



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.501 OF 2014**

**PATRICK LISUTSA MASAKHWI.....CLAIMANT**

**VERSUS**

**MOGAS KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

On 1<sup>st</sup> October, 2011 the claimant was employed by the respondent as Station Manager in a fuel service station. The salary paid was ksh.22,000.00 per month. The duties allocated were that as station manager the claimant was to drive sales at the designated station of Njoro Mogas Station with a view of growing sales volumes and margins.

On 14<sup>th</sup> March, 2012 the claimant was issued with letter confirming his employment based on good performance and upon completing his probation period. On 22<sup>nd</sup> April, 2013 the claimant was awarded for exemplary service as the best station manager for the year 2012.

Around October, 2013 due to a leakage of the storage tank in the Njoro station, part of the stock leaked underground and this led to loss. The respondent's mechanic did a comprehensive review of the loss and determined the loss was attributable to the leakage of the underground tank but this report was ignored and the claimant made responsible for the loss despite having reported the loss.

In November, 2013 the respondent demanded to recover a sum of Ksh.361, 630.89 from the claimant allegedly to recover for the lost stock. The claimant was not paid his October and November, 2013 salary despite being at work and which was contrary to his contract of employment.

On 10<sup>th</sup> December, 2013 the claimant was suspended from duty on allegations of being responsible for incidences of loss of fuel at his station. Such suspension was without pay.

On 19<sup>th</sup> December, 2013 the claimant was summarily dismissed from his employment by the respondent on alleged gross negligence attributed to the leakage of fuel and the station he was manager. The claim is that such summary dismissal was not justified and amounted to unfair termination of employment as there was no due process and the claimant was not paid his withheld salary, was not given a hearing.

The claimant is seeking for the payment of his withheld salary for October and November, 2013 at ksh.54,000.00; the payment of Ksh.9,000.00 being salary arrears for 10 days worked in December, 2013; the payment of Ksh.4,050.00 half salary due while he was on suspension, compensation for unfair termination of employment, the payment of gratuity and costs.

The claimant testified in support of his case. Upon employment he worked diligently as Njoro station manager.

The station had two fuel tanks sunk underground for fuel storage. In June, 2013 one tank was discovered to be faulty which the claimant noticed following fuel losses. There was excavation and it was determined there was a small hole causing leakage of fuel underground. A repo was done on 6<sup>th</sup> December, 2013 after the claimant had been suspended and his salaries stopped. Despite the claimant having reported the loss, he was not allowed to seek the investigation report after the excavation for this it is considered and to allow him resume work. The summary dismissal was not justified as there was no good reason for the same.

**Defence**

The defence is that the claimant was employed by the respondent as station manager at Njoro but in October, 2013 there were reports of an abnormal loss of fuel especially on the night of 13<sup>th</sup> October, 2013 when the claimant said to have lost 3,355 litres of fuel through an underground tank. This kind of loss was unprecedented and the respondent decided to conduct an investigation as to whether there was an underground leakage of the fuel tank to account for such loss.

The respondent dug out the underground tank through a hydro test and retained the services of Petersons Technical Services who conducted the same. On 9<sup>th</sup> December, 2013 the hire company submitted a report which confirmed that the underground tank had a tiny perforation the size of a pin hole, the amount of water that was lost through the tiny hole was 315 litres over a period of 27 days which translated to approximately 11.6 litres per day and that since the porosity of super petrol is higher than water, the amount of petrol that could have leaked over the same period is approximately 1,245 litres.

The defence is also that based on the investigations report, the huge loss of fuel noted, it was established that the claimant was dishonest and had stolen fuel product or negligently led to the loss of the fuel.

The claimant as called for a meeting on 30<sup>th</sup> October, 2013 and the claimant admitted that on 9<sup>th</sup> October, 2013 he had noted a variance of 1,500 litres of super petrol stock while doing his calculation but failed to report the same immediately but instead overstated the stock at the station so as to conceal the loss. On the same date, 9<sup>th</sup> October, 2013 the claimant received fuel at hi station but he failed to check and record the tank dips and pump metres before and after loading to confirm the actual amount received and ascertain any loss during offloading. On equal date the claimant failed to lock the super petro tank.

The defence is also that in the month of October, 2013 the claimant altered the actual fuel stocks of affected super fuel while doing his daily reports to the head office and on 12<sup>th</sup> October, 2013 the day before the alleged loss of 3,355 litres of super petrol, the claimant failed to check or record the tank dips and metres before and after offloading to ascertain the amount of super petrol received at the station.

At the meeting held on 30<sup>th</sup> October, 2013 the claimant as informed of the findings of the investigations and his gross misconduct being that of altering and misreporting actual stock movement in his reports to the head office in order to conceal theft of stock, not following the laid down offloading procedures and not locking super petrol tank.

The claimant was suspended from employment on 10<sup>th</sup> December, 2013 and per procedure he was not entitled to any pay. This was to allow for an audit with regard to stock loss and the losses occasioned to the respondent. Upon investigations, it was established that due to the negligence, theft and false reporting by the claimant the respondent lost approximately ksh.421, 297.00. This was communicated to the claimant and he was asked to respond on how he was going to compensate the respondent for the same.

On 19<sup>th</sup> December, 2013 the respondent decided to dismiss the claimant for gross misconduct. There was calculation of terminal dues which were used to offset what the claimant owed.

The dismissal of the claimant was lawful and justified following the claimant defrauding the respondent through giving false and altered reports to conceal theft and failing to follow the laid down procedures. The total loss of Ksh.421, 297.00 has not been paid.

John Marube testified in support of the defence. At the time the claimant was employed with the respondent the witness was the retail analyst and took account of the day to day running of the fuel stations checking on the stocks. Each station manager was required to account for the stocks, sales and staff and send daily and monthly reports to the head office.

On 13<sup>th</sup> October, 2013 the claimant sent a report to the head officer for sale of stocks and there was a variance of 3,355 litres of super petrol. The claimant justified the variance on the basis that there was a leakage of fuel tank which prompted for investigations.

The respondent commissioned a company to undertake a hydro test. The claimant was suspended to allow for the same and the investigations revealed a small hole in the underground take and when the hydro paste analysis was done, the loss of 3,355 fuel loss was not accounted for. It was also established that the claimant failed to report the matter to the head office when he detected fuel losses from June to October, 2013 and followed this up by misreporting to conceal theft and negligence. The claimant was also found to have altered the records to cover the losses and cancel material information from the respondent. The total loss to the respondent was assessed at Ksh.421, 297.00.

Mr Marube also testified that the claimant was invited to respond to the allegations made against him and he admitted to having been negligent.

At the close of the hearing, both parties filed written submissions.

The court has considered the pleadings, the evidence of the parties and the written submissions and can summarise the emerging issues for determination as follows;

Whether employment terminated wrongfully;

Whether the remedies sought are due; and

Who should bear costs?

On the first issue for determination, the claimant has based his claim as being a case of wrongful termination of employment. This is the issue registered as being in dispute.

Section 47 (5) of the Employment Act, 2007 places the burden on the employee to proof a case of unlawful termination of employment and creates an obligation on the employer to rebut the same in the following words;

47 (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

In this case, the claimant was summarily dismissed from his employment with the respondent vide letter dated 19<sup>th</sup> December, 2013 which stated as follows;

#### SUMMARY DISMISSAL

Refer to the incidences where 4500 litres of PMS was lost in your station and subsequent investigations and meetings that followed at head office.

Gross negligence was revealed on your part as follows:

1. You did not follow offloading procedure when receiving fuel to the PMS tank on date 9.10/13 and date 13/10/13 thus exposing the company to loss of product.
2. You altered actual movement in your daily reporting to head office for the month of October 2013 thus misleading head office on tank movement. This was evident comparing your original book entry to the reports you sent too head office.
3. You knowingly left the PMS tank open exposing it to theft through siphoning of product.

In view of the above and subsequent suspension, the management had reached to a decision of terminating your services with immediate effect. ...

Before the summary dismissal, the claimant had been suspended from duty by letter dated 10<sup>th</sup> December, 2013. This was on the grounds that there was loss of 4500 litres of fuel at his station and investigations would be conducted.

In the letter of suspension the respondent noted that the allegations made against the claimant had been brought to his attention and the claimant ad requested for two (2) days off until 11<sup>th</sup> December, 2013 to follow up on the hydro tests.

Upon the employment of the claimant, he was confirmed into his employment upon his successful completion of the probation period. The claimant was also issued with his job description setting out his key results areas. These included management of stocks in his station, conducting regular stock reconciliations on a daily basis and as required. The claimant was also required to ensure the proper keeping of records.

From the filed records, the claimant by email dated 14<sup>th</sup> October, 2013 he raised alarm following what he found to be *abnormal underground loss of PMS tank two at Njoro*. The claimant noted that he had checked on stocks and found a loss of 827 litres of fuel. He called the retail supervisor, Stanley and was advised to transfer the remaining fuel to PMS tank one and an amount of 2,842 litres was moved and total amount was 3,600 litres. The claimant left for home but was called back by the retail supervisor to check on the litres and at around 9pm he found the stock at 2,600 litres. He was advised to move the fuel to a spare tank and to call the OCS Njoro to give him officers for security during the transfer of fuel that night. He finally left the station around 12 midnight after pumping 2,480 litres of fuel. In the morning he found the 100 litres left in the tank had all leaked.

On his report, the claimant reported a loss of 3,355 litres of fuel.

The claimant also reported that around 2pm robbers struck Syma petrol station in Njoro.

Summary dismissal of an employee from his employment is allowed under the provisions of section 44(3) and (4) of the Employment Act, 2007. However, the safeguard given to the employee is at section 41(2) of the Act. There must be a hearing of the employee before such sanction of summary dismissal can issue. Another safeguard is section 43 of the Act which requires the employer to have a valid and genuine reason(s) so as to justify the sanction of terminating employment.

As correctly submitted by the claimant in the case of **bamburi Cement Limited versus William Kilonzi [2016] eKLR** and in the case of **Anthony Mkala Chitavi versus Malindi Water and Sewerage Co. Limited [2013] eKLR** under section 41 of the Employment Act, 2007 the employer is required to ensure procedural fairness to the employee by informing the employee on the charges levelled against him and to allow the employee to have a hearing in the presence of his representative.

In this case, the claimant was suspended from duty on 10<sup>th</sup> December, 2013 to allow for investigation. By taking this option, the respondent as the employer should have invited the claimant for a hearing based on the findings of the investigation as he had been removed from office to allow for the same to be completed.

Up and until the 10<sup>th</sup> December, 2013 when the claimant was suspended, the emails exchange between him and Ms Lillian Gathara revolved around the claimant's role as station manager at Njoro and the loss of fuel alleged to have occurred. There was however no agreement.

These exchanges of emails can be traced from 5<sup>th</sup> November, 2013 when the claimant wrote;

High H/R, I have read your email to me and according to report given by company's mechanