



Omanya v Kenya Pipeline Company Limited (Employment and Labour Relations Cause 70 of 2017) [2023] KEELRC 3323 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3323 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 70 OF 2017
AN MWAURE, J
DECEMBER 21, 2023**

BETWEEN

DAVID OGOLLA OMANYA CLAIMANT

AND

KENYA PIPELINE COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed an Amended Memorandum of Claim dated 17th May 2019.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent on 11th May 2007 as a Security Guard II- Job Group 14A earning a salary of Kshs 84,853.75 monthly. He worked competently and diligently until he was maliciously and unlawfully terminated on 21st July 2016.
3. The Claimant avers that his main work was guiding PS-1 by ensuring smooth flow of activities within the assigned area.
4. The Claimant avers that on 2nd March 2016, he was served with a suspension letter with immediate effect to pave way for investigations into allegations of product theft, however, the said theft was never reported to the police.
5. The Claimant avers that the Respondent issued him with a show cause letter on 20th May 2016 with several allegations of product theft from PS-1 on diverse dates between 2014 and 2015.
6. The Claimant avers that he responded to the show cause letter vide a letter dated 24th May 2016 addressed to the Respondent's Human Resource Manager giving a chronological breakdown of events and that the alleged theft never happened during his shift.



7. The Claimant avers that on 6th June 2016, the Respondent issued him an invitation to a disciplinary hearing, however, during the hearing, the committee had a predetermined and biased mindset to dismiss him.
8. The Claimant avers that the disciplinary committee disregarded his explanation and moved to summarily dismiss him vide a letter dated 21st July 2016.
9. The Claimant avers that the Respondent has refused to settle the compensation outlined in the summary dismissal letter and in September 2016, he received a letter asking him to vacate a house allocated by the Respondent.
10. The Claimant avers that he wrote an appeal letter received by the Respondent on 4th August 2016 raising pertinent issues on his summary dismissal but the Respondent has refused to correct the wrong undertaken.

Respondent's Case

11. In opposition to the Claim, the Respondent filed its memorandum of response dated 7th February 2017.
12. The Respondent avers that the Claimant was summarily dismissed by a letter dated 21st July 2016 for reasons stated including but not limited to failure by the Claimant to discharge his contractual obligations, wilful neglect to perform his duties, dishonesty, failure to obey the company staff rules and regulations under Section 8.3.4 and the Collective Bargaining Agreement clause 38.
13. The Respondent avers that the Claimant was served with a suspension letter dated 2nd March 2017 to pave way for investigations into the product theft syndicate which the Claimant was involved at its plant in the year 2014 and 2015.
14. The Respondent avers that the matter was handled internally and after satisfactory investigations, the Claimant was found privy to vital information on the theft of product syndicate that took place as listed hereunder:
 - i. On 1st/2nd August 2014 while on duty jointly with his shift colleagues conspired to steal various grades of petroleum products estimated as 81,000 litres from its plant area.
 - ii. On 5th/6th November while on duty jointly with his shift colleagues conspired to steal various grades of petroleum products estimated as 114,000 litres from its plant area.
 - iii. On 7th/8th November while on duty jointly with his shift colleagues conspired to steal various grades of petroleum products estimated as 90,000 litres from its plant area.
 - iv. On 13th/14th November while on duty jointly with his shift colleagues conspired to steal various grades of petroleum products estimated as 78,000 litres from its plant area.
 - v. On 20th/21st November while on duty jointly with his shift colleagues conspired to steal various grades of petroleum products estimated as 90,000 litres from its plant area.
15. The Respondent avers that the Claimant's actions amounted to gross misconduct, breach of the company staff rules and regulations, the collective bargaining agreement and the [Employment Act](#) and it opted to summarily dismiss him.
16. The Respondent avers that it received the Claimant's letter dated 24th May 2016 but the Claimant was on duty on the aforementioned dates when the theft syndicate occurred.



17. The Respondent avers that the disciplinary committee analysed all evidence presented by all parties and denies that it disregarded the Claimant's explanation as alleged.
18. The Respondent avers that it followed the laid down legal procedure in the termination process and the reasons for termination were valid and fair contrary to the Claimant's allegation.
19. The Respondent avers that in view of the terminated employment, it had a right to ask the Claimant to vacate its premises due to the severed relationship.
20. The Respondent denies to have refused to settle the Claimant's dues and avers that the Claimant has refused and/or not cleared/ handed over to his then supervisor its property, staff identification, medical cards of his dependants, returned a filed a wealth declaration form as requested in the termination letter. In the circumstances, the Claimant has declined to clear with the Respondent thus not collected his dues in full.
21. The Claim was canvassed by way of written submissions as directed by court on the 19th June 2023.

Claimant's Submissions

22. The Claimant submitted that it is considered unfair to terminate a contract of service if the employer fails to demonstrate the reasons for termination are valid and fair. The burden on the employee is only limited to asserting that unfair termination occurred.
23. The Claimant submitted that despite the Respondent deliberating on a disciplinary case involving 14 members of staff, essential key personnel were absent including the investigators and markers of the surety incident report dated 24th February 2016 together with representatives from the Kenya Petroleum Oil Workers Union.
24. The Claimant submitted that the disciplinary meeting was instigated with malice and was a sham as to date no criminal investigations or charges were conducted against the Claimant and the investigation report was never supplied to the Claimant to enable him adequately prepare his defence.
25. The Claimant submitted that the Respondent has never adduced any evidence that there was any report or complaint of theft against the Claimant. It would have been easier for the Respondent to produce the Claimant's records to prove to this court that the theft occurred as it is the keeper of the employees records as set out in Section 74 of the *Employment Act*.

Respondent's Submissions

26. The Respondent submitted that in a related matter from the same cause of action *Juma & 5 others v Kenya Pipeline Company Limited* (Cause 80, 81, 82, 83, 84 & 85 of 2017 (Consolidated)) [2022] KEELRC 69 (KLR) (13 May 2022) (Judgment), the court found the summary dismissal was substantively and procedurally unfair and unlawful and proposes the judgment be applied herein as well.
27. The Respondent submitted that Section 12(3)(vii) of the *Industrial Court Act*, 2011 empowers the court to reinstate an employee within 3 years of dismissal subject to the conditions the court thinks fit. In this case, the 3-year limitation period lapsed hence the court is statutory barred.
28. The Respondent submitted that the Claimant's former position no longer exists hence his reinstatement is untenable. A just and fair compensation by the Respondent effectively ends the employment relationship.



29. The Respondent submitted that the Claimant was not issued with notice to terminate his employment as provided under Section 35 of the *Employment Act* hence is entitled to one month pay in lieu of notice. Three months' salary in lieu of notice should not be awarded as it is not in the contract of employment or recognition agreement signed on 14th November 2012 between the Respondent and the Kenya Petroleum Oil Workers Union.
30. The Respondent submitted that the Claimant was a member of its retirement benefits scheme and therefore unqualified for service pay as section 35(6) of the *Employment Act* disentitles him.

Analysis and Determination

31. It is not in dispute that the termination of the Claimant's employment was substantively and procedurally unfair and unlawful. The claimant was not afforded a valid reason for his termination as provided in section 45 of the *Employment Act*. Section 45(1) states as follows:

No employer shall terminate the employment of an employee unfairly.

32. The reasons given that the claimant was guilty of theft of petroleum products are not proved and are not substantially clarified as required in law. In the case of *Anthony Mkata Chitavi vs Malindi water & Sewerage company Ltd* (2013) eKLR the court held:

" The ingredients of procedural fairness as I understand it within the Kenya situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would allow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

33. The court finds the respondent did not follow the fairness test required in terminating an employee or dismissing him for gross misconduct. At the same time the respondent did not follow the procedure mandated in section 41 of the *Employment Act*. The said section 41 of *Employment Act* states as hereunder:

" 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."

34. Claimant was served with a suspension letter on 2nd March 2016 for unspecified period. On 20th May 2016 he was issued a notice to show cause with numerous allegations of gross misconduct and he responded on 24th May 2016. On 6th June 2016 he received a letter inviting him to a disciplinary meeting on 9th June 2016 and then after the hearing he was dismissed on 21st July 2016.



35. The court was not availed the minutes of the meeting but was not clear if claimant was availed the same and if he signed them. It was also not clear if he was represented by a fellow worker or a shop union representative.
36. There is evidence that respondent did not dismiss the claimant fairly and procedurally and even as submitted orally by the respondent on 10th March 2023 in the cases of *Juma & 5 Others vs Kenya Pipeline Co Ltd* Cause 850 as consolidated with others (*supra*) the trial judge found the claimant was not dismissed fairly and procedurally. The respondent submitted the facts were the same as in this one.
37. The court is therefore convinced even in this case the respondent did not dismiss the claimant fairly and procedurally and so judgment is entered in favour of the claimant.
38. Section 12 (3) (Vii) of the *Employment and Labour Relations Court Act*, 2011 provides that: -
- “In exercise of its jurisdiction, the Court shall have power to make an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.”
39. In *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR, Maraga J (as he then was) stated thus:
- “As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12 (3) (vii) of the *Industrial Court Act* that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal. (Emphasis supplied).
- Under the Kenyan *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, say something about the practicability factor”.
40. As submitted by the Respondent, the Claimant’s reinstatement is untenable firstly because his termination occurred in 2016, which is seven (7) years ago hence statute barred under Section 12 (3) (vii) of the *Employment and Labour Relations Court Act*.
41. Further, the reinstatement is impractical as the reasons leading to the termination was an alleged theft which may have created mistrust between the parties and severed the employment relationship.



Three Months' Salary in lieu of Notice

42. The Respondent acknowledges that the Claimant's employment was terminated without notice. Section 36 of the *Employment Act* provides: -

“Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been claimed by the other party, or paid by him as the case may be in respect of the period notice required to be given under the corresponding provisions of the section.”

43. In *Daniel Ochiaku Abochi v Dynaplast Limited* [2021] eKLR the court held:

“For purposes of this matter, the statutory notice period is as set out in section 35 (c) of the *Act*, and the entitlement for a payment of salary in lieu of notice sets in courtesy of section 36. By reason of this the Claimant in the circumstances of his case, can only be entitled to a one month's salary in lieu of notice.”

44. In view of the foregoing and in reference to the Claimant's submissions the Claimant cemented the fact that he is only entitled to one month's salary in lieu of notice of Kshs 84,853.75.

Service pay

45. Section 35 (5) and (6) of the *Employment Act* provides that:

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

- a. A registered pension or provident fund scheme under the *Retirement Benefits Act*;
- b. A gratuity or service pay scheme established under a collective agreement;
- c. Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- d. The National Social Security Fund.”

46. The Respondent submitted that the Claimant is not entitled to service pay as he was a member of its retirement benefits scheme. The court agrees that since the claimant was a member of respondents retirement benefit he is best suited to follow his retirement dues from the retirement benefits fund. This prayer is therefore not merited.

47. 12 month's salary for wrongful dismissal is granted as provided in section 49 of *Employment Act* as compensation for unfair dismissal. He is entitled to Kshs $84,853/75 \times 12 = 1,018,254/-$.

48. He is also entitled to costs as is trite law costs follow the events.

49. Total award is Kshs 1,103,107/75 plus interest at court rates from the date of judgment till full payment.



50. Certificate of service to be provided within 30 days hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF DECEMBER, 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.

