



**Genga v Kenya Pipeline Company Limited (Cause E035 of 2021)
[2022] KEELRC 13440 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13440 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E035 OF 2021
HS WASILWA, J
DECEMBER 8, 2022**

BETWEEN

TREZAH ADHIAMBO GENGA CLAIMANT

AND

KENYA PIPELINE COMPANY LIMITED RESPONDENT

JUDGMENT

1. By a Memorandum of claim dated 22nd June, 2021, the claimant sued the Respondent for alleged unfair termination and seeking to be reinstated back to employment and in the alternative, he be compensated for the unfair termination. The prayers sought are as follows;
 - a) Declaration that the claimant was unfairly dismissed from employment by the Respondent.
 - b) An order of reinstatement to the position that she held before dismissal without loss of benefits and salary.
 - c) An order directing the Respondent to pay the claimant salary and allowances thereto accruing from the date of dismissal on 16th February, 2021 to the date of reinstatement.
 - d) Terminal allowances and or retirement benefits.
 - e) Costs and interests.

Claimant's case.

2. The claimant was employed by the Respondent in January, 1996 as a subordinate staff (SSI) and posted to Pump station 25(PS25) till the year 2011 when she was promoted to Operations department as a Technician Operator II. After the said promotion she was transferred to Pump Station 27 for one and half years then transferred back to Pump station 25.



3. She states that she sought transfer to Pump station 26 in order to be in a position to further her studies and undertake diploma in Electrical engineering. She states that she performed her duties diligently till the night of 13th May, 2020, when she was arrested while on duty and then arraigned in Court on 14th May, 2020 for stealing petroleum products. While the criminal case was active in Court, she was suspended from employment on 18th May, 2020 for allegedly colluding with others to siphon petroleum products from the plant area.
4. A show cause letter dated 14th September, 2020 was served on her on the allegation of siphoning petroleum products, which she responded to by the letter of 22nd September, 2020. She was invited to disciplinary hearing on the 15th October, 2020 vide the invitation letter of 7th October, 2020.
5. The disciplinary meeting proceeded as scheduled but was not heard because there were documents that had not been served on her. The matter was then adjourned and on 22nd September, 2020 she was served with an amended Show cause letter, requiring a response to be made within 48 hours which she responded to and a disciplinary hearing meeting held on 1st December, 2020.
6. On 19th February, 2021, the claimant was served with a termination letter on the basis of negligence of duty on the night of 12th and 13th May, 2020. She contends that she satisfactorily explained herself in the disciplinary hearings as such did not deserve to be dismissed from employment.
7. She also stated that she appealed against the decision of the Respondent but her appeal was not successful, she however contends that she was subjected to double jeopardy because the internal disciplinary process run concurrently with the criminal case, when the subject matter in both case was the same.
8. In the response to defence filed on the 22nd October, 2021, the claimant denied all the allegation of colluding with others to siphon petroleum products and allowing vehicles to transport siphoned products from the plant. She reiterated her claim as pleaded in the memorandum of claim.
9. During hearing the claimant testified as CW-1 and adopted her witness statement of 25.6.2021 and in addition testified that she was on duty on the night of 7th and 8th April, 2020 and handed over to Mr. Mutai who took over on the night of 8th/ 9th April, 2020. That she was not on duty on the night of 12th / 13th April, 2020 but was on duty on the night of 14th /15th April, 2020 and that there was no petroleum products on the pipeline till 21hours when line 2 came online but the rest of the line were off till 9am in the morning. On 16th April, 2020, all lines were off except line 3 and on 20th/ 21st April, 2020 when she was on duty all lines were off. She testified that the Respondent alleged that products were lost on night that she was not on duty. With regard to vehicles leaving the premises with siphoned products, she stated that on the said date, there was no products on the pipeline and secondly that she was not in charge of letting in and out vehicle as the said task is for security guards and access by any vehicle can only be allowed by security guards. She denied seeing any foreign objects such as hose pipe and Jerrican in the plant area on the material date. She testified that she has worked for the Respondent for over 25 years and earned Kshs 140,000 at the time of the said termination.
10. Upon cross examination by Rop Advocate, the witness testified that she has read the Respondent's Human Resource manual and was aware that negligence of duty attracted summary termination. She admitted that on the material date, she took over from Mr. Mutai and the control room together with the plant area were okay. She testified that they fill an occurrence book everyday giving a breakdown of each days happening and that on the fateful day when she was arrested by DCI she had not transferred the notes from her notebook to the Occurance book (OB). She testified that she asked to see the



damaged valve but the Respondent decline. She admitted being taken through disciplinary process and being heard on her Appeal.

