



REPUBLIC OF KENYA



**Chando v Tata Chemicals Magadi Limited (Petition 105 of 2018)
[2022] KEELRC 13445 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13445 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 105 OF 2018
MN NDUMA, J
DECEMBER 8, 2022**

BETWEEN

JULIUS OUMA CHANDO PETITIONER

AND

TATA CHEMICALS MAGADI LIMITED RESPONDENT

JUDGMENT

1. The petition was filed on October 8, 2018 by the petitioner, Julius Ouma Chando against Tata Chemicals Magadi Limited in which the petitioner prays for the following reliefs:-
 - (a) A declaration be issued that the respondent's termination of the petitioner's employment *vide* the undated letter of termination is unconstitutional, null and void.
 - (b) A declaration be issued to declare that the undated letter of termination issued against the petitioner violates the provisions of article 41 of the Constitution of Kenya, 2010.
 - (c) A declaration that the respondent's termination of the petitioner's employment *vide* the undated letter of termination amounts to unfair and unlawful termination.
 - (d) An order for payment to the petitioner of the actual pecuniary loss suffered as a result of wrongful termination from date of such termination to date of such determination and as detailed through paragraphs 2(d) herein above.
 - (e) An order that the respondent issue the petitioner with a certificate of service.
 - (f) general damages.



- (g) Constitutional damages
- (h) Costs of this petition be awarded to the petitioner.
- (i) Any other or further relief that this honourable court may deem fit and just to grant.

Facts of the Petition

2. The petitioner deposes that he was employed by the respondent in March, 2010 and worked continuously for the respondent in the position of Rail Operations and Logistics Manager until the July 6, 2018, when his employment was terminated.
3. The petitioner deposes that the termination was unlawful, and unfair and was done in violation of article 27, 41 and 47 of the Constitution in that the respondent discriminated against the petitioner as against all persons who were directly involved in the matters in question in violation of article 27. That the termination amounted to unfair labour practice in violation of article 41 of the Constitution and that the administrative action taken against the petitioner was not lawful, reasonable and procedurally fair in violation of article 47(1) of the Constitution.
4. That the petitioner was summarily dismissed without a hearing and his dignity was impugned by the respondent in that respect in violation of article 28 of the Constitution. That the totality of the violations of the petitioner's rights rendered the disciplinary proceedings unfair, illegal and unconstitutional.
5. That the petitioner earned a gross monthly salary of (Kshs 258,000 and 45,000 Kshs) 303, 000, plus fees, payment per term for his four (4) children in the sum of Kshs 43,000 per term which amounted to Kshs 516,000 per year.
6. The petitioner states that he was 51 years old at the time of termination and had four (4) years left to his retirement at age 55. That he suffered loss and damage due to the unlawful, dismissal. The petitioner claims specific reliefs including:-
 - (i) One month salary *in lieu* of notice... Kshs 346,000
 - (ii) Equivalent of 12 months' salary being compensation for the unlawful termination
 - (iii) Payment of loss of income for the unserved term of four (4) years and
 - (iv) Payment of lost pension contribution at 7.5% by the employer for the unserved four (4) years.
7. The suit is supported by the affidavit of the petitioner to which is attached documentary evidence in support of the petition.
8. The petition is opposed vide a replying affidavit of John Kabera, the Human Resource Manager of the respondent who deposes *inter alia* that the particulars of employment of the petitioner are admitted. That the petitioner was employed by the respondent on January 25, 2009 as Manager Rail Operations and Logistics and his terms were fully set out in the contract of employment and as summarized under paragraph 3 of the replying affidavit.
9. That shortly after being employed, the petitioner began neglecting his duties which resulted in fraudulent losses of high value stocks being written off in the last financial year of 2017/2018.



