



**Otiato v Gulf Energy Holdings Limited (Cause E343 of 2020)
[2022] KEELRC 13350 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13350 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E343 OF 2020
MN NDUMA, J
DECEMBER 1, 2022**

BETWEEN

EVANS OTIATO CLAIMANT

AND

GULF ENERGY HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. The suit commenced by way of a Memorandum of Claim filed on 29th July, 2020. The claimant seeks the following reliefs: -
 - (i) A declaration the dismissal of the Claimant is unlawful, wrongful and unfair.
 - (ii) Payment for days worked in June, 2020Kshs.114,282.69
 - (iii) Payment in lieu of NoticeKshs.250,090.00
 - (iv) Payment in lieu of leave.....Kshs.274,137.12
 - (v) Leave travelling allowance.....Kshs.60,021.60
 - (vi) Compensation (Kshs 250,090.00 X 12 months)Kshs.3,001,080.00
 - (vii) Certificate of service.
 - (viii) Costs of the cause.
 - (ix) Interest on (2) – (5) and (7).
 - (x) Any other relief this Honourable Court may deem fit and just to grant.
2. The facts of the claim are set out in the witness statement dated 29th July, 2020 adopted by C.W.1 as his evidence in chief.



3. C.W.1 was employed by the respondent vide a contract dated 4th March, 2015 as a Senior Supply Analyst. The effective date was 7th April, 2015 at a salary of Kshs 200,000 per month.
4. The claimant worked continuously until 28th May, 2020 when the respondent issued the claimant an email letter of suspension on allegations that the claimant had disregarded the line manager's instructions and due process.
5. C.W.1 was issued with a show cause letter dated 5th June, 2020 in which the claimant was accused of insubordination.
6. C.W.1 responded to the show cause letter on 8th June, 2020 in which he explained that he had received instructions from the Group Strategy and Corporate Affairs Manager and acted on those instructions by asking Oryx Energy to cede Jet AI import allocation to Jaguar. That C.W.1 reached out to the line Manager to have any misunderstanding on that action cleared. C.W.1 also explained that respondent was acquired by Kenol Kobil P.L.C, and the reporting channels for his job was not clear and that C.W.1 was not issued with a new and/or any updated job description.
7. That C.W.1 carried out his duties as he had done always and believed he had always acted in the best interest of the respondent. C.W.1 also explained that he had utmost respect for his line manager and that he was willing to discuss with her any misunderstanding on the roles and responsibilities to avoid any areas of conflict in future.
8. C.W.1 was issued with a letter dated 9th June, 2022 inviting him to a disciplinary hearing on 11th June, 2020 at 11.00 a.m. being accused of instructing Oryx Energies Kenya Limited to cede the Respondent's share of JET import allocation in favour of a different company without C.W.1's line manager's knowledge and approval and that C.W.1 had issued instructions to Oryx Energies Limited asking it to disregard the line manager's instructions.
9. C.W.1 attended the disciplinary hearing on 1st June, 2020. The committee comprised of Caroline Kamau – Human Resource Manager, Ruth Mabele – General Counsel, Dorothy Rukenya – Supply Manager (C.W.1's line Manager); John Githiomi – Chief Finance Officer and David Itubia, Human Resource Business Partner.
10. C.W.1 requested for more time to prepare but was denied any extension. C.W.1 testified further that he was surprised that the complainant was part of the panel to decide his fate. C.W.1 protested that he had not been allowed opportunity to bring another employee of his choice along since he had been suspended and denied access to the respondent's premises. The objection was overruled.
11. C.W.1 testified also that he had requested for a copy of the investigations report referred to in the show cause letter but none was given to him. The panel stated that the email exchanges between C.W.1 and the line manager Dorothy Rukenya were sufficient.
12. C.W.1 explained his case stating that he acted on instructions from the Group, strategy and corporate Affairs Manager on the issue of importation of fuel complained of. That C.W.1 had called the line Manager on phone but the call did not go through. That C.W.1 had called the Group strategy and Corporate Manager and asked him to discuss the matter with Dorothy Rukenya. That on 28th May, 2020, the Group Strategy and Corporate Affairs Manager gave clear instructions on the matter whereupon the matter was resolved.
13. C.W.1 received a letter of dismissal dated 15th June, 2020 in which was indicated that the panel had considered the written and oral representations by C.W.1 and had decided to dismiss C.W.1 from employment for insubordination.



