



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 683 OF 2017**

**KENYA PETROLEUM WORKERS UNION.....CLAIMANT**

**VS**

**KENYA PETROLEUM REFINERIES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant in this case is a Trade Union registered in Kenya with the mandate to represent workers in the Petroleum and Oil Sector. The Respondent is a limited liability company engaged in petroleum refinery, storage and movement of petroleum and oil products, with its registered office in Mombasa.
2. The Union brings this claim on behalf of its members namely; Wycliffe Apollo, Charles Kithi Kazungu, Fredrick Busaka and Jesse Waweru Kung'u (referred to as 'the Grievants' in this judgment).
3. The claim is documented by a Memorandum of Claim dated 23<sup>rd</sup> August 2017 and filed in court on 24<sup>th</sup> August 2017. The Respondent filed a Memorandum of Response on 27<sup>th</sup> November 2017.
4. The matter proceeded to full trial with Wycliffe Apollo, Fredrick Busaka and Jesse Waweru Kung'u testifying for the Claimant. The Respondent called its Product Movement Manager, Nelson Kazungu Karisa; Technology Manager, Michael Kariuki; and Human Resources Manager, Martin Wahome.
5. The parties also filed written submissions.

**The Claimant's Case**

6. The Grievants were all employees of the Respondent employed on diverse dates and in different capacities. Their complaint arises from the termination of their employment on 26<sup>th</sup> January 2017.
7. Wycliffe Apollo joined the Respondent Company on 1<sup>st</sup> September 2010 as a Trainee Plant Operator (CAT 2). His entry monthly salary was Kshs. 24,721 plus a house allowance of Kshs. 10,150 and a shift allowance of 3,460.95.
8. Apollo was confirmed in his appointment on 1<sup>st</sup> March 2011.
9. Charles Kithi Kazungu was appointed on 4<sup>th</sup> May 2009 also as a Trainee Plant Operator (CAT) 2 at an entry monthly salary of Kshs. 20,542, a house allowance of Kshs. 8,600 and a shift allowance of Kshs. 2,876.
10. Kithi Kazungu was confirmed in his appointment on 4<sup>th</sup> November 2009.
11. Jesse Kung'u was employed as a Plant Operator (CAT 2) on 1<sup>st</sup> September 2010 at an entry monthly salary of Kshs. 24,721 plus a house allowance of Kshs. 10,150 and a shift allowance of Kshs. 3,460.95.
12. Fredrick Busaka was employed as a Trainee Operator (CAT 1) at an entry monthly salary of Kshs. 11,257 plus a house allowance of Kshs. 4,650. He was confirmed after six months and on 2<sup>nd</sup> July 2008, he was promoted to management level.

13. On 9<sup>th</sup> January 2017, the Grievants were suspended from duty, pending investigations into the loss of unspecified products. On 16<sup>th</sup> January 2017, they were invited to a disciplinary hearing scheduled for the next day, 17<sup>th</sup> January 2017 and on 26<sup>th</sup> January 2017, they were dismissed for gross negligence and dereliction of duty.

14. They appealed against the dismissals upon which appeal hearings were convened but the dismissals were upheld.

15. A dispute was reported to the Minister for Labour and a Conciliator by the name Opalakadi was appointed. The Conciliator convened two meetings on 14<sup>th</sup> and 30<sup>th</sup> June 2017 that were attended by both parties.

16. On 31<sup>st</sup> July 2017, the Conciliator declared the Grievants' dismissal wrongful and unfair and recommended their reinstatement.

17. The Respondent however declined to implement the Conciliator's recommendation hence the present claim.

18. The Claimant seeks for reinstatement and/or re-engagement of the Grievants or in the alternative, 12 months' salary in compensation together with terminal benefits as tabulated.

19. The Claimant further asks for Certificates of Service plus costs of the case.

### **The Respondent's Case**

20. In its Memorandum of Response dated 27<sup>th</sup> November 2017 and filed in court on even date, the Respondent admits having employed the Grievants as follows:

a. Wycliffe Apollo was employed on 1<sup>st</sup> September 2010 as a Trainee Plant Officer and later promoted to the position of Operations Technician. At the time of dismissal, he earned a consolidated monthly salary of Kshs. 79,803;

b. Charles Kazungu was employed on 4<sup>th</sup> May 2009 as a Trainee Operator and later promoted to the position of Assistant Refinery Operator earning a consolidated monthly salary of Kshs. 85,437 at the time he was dismissed;

c. Fredrick Busaka was employed on 14<sup>th</sup> July 2000 as a Refinery Operator and later as Oil Movement Shift Assistant at a consolidated monthly salary of Kshs. 150,532 at the time of dismissal;

d. Jesse Kung'u was employed on 1<sup>st</sup> September 2010 as a Trainee Plant Operator and later promoted to the position of Operation Technician earning a consolidated monthly salary of Kshs. 48,485 at the time of dismissal.

21. The Respondent states that on 24<sup>th</sup> December 2016, there was loss of Automotive Gas Oil (AGO-Diesel) and Premium Motor Spirit (PMS-Gasoline) on transfer from Mombasa Joint Terminal (MJT)-Changamwe and subsequent operations, causing the Respondent to lose Kshs. 1,784,196.

22. At the time of the incident, the 1<sup>st</sup> Grievant, Wycliffe Apollo was the Inside Movement Operator (IMO) for the AGO transfer and support person for the PMS transfer.

23. The Respondent accuses Apollo of failure to follow the required procedure by allowing erroneous product movement and failing to appraise his superiors on the progress of work and areas of concern.

24. At the time of the incident, the 2<sup>nd</sup> Grievant, Charles Kazungu was the Outside Movement Operator (OMO). He is accused of negligently giving priority to transfers to MJT-Changamwe despite being aware of the possibility of the Respondent incurring demurrage charges for delay in discharge of fuel oil to KenGen.

25. Kazungu is further accused of negligently leaving unattended the valve at MJT to be operated by a customer contrary to company procedures which required that the valve remained sealed and be operated by both parties.

26. At the material time, the 3<sup>rd</sup> Grievant, Fredrick Busaka was performing the duties of Outside Movement Supervising Assistant (OMSA) whose substantive holder was off duty. He was charged with the responsibility of overseeing and supervising the activities in the product movement section.

27. The Respondent states that Busaka performed his duties without a radio which was an important tool of trade, with the result that when there was a drop in the tank by 15mm, he could not be reached to give directions, guidance and support to his subordinates, thus occasioning loss of company products.

28. Jesse Kung'u, the 4<sup>th</sup> Grievant worked in the position of Outside Movement Operator (OMO) charged with the responsibility of determining final levels of customers' tanks at MJT-Changamwe.

29. Kung'u is accused of failing to carry out actual dipping of the tanks to take record of final dips, making the final report by the surveyors an incorrect representation of the products moved, thus exposing the Respondent to product manipulation.

30. The Respondent claims to have lost Kshs. 818,624; 565,658; 1,014,000; and 399,914 as a result of the Grievants' acts and/or omissions.
31. The Respondent avers that the investigations carried out revealed that there was a high likelihood that there was deliberate collusion in the movement of products from the tanks at MJT-Changamwe.
32. The report returned the following verdicts on the Grievants:
- a. 1<sup>st</sup> Grievant: Wycliffe Apollo-lack of adherence to procedure despite having been adequately trained;
  - b. 2<sup>nd</sup> Grievant: Charles Kazungu-lack of adherence to procedure/serious lapse in work method;
  - c. 3<sup>rd</sup> Grievant: Fredrick Busaka-serious lapse in supervision and lack of adherence to procedure;
  - d. 4<sup>th</sup> Grievant: Jesse Kung'u-serious lapse in work methods and lack of adherence to procedure.
33. The Respondent states that following investigations, the Grievants were invited for a disciplinary hearing, which they duly attended in the presence of their union officials.
34. Following the disciplinary hearing, the Grievants were dismissed from employment on 26<sup>th</sup> January 2017, with the right of appeal.
35. The Grievants' appeal was heard and determined and the dismissals upheld.
36. The Respondent further states that upon dismissal, the Grievants were paid their final dues being; salary for days worked, shift allowance, overtime and leave allowance.
37. The Respondent asks that the claim be dismissed with costs.

### **Findings and Determination**

38. There are two (2) issues for determination in this case:
- a. Whether the Grievants' dismissal was lawful and fair;
  - b. Whether the Grievants are entitled to the remedies sought.

### **The Dismissal**

39. The Grievants were dismissed by respective letters dated 26<sup>th</sup> January 2017 and 14<sup>th</sup> February 2017, citing gross negligence and dereliction of duty.
40. The letter addressed to the 1<sup>st</sup> Grievant, Wycliffe Apollo accuses him of:
- a. Allowing PMS and AGO transfers to progress while fully aware that an obvious anomaly had occurred during Line Packing;
  - b. Failing to follow standard procedure for Line Packing and failing to report failure of equipment (gauge) on the line, leading to inadequate Line Packing, which may have contributed to product loss.
41. The letter to the 2<sup>nd</sup> Grievant, Charles Kazungu accuses him of:
- a. Failure to exercise due care and diligence while the MJT line was being packed;
  - b. Leaving the MPS custody valve open for MJT personnel to operate independently thereby exposing the Company to loss to third parties.
42. In the letter addressed to the 3<sup>rd</sup> Grievant, Fredrick Busaka, he is accused of:
- a. Giving out OMSA portable radio and failing to inform GSS that there were challenges with radios, thus making communication with field operators difficult;
  - b. Allowing internal PMS transfer from a custody tank (T-111) before receiving tank was finalised and comparing done;
  - c. Allowing external system to remain open after transfer.

43. The Respondent also expresses doubt as to whether Busaka was present at the Oil Movement Desk to follow the transfers and correct anomalies that had occurred.

44. The 4<sup>th</sup> Grievant, Jesse Kung'u was issued with a dismissal letter dated 14<sup>th</sup> February 2017 accusing him of failing to participate in the final dipping of the tanks at MJT-Changamwe, abdicating his responsibility to external parties namely; the designated surveyors (ITS) and MJT Terminal Representative.

45. Overall, the Respondent states that the Grievants failed to adhere to operational procedure, leading to loss of petroleum products, to the Respondent's detriment.

46. From the evidence on record, it appears that there was indeed a drop in the product conveyance line. However, the Respondent did not lead any evidence to establish whether the drop was as a result of the Grievants' failure or a compromised transmission line. Moreover, the Respondent did not provide unequivocal proof that the drop was abnormal. Further, the Respondent did not demonstrate how the monetary value attached to the alleged loss was arrived at.

47. It seems to me therefore that although the Respondent may have incurred some loss, there was no evidence upon which any specific loss could be assigned to any of the Grievants.

48. In **Hilton Waweru Kariuki & another v Attorney General [2018] eKLR** this Court held that an employer alleging wrongdoing against an employee must adduce evidence connecting the wrongdoing to the employee. This is the import of Section 43 of the Employment Act.

49. In the instant case, the Respondent did not lead any evidence to connect the Grievants with the alleged loss of petroleum products. I therefore find and hold that there was no valid reason for the Grievants' dismissal.

50. Regarding, the procedure adopted by the Respondent in executing the dismissal, the Court observed the following:

a. Wycliffe Apollo, Charles Kazungu and Fredrick Busaka were suspended for a period of twelve (12) days effective on 9<sup>th</sup> January 2017, pending investigations into loss of products.

b. By letter dated 16<sup>th</sup> January 2017, Apollo, Kazungu and Busaka were invited to appear before a Disciplinary Committee on 17<sup>th</sup> January 2017. Kung'u was also given a day's notice to appear before the Disciplinary Committee on 6<sup>th</sup> February 2017;

c. By e-mail dated 16<sup>th</sup> January 2017, the Grievant's Union protested against the short notice issued to Apollo, Kazungu and Busaka.

51. It would appear that the Respondent ignored the protest by the Union and went ahead to conduct the disciplinary hearings as scheduled on 17<sup>th</sup> January 2017 and 6<sup>th</sup> February 2017.

52. The procedural fairness requirements of Section 41 of the Employment cannot be achieved if the employee is not served with specific charges and allowed adequate time to prepare and present their defence. The mode adopted by the Respondent in this case fell short of these mandatory requirements and the ensuing dismissal was procedurally unfair.

## Remedies

53. Bearing in mind the Grievants' respective periods of service, the Respondent's conduct, the evidence on record and the time lapse since dismissal, I make the following awards in favour of the Grievants:

### **1<sup>st</sup> Grievant: Wycliffe Apollo**

a. 7 months' salary in compensation.....Kshs. 558,621

b. 1 months' salary in lieu of notice.....79,803

**Total.....638,424**

### **2<sup>nd</sup> Grievant: Charles Kithi Kazungu**

a. 8 months' salary in compensation.....Kshs. 683,496

b. 1 months' salary in lieu of notice.....85,437

**Total.....768,933**

### **3<sup>rd</sup> Grievant: Fredrick Busaka**

a. 12 months' salary in compensation.....Kshs. 1,806,384  
b. 3 months' salary in lieu of notice.....451,596  
**Total.....2,257,980**

**4<sup>th</sup> Grievant: Jesse Waweru Kung'u**

c. 7 months' salary in compensation.....Kshs. 339,395  
d. 1 month's salary in lieu of notice.....48,485  
**Total.....387,880**

54. These amounts will attract interest at court rates from the date of judgment until payment in full.

55. The Respondent will meet the costs of the case.

56. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY JANUARY 2020**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Raphael Olala (Union Representative) for the Claimant

Miss Opolo for the Respondent