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)

Neutral citation: [2022] KEELRC 69 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 80, 81, 82, 83, 84 & 85 OF 2017 (CONSOLIDATED)

B ONGAYA, J

MAY 13, 2022

BETWEEN

BENSON AMWOGA JUMA ..... 1ST CLAIMANT

SAMUEL WAHOME NJAU ..... 2ND CLAIMANT

WENNESLUS YAA KARISA ..... 3RD CLAIMANT

GEORGE NDERITU GACHINWA ..... 4TH CLAIMANT

KEFA AFANDE BOSIRE ..... 5TH CLAIMANT

DICKSON LUMUMBA ALWALLA ..... 6TH CLAIMANT

AND

KENYA PIPELINE COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. Each claimant filed a memorandum of claim on 30.01.2017 against the respondent and through Cootow & Associates Advocates and Mr. Wafula Advocate appeared in that behalf. The claimants were employed by the respondent on diverse dates – the 1st claimant as a Driver II in January 2002; the 2nd claimant as Security Guard II in November 1994; the 3rd claimant as Security Guard I in May 2012; the 4th claimant as Technical Operator III in June 1984; the 5th claimant as Security Guard II in October 2003; and the 6th Claimant as Security Guard II in August 1994. Each claimant claimed unfair and discriminatory dismissal and prayed for judgment against the respondent for:

    a. A declaration that the termination of the claimant was substantively and procedurally unfair.

    b. An order for reinstatement with no loss of benefits.

c. In alternative payment of damages for unfair termination as set out in the memorandum of claim (computed on the headings of one-month basic salary in lieu of notice and 12 months' salaries for unfair termination).

d. Costs of the suit.

e. Interest in (b) and (d) above.

f. Any other relief as the court may deem just to award.

2 . The claimants were at all material times employees of the respondent having been employed on diverse dates and upon varying designations and monthly remuneration. There was no dispute that the claimants were so employed and the terms and conditions of service were not in dispute.

3. Each claimant received a letter dated 02.03.2016 being on suspension from duty. The letter stated that the respondent's management had received intelligence reports whereby the claimants were amongst other members of staff suspected to have been involved in a product theft syndicate over a period of time. Further, in view of the reports, and in line with the respondent's section 8.3.4 staff rules and regulations and clause 38 of the CBA, it had been decided that each claimant be suspended from duty with immediate effect pending further investigations. While on suspension each would continue drawing full salary and benefits as per the CBA in place. However, during suspension the claimants would not enter the respondent's premises unless authorised to do so and each was to be accessible by providing contact address and telephone number so that the respondent could reach them anytime, when need arose.

4. The claimants' union Kenya Petoleum Oil Workers Union protested against the suspension letters issued to the claimants and date 02.03.2016. The Union's protest letter dated 04.03.2016 raised issues as follows,

> " 1. It is not only unfair but also demotivating to book our members on a round up trip air ticket to headquarters with a misleading agenda of "work related issues" only to be handed with suspension letters suspecting them of theft of unspecified product.
>
> 2. Even if they were sufficiently suspected of theft, they are still entitled to their fundamental freedom of choice where they should only write what they verily know or otherwise but not restricting them by providing a guideline.
>
> 3. It is also not lawful to subject our members to record statements about unspecified dates. That amounts to intimidation.
>
> 4. In your guideline, bullet No. 6 you singled out same 3 dates i.e. 01.11.2015, 05.11.2015 and 07.11.2015 which according to your own records, you are aware that some members, e.g. Bro. Alwala and Bro. Chringa had long been transferred to Ps 14 and Ps 12 respectively and are not procedurally bound to record statements on "theft" in Ps1. Bro. Bosire Kefa had been cleared for transfer from security to IT department on 8th October 2015 and MUST not be subjected to matters of security on 1st, 5th and 7th November 2015 when he no longer was in charge of security.
>
> 5. You informed our members that their phone conversations had been tapped and you are aware of their plot which we shall ultimately demand that you produce a clip to affirm the suspected plot, otherwise that is considered as infringement on civil liberties of our members. It is also unethical to monitor employees' phone calls without express authority from National Security Agencies.

6. All the statements recorded within your demand are not legally binding since they were done under duress and coercion. They were not also allowed to consult their union Representatives; neither were they sufficiently notified of such requirement.

7. Finally, why MUST the Human Resource Manager summon 14 members of staff from Coast to Nairobi only to be issued with an open-ended suspension letter over Security matters whereas the Senior Security Officer (SSO) – Coast has not done any security audits at Ps1 and forwarded his report to warrant such summons."

5. The union's protest letter concluded that the suspension letters be withdrawn as within union knowledge there were no incidences recorded on OB on the nights of 1st, 5th, and 7th November 2015 and proving otherwise was the respondent's burden.

6. Each claimant received a letter to show-cause dated 20.05.2016 with allegations as follows:

    1. For 1st claimant Benson it was alleged that on the night of 26th/27th June 2015 while on duty as shift driver at Ps1 Mombasa jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 90, 000 litres from the plant area; and on 13th/14th November 2015, jointly with his shift colleagues again conspired to steal various grades of petroleum products estimated to be 78,000 litres from the plant area. In both cases it was stated that the claimant used trucks registration Nos. KAY 781X and KBW 348T. he replied on 23.05.2016 denying the allegations.

    2. For the 2nd claimant Samuel it was alleged that on the night of 26th/ 27th June 2015 while on duty as Tech Opr II at Ps1, Mombasa jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 90, 000 litres from the plant area; on 5th/6th November 2015, he jointly with his shift colleagues allegedly conspired to steel various grades of petroleum products estimated to be 114, 000 litres from the plant area; and on 7th/8th November 2015 he jointly with his shift colleagues allegedly conspired to steel various grades of petroleum products estimated to be 90,000 litres from the plant area. It was alleged that he used trucks registration Nos. KAY 781X, KBN 086G and KBW 348T in all the three incidences. He denied the allegations by his letter dated 23.05.2016 as he had not seen the trucks and had not witnessed or conspired as alleged.

    3. For the 3rd claimant Wenneslus it was alleged that on the night of 26th/ 27th June 2015 while on duty as Shift Security Guard I at Ps1, Mombasa jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 90, 000 litres from the plant area; and on 1st/2nd November 2015 he jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 90, 000 litres from the plant area. It was alleged that he used trucks registration Nos. KAY 781X, and KBN 086G in all both incidences. He replied by his letter dated 24.05.2016 denying the allegations that on the night of 26th/27th June 2015 he was not on duty and on the night of 1st/2nd November 2015 he was on duty and discharged his duties diligently and no incidence of theft was recorded and he had not been involved with the trucks as alleged.

    4. For the 4th claimant George it was alleged that on 6th/7th July 2015 while on duty as Senior Tech Opr at Ps1 Mombasa he jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 90, 000 litres from the plant area; on 1st/2nd November 2015 he jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 90, 000 litres from the plant area; and on 13th/14th

November 2015 he jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 78,000 litres from the plant area. It was alleged that he used trucks registration Nos. KAY 781X, and KBW 348T in all both incidences. He replied by his letter dated 23.05.2016 that on all the mentioned dates he was on duty and he performed his duties diligently and never witnessed or participated in the alleged theft He had never taken anything that belonged to the respondent. He had never been involved in theft in his 32 years of service.

5. For the 5th claimant Kefa it was alleged that on 6th/7th July 2015 while on duty as IT support at Ps1 Mombasa he jointly with his shift colleagues allegedly conspired to steal various grades of petroleum products estimated to be 90, 000 litres from the plant area. It was alleged that he used trucks registration Nos. KAY 781X, and KBW 348T in the incident. He replied by his letter dated 24.05.2016 he was on duty as a Security Guard and not as IT support staff because he had been seconded to IT department in October 2015. Further he had no information about the allegations. He had served for 14 years which had earned him a transfer to IT department. He was shocked in the manner he was being implicated as he had never participated in a theft.

6. For 6th claimant Dickson it was alleged that on 23rd/ 24th July 2014 while on duty as the Assistant Senior Guard I at Ps1 Mombasa jointly with his shift colleagues conspired to steal various grades of petroleum products estimated to be 67,000 litres from the plant. It was alleged that he used trucks registration Nos. KAY 781X, KBN 086G and KBW 348T in the incident. He replied by his letter dated 23.05.2016. He stated that on the material time he was on duty but he was not involved in the thefts or never witnessed such incident. He had been employed per letter dated 01.08.1994.

7. The record shows that per the staff disciplinary committee meeting held on 9th and 10th June 2016 the claimants' disciplinary cases were deliberated. Each claimant attended and gave oral testimony denying the allegations. Subsequently each was dismissed by a letter of summary dismissal dated 22.07.2016.

