



REPUBLIC OF KENYA



**Muinde v Libya Oil Kenya Limited (Employment and Labour Relations Cause
78 of 2016) [2023] KEELRC 2437 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2437 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 78 OF 2016
AN MWAURE, J
OCTOBER 6, 2023**

BETWEEN

TITUS KIILU MUINDE CLAIMANT

AND

LIBYA OIL KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim dated 22nd January 2016.

Claimant's Case

2. The claimant avers that he was employed by the respondent in September 1980 as a terminal supervisor and he worked with due diligence and to the satisfaction of the respondent, his salary being computed at Kshs 249,131.21 per month.
3. The claimant avers that on 8th January 2015 he received a letter of summary dismissal from the respondent accusing him of wilfully neglecting to perform his work, breaching company policy and failing to follow written policies.
4. The claimant avers that the disciplinary hearing did not take cognisance to the fact that he had been assigned duties at Konza station though not documented in the job description from February 2014- November 2014 therefore it was not practical for him to be abreast with the issues at the Nairobi terminal.
5. The claimant avers that the investigations carried out on 19.11.2014 were not thorough to establish the loss of LPQ as the stock accountant in charge of the accounting system left the company making reconciliation complicated.
6. The claimant avers that it was unfairly concluded that the presentation showing each month's losses and gains was to conceal inventory control versus physical stock variations. Further the reports were



compiled by section heads and he could not access the stock accounting system as his role was supervisory.

7. The claimant avers that the respondent did not issue him a certificate of service until when it was demanded through his advocate.
8. The claimant avers that he was unfairly terminated as despite serving the respondent for many years he was never given a warning letter and was not accorded time to have a representative of his choice during hearing as the respondent denied him more time to avail a representative when his choice was unavailable.

Respondent Case

9. In opposition to the claim, the respondent filed response to memorandum of claim dated 8th April 2016 denying every allegation in the claimant's memorandum of claim and puts him to strict proof.
10. The respondent avers that the claimant was employed as a terminal supervisor vide an employment contract dated 25/3/2011 whose basic function was to coordinate and follow up on LPG fuel receipts and dispatches to ensure there were no products run outs and others.
11. The respondent avers that between January 2012 and December 2014, it lost an annual average of approximately 3 million litres of product through fraudulent shipping from its Nairobi terminal.
12. The respondent avers that during the aforementioned period the claimant as the Nairobi terminal supervisor, his updated job description was:

Manage physical stocks for LPG and fuels; Manage product receipts ex KPC into Nairobi terminal; Manage product receipts ex-Mombasa into Nairobi terminal by rail cars and trucks; manage stock variations and participate in investigation of the same; Maintain adequate stocks in the terminal; Liase with customer service on product stocks position to ensure prompt service delivery to customers; Control costs to ensure all expenditure is properly justified and business is served in the most cost effective manner provided by the contractors; and participate in terminal safety meetings.
13. The respondent denied that the claimant worked with due diligence and avers that the claimant was summarily dismissed with effect from 9/1/2015 on grounds that:
 - i. The claimant wilfully neglected to perform work which was his duty to perform and carelessly and improperly performed work.
 - ii. The claimant breached the respondent's policy on conflict of interest and ethics
 - iii. The claimant failed or refused to follow written policies and procedures in the conduct of his job.
14. The respondent further avers that the letter dated 8/1/2015 set out the grounds for termination and informed the claimant of his right to appeal and be accompanied to the appeal hearing with another employee.
15. The respondent avers that on 15/10/2014 it conducted internal investigations following the loss of approximately 3 million litres of product between 2012 to 2014 from its Nairobi terminal which involved an investigative team tasked to investigate and reconcile stock variance at the terminal.