14. C.W.1 stated that the dismissal was not for a valid reason; was unprocedural; and was unlawful and unfair. That principles of natural justice were violated and the defence which was valid and reasonable was ignored.
15. That C.W.1 was not paid final dues upon dismissal and he was not issued with a Certificate of Service to enable him look for alternative employment.
16. C.W.1 earned Kshs 250,000 at the time of dismissal and was entitled to 2% of his annual salary as his leave travelling allowance.
17. That C.W.1 did not get notice and was not paid in lieu thereof and claims payment in respect thereof. That he had 28.5 days leave due at the time of dismissal and was not paid in lieu and seeks payment in respect thereof.
18. That C.W.1 issued a demand notice to the respondent which notice was ignored. C.W.1 prays to be awarded as set out in the Statement of Claim.
19. R.W.1 David Itubia, Njuguna, testified for the respondent. R.W.1 stated that he was the Human Resource and Business Partner of the Respondent. That C.W.1 was transferred from the Respondent's predecessor Gulf Energy Limited to Gulf Energy Holdings Limited. That C.W.1 held the position of Senior Supply Analyst. That his salary was Kshs 250,090.
20. That C.W.1 got a new contract dated 15th November, 2019 in which, C.W.1 was to report to the Supply and Planning Manager. That the job description was explained and C.W.1 acknowledged that he understood his new terms of employment set out in the contract.
21. That on or about, July 2020, during reconciliation of Kenya Revenue Authority entries, the Respondent noted that the claimant had fraudulently issued authority to Texas Energy Limited severally to use the Respondent's duty payment entries to the tune of Kshs 34,746,391 without prior approval of the claimant's line manager.
22. The Respondent thereafter instituted Civil Proceedings against the claimant and Texas Energy for recovery of interalia Kshs 49,260,637.70 in case No. H.C.C. No. E324 of 2020 – Gulf Energy Holdings Limited –vs- Evans Otiato which proceedings are still pending. That the claimant therefore was not executing his duties diligently as alleged or at all.
23. That on 27th May, 2020, the respondent whilst conducting preliminary investigations regarding the claimant's behavior, suspended the claimant vide a letter dated 27th May, 2021.
24. The respondent while conducting further investigations noted that on 19th May, 2020 at around 10.43 hours, the respondent through the claimant's supervisor sent out email to Oryx Energies Kenya Limited (Oryx) one of the Respondent's clients advising on fuel discharge instructions. The claimant was in copy in the said email.
25. Four minutes later, at approximately 10.47 hours, the claimant sent out an email to Oryx giving discharge instructions that contradicted the Respondent's instructions issued by his supervisor. While discharging these contradictory instructions, the claimant did not copy his supervisor in the email.
26. That on 26th May, 2020, Oryx sent invoices to the Respondent and it was only then that the Respondent noted the contradiction. The supervisor of the respondent wrote to Oryx an email dated 27th May, 2020 clarifying that the instructions given by the claimant were null and void and they were issued without consultations. The claimant's supervisor thereafter wrote an email dated 27th May, 2020



- to the claimant advising him not to discharge any further instructions to Oryx as the Respondent's share of the Jet A1 import allocation had been duly reallocated and planned for.
27. That the claimant in total disregard of his line manager's instructions again discharged further instructions on the same date to Oryx asking them to disregard his supervisor's instructions and to only act on instructions which had been issued by the claimant.
 28. In light of this, the respondent issued the claimant with a suspension notice dated 27th May, 2020 with reasons for suspension clearly stipulated. The respondent thereafter upon conclusion of investigations issued the claimant with a show cause notice dated 5th June, 2020. The claimant responded to the notice on 8th June, 2020 in which the claimant admitted having issued instructions by email countermanding his supervisor's instructions.
 29. The respondent invited the claimant to a disciplinary hearing to be held on 11th June, 2020 by a letter dated 9th June, 2020.
 30. The hearing took place on 11th June, 2020 in the presence of the Respondent's Human Resource Manager; General Counsel; Line Manager of the claimant; Chief Finance Officer and R.W.1. That the composition of the committee was in terms of clause 10.5 of the Respondent's Human Resource Manual which provides:-