8. The claimant's case is that the summary dismissal was unfair upon the following particulars as pleaded:

   a. Each was suspended for more than 30 days contrary to provisions of the CBA and the respondent's human resource manual.

   b. Failure to prove that indeed the respondent lost any product as alleged on the dates as was alleged.

   c. The claimants were not given an opportunity to face their respective accusers, to cross-examine them and that was contrary to principles of fair hearing under article 47 of *the Constitution* and 41 of the *Employment Act*, 2007. The claimants were not afforded fair administrative action as per *the constitution*.

   d. Disregarded the claimants' long diligent service.

   e. Failure to adhere to provisions of the *Employment Act*, 2007 including section 41, 43 and 45 thereof.

   f. Dismissing the claimants without due investigations establishing their respective culpability.

   g. Dismissing the claimants without a valid and fair reason.

9. Each claimant appealed against the summary dismissal but which was not considered and determined within 90 days per the CBA and no decision has been made so far. The Claimants' further case is that

they were discriminated against because the staff who were suspended and being on duty the same dates with the claimants as per the allegations were unconditionally returned to work so that the respondent is guilty of unfair practices. Further, despite demand being made, the respondent had refused and failed to purge the injuries occasioned to the claimants.

10. In each suit the respondent filed a response to the memorandum of claim on 27.03.2017 through Robson Harris & Company Advocates and Mr. Akello Advocate appeared in that behalf. The respondent admitted that it employed each claimant as pleaded. The respondent pleaded that each claimant engaged in unethical and unconscionable practice which lead to the lawful and justifiable termination of the respective contracts of service. Further, the respondent received reports about theft of petroleum products at its Ps1 terminal in Mombasa said to have occurred sometimes in 2015. Further, investigations were instituted and it was revealed that some employees including the claimants were involved. Upon receipt of the investigation report the claimants were suspended, given letters to show cause, each replied, each appeared before the staff disciplinary committee, each was heard, and a decision made to summarily dismiss each claimant per the letters of summary dismissal. The claimants appealed against the dismissals and before the appeals could be heard, the union reported the dispute to the Cabinet Secretary for labour which was still pending determination. In the final submissions for the respondent, it is submitted that while the present suit was pending hearing, parties attempted to revisit the statutory conciliation and when the same did not yield amicable resolution, the Court ruled and directed that the suit goes for full hearing. In particular, on 29.05.2020 the Court (Rika J) ordered thus:

    a. Orders staying proceedings of the Court are set aside.

    b. The conciliation process has failed.

    c. The claim to proceed to full trial before the Court.

    d. Parties to take pre-trial directions.

    e. The relevant files, Cause Nos. 80 to 85 of 2017 are consolidated, to be heard and determined under Cause No. 80 of 2017.

    f. Costs in the Cause.

11 The respondent further pleaded that the staff rules and regulations and clause 38 of the CBA did not mandatorily require the respondent to conclude investigations in 90 days. Further, the claimants were summarily dismissed for gross misconduct and breach in accordance with the staff rules and regulations clause 8.5.5 thereof; clause 40(c) of CBA; and, section 44(4) (c) and (g) of the *Employment Act*, 2007. The respondent denied that the claimants were entitled to reinstatement or compensation and damages as claimed for. The respondent prayed for dismissal with costs, of each of the claimants' suits.

12 Each claimant testified to support his respective claim. The respondent's witness (RW) was Ezekiel Ceptumo, Senior Foundation Officer and at the time of the claimants' summary dismissal, the Senior Human Resource Officer for the respondent. Final submissions were filed in the suits as consolidated. The Court has considered all the material on record and returns as follows.

13 To answer the 1st issue for determination, the Court returns that the parties are not in dispute that the respondent employed the claimants as pleaded for each claimant. The Court finds the contract of service, whose terms are pleaded by each claimant, is accordingly established.

14 To answer the 2nd issue for determination the Court returns that there is as well no dispute that each claimant was summarily dismissed by the letter dated 22.07.2016 and exhibited for each party.

15 To answer the 3rd issue, the Court returns that the procedure adopted by the respondent to dismiss the claimants was unfair. It is not in dispute that each claimant received a notice to show cause, each replied in writing, each attended disciplinary hearing in presence of a union representative, and each received a letter of summary dismissal. The Court finds that while is submitted for the respondent that provisions of section 41 of the *Employment Act*, 2007 on notice and hearing were complied with, a full analysis of the circumstances and evidence shows that not to have been the case.

16 While submitting for the claimants that they were invited by letter dated June 6, 2016 for the meeting of 09.06.2016 at Ps1 boardroom at 12 noon stated as merely "in order to shade more light to your explanation..." and the claimants did not know that they were being invited to a disciplinary hearing, the evidence is that the suspension letter dated 02.03.2016 had conveyed that each claimant was suspected as being involved in product theft syndicate. Further, the letter to show-cause had informed each claimant to give an explanation why disciplinary action should not be taken on account of the gross misconduct to enable the respondent to progress the case accordingly. Thus, when the claimants attended the disciplinary hearing, they had been on suspension and the invitation's agenda must have been obvious to each claimant that it was about the suspension letter, the letter to show cause and the written explanation each had provided. The Court finds accordingly.

17 The flow of the steps in the disciplinary process would give the impression that the respondent adhered to section 41 of the *Employment Act*, 2007 on notice and hearing the claimants in presence of the union representative. However, on the whole analysis of the claimants' procedural lamentations, it turns out that the procedure was in fact unfair and was not a termination in accordance with a fair procedure as envisaged in sections 41 as read with section 45(2) (c) of the Act.

18 The chairperson of the staff disciplinary committee opened with remarks that the committee had been convened in order to accord an opportunity to the staff affected to be heard and also to make their pleas and the minutes proceeded to further state,

> "The Chairperson pointed out to members that theft was a criminal offence hence gross misconduct that was not tolerated by the Company. He asked members to review the investigations report, listen to the oral submissions by the staff and finally come up with appropriate recommendations to management on each staff while taking into consideration the interests of both the Company and the affected staff."

19 The evidence is that as at the time of that staff disciplinary committee hearing, none of the claimants had been provided the copy of the investigation report annexing the witness statements and investigator's notes and which report the chairperson invited the committee members to rely on in purportedly arriving at a fair decision. RW testified that during the staff disciplinary committee hearing the investigator was not present for each claimant to cross-examine him. RW testified thus,

> "I see chairperson's opening remarks. Investigation report was not served upon the claimants prior to hearing date. I have no evidence the investigation report had been served. Only specific charges were send to individual claimant. At disciplinary hearing the claimants did not know the evidence they were to challenge because no investigation report had been served. I only rely on the letter to show cause.... I say investigation report prevailed."

RW further confirmed that in the case of Benson, the dismissal was based on consideration of some voice that was recorded but as far as RW was aware, at the hearing, nothing had been played for Benson to listen and respond to. The staff disciplinary committee's minutes exhibited for the respondent show that each claimant was found culpable on the basis of the investigation report and other information

which the claimants had not been informed about and which they had no chance to interrogate towards exculpation. The Court finds that the procedure was indeed an unfair disciplinary process. The Court finds that looking at the content of the disciplinary process and in particular the suspension letter, the letter to show cause, the response thereto, the record or minutes of the disciplinary hearing, and the ultimate summary dismissal letters, it cannot be returned that the respondent dismissed the claimants upon matters or grounds which the claimants had been given an opportunity to defend themselves. The Court holds that such was a pretence or sham of due process and it amounted to unfair labour practice.

20 It is in *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* [2013] eKLR where the Court opined thus,

> " What is this right to fair labour practices?
>
> First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in article 41(2), (3), (4) and (5) of *the Constitution*. Under article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under article 41(3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under article 41(4), every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation. Under article 41(5) every trade union, employers' organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices.
>
> Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."

21. The Court considers that it was a basic procedural requirement for the respondent to afford the claimants due process by serving them the investigation report, relevant information and full particulars of the allegations prior to the disciplinary hearing. Having failed to do so, the Court finds that the respondent breached the claimants' right to fair labour practices.

22. While making that finding and as submitted for the claimants, the Court of Appeal (Waki, Musinga and Kiage JJ A) held in Postal Corporation of *Kenya v Andrew K Tanui* [2019]eKLR that section 41 of the *Employment Act*, 2007 provides the minimum standards of a fair procedure that an employer ought to comply with and further, "Four elements must thus be discernible for the procedure to pass muster:

a. an explanation of the grounds of termination in a language understood by the employee;

b. the reason for which the employer is considering termination;

c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

d. hearing and considering any representation made by the employee and the person chosen by the employee."

