



**Kenya Union Of Domestic, Hotels, Educational Institutions, Hospitals
And Allied Workers Union v Gertrudes Children Hospital (Cause
1184 of 2016) [2022] KEELRC 4112 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4112 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1184 OF 2016**

M MBARŪ, J

JUNE 30, 2022

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS UNION CLAIMANT**

AND

GERTRUDES CHILDREN HOSPITAL RESPONDENT

JUDGMENT

1. The claimant is a registered trade union recognised by the respondent and representing the grievants. The respondent is a limited liability company.
2. Jared Masenge was employed by the respondent on October 1, 2011 as an EMT driver earning ksh 35, 000 and he worked until February 26, 2015 when he was summarily dismissed by the respondent while earning ksh 57, 800 per month. Employment terminated on the grounds of alleged fraudulently sign fuel card and use of his pin in his absence.
3. The claim by Masenge is that on January 27, 2015 he was issued with a show cause notice on the mileage coverage of motor vehicle registration KAT 676Q to which he gave a response and denied the allegations and that he could not remember fuelling at Total Limuru Road and on the stated dates he was either on leave or attending duty at either Embakasi or Kitengela Clinics. He was invited to a disciplinary hearing and issued with letter of summary dismissal
4. Peter Shamalla was employed in July 7, 2007 as a driver earning a wage of ksh20, 000 and which was increased to ksh 63, 300. He worked until January 27, 2015 when he was issued with a notice to show cause over fuel consumption and mileage recording on his allocated motor vehicle. He responded to the show cause notice and denied the allegations. On February 4, 2015 he was invited to a disciplinary hearing and which was postponed to February 11, 2015 and in a letter dated February 26, 2015 the



- respondent dismissed the grievant over alleged misuse of fuel card for vehicle KAT 676Q and KAX 707L, engaging in credit facility without undertaking of the respondent and constant tampering of mileage of the vehicles.
5. The grievants reported the matter to the claimant who registered a dispute but the respondent failed to settle.
 6. The claim is that the allegations made against the grievants were not justified. The reasons given for the wrongful termination of the grievants of using the fuel card of vehicle KAT 676Q when it was the garage lack of explanation of the use of his pin in his absence. The respondent failed to prove any fraud and there was no fair hearing.
 7. The claim is for the following dues;
Jared Masenge;
 - a) Compensation ksh 693,600;
 - b. Notice pay ksh 57,800;
 - c. Compensation for accumulated leave days and 11 public holiday's ksh 100, 186.Peter Shamalla;
 - a. Compensation ksh 759,600;
 - b. Notice pay ksh 63,300;
 - c. Compensation for 45 leave days ksh 94,300The claimant is also seeking costs.
 8. Peter Shamalla testified in support of the claimant's case and on behalf of the grievants that he was not assigned any specific vehicle by the respondent and would be allocated any vehicle in his daily duties but on January 27, 2015 he was called and issued with a notice to show cause to explain why vehicle KAT 676Q and KAT 707L were fuelled on October 24, 2014 which had been fuelled in his presence. There was a procedure before one could fuel a vehicle. One driver was required to take the 7 vehicles for cleaning and fuelling and the driver would be responsible and did not require the approval of the respondent. Fuelling would be paid for by a credit card.
 9. On November 2, 2014 vehicle KAT 676Q and KAX 707L were fuelled at the Total Petrol Station and the station attendant rejected the credit card on the grounds that it had no cash. The grievant informed his supervisor who said that since the respondent was a consumer, he should return the vehicle and pay later. This arrangement was not the first time. the fuel card was available to all the drivers and other employees.
 10. The grievant responded to the notice to show cause and related to 4 vehicles of the total 7 noted. He was called to the disciplinary hearing and gave his responses but his employment was terminated by summary dismissal which was wrongful and unfair since the allegations made were not justified.

Response

11. In response, the respondent's case is that the grievants were employed as drivers. In January, 2015 the respondent decided to conduct an audit exercise in its transport department occasioned by the review of the December, 2014 management accounts that indicated an increase in the vehicle expenses by 92.5% compared to previous year and despite the fact that there had been no unusual or new activities



regarding vehicles. The audit involved the observation of the fuel statistics on a case by case basis for each driver and their appointed vehicles,

12. The report revealed that the 1st grievant Jared was involved in fraudulent fuelling as his appointed vehicle's fuelling records indicated additional fuelling on various dates which amounts were unlikely since the fuelling was very high.
13. Based on the audit and findings the respondent issued the grievants with notices to show cause why disciplinary action should not be taken against them and to provide destination of travel, mileage covered and work done to justify the exorbitant fuel amounts on various dates as indicated. They both denied the allegations and that they were off duty and that someone else must have been using the fuel card.
14. The responses were considered but found unsatisfactory leading to disciplinary hearing on 10th and February 11, 2015 and were found to have engaged in improper activities using the fuel cards contrary to the set guidelines causing the respondent great liability and leading to summary dismissal which was lawful and justified and followed due process.
15. In evidence, the respondent called Kenneth Afande the Head of Human Resource and who testified that following audit investigations, the grievants were found to have fraudulently used the fuel card for vehicle KAT 676Q and KAX 707L and when they were issued with show cause notices they fail to give satisfactory responses leading to disciplinary hearing and a decision for summary dismissal for gross misconduct. Their actions had led to huge financial losses for the respondent and such document was not justified.

Determination

16. An employer is allowed to summarily dismiss an employee for breach of the employment contract and for gross misconduct. Section 44 (4) of the *Employment Act, 2007* (the Act) provides for actions and inactions of an employee that may amount to gross misconduct to attract the sanction of a summary dismissal against the employee. However, it is imperative to state that the list therein is not an exhaustive. See *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR.
17. An employer can summarily dismiss an employee on an account outside the matters listed under section 44(4) of the Act based on internal policy, practices and matters unique for the business and the function of the employee. Where an act is defined under the policy to be in gross misconduct, pursuant to section 12 of the Act read together with section 44 of the act, such amounts to gross misconduct.
18. The Court of Appeal in the case of *Prof Macha Isunde v Lavington Security Guards Limited* [2017] eKLR held that;

“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
19. In this case, the grievants were employed as drivers of the respondent. they were both issued with letters of appointment and job descriptions with details as to their duties and responsibilities. These included



efficient and cost effective use of the respondent's property and proper maintenance of allocated vehicles.

20. Following investigations on the fuel use for the allocated vehicles, the respondent discovered high fuel usage with regard to the grievants. They were both issued with notices to show cause and in their responses, and despite the details in the audit investigations denied misuse of fuel cards when the supervisor was not aware. The grievants had also failed to maintain comprehensive logs for all the activities of the vehicles as required under the job description and making it difficult for the respondent to review their work and purpose for high fuel usage.
21. As the grievant Mr Shamalla testified in court, the respondent had an elaborate procedure for fuelling to its vehicles. The fuel attendant had to confirm the amount of fuel on the fuel card prior to fuelling to avoid any customer taking fuel while the card had no credit. He admitted that on October 24, 2014 he was allowed to fuel while the credit card had no money but was allowed to go and pay later.
22. Such procedure was contrary to the laid down policy and led to the respondent incurring liability due to the conduct of the grievants. This led to issuance of the notice to show cause and the grievants filed to give satisfactory responses on the face of the detailed job descriptions they had signed to conform to.
23. Pursuant to the respondent's policy and the court reading of section 44(4) (g) of the Act read together with section 41(2) of the Act, summary dismissal of the grievants was justified and the claim for notice pay and compensation are not available.
24. On the claim for leave days not taken and work during public holidays, the periods when such annual leave was earned is not stated
25. The subjects Public Holidays are not stated taking into account all public holidays are gazetted.
26. Accordingly, the claims made are found without foundation and are hereby dismissed in their entirety. Costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Peter Kigotho

..... **and**

