



Kenya Petroleum Workers Union v Olympic Petroleum Limited (Cause 463 of 2017) [2023] KEELRC 2338 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2338 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 463 OF 2017
L NDOLO, J
OCTOBER 5, 2023**

**BETWEEN
KENYA PETROLEUM WORKERS UNION CLAIMANT
AND
OLYMPIC PETROLEUM LIMITED RESPONDENT**

JUDGMENT

Introduction

1. Kenya Petroleum Workers Union, the Claimant in this case is a registered trade union representing workers' interests in the Petroleum, Oil and Gas Industries.
2. The Claimant Union brought this claim against the Respondent, on behalf of its member, Mohamed Saka (the Grievant). In a Memorandum of Claim dated 7th March 2017 and filed in court on 8th March 2017, the Claimant cites wrongful termination of the Grievant's employment and refusal to pay his terminal benefits as the issues in dispute.
3. The Respondent filed a Reply and Counterclaim dated 7th April 2017, to which the Claimant responded on 2nd November 2021.
4. At the trial, the Grievant testified on his own behalf and the Respondent called its former Station Manager, Abdikhaliq Hussein Sheikh.

The Claimant's Case

5. The Claimant states that the Grievant was employed by the Respondent in April 2013, as a Supervisor/Cashier at a gross monthly salary of Kshs. 12,000 which was later increased to Kshs. 16,650.
6. According to the Claimant, the Grievant worked for the Respondent until 25th October 2015, when he was verbally ordered out of his workstation by the Station Manager, Mr. Abdi.



7. Attempts to resolve the matter between the parties did not yield fruit and the Claimant reported a dispute to the Ministry of Labour in accordance with Section 62(1) of the *Labour Relations Act*. The dispute was not resolved at the conciliation stage and the Conciliator issued a certificate to that effect, on 3rd May 2016.
8. The Claimant's case is that the termination of the Grievant's employment was without justifiable cause and was in violation of due procedure.
9. The Claimant therefore seeks the following remedies on behalf of the Grievant:
 - a. One month's salary in lieu of notice.....Kshs. 16,650
 - b. Unpaid leave of 32 months.....35,862
 - c. Underpayment.....317,430
 - d. Public holidays (24 days).....30,738
 - e. 12 months' salary in compensation.....199,800
 - f. Certificate of Service
 - g. Costs

The Respondent's Case

10. In its Reply dated 7th April 2017 and filed in court on 10th April 2017, the Respondent states that the Grievant was employed as a Pump Attendant and not in the position of Cashier as alleged. The Respondent avers that the Grievant was in charge of other Pump Attendants, hence the title Supervisor.
11. According to the Respondent, the Grievant's employment was terminated on account of gross misconduct, which caused damage and loss to the Respondent. The Respondent claims that the Grievant was afforded a fair hearing prior to the termination.
12. The Respondent accuses the Grievant of interrupting workflow. The Respondent further accuses the Grievant of stealing Kshs. 35,000 and thereafter deserting duty. The Respondent avers that the Grievant did not turn up for duty for three (3) months.
13. By way of Counterclaim, the Respondent claims the sum of Kshs. 35,000 being unaccounted money plus interest, from the Grievant.

Findings and Determination

14. From the parties' pleadings and submissions, four (4) issues emerge for determination in this case:
 - a. Whether the Claimant has the locus standi to bring this claim on behalf of the Grievant;
 - b. Whether the termination of the Grievant's employment was lawful and fair;
 - c. Whether the Grievant is entitled to the remedies sought;
 - d. Whether the Respondent has established a proper Counterclaim against the Grievant.



Locus Standi

15. The Respondent argues that because it had no Recognition Agreement with the Claimant, then the Claimant could not bring a claim on behalf of the Grievant. In pursuing this line, the Respondent relies on Section 54(1) of the [Labour Relations Act](#), which provides for recognition of a trade union representing a simple majority of unionisable employees, by the employer of those employees.
16. With much respect, the Respondent appears to have misapprehended the law on representation of employees by their trade union.
17. In its decision in [Kenya Shoe & Leather Workers Union v Modern Soap Factory](#) [2018] eKLR this Court stated the following:

“....a trade union has many roles and although collective bargaining which is premised on recognition is a premiere one, the other roles such as association generally and representation in particular, are equally important. What is clear is that Section 45(1) of the [Labour Relations Act](#) creates no necessary nexus between recognition and representation.”