Respondent's case.

11. The respondent entered appearance on the 27th September, 2021 and filed a response to claim on even date. In the said defence the Respondent avers that the termination of the claimant was justified because she was found negligent in the performance of her duties which was in violation of the Respondent's Human Resource and Procedure manual, 2019.
12. The respondent admitted to employing the claimant in the said job group but that the claimant at all material time was stationed at the Respondent's Pump station number 26 which is located in Sinendet, Nakuru County.
13. The Respondent avers that on 13th May, 2020, it received intelligent reports that petroleum products transported by it through their pipeline network were siphoned from Pump station number 26 at Sinendet Plant areas by unknown people.
14. Covert investigations were carried into the issue to establish the veracity of the said allegations. It was discovered that products had been siphoned between August, 2019 and 12th May, 2020, when the claimant was the night shift duty controller. Furthermore, that the said theft was done in cahoots with unknown people with the aid of Administration Police officers in the watch of the claimant.
15. It is the Respondent's case that indeed the issue was reported to the police who carried out further investigations and arrested the claimant together with others for stealing petroleum products. While the same was ongoing the Respondent carried out its internal disciplinary process by issuing notice to show cause and inviting the claimant to disciplinary hearing which was to be carried out on 15th October, 2020, however on the request of the claimant to have additional documents, the said disciplinary hearing was adjourned and rescheduled to 1st December, 2020. Thereafter, an amended notice to show cause was served upon the claimant, and the claimant was only subjected to one disciplinary hearing of 1st December, 2020.
16. It is stated that after the hearing, it was established that the claimant was negligent in the way she handled her duties that caused loss to the Respondent and therefore the Respondent terminated her services.
17. The particulars of negligence are that; the claimant colluded with others to siphon petroleum products from Sinendet plant area on 7th, the night of 8th/9th, 12th/13th, 14th/15th, 16th, 20th/21st, 29th/30th April, 2020 and 12th/13th May, 2020; allowed motor vehicles registration numbers KBB 053B, KAW 002H and KBC 270N to access the plant area and transport siphoned products on various dates such as the 8th and 9th April, 2020, 12th/13th April, 2020, 14th/15th/16th, 29th/30th April, 2020, 12th/13th May 2020; failed to ensure that all person accessing the plant areas on the night of 12th/13th May, 2020, were authorised personnel, failed to explain how foreign material such as a hose pipe, jerricans and gunny bags were found in the plant area and failed to generally protect the Respondent's properties under her watch leading to damage of the product vent at line 3 hatch at her duty station.
18. The Respondent states that the claimant's appeal was not merited as per the Appellate committee.
19. It is indicated that the fact that criminal charges were preferred against the claimant did not bar the Respondent from carrying out its internal disciplinary procedure. In any case that the doctrine of double jeopardy applies to criminal offenses only and not to disciplinary process that are civil in nature.



20. The Respondent maintained that the termination was justified as such the claim is not merited and ought to be dismissed with costs.
21. During hearing the Respondent summoned four witnesses, the first one was Wilkinson Ndinga, a retired KPLC staff who was a service security officer in charge of investigations and intelligence. He adopted his witness statement dated 25.2.2022.
22. Upon cross examination, the witness testified that the claimant was on duty the night of 9th April, 2020 and 12th/ 13th April, 2020 as per the record kept by the operations department. He testified that his investigation confirmed that the valve had been 20% opened and the only person that can give such instruction is the claimant. He also testified that the claimant was the only person that can give authorisation for vehicle to access the plant areas as such she was in charge and to blame for any loss that occurred on the said night.
23. RW-2 was Emily Thathi the Respondent's Senior Human Resource officer who adopted her statement dated 2.3.2022.
24. Upon cross examination, she testified that the claimant served the Respondent for 25 years with a clean record. That they followed due procedure and involved the DCI in the investigations of the happening of the said night and therefore that the termination was justified.
25. RW-3 is Stephen Gachie the claimant's supervisor. He adopted his statement of 24.2.2022.
26. Upon cross examination, he testified that he knows the claimant's job description and that she was in charge of allowing vehicles in and out of the plant areas. He confirmed that there are two gates and the second gate was manned by AP officer, which gate could only be accessed using a security card. He maintained that the claimant was on duty on the night of 8th/9th April, 2020 and 12th/ 13th April, 2020. He also admitted that the OB was empty for the night of 12th /13th May, 2020 as the claimant did not complete her shift. He admitted further that he was not aware whether the valve that was 20% open was on the Pig line but affirmed that pigging was not carried on the said date. He testified that he was not sure what amount of product was lost but that he was shown 1000 litre gauge at the DCI offices but admitted that he never visited the scene.
27. RW-4 was Oscar Robert Matano, the Respondent' Chief Technician. He also adopted his statement of 24. 2, 2022 and upon cross examination testified that he does not know the amount of product that was lost. He testified that there are valves that can be operated from the control room and the one that was 20% open can be operated from the control room. It was his testimony that pigging was done in presence of mechanics, however that it is not possible for oil to spill during the said exercise. He admitted not knowing when the oil spillage found at the scene occurred. He confirmed that hose pipe and jerrican were recovered at the plant areas but could not ascertain the days the claimant was on duty and the days off duty.

Claimant's Submissions.

28. The claimant submitted the following issues for determination; whether the reason for termination was valid; whether the difference in the charges indicated in the amended show cause and the ones on the letter of termination caused the claimant unfair hearing; whether there was unfair process as conducted in the meetings of 14th and 16th October, 2022 and whether the claimant is entitled to the reliefs sought.
29. On the first issue it was submitted that the reason for termination as captured in the termination letter of 19th February, 2021 was for being negligent on duty based on recovery of a hose pipe and a Jerrican



with petroleum products at the plant and leaving the Ball valve 20% open when it should have been fully closed. It was argued that in the testimonies of the witnesses, none of them confirmed the materials that were recovered in the plant areas. It is argued that during disciplinary hearing, only the hosepipe was seen at the plant and not a jerrican or gunny bag as indicated in the termination letter. On the second reason of leaving the valve 20% open, the claimant submitted that no evidence was led to link her to the same. It was argued that the said valve can be controlled remotely and therefore anyone could have done it, in any case that the Respondent did not ascertain whether the said valve had been opened on the very night the claimant was on duty. Accordingly, it was submitted that none of the acts was linked solely to the claimant as such there was no sufficient reason to secure summary termination.

30. It is the claimant's submissions that, the Respondent did not inform him of the offense of leaving the valve 20% open and failing to make a report on the handbook, as such she was unable to defend herself during disciplinary hearing, when the said offense contributed to her termination. It was argued that the failure by the Respondent to accord the claimant fair hearing with regard to the two offense went against the provisions of section 4 of the Fair Administrative Actions Act. To support this position, he relied on the case of *Mandeep Chauhan V Kenyatta National Hospital & 2 others* [2013] eKLR.
31. The claimant took issue with the meetings of 13th, 14th and 15th October, 2020 which were conducted in her absence. He argued that the claimant was not in a position to cross-examine the said witnesses as such the taking of evidence in the disciplinary meeting was not properly done. In support of this argument, the claimant cited the case of *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR.
32. On the disciplinary process running concurrently with the criminal charges, the claimant cited the case of *Mathew Kipchuma Koskei v Baringo Teachers Sacco* [2013] eKLR where the Court expounded on the issue and held that :-

“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."

33. Accordingly, the claimant urged this Court to be persuaded by the above decision and find the running of the charges concurrently unfair to the claimant.
34. In conclusion, the claimant urged this Court to find in her favour and reinstate her back to employment in the alternative allow the claim for compensation as prayed.

Respondent's submissions.

35. The Respondent identified three issues for determination; whether the claimant's termination was justified; whether being subjected to disciplinary proceedings while criminal charges had been preferred amounts to double jeopardy and whether the claimant is entitled to the reliefs sought.
36. Before delving into the first issue, the Respondent submitted that the claimant did not challenge the disciplinary process in her pleadings and testimony and that the said issues have only been raised in submission stage. He added that parties are bound by their pleadings and therefore cannot raise any substantive issue at submissions stage.
37. On whether the termination was justified, the Respondent submitted that it had a valid reason to warrant the claimant's summary dismissal on grounds of negligence in the performance of her duties which led to the loss of petroleum products. It is argued that the Respondent had genuine reasons to believe that the claimant, who was the technical operator and the night shift controller on the night of 12th /13th May, 2020, was negligent in the way he carried out the duty, causing loss to the Respondent. That these actions of gross misconduct attract termination as provided for under clause 40(c) of the Collective Bargaining Agreement and Clause 11.7.1 (c) of the Respondent's Human Resource manual. It was further argued that, since the claimant was on duty and in charge of the plant areas, any loss fell squarely on her shoulders.
38. It was also submitted that the claimant admitted during hearing that she inspected the plant before taking over from Mr. Mutai and everything seemed okay and if indeed she performed her duties well she ought to have suspected any misnomer, enter it in the occurrence book and later make appropriate report.
39. In light of the foregoing the Respondent submitted that it has discharged its burden under section 47(5) of the *Employment Act* in proving that it had genuine reason to terminate the services of the claimant.
40. On procedural fairness, it was submitted that due procedure was followed in accordance with section 41 of the *Employment Act*. It is argued that the claimant was issued with a show cause letter, invited to disciplinary hearing on 15th October, 2020, but since there were documents the committee was relying upon which the claimant had not be furnished, the hearing was adjourned to 1st December, 2020 and the claimant issued with amended Show cause with finer details. That the claimant was informed about her right to have a representative of her choice during the said hearing and granted ample time to defend her case which she did.



41. It is submitted also that the charges levelled against the claimant as captured in the amended show cause letter of 22nd October, 2020 are the same reason that caused her termination as captured in the letter of 19th February, 2021. He further submitted that the informer was not availed for cross-examination for fear of their security. In totality, the Respondent argued that the disciplinary process was conducted up to par. To support this argument they relied on the case of *Kenya Power and Lighting Company Limited V Aggrey Lukorito Wasike* [2017] eklr.
42. On the whether the claimant was subjected to double jeopardy, it was argued that the claimant being charged in Court for a criminal offense is not a bar to the Respondent from instituting internal disciplinary proceedings. He added that the doctrine of double jeopardy only applies in criminal case. To support this argument they cited the court of Appeal decision in *Teachers Service Commission V Joseph Wambugu Nderitu* [2016] eklr and he case of *Jeremiah Gitau Kiereini V Capital Markets Authority and the Attorney general* [2013] eklr where the Court held that;-
- “the double jeopardy rule strictly applies to criminal offenses and not disciplinary proceedings or any proceedings of administrative nature.”
43. On whether the reliefs sought should issue, the Respondent submitted that they have demonstrated that the claimant’s dismissal was based on a valid grounds and subjected through proper disciplinary process, as such fair in the circumstances, therefore that the claimant is not entitled to the reliefs sought. He urged this Court to disallow the claim especially for reinstatement noting that there are no peculiar circumstances table by the claimant to warrant the issuance of the said relief. He then prayed for the entire claim to be dismissed with costs.
44. I have considered the averments, evidence and submissions of the parties herein. The issues for this court’s determination are as follows;-
1. Whether there were valid reasons to warrant dismissal of the claimant.
 2. Whether the claimant was subjected to due process.
 3. Whether the claimant is entitled to the remedies sought.

1. Reasons For Dismissal

45. As per the claimant’s letter of summarily dismissal dated 19/2/2021, the reasons for claimant’s dismissal were indicated as follows;-

“Re: Summary Dismissal

Reference is made to the show cause letter issued to you dated 14th September 2020, the content of which was amended vide another show cause letter dated 22nd October 2020, your subsequent written responses thereto and your personal appearance before the Staff Disciplinary Committee on 15th October 2020 as well as 1st December 2020.

In this regard, we wish to inform you that Management reviewed your case and it was established that as the Technical Operator on duty in charge of the station, you were responsible for ensuring that the plant area was free of any unauthorized foreign materials at all times. Regrettably, this was not the case on the night of 12th/13th May 2020, since unauthorized materials namely; a hose pipe with product, a jerrican and a gunny bag were recovered from the plant area. Indeed, in your own submission during the disciplinary



hearing, you admitted to the presence of a hose pipe within the plan area and which was not supposed to be at the site.

Further, the Management established that whereas it was your responsibility to ensure that the instruments at the plant area were functioning normally before taking over your shift duties on 12th/13th May 2020, you failed to do so, in that a bail valve 26-Nov-013 was found partially open at 20%, the same of which was supposed to be fully closed.

In both incidences, you failed to make a report on the same in the Shift Hand Over Report, hence a serious omission on your part.

Arising from your negligence in the performance of your duties, theft occurred leading to the Company losing product. Please note that negligence amounts to gross misconduct and a breach in accordance with the Employment Act 2007 Section 44 (4), Human Resource Policy and Procedures Manual (HRPPM)... Collective Bargaining Agreement (CBA) Clause 40(c).

In view of the foregoing, we regret to inform you that you have been summarily dismissed from Company service with immediate effect”.

46. The indications in this letter are that the claimant was dismissed for reasons of being negligent in the performance of her duties which caused theft to occur leading to the company losing products.
47. The negligence according to the respondent arose from the fact that the claimant was on duty as Technical Operations In-charge of the station and was to ensure the plant area was free of any unauthorized foreign materials at all times.
48. That regrettably, on the night of 12th/13th May, 2020 while on duty unauthorized materials namely hose pipe with product, a jerrican, gunny bag were recovered from the plant area.
49. It was also indicated she failed to ensure that the instruments at the plant area were functioning normally before taking over her shift on the same night of 12th/13th May 2020 and a bail valve 26th November.. was found partially open at 20% the same of which was supposed to be fully closed.
50. The claimant has indicated in her evidence and in her submissions that none of these materials were confirmed recovered at the plant area by the witnesses. She argued that during the disciplinary hearing only the hose pipe was seen at the plant and not a jerrican or gunny bag as indicated in termination letter.
51. Before the dismissal of the claimant, she was issued with Amended Show Cause Letter. In the Show Cause Letter of 22/10/2020 claimant was accused of colluding with others to Siphon petroleum products from the plant area occasioning the company loss of petroleum products approximately 300 litres on diverse dates in the month of April and May 2020 between 7th April, 2020 to 13th May, 2020.
52. The claimant was accused of failing to ensure unauthorized persons accessed the plant and station and also the safety environmental and security requirements.
53. It was indicated that a hose pipe, jerrican and gunny bag were recovered from the plant area. Lastly it was indicated that the claimant failed in her responsibilities to protect the company property and investigations established that the product vent at the 3 pig hatch at the station i.e. PS 26 plant area facility was damaged while she was on duty.
54. The claimant was asked to respond to this show cause letter and explain why disciplinary action should not be taken against her.



55. The show cause letter was accompanied with an investigation report, security occurrence book for PS 26, Sinendet, operation event log book and pictorial evidence of the crime scene attached.
56. The investigation report seemed to indicate that the claimant with others colluded to siphon fuel from the respondent's premises.
57. The claimant was also accused of being negligent in her duties by allowing unauthorized persons into the respondent's premises. She was also accused of misappropriation and theft of company products.
58. Other than the claimant other staff including police officers and guards were also suspected of involvement in the theft.
59. The claimant responded to these allegations denying any culpability. She was then invited to a disciplinary hearing which meeting was to take place on 15/10/2020.
60. The same was apparently moved to 1/12/2020. The minutes of the disciplinary hearing have been produced in court.
61. From the evidence of RW1, he indicated that no pigging was done on 12th/13th May night. He indicated that he never visited the crime scene that day but did so a week later.
62. RW1 indicated that claimant was on duty in plant area that night and there are 2 gates at the plant manned by security guards and hired guards. The 2nd gate could only be accessed using a card. He indicated he found a hose pipe and jerrican at scene and not a gunny bag.
63. He indicated that in his statement he didn't talk about the jerrican.
64. He also indicated that part of claimant's duties was to operate the pig lane but on that day there was no pigging and that a valve was found open at 20%.
65. He also indicated that when one is at the control room, they cannot see anything out there.
66. What I gather from the evidence of claimant and respondents is that indeed the claimant was the technical officer in-charge of the plant. The plant is a big area manned by Administration police officers and hired guards outside.
67. To access the plant one needs to go through security and in the inner part, through a card that open the second gate.
68. The claimants area of operation was at the control room and she couldn't see the outside area.
69. On the day of these incidences there is no indicating that what the witnesses call pigging was done.
70. There is however evidence from the witnesses that a valve was open outside the plant.
71. Whether the claimant could open these valves is not clear but RW2 indicated that the claimant could open the valve if she had the tools. He indicated he didn't see any tools on the site.
72. The claimant is accused of being negligent in her duties. Indeed she was the in-charge of the plant at the time.
73. She worked with others under her including security. She operated from a control room not visible from the outside.
74. There is no evidence that she actually colluded with the security guards who manned the plant to steal from the respondent.