16. The respondent avers that the internal investigation report identified the product was lost through fraudulent transactions shipping out product at the Nairobi terminal through collusion by the respondent staff and third parties.
17. The respondent avers that vide a letter dated 18/11/2014, the claimant was invited for an investigatory meeting whose aim was to gather facts and information into the fraudulent transactions and not aimed at the dismissal of the claimant. He says that the letter stated upon conclusion of the investigation if there were grounds for disciplinary action it may be necessary to invite the claimant to a disciplinary hearing.
18. The respondent avers that the investigations were carried out in a transparent manner as the findings and conclusions were corroborated by the findings of the independent forensic audit of stock movement at 1st Nairobi terminal.
19. The respondent avers that the claimant was invited for a disciplinary hearing on 16/12/2014 and was informed vide the invitation letter the purpose of the hearing, the allegations raised and attached copies of relevant documents intended to be used. The claimant was given an opportunity to respond to the allegations.
20. The respondent avers that the claimant was requested to advise the respondent if for any reason he or his companion were unable to attend the disciplinary hearing.
21. The respondent avers the claimant was accorded a fair hearing on 16/12/2014 in which the claimant gave his explanation together with documentation relied on at the hearing before making the decision to summarily dismiss the claimant. The decision which was communicated vide a letter dated 8/1/2015 which provided the reasons for its decision and informed the claimant of his right to appeal.
22. The respondent avers the claimant appealed the decision through a letter dated 14/1/2014 and the respondent constituted a panel and accorded the claimant another opportunity to make representations on 22/1/2015 but, however, the panel upheld the disciplinary panel's decision to summarily dismiss the claimant which was communicated vide a letter dated 9/2/2015.
23. The respondent avers that the claimant was informed of his right to a second and final appeal to the general manager but he failed to utilise the same and opted to file this suit.
24. The respondent avers that the claimant was terminated by summary dismissal which places no requirement to have warning letters.

Evidence in court

25. The claimant testified and adopted his witness statement dated 22/1/2016 as his evidence in chief and his list of documents number 1-7 as exhibit 1-7.
26. The claimant testified that the disciplinary hearing was rushed and neither his response nor documents were considered and further, the panellists had a set mind and did not pay attention to him.
27. The claimant testified that the respondent had systems to see anything that went wrong and would have seen any losses.
28. The claimant testified that stock reports were compiled by heads of different sections and he participated in reviewing the reports and that the stock accountant's role was to check the stock accounts being distributed daily.



29. The claimant testified that the report did not mention him adversely but persons working with accounts were mentioned adversely and these were Boniface Wanyama and David Mutiso.
30. During cross examination, the claimant testified that during the disciplinary hearing he responded from variances and that he came to know the specific variances this year as the reconciliation was to be completed.
31. The claimant testified it was his responsibility to reconcile the figure and that during the hearing he admitted that he could have identified the problem and that he regretted lack of close monitoring.
32. The claimant further testified that he did not raise any issue how the panel was constituted or request for more time to prepare for the hearing and that he signed the minutes and all documents were sent to him
33. The claimant testified that he was paid some money but was not aware that was all he deserved.
34. The claimant testified that there is a difference between variance and a loss variance requires reconciliation and what was being discussed was a variance.

Respondent

35. The Respondent's witness RW1, Irene Mwangangi testified and adopted her witness statement dated 23/03/2023 as her evidence in chief and list of documents dated 08/04/2016 and 24/03/2023 as her exhibits.
36. During cross examination, RW1 testified that there are set bare minimum of losses accorded but she cannot confirm that there is panel evaporation.
37. RW1 testified that the claimant was told he could bring a witness during the disciplinary hearing but however the claimant informed the panel that his witness was not available and he did not ask for extended time

Claimant's Submissions

38. The claimant submitted that his responsibility was to manage stock variations and participate in investigations of the same, however, there were section heads who were to compile reports and present the same to him as their supervisor which function he performed together with the stock loss committee which met monthly to deliberate the reports. Therefore, it was a collective responsibility not individual.
39. The claimant submitted the stock loss committee could not come up with a conclusive report because reconciliation had not been effected by the stock accountant hence the investigations were not thorough.
40. The claimant submitted that his dismissal was not objective and was predetermined as the hearing was rushed and he was not given time to prepare or be accompanied by a person of his choice.

Respondent's Submissions

41. The respondent submitted that the claimant made unequivocal admission of his neglect of duty during the disciplinary hearing and appeal hearing minutes which he signed as true records and confirmed during his cross examinations that indeed he made the admissions.



42. The respondent submitted its disciplinary process was procedurally and substantively fair as the claimant was invited to attend a disciplinary hearing on 16th December 2014 through the hearing notice dated 9th December 2014 hence the claimant was given enough time to prepare.