23. That is the law and the interpretation and the Court is guided as well as bound accordingly. It was submitted for the respondent that the claimants did not raise the objections now complained about during the disciplinary process and particularly before the staff disciplinary committee. However, the Court holds that under section 41 of the Act, the respondent was obligated to comply and serve or provide them the investigation report, relevant information and full particulars of the allegations prior to the disciplinary hearing. Thus in *Postal Corporation of Kenya v Andrew K Tanui* [2019]eKLR the Court of Appeal stated thus,

> "In this case, the letter inviting the respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular. At the Board meeting, there is no evidence that an explanation of the grounds of termination was made to the respondent, and if so, in what language. The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held. Instead, all the respondent had was a technical appearance of less than five minutes with the Board, which evidence was not seriously challenged. For all those reasons, we agree with the trial court that the procedure adopted by the appellant was short of a fair one. We so find."

25. In the instant case, the court has found that the staff disciplinary committee had in its possession the very investigation report and other information such as the mentioned sound clips that formed the basis of the charges framed against the claimants but kept it away from them. The court has therefore found that the procedure adopted by the appellant was short of a fair one.

25. The Court has also considered the submission made for the claimants that in *Gladys Boss Shollei v Judicial Service Commission* [2022] KESC 5(KLR) the Supreme Court (MK Koome CJ &P. PM Mwilu, DCJ & VP, MK Ibrahim, NS Ndungu & W Ouko, SCJJ) upheld its decision in *Evans Kidero & 4 others v Ferdinard Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as Consolidated with Petiotion No 20 of 2014 [2014]eKLR concerning the right to a fair trial under article 50(1) and 50(2) holding thus,

> (261) It is important to restate that a literal reading of the provisions of *the Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experiences show that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively

before the court" (See *Steel and Morris V United Kingdom*, [2005] ECHR 103, paragraph 59)."

The Court is guided accordingly and returns that indeed, the claimants were entitled to be provided or served with the investigation report, relevant information and full particulars of the allegations prior to the disciplinary hearing.

26. While making those findings, the Court has considered the submissions made for the claimants objecting to the admissibility of the respondent's inspection report in respect of product theft at Ps1 Changamwe – Mombasa between June 2014 and February 2016 - which purportedly formed the basis of the disciplinary proceedings initiate against the claimants and therefore subject of the foregoing findings by the Court. It was submitted for the claimants that the report was inadmissible because the maker was not called to testify as it amounted to hearsay. The claimants relied on *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015]eKLR holding that marking of a document does not dispense with the formal proof thereof thus,

> " 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account."

For the respondent it is submitted that at the outset of the hearing and by consent of the parties all documents were produced and admitted as filed and thus the claimants' objection was invalid. At the hearing on 17.11.2021, it was ordered thus, "By consent, all documents filed for parties admitted in evidence as filed." The respondent's submissions are upheld in that regard but do not change the Court's foregoing findings that the claimants were not served the investigation report prior to the hearing and they only saw the report, as it appears, after they were dismissed and more so after its filing in the instant case. The Court will therefore allow the report and its relevance as will be reverted to later in this judgment on whether the respondent has established, if at all or in any manner, validity and fairness of the reasons for termination of the claimants' respective contracts of service.

27. The claimants had also lamented that under clause 38 of the CBA, suspension was not supposed to go beyond 30 days but as testified by RW, the clause states after suspension, ".... effort shall be made to reach a decision within one month." The Court finds that as per respondent's case, it was not mandatory for the suspension to lapse within 30 days but the clause encouraged and impressed as such - as it was an inspirational rather than an imperative provision. It is true the dismissal decision was not made within one month of the suspension but within the terms of that clause the respondent may not be faulted and in any event, the mitigating factor was that during the suspension the claimants appear to have continued to draw their full salary and benefits per the letter of suspension from duty dated March 2, 2016.

28. The Court has reflected upon the serious allegations that had been made against the claimants. It was a case of mixed criminal allegations and alleged work place misconduct. In in the case of *Mathew Kipchumba Koskei v Baringo Teachers SACCO* [2013] eKLR, the court opined and advised as follows:

> " Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is

the opinion of the court that the following general principles would apply in assessing the individual cases:

a. Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.

b. If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.

c. If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.

d. To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process."

29. In the instant case, the respondent decided to proceed without involvement of the criminal justice agencies and process and the result as already found was that there was miscarriage of justice. The Court reckons that criminal proceedings are clearly separate from the administrative disciplinary proceedings and they can be undertaken concurrently in an appropriate case. The Court has considered the holding of the Court of Appeal in *Teachers Service Commission v Joseph Wambugu Nderitu* [2016]eKLR . The Court of Appeal held that a successful outcome of a criminal process against an employee did not have primacy over an internal disciplinary process against such an employee arising from the same set of circumstances and that the two processes were distinct. To mitigate against the emerging procedural failures that have been found to have occurred in the instant case, the Court considers that it would have been appropriate for the respondent to have invoked the criminal justice process rather than attempting to finding the claimants culpable of a manifestly and a supposed criminal offence through a process the respondent was not properly equipped to undertake and lacked the necessary competence or jurisdiction to embark upon. In that regard the Court upholds its opinion in *David Nyamai and 7 Others v Del Monte Kenya Limited* [2015]eKLR thus,

> " The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under article 50(2) (d) of *the Constitution* of Kenya, 2010, every accused

person has the right to a fair trial which includes the right to a public trial before a court established under *the Constitution*. Under sections 4 of the *Criminal Procedure Code* Cap75, an offence under the *Penal Code* Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under section 4 of the *Criminal Procedure Code* Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the *Criminal Procedure Code*. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the *Employment Act*, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee."

The nature of the allegations and the complexity of the alleged conspiracy in issue appears to have involved the respondent's staff, police officers deployed to serve the respondent, the respondent's customers, and, staff from respondent's outsourced service providers such as private guards. Further, the case involved complex criminal allegations involving the respondent's staff. The Court therefore returns that the internal investigations appear to have served the purpose of a preliminary inquiry so that in the Court's opinion and in those circumstances of the case, external and competent investigation by the relevant investigative agencies in the criminal justice system was necessary towards an objective outcome including the disciplinary process the respondent would prefer against its employees as may have been implicated.

30. To answer the 3rd issue for determination the Court returns that the procedure adopted to summarily dismiss the claimants was unfair.

31. To answer the 4th issue for determination the Court returns that the respondent has failed to show that the reasons for the summary dismissal of the claimants existed and were genuine and fair as envisaged in section 43 of the *Employment Act*, 2007 as read with section 45 (2) (a) and (b) of the Act. The Court has already found that the respondent dismissed the claimants upon an investigation report and other information they had no knowledge about prior to the hearing before the staff disciplinary committee and particulars of which had not been provided in the letter to show cause or the suspension letter.

32. The respondent was required to discharge the burden of justifying the grounds for the summary dismissal as envisaged in section 47(5) of the Act. The respondent was also obligated to show that the reasons existed, were valid or genuine as well as fair as per sections 43 and 45 (2) of the Act. The respondent's only witness RW testified thus,

> "I did not conduct the investigations. Honestly only investigators who can confirm veracity of the findings. I did not investigate the case and cannot confirm the veracity of allegations against the claimants. I cannot confirm if Benson Amwoga Juma was not on duty on date fuel was lost. I say I gave no report to disciplinary committee to disturb his assertion. I say investigation report prevailed. I see page R.11. Recommendation show some voice that

was considered. I do not know if the recorded voice was played at disciplinary hearing. The minutes are incomplete. At disciplinary hearing nothing was played for Benson to listen and respond. I say am not as of now, aware of a witness before the disciplinary committee to testify against the claimants or any of them."

RW testified that the minutes of the staff disciplinary committee hearing did not list investigators as present and there was no evidence that the investigators attended. By that testimony of RW the Court returns that the respondent has failed to show that the reasons existed as at termination as valid or genuine or fair and the grounds purportedly justifying the summary dismissal are found not established by the respondent.

33. Does the investigation report aid the respondent's case at all? The Court answers in the negative in view of the following analysis of the report.

34. The report at page 22 made specific findings. The Court observes that the findings do not specifically identify the claimants by name as they do for specific persons who are implicated. The claimants not having had an opportunity to answer any specific queries about their generalized implication as alleged, the Court finds that the report by itself does not establish their individual culpability especially in view of the very serious allegations bordering criminal liability. The report also has glaring contradictions to implicate the claimants. For instance, while alleging the KPC security guards facilitated and coordinated the entry of trucks used to illegally lift product from the station by putting out the security lights at gate house and instructing the truck drivers to switch off lights as they approached and drove into in to the station, the same report finds thus, "Most of the reported theft incidents formed a pattern of happening during silent hours of weekends, holidays and when security officers were not within vicinity." So, were the respondent's guards, such as some of the claimants, involved or not? Further, the first finding in the report is stated, thus, "There existed a cartel/syndicate comprising of KPC staff, police officers, petroleum dealers and hired security guards who illegally lifted product from Ps1." So, once again is it not the hired guards and not the respondent's guards who were involved? The Court considers that such general findings show that the report could not be relied on to find claimants culpable as was alleged.