“A disciplinary hearing will be conducted by a panel that will accord the employee an opportunity to discuss the facts surrounding the incident, the Line Manager and the Head of Human Resource or his/her representative shall form part of the panel to ensure the employee has an opportunity to gather and present relevant facts.”
 31. R.W.1 states that nothing was wrong therefore with the line manager being a member of the disciplinary panel.
 32. R.W.1 stated that the claimant was advised that he could call the group Strategy and Corporate Affairs Manager Mr. Pius as his witness. The claimant declined to call Pius, and decided to proceed with the hearing alone. That the above is captured at page 19 to 22 of the minutes of the proceedings.
 33. R.W.1 stated that no investigation report had been generated and the claimant was informed accordingly when he requested for a copy. That the respondent relied on email correspondence on the matter which were considered sufficient in the circumstances of the case.
 34. R.W.1 stated that the claimant admitted he was aware of the reporting line and supervisor and that he knowingly sent instruction's that were contradictory to his line manager's instructions twice. That the claimant thereafter apologised for his action.
 35. The respondent on 15th June, 2021 summarily dismissed the claimant from employment on grounds of insubordination.
 36. R.W.1 stated that the dismissal was lawful, and fair and was in terms of Section 44 (4) (e) of the [Employment Act](#), 2007 and the Human Resource Manual Clause 10.5.
 37. That the claimant has not cleared with the respondent as advised in the letter of dismissal so as to be paid his terminal benefits. That upon clearance, the claimant will be paid and given his Certificate of Service.
 38. The parties filed written submissions and the issues for consideration are:-



- (i) Whether the respondent summarily dismissed the claimant from employment for a valid reason.
 - (ii) If the respondent followed a fair procedure in summarily dismissing the claimant.
 - (iii) What remedies if at all is the claimant entitled to?
39. . The Court has carefully considered the evidence adduced by the claimant vis a vis that adduced by R.W.1 and the Court is satisfied that the claimant on two different occasions, issued instructions on email that contradicted the instructions by his line manager and supervisor. That the subject matter of the contradictory instructions was of a serious nature and went to the core of the business conducted by the respondent. That the instructions issued, involved a major customer of the respondent.
40. That the conduct by the claimant consisted gross insubordination which the respondent could not tolerate considering all the circumstances of the case.
41. The Court is satisfied that the claimant admitted his mistake during the disciplinary hearing and apologized. The Court however, finds that the nature of insubordination was of such a serious nature and magnitude that it satisfied the requirement of Section 43(1) and (2) read with Section 44(4) (e) as a valid reason to summarily dismiss the claimant from the employment of the respondent.
42. Regarding the requirement of a disciplinary committee under clause 10.5 of the Respondent's Human Resource Manual to have the line manager as part of the panel, the Court notes that the Respondent should treat each case on its facts. Where the complainant is the line manager of the employee, then it is contrary to the rules of natural justice to have the accuser of the employee to be a judge of the matter in dispute. It was therefore wrong in the circumstances of this case to have the line manager sit in judgment of the claimant in a matter where the line manager was the direct complainant.
43. The respondent did not therefore satisfy the procedural requirements under section 41 of the Employment Act, read together with the rules of natural justice.
44. Accordingly, the Court finds that even though the respondent clearly had a valid reason to summarily dismiss the claimant, the respondent did not accord the claimant a fair hearing in the circumstances of the case.
45. The Court also finds that the respondent was also wrong not to compute and pay the terminal benefits due and payable to the claimant upon summarily dismissing him. The Respondent was also wrong in not providing a Certificate of Service to the claimant to enable him get alternative employment.
46. These are considerations the Court has made in considering the Quantum of compensation the Court would award the claimant in terms of section 49(1) (c) and (4) of the Employment Act for the procedural failure the respondent has been found guilty of.
47. The claimant was a senior officer and had served the respondent from 15th November, 2019 to 15th June, 2021 a period of one year and seven months. The claimant clearly contributed to the summary dismissal by being insubordinate, not once but twice against his line manager on a serious issue.
48. The Court finds that the claimant has suffered loss and damage by fact of the delayed payment of his terminal benefits and lack of Certificate of Service. The terminal benefits set out in the Statement of Claim and supported by the testimony of C.W.1 were not contradicted by R.W.1. The Court therefore awards the claimant the terminal benefits claimed as follows:-
- (i) Arrear salary for June, 2020.....Kshs 114,282.69.



(ii) Payment in lieu of leave days

not takenKshs 274,137.12.

The claimant did not go on leave and so the leave travelling allowance of Kshs 60,021.60 is not payable and is not awarded.

(iii) The respondent to provide the claimant with a Certificate of Service within 30 days of this judgment.

Compensation

(iv) The Court awards the claimant two (2) months' salary in compensation for the failure to accord the claimant a fair hearing before summarily dismissing him from service in the sum of Kshs 500,180

Total award to the claimant is therefore Kshs 888,599.81.

(v) Interest at Court rates from date of judgment till payment in full.

(vi) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 1ST DAY OF DECEMBER, 2022

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Abei for claimant

M/s Wamuyu for Respondent

Ekale – Court Assistant

