dated 9th July, 2015 indicating that truck KBU 512X was loaded on 9th July, 2015 with Oilbya oil. Further exhibited, is a delivery note dated 10th July, 2015 issued by Kijari & Sons Enterprises to Matecha Enterprises Lodwar. The delivery is indicated to have been made by Mr. Philip Lamai.
 57. The above evidence when considered alongside the information given to the investigating team by the representative of Kijari & Sons Enterprises, Matecha Petrol Station and EAGOL, lend credence to the Respondent's version that truck KBU 512X was in Lodwar on 10th July, 2015 and therefore, it is not possible that the same truck would have been physically available for loading on 10th July, 2015 at Eldoret. This is further noting the distance between the two towns.
 58. Coupled with the foregoing, Mr. Jocktan Chemengu, a security staff at the Respondent company stated during the investigations that the role of the security staff is to confirm that the truck is available as per the QMS. He stated that he was on duty on 10th July, 2015 and that he did not see truck KBU 512X since he did not go to the inspection area to confirm whether it was there. He only passed it in QMS as available on the inspection yard on trust as he was informed by a broker that the truck was available.
 59. The foregoing evidence when considered as a whole, lends further credence to the Respondent's version that truck registration KBU 512X was not physically available for loading on 10th July, 2015 at the Eldoret depot.
 60. What further manifests from the foregoing is that it is highly probable that the documents that were used to load and clear truck registration KBU 512X on 10th July, 2015, were not credible. These include the FAN ticket, the gate pass by KRA and the truck loading sheet. This is further noting that the said documents indicate the driver of the truck as Mr. Philip Langat.
 61. Coupled with the foregoing, the truck was released using the gate pass of another oil marketer, "Tosha" instead of "EAGOL". Notably, the motor vehicle registration number of the said gate pass has been altered from KBN 321Y/ZD5765 to KBU 512X. This further cast doubt on the entire loading and clearance process that took place on 10th July, 2015, with regards to truck KBU 512X.



62. To this end, I am led to conclude that the Respondent has proved on a balance of probability that the Claimant was negligent in the performance of his duties as a loader, in that he loaded a truck with product without confirming the particulars in the loading order, the FAN ticket and the identity of the driver. Had he acted more prudently, he would have noted the anomaly hence he would not have loaded the product altogether.
63. In arriving at this determination, I am mindful of the standard of proof applicable in this case. As I have stated elsewhere in this Judgment, Section 43(2) of the Act, provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee. Therefore, the standard of proof is on a balance of probability as opposed to, beyond reasonable doubt.
64. From the evidence presented in the instant case, it can very well be said that by his own actions and omissions, the Claimant gave the Respondent sufficient and reasonable grounds to believe that he was imprudent in the performance of his role as a Technical Operator by loading a truck with product without confirming the accompanying documentation.
65. In total sum, I am of the considered view that the Respondent has proved that the reasons for the Claimant's dismissal were valid, fair and related to his conduct thus warranting his summary dismissal.

Procedural fairness?

66. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
67. In the instant case, it is evident from the record that the Claimant was issued with a Notice to Show Cause dated 29th October, 2015. Through the said Notice to Show Cause, he was asked to give his written explanation. From the record, the Claimant responded to the Notice to Show Cause through his repose dated 3rd November, 2015 and on 19th November, 2015, he was invited to appear before a staff disciplinary committee on 24th November, 2015. He was notified of the time and venue of the hearing. He was further advised of his right to be accompanied to the disciplinary hearing by a union official or a colleague.
68. From the record, the Claimant appeared for the hearing of his case and his explanation was noted and recorded. In the end, the disciplinary committee recommended his termination.
69. In the circumstances, I am satisfied that the Respondent complied with the spirit of Section 41 of the Act hence the disciplinary process was procedurally fair as the Claimant was notified of the allegations against him in a language he understood, given opportunity to respond in writing and appear in person before the Respondent's disciplinary committee.
70. The total sum of my consideration is that the Claimant's dismissal was not unfair and unlawful.

Orders

71. In the final analysis, I find that the reliefs sought by the Claimant do not lie. Consequently, I dismiss the Claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.



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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Muga

For the Respondent Mr. Karuga

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