10. That it is not in dispute that the docket of the petitioner was directly related to the losses incurred since stocks were lost in transit.
11. That the petitioner interfered with ongoing investigations into diverted 560 bags of industrial salt by hastily lifting the suspension of Haraf Traders truck registration No KBZ 960A/ZE2137.
12. That by a letter dated June 25, 2018, the petitioner was informed of his neglect of duties resulting in fraudulent loss of stocks valued at 45 million and was given an opportunity to explain why disciplinary action should not be taken against him.
13. That the petitioner replied to the show cause letter by a letter dated June 26, 2018. That the response was not satisfactory since he blamed the stocks committee for the continuous loss of stock and denied any responsibility, yet that was a matter directly in his job description and responsibilities. In particular, the petitioner was charged with “ensuring stock control and transfer to other rooms, invoicing and facilitating smooth reconciliation of books and systems and systems stocks.”
14. That the respondent found the petitioner guilty as charged and decided to terminate his employment by a letter dated July 6, 2018. That the letter stated the reasons for the termination being neglect of duty and further interference with investigations by hastily lifting the suspension of Haraf Traders trucks that was in place pending outcome of investigations.
15. That the respondent had lost confidence in the petitioner’s ability to handle logistics of products and in management capability.
16. That the petitioner was informed that he would be paid all lawful dues upto and including the July 5, 2018 upon clearing with all the sections as per procedure.
17. That the respondent did not violate any of the alleged provisions of the Constitution and the Employment Act, 2007. That the respondent did not discriminate against the petitioner nor did they engage in any unfair labour practice. That the termination of the employment of the petitioner was lawful, fair and just.
18. That the suit be dismissed with costs.
19. CW1, the petitioner testified in support of the petition and relied on a witness statement dated March 3, 2020 which he adopted as his evidence-in-chief. The petitioner produced list of documents filed on October 4, 2018 and January 20, 2020 as part of his evidence.
20. The petitioner was subjected to cross-examination by M/s Wetende for the respondent. He stated that he managed some warehouses, but not all since Magadi and Mombasa warehouses were under different people. That Kajiado, was under him, and that is where transport mainly took place. CW1 stated that stock variance occurred before, during and after his employment. That this was a system’s weakness under responsibility of different people in the stocks committee and he would therefore not be solely blamed for any losses. CW1 admitted that there was a loss of stock of 45 million Kenya shillings before his termination in 2018.
21. That there was a write-off of stock in 2016 also. That a total of 76 million was written off on account of stock variances. CW1 denied that the respondent lost 76 million worth of stock under his watch.
22. CW1 stated that he and the Stocks Committee had given reports of loopholes in the whole chain that needed to be remedied but no steps were taken. These included spillage while loading; use of poor quality bags. Furthermore, there was weight variance between harvesting season, when salt was wet and later in the warehouse, when it has less moisture. CW1 admitted that his docket included



- logistics which in sum was storage and movement of stock. CW1 stated that his duty did not include stopping of stock variances. This was a joint responsibility of Stocks Committee and management which continued even after he had left the organization.
23. That the board was aware of all the challenges as presented from the report of stocks committee. It was up to the board to resolve the gaps to minimize if not eliminate the shortages.
 24. CW1 insisted that reasons for the stock variance were well known and documented and that he was not to blame for it.
 25. RW1 Nicholas Mangeto testified for the respondent. He relied on a witness statement filed on April 28, 2021 as his evidence in chief and produced documents filed on November 20, 2018 and July 19, 2021, respectively. RW1 stated that he was the Human Resource Manager of the respondent. That the claimant's employment was terminated for negligence of duty.
 26. That the petitioner was employed on January 25, 2009 as a Manager Rail Operations and Logistics and his terms and conditions of employment were contained in a letter of the same date. That the dates included:-
 - (a) planning in liason with marketing and production for serving of customer orders with a view to ensuring timely fully delivery while ensuring that production was not hampered by lack of fuel.
 - (b) Management of warehousing operations in Kajiado, Nairobi, Kisumu, Nakuru and Eldoret
 - (c) Ensuring stock control and transfer to other stock rooms and ensure prompt invoicing to facilitate smooth reconciliation of book and systems stock at the end of each month.
 27. That whilst the petitioner was in-charge of the aforesaid docket, the respondent experienced challenges relating to stock variance between stock records in respondent's SAP system and physical stock held in the stock rooms.
 28. That the stock variances were as a result of the petitioner neglecting his duties which resulted in fraudulent losses of high value stocks worth Kshs 45 million being written-off in the financial year 2017/2018.
 29. That on or about that time, the petitioner willfully interfered with ongoing investigations into diverted 560 bags of industrial salt by hastily lifting the suspension of Haraf Traders truck registration No KBZ 960A/ZE 2137.
 30. That the petitioner was informed of his misconduct by a letter dated June 25, 2018 and was given opportunity to explain why disciplinary action should not be taken against him.
 31. That the petitioner explained that stocks management was under Stocks Committee and that the charge sheet was not only defective but meant to divert attention from the real issues surrounding variances. The petitioner also relied on a letter to the respondent's board seeking a write off of the costs of the product dated June 26, 2018.
 32. That the petitioner was simply denying his responsibilities and shifting blame to a committee. That the respondent by a letter dated July 6, 2018 decided to terminate the employment of the petitioner for negligent of duty and interference with investigations by hastily lifting the suspension of Haraf Traders trucks on the loss of 560 bags of Industrial Salt by KBZ 960A/ZE 2137.