Analysis and Determination

43. The issues for determination are:

1. Whether the claimant was unfairly terminated
2. Whether the claimant is entitled to the remedies sought.

44. Section 45(2) of the [Employment Act](#) provides for substantive fairness and reads:

“A termination of employment by an employer 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; and
- (c) that the employment was terminated in accordance with fair procedure.”

45. Section 44 (4) (g) of the [Employment Act](#) provides for summary dismissal:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

46. During cross examination, claimant testified that his job description included managing physical stocks for LPG and fuels, managing stock variations and investigations and maintain adequate stock. He further admitted in court and during the disciplinary hearing by the respondent that it was his responsibility to reconcile the figures and that he could have identified the problem and that he regretted lack of close monitoring.
47. Having said so the court has carefully considered the reasons given for the claimant’s termination and the same is found wanting.
48. With regard to procedural fairness, section 41 of the [Employment Act](#) provides:

“Notification and hearing before termination on grounds of misconduct:-

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor



performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

49. Indeed, the respondent may well have had a good reason to discipline the claimant eventually for termination. However, the reasons given are not quite convincing. The respondent did not prove what actual negligence he committed and did not prove it was only the claimant who was in charge of stock reconciliation.
50. The claimant informed the court during his evidence in court that he admitted he had a supervisory role and there were other staff members who were section heads who were in charge of reconciliation. He also said he worked with a committee to participate in stock loss reconciliation. He said they used to meet and discuss the reconciliations and the heads of department would write their reports. He says that there were variances in reconciliation and this was expected. Furthermore, even if there were discrepancies in the stock taking the same was not caused by the claimant only as he did not work alone but he worked with a committee. The other committee members do not seem to have been disciplined or even involved in investigation.
51. So the court finds that despite the participation of the claimant in the disciplinary meeting the matters raised were quite general and no prove of the losses incurred by the respondent. This court has always held that for termination of the employee to be fair it must establish there was a valid verifiable reason or reasons to terminate an employee.
52. The termination letter dated 8th January 2015 the charges against the claimant were:-
1. You have wilfully neglected to perform work which it was your duty to perform and have carelessly and improperly performed work which from its nature was your duty, under our contract, to have performed carefully and properly
 2. You have breached company policy on conflicts of interest and ethics and
 3. You have failed or refused to follow written policies and procedures in the conduct of your job.
53. You can see the allegations are very general and there is no proof of how he neglected his duties and the referred conflict of interest. The respondent therefore gave reasons for termination but the reasons were not verified and for that the court hesitate to find the claimant was lawfully terminated.
54. In the case of *Kenfreight EA vs Benson Nguti* (2016) eKLR where court held:
- “it is not enough to termination employment by notice of payment in lieu thereof. Termination should be based on valid reasons and fair procedure should be followed”



In other words the termination to be fair there has to be both substantive justification as well as procedural fairness. In the case of Walter Oguro Onuro vs Teachers Service Commission Cause 955 of 2011 It was Held:

“for termination to pass the fairness test it ought to be shown that there was not only substantive termination but also procedural fairness.”

Given the respondent did well in inviting the claimant for a disciplinary hearing and conducting the disciplinary hearing in a fair manner the court gives them a good mark.

55. However, in view of the fact that the reasons for termination were not certain and were not well proved the court finds there was unlawfulness in terminating the claimant. The court therefore enters judgment in his favour.
56. Having entered judgement in favour of the claimant the court awards him the following:-
1. The one-month salary in lieu of notice the respondent avers he settled the same.
 2. Service pay is not awarded as from claimants pay slip of December 2014 the NSSF dues were being remitted unless claimant says the same was not paid.
 3. The payslips are for December 2014 and December 2015.
 4. Loss of earning lost for years he could have worked and even this prayer is speculative and so is not granted.
 5. The compensation for unfair termination but considering the guidance of section 49(4) of the employment act and considering the fact that the respondent as closely as possible followed the right procedure prior to termination save for lack of a valid verifiable reason for termination the court will award him 2 months equivalent of his salary kshs $2 \times 249,131/21 = \text{Kshs } 498,202/42$.
57. Each party will pay their costs but the above award will attract interest at courts rates from date of judgment till full payment.

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

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.



ANNA NGIBUINI MWAURE
JUDGE