35. The findings also establish that the alleged loss arose out of the respondent's serious internal operational deficiencies. It was found that the equipment for opening the valves and connecting the hose pipe for syphoning used to be on a pickup and staff Hirbae was key operator. Further, the report finds that Herman Munga was suspected to have had information about the illegal lifting of products at Ps1. Further, police officers intimidated and instilled fear in any person who may have had knowledge about the theft. The report also finds that absence of surveillance system, CCTV, at Ps1 highly contributed to the occurrence of the theft of product from station. Further, it was found that there existed gaps at the pump area at Ps1 where the syphoning of product took place unnoticed – and the Court is asking, so was it and could it be noticeable to the claimants and unnoticeable to what persons? It was further reported that there was laxity and lack of adherence to follow or observe security procedures especially usage of access control cards hence creating security gaps. Further, the respondent's Bridger trucks had been used to steal product at the initial stages of the theft but when control measures of monitoring their movement were put in place, the practice stopped- but the gap still existed since the trucking system was not functional at the time of the report and the old practice was likely to resume.

36. Further respondent's deficiency in operational systems and policies or requirements were highlighted in the recommendations at page 26 of the report as follows. The respondent's Bridger trucks be fitted with tracking system. CCTV be installed in all critical areas. The respondent's staff be screened on background checks during recruitment. Security guards be recruited to carter for the acute shortage

of security officers. Deployment of 10 armed GSU officers at Ps1 to provide day and night security services. Further, 5 AP officers to be deployed under a corporal to undertake right of way night patrol duties.

37. The Court finds that it was unfair labour practice to summarily dismiss the claimants upon such glaring deficiencies in the respondent's operational systems and requirements. In that regard and of deficient employer's operational systems or requirements the court upholds its opinion in *Grace Gacheri Muriithi –Versus- Kenya Literature Bureau* (2012) eKLR thus,

> " To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of *the Constitution* that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

38. The report particularly sub-file E on conclusion and recommendations has more revealing concerns. The report identifies the staff including the claimants to appear before the Coast Region Disciplinary Committee to answer charges of gross misconduct but the recommendations at page 25 make serious reservations thus,

> " 3. In order to avoid any weaknesses in the investigation process that may sink the company's side during the disciplinary process and in event of an appeal or court process, it is recommended that the following facts be fully established by analyzing the suspects' mobile data. (left out during the investigation on the security manager's advice)
>
> a. Communication between KPC security guards and the truck drivers on the material days of product theft from Ps1.
>
> b. Communication between Lavington security guard and some of the suspects who were audio recorded in the presence of the investigating team.
>
> c. Communication between the OCPD Changamwe and the mastermind suspects from KPC and the petroleum dealer.
>
> d. The pattern of communication amongst the suspects during the material days of product theft.
>
> 4. It is recommended that Eng. Herman Munga be interrogated about his involvement/role in the theft of product from Ps1 considering the fact that key witness reported that he (Munga) had communications with staff Raymond Hirbae in regard to product theft from Ps1. (Engineer Munga could not be

summoned after investigating officer was advised to submit the report as this can be concluded separately)."

39. The Court finds that the report identified the suspected two key culprits and they were not any of the claimants. The report is therefore also clear that it was inconclusive as it was submitted abortively without key findings on the role of one of the key culprits – and the Court finds that the report was in that respect seriously incomplete so that the report could not be relied upon to make a finding that the claimants were culpable. The report at page 26 also listed the following essential documents required during the disciplinary process but which were never mentioned during the staff disciplinary committee hearing and the claimants had no access to them as listed and mentioned as essential, thus:

    a. Sylvester Langat's statement.

    b. Accused statements or interview questionnaires.

    c. Audio recordings.

    d. PS1 Security Occurrence book records.

    e. Ps 1 Operations Log Book.

    f. Ps1 Quality Control (Lab) hand-over or take over records.

    g. Ps1 Shift Vehicle Work Tickets.

    h. Access control system data.

    i. Mobile phone data.

    j. E-citizen vehicle ownership records.

40. The Court has therefore found that the report by itself did not specifically implicate and establish the claimants' culpability. The report paints an extremely sad state of things under which serious offences with great losses appear to have been committed at Ps1 but the claimants are not implicated individually. The report identifies the specific culprits and who appear to have been way senior to the claimants and also involvement of the persons in law enforcement agencies such as the police. The report shows a desperate attempt to curb the saddening state of events at Ps1 such as deployment of 10 armed GSU officers at Ps1 to provide day and night security services; and, further 5 AP officers to be deployed under a corporal, to undertake right of way night patrol duties. The Court can only hope that things will be better at Ps1 so that integrity and freedom from value-deficit will flow in the persons stationed to work at Ps1- probably away from the strategy of more policemen policing policemen and more guards guarding guards. It should be that appropriate technology will be deployed at Ps1. Meantime, the Court considers that the claimants were unfairly rendered the sacrificial lambs in the whole sad and despicable episode. On a balance of probability, they stand vindicated.

41. The 5th issue is whether the claimants are entitled to the remedies as prayed for. The summary dismissal was on July 22, 2016. Section 12 (3) (vii) provides that the Court may grant an order of reinstatement of any employee within three years of dismissal subject to such fit conditions the Court may impose. The three statutory years of limitation lapsed on or about July 22, 2019. The period having long lapsed, the Court returns that the remedy of reinstatement is barred by that statutory provision. It was urged that the administrative appeal was pending and in that consideration, time was still alive to grant reinstatement. The Court finds otherwise that the dismissal took effect on July 22, 2016 per the impugned letter of summary dismissal. There was no prayer that the administrative appeal be determined and the parties' mutual evidence was that they submitted the impugned summary dismissal

to conciliation - then to the present suit with a referral back to conciliation but which collapsed. The Court finds that it was therefore misconceived for the claimants to urge that the overtaken administrative appeal was still alive. The Court further considers that even if it was so alive, there was no contractual provision that a pending administrative appeal would automatically stay or set aside the imposed summary dismissal. An order for reinstatement is therefore found unavailable and is declined.

42. The claimants prayed for the order of maximum compensation under section 49 of the *Employment Act*, 2007. The Court has considered the claimants' cases. Each had served for a long time (some of between over ten years to over 30 years). But for the suspension and ensuing disciplinary process, each appear to have had a clean record of service and had earned promotions. The Court had considered that the claimants were subjected to disciplinary proceedings whereas the identified likely two culprits were well known and the respondent offered no information about the action taken against them. The respondent also maintained a deficient operational system, requirements and policies which largely caused the alleged loss together with the claimants' predicament. Further, as urged for the claimants, the respondent provided no evidence to show that the fuel products allegedly stolen had actually been so stolen or lost. The Court has found that the procedure adopted by the respondent was indeed grossly unfair and was a sham. All that happened in circumstances whereby the claimants as long serving employees had so far rendered a dedicated service that appeared clean. In view of those factors and the mentioned adverse considerations against the respondent which amounted to aggravating factors, the Court returns that the claimants have established a case for maximum compensation as claimed for. The respondent has not urged a mitigating factor and none has been established. Further, as prayed for, each claimant is entitled to the contractual one-month payment in lieu of the termination notice. The claimants have succeeded in their claims and each is awarded costs of the suit.

43. The claimants submitted on damages for discrimination. However, as submitted for the respondent there was no specific prayer in that regard and parties must be bound by their own pleadings. In any event, the claimants alleged that colleagues similarly deployed at Ps1 had not been subjected to disciplinary process or dismissed. However, as submitted for the respondent particulars of discrimination were not pleaded at all and it is difficult to tell the circumstances of such other employees as basis to compare and establish the alleged discrimination. Further, the Court has already taken into account (as an aggravating factor) the incomplete investigations and undisclosed action particularly with respect to the identified likely two culprits and in that regard, the Court has awarded maximum compensation for the unfair summary dismissal. The claim and submissions on discrimination will collapse as unjustified and not established, alongside, offending the rules of pleading.

44. In conclusion, judgment is hereby entered for the claimants against the respondent for:

    1. The declaration that the summary dismissal of each claimant by the respondent was substantively and procedurally unfair.

    2. The respondent to pay the 1st claimant Benson Amwoga Juma Kshs. 1, 385, 605.00; the 2nd claimant Samuel Njau Wahome Kshs. 1, 532, 752.00; the 3rd claimantWenneslus Yaa Karisa Kshs. 1, 070, 719.00; the 4th claimant George Nderitu Gachinwa Kshs. 2, 606,851.00; the 5th claimant Kefa Bosire Asande Kshs. 1, 054,443.00; and the 6th claimant Dickson Lumumba Alwalla Kshs. 1, 534, 312.00 payable to each claimant less PAYE and the respondent to pay by 01.08.2022 failing, interest to be payable thereon at Court Rates from the date of this judgment until full payment.

    3. The respondent to pay each claimant the costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13TH MAY, 2022.

BYRAM ONGAYA

JUDGE