33. That the respondent had lost confidence in the ability of the petitioner to handle logistics of products and in management capability.
34. That the petitioner would be paid all dues owed to him up to and including July 5, 2018 after clearing with all sections as per procedure.
35. That the suit lacks merit and it be dismissed with costs.
36. Under cross-examination by Mr Onyony, Advocate for the claimant, RW1 admitted that the notice to show cause did not mention that the petitioner was accused of lifting the suspension of Haraf Transporter.
37. RW1 admitted that a disciplinary hearing was not held before the termination of employment of the petitioner.
38. RW1 denied that the petitioner had mandate to lift the suspension as the Manager Logistics. RW1 admitted that stock variances were experienced by the respondent for a long time, before and after the employment of the petitioner. That the variances had not been eliminated even after the petitioner had left employment. That the variances were between the stock at hand and book value. RW1 admitted that several departments handled stocks including supply chain and Finance departments. That all departments including logistics had a role to play in ensuring the stocks were not lost. RW1 insisted that the petitioner had the overall responsibility of the stocks transfer and storage.
39. That the petitioner was guilty of neglect of duties and did not offer reasonable explanation. That he was given notice to show cause which he had responded to. That the petitioner received a letter of termination dated July 6, 2018. That the suit has no merit and it be dismissed.

submissions

40. The parties filed written submissions in support of their respective cases. The petitioner relied on the case of *David Wanjau Muboro v Ol Pejeta Ranching Limited* [2014] eKLR in which the Court of Appeal observed that courts are reluctant to find an employee's act of negligence to amount to gross misconduct in the absence of deliberate and intentional wrong doing. The petitioner cited the English case of *Dietman v Brent LBC* [1987] IRLR 259 in support of the aforesaid proposition. The petitioner submits that the stock variances experienced by the respondent did not arise from any intentional wrong doing on the part of the petitioner.
41. The petitioner submitted that the respondent fell foul of section 41(1) of the *Employment Act*, by not holding a hearing before terminating the employment of the claimant. The petitioner relied on the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR to submit that adhering to the provisions of section 41 was mandatory. The petitioners further relied on the case of *Bernard Ngugi v G4s Security Services Kenya Limited* [2013] eKLR to submit that due process before terminating employment of a person is mandatory in terms of section 41, 43 and 45 of the Employment Act, 2007.
42. The petitioner further relied on the case of *Edah Cherono Maiywa v University of Nairobi Enterprises and Services Limited* in which the court cited with approval *Willis v UK* 36042/97 ECHR 2002 – iv that “discrimination and unfair labour practice means treating differently, without any objective and reasonable justification persons in similar situations.” The petitioner submits that he was discriminatively singled out for termination in a situation where different persons, departments and committee were collectively responsible for the stock variance.
43. The petitioner prays that he be awarded as prayed.



44. The respondent submitted that the employment of the petitioner was terminated for a valid reason being neglect of duty leading to considerable stock loss to the company. Furthermore, the respondent submits that due process was followed before the termination.
45. The respondent submits that the petitioner did not meet the prerequisites set out under *Anarita Karimi Njeru v Republic* [1979] eKLR.
46. That this is a pure employment contract matter and the termination of the contract did not raise any constitutional issues worthy of filing a constitutional petition. That no violation and or threat of violation of any constitutional rights of the petitioner was disclosed in the petition.
47. That in terms of the case of *Godfrey Meso Kombe v Inter Beauty Products Limited* [2021] eKLR, the respondent satisfied the substantive and procedural test in terminating the employment of the petitioner in terms of section 44(4) (c) in that the petitioner had willfully neglected his duties to the loss and detriment of the respondent.
48. That the petitioner has not proved that he was discriminated upon since he was the overall in-charge of stocks at the company and his attempt to deny that responsibility and shift it to other employees was in vain and did not succeed.
49. The issues for determination are:-
- (i) Whether the termination of employment of the petitioner was for a valid reason and whether the respondent followed a fair procedure in terminating the employment.
 - (ii) What remedies if any should the court grant.
50. Having considered the evidence adduced by the parties, and the submissions thereof, the court has arrived at the conclusion that this was a pure employment contract termination matter and did not raise any valid constitutional issues for determination. The threshold set out in *Anarita Karimi case* (supra) was not met. However, the court is able to determine whether the respondent violated the employment contract of the petitioner lawfully and fairly given the pleadings and evidence placed before it, though not in a proper statement of claim as demanded by the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
51. The totality of the evidence points to the fact that the petitioner was the head of logistics and so his docket placed him in control of storage and movement of stocks. There is clear evidence that the respondent experienced stock shortage and variances before, during and after employment of the petitioner. It is clear that this was a huge problem for the respondent and was impacted by different departments, officers and a specific committee was tasked with oversight of stocks movement and storage. That indeed, the respondent had written off- stock to the tune of 45 million Kenya shillings during the tenure of the claimant.
52. The matters for the petitioner came to a head when he lifted the suspension of Haraf Traders trucks after a loss of 560 bags was experienced and associated with this company. The respondent stated that the petitioner did not provide reasonable explanation why he had lifted the suspension of the truck KBZ 960 A/ZE2137 without the authority of the committee, which he testified was overall responsible for security of stocks. However, the notice to show cause given to the petitioner did not provide the lifting of suspension as the cause of the intended disciplinary action. Furthermore, the respondent admitted that it did not hold a disciplinary hearing before dismissing the petitioner upon his written