18. The matter went on appeal to the Court of Appeal and in its decision in [Modern Soap Factory v Kenya Shoe and Leather Workers Union](#) [2020] eKLR the Appellate Court rendered itself thus:

“Article 41 of the [Constitution](#) of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the [Constitution](#) on enforcement of the [Constitution](#) provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where the [Constitution](#) is contravened or threatened with contravention. In the same spirit, Section 22 of the [Employment and Labour Relations Court Act](#) provides that:

“In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party may act in person or be represented by an advocate, an office bearer or official of the party’s trade union or employers’ organisation, and if the party is a juristic person, by a director or an employee specially authorised for that purpose.”

We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection.....

A recognition agreement is defined under Section 2 of the [Labour Relations Act](#) as an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union



represents its members in court. As the learned Judge correctly stated, the two roles are distinct.”

19. The Grievant told the Court that he was a member of the Claimant Union and that he paid his union dues directly to the Union. There is therefore no reason for the Respondent to object to the Claimant’s appearance on behalf of its member. The Grievant’s right to representation by his Union is support by both the Constitution and statute.

The Termination

20. On 28th October 2015, the Respondent wrote to the Grievant as follows:

“RE: Summary Dismissal of Mohamed Saka

This is to inform you that your informal employment with Olympic Petroleum Limited is terminated for cause, effective immediately.

Your service as a pump attendant at the Juja Station is terminated on account of your gross misconduct, deceitful (sic) and undermining the company policies severally, as reported by your line managers and confirmed by the management after the matter has been investigated.

In a view of the above you are summarily dismissed from the service of the company. The company had suffered economic loss as a result of your gross misconduct and is contemplating to institute legal actions against you.

You are, therefore, required to handover the company properties and/or its affiliates in your possession with immediate effect.

Yours Sincerely,

(signed)

Mohamed Haji Jama,

Managing Director,

Olympic Petroleum Limited.”

21. This letter cites gross misconduct as the reason for termination of the Grievant’s employment, whose details were given as misappropriation of company funds. In this regard, the Claimant was accused of taking off with Kshs. 35,000 belonging to the Respondent.
22. There was however no evidence placed before the Court to support the allegations made against the Grievant. The Respondent’s witness, Abdikhaliq Hussein Sheikh, told the Court that he had no evidence to show that the Grievant had misappropriated any money belonging to the Respondent. In fact, he did not know the amount of money alleged to have been lost through the Grievant.
23. Further, the Grievant was not subjected to any disciplinary process prior to the termination, as required by Section 41 of the Employment Act.
24. The Respondent itself cited the decision in *Janet Nyandiko v Kenya Commercial Bank* [2019] eKLR where it was held that:

“Section 45 of the Employment Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the



reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether an employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41..."

25. In the circumstances of this case, the only conclusion to make is that the Respondent not only failed to discharge the duty imposed by Section 43 of the *Employment Act*, to establish a valid reason for termination of employment but also ignored the procedural fairness requirements set by Section 41 of the *Act*.
26. In the result, I find and hold that the termination of the Claimant's employment was substantively and procedurally unfair.

Remedies

27. I therefore award the Grievant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Grievant's length of service and the Respondent's unlawful conduct in bringing the employment to an end.
28. I further award the Grievant one (1) month's salary in lieu of notice.
29. In the absence of leave records to show that the Grievant had exhausted his annual leave, the claim for leave pay succeeds and is allowed.
30. The claim for underpayment is based on the averment that the Grievant was employed as a Cashier. However, there was no evidence to support this position and the claim therefore fails.
31. The claim for public holidays was not proved and is dismissed.

The Respondent's Counterclaim

32. The Respondent's Counterclaim against the Grievant is based on an allegation that the Grievant failed to account for the sum of Kshs. 35,000. Having found that this allegation was not supported by any evidence, the Counterclaim has no leg to stand on and is disallowed.

Final Orders

33. Finally, I enter judgment in favour of the Claimant on behalf of the Grievant as follows:

- a. 6 months' salary in compensation.....Kshs. 99,900
- b. 1 month's salary in lieu of notice.....16,650
- c. Leave pay for 2 years (16,650/30*21*2).....23,310
- d. Prorata leave for 6 months (16,650/30*1.75*6).....5,828
- Total.....145,688



34. This amount will attract interest at court rates from the date of judgment until payment in full.
35. The Respondent is further directed to issue the Grievant with a Certificate of Service and to pay the costs of the case.
36. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER 2023

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JUDGE

Appearance:

Mr. Kogangah h/b for Mr. Onyony for the Claimant

Miss Wanjiku for the Respondent