75. Whereas her responsibility was heavy to ensure security of the plant and also the products, there is no clear evidence that she was negligent in this.
76. I say so because the plant was large. It had armed police security and guards. The problem that occurred at the plant was outside the control room and she didn't occasion or authorize the opening of the gates to the plant.
77. There is doubt in her culpability to the accusations she is accused of and I find that the evidence adduced fails below the required standards.
78. Section 43 of [Employment Act](#) 2007 states as follows;-



<p>“43.</p>	<p>Proof of reason for termination</p> <table border="1"> <tr> <td data-bbox="858 271 1123 837">(1)</td> <td data-bbox="1123 271 1390 837"> <p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p> </td> </tr> <tr> <td data-bbox="858 837 1123 1404">(2)</td> <td data-bbox="1123 837 1390 1404"> <p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.</p> </td> </tr> </table>	(1)	<p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p>	(2)	<p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.</p>
(1)	<p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p>				
(2)	<p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.</p>				
<p>(1)</p>	<p>In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.</p>				
<p>(2)</p>	<p>The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.</p>				



79. This proof of validity of reasons need to be tangible in terms of her duties, materials or equipment available to do the work and failure to deliver as expected.
80. I return the verdict that there is doubt in her capability and I find there is no proof of valid reason leading to her dismissal.

2. Due Process

81. On this issue the claimant has submitted that she was not accorded a fair opportunity to defend herself.
82. The respondent indicated that the claimant was accorded an opportunity to defend herself. The respondents produced minutes of the disciplinary committee meeting held on 14th, 15th & 16th October 2020.
83. As per the minutes, the meeting proceeded in presence of 6 people who deliberated on issues pertaining to the claimant but in her absence.
84. Thereafter the claimant was served with an amended show cause letter in which she was accused of colluding with others to siphon petroleum products from the plant occasioning the company to lose petroleum products of approximately over 300 litres on diverse dates in the month of April and May 2020 as was indicated in the show cause letter amongst other offences.
85. The claimant responded to this show cause letter denying any culpability.
86. The claimant also indicated in her show cause letter her duties being to run Lines 2, 3, 4 & 6 alongside taking instructions from Nairobi Control Centre (NCC) to sign work permits, report defects and check on generation its case of power failure.
87. She also indicated that on 7th/8th April 2020 she reported on duty on 5/4/2020 taking over from Yegon and continued until 8/4/2020.
88. She indicated that on the night of 7th/8th April 2020 at 300 hours Line 3 went offline and Line 6 went online.
89. During the day the dump tank was offloaded and lifted by budger.
90. That on 8th/9th April 2020, she was not on duty and she handed over to Mr. Mutai in the morning of 8th April 2020.
91. That on 12th/13th April 2020, she took over the shift duties from Benard Yegon and all liner were offline apart from Line 2.
92. That on 15th/16th April 2020, lines 2, 4, 6 were offline while line 3 was online. That on 20th/21st 2020 line 2 & 6 were online while line 3 & 4 were offline and that on 29th/30th April 2020 lines 2, 3, 4 & 6 were online.
93. The other explanation by claimant were to a denial of any culpability on the events of 12th/13th night when claimant was arrested. She was then invited to a disciplinary committee meeting and after the hearing was found guilty of negligence of duty and the committee recommended she be dismissed from duty for gross misconduct.
94. On issue of a disciplinary hearing it is apparent that the claimant was given an opportunity to be heard.
95. She was allowed ample time to prepare her case.
96. In terms of the right to be heard, I find that the claimant was given this right and she defended herself.



3. Remedies

97. I have from the above analysis established that the claimant was accorded a fair hearing though the validity of reasons of dismissal have not been established.

98. Section 45 (2) of the Employment Act 2007 states as follows;-

“45.

(1)

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

99. Since the validity of reasons for dismissal were not established, I find the dismissal of the claimant unfair and I declare it so.

1. In terms of remedies sought, the claimant sought to be reinstated to work.

2. However considering the circumstances under which she was dismissed and also considering that she has a pending criminal trial ongoing, I find reinstatement not a plausible remedy.

3. I however find that she is entitled to payment of all her terminal and retirement benefits.

4. I also award her compensation for the unfair dismissal and considering the length of time she has served and the possibility of not getting another job, I award her maximum compensation equivalent to 12 months salary

$$12 \times 147,606.85 = 1,771,282/=$$

Less statutory deductions.

5. I also order that the respondent pays costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mongeri for Claimant – present

Nyandura holding brief for Rop for the Respondent – present

Court Assistant - Fred