- response to the notice to show cause dated June 26, 2018 and the detailed explanation placed before the board for stock variances which led the board to approve write-off of stocks to the tune of 45 million.
53. It is the court's finding that there is no evidence placed before court by the respondent to demonstrate that it was the negligent conduct by the petitioner that led to the write-off of stocks worth Kshs 45 million in the financial year 2017/2018. Clearly, the collective failure of the company was being placed at the door step of one employee in a situation where responsibility lay with entire management comprising of different departments, the stocks committee and the board itself, which had approved the writing-off of the stocks.
 54. The court is satisfied that the respondent failed to discharge the onus placed on it under articles 43(1) and (2); 45(1) and (2) and 47(5) in that it did not demonstrate that there was misconduct and/or gross misconduct on the part of the petitioner to warrant the action taken against him.
 55. Furthermore, the respondent failed to satisfy the court that it had followed section 41 of the Employment Act, before taking the drastic action against the claimant. The petitioner did not get opportunity to appear before the respondent with a fellow employee or with a representative of choice to exonerate himself from the alleged misconduct that led to summary dismissal of the claimant.
 56. Furthermore, the letter of dismissal dated July 6, 2018 included extraneous reasons for the dismissal that were not part of the matters raised in the notice to show cause. This violated the right of the petitioner to a fair hearing before a punitive decision with very adverse effects on his life was arrived at.
 57. Accordingly, the court finds that the summary dismissal of the petitioner was unlawful and unfair and violated sections 36, 41, 43, 44, 45 and 47 of the Employment Act, 2007. The petitioner is entitled to compensation in terms of section 49(1) (c) and 4 of the Act.
 58. The petitioner is in the first place entitled to payment in lieu of one month termination notice in the sum of Kshs 346,000 which the court awards. The petitioner is also entitled to payment of all withheld terminal benefits as admitted by RW1 and should be paid forthwith.
 59. With respect to compensation, the claimant served the respondent in high managerial position from January 25, 2009 upto the date of summary dismissal on July 6, 2018 when he was unlawfully and unfairly dismissed from employment. The petitioner lost a very good job, not easily replaceable in the Kenyan scenario. The petitioner's employability was greatly diminished as a result. The petitioner was not paid terminal benefits upon summary dismissal. The petitioner was not given opportunity to explain the issue of lifting suspension of a transporter, which matter was emphasized in the letter of dismissal yet it was not raised at all in the notice to show cause that had commenced the disciplinary process. The court holds that the petitioner did not contribute to the summary dismissal since the process was mishandled by the respondent and denied him opportunity to exonerate himself.
 60. The financial loss to the petitioner was huge and drastic and the petitioner suffered loss and damage. The petitioner lost several fringe benefits to himself and family. The petitioner wished to continue serving the respondent and had not found alternative employment as at the time of hearing of this case.
 61. The court relies on the various cases cited herein before including *Mary Chemweno and Bernard Ngugi* (supra) to award the petitioner the equivalent of ten (10) months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs (346,000 x 10) 3,460,000.
 62. In the final analysis, judgment is entered in favour of the petitioner as against the respondent as follows:-
 - (i) Kshs 346,000 *in lieu* of one month notice (basic salary + allowances).



- (ii) Kshs 3,460,000 being the equivalent of ten (10) months gross salary as compensation for the unlawful dismissal.

Total award Kshs 3,806,000

- (iii) All unpaid terminal benefits admitted by RW1 to be paid forthwith.
- (iv) Interest at court rates from date of judgment till payment in full.
- (v) Costs of the suit.
- (vi) Respondent to provide certificate of service to the petitioner within 30 days of this judgment.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8TH DAY OF DECEMBER, 2022.

MATHEWS NDERI NDUMA

JUDGE

Appearances

Onyony & Company Advocates for the petitioner

Kaplan & Stratton Advocates for the Respondent

Ekale – Court Assistant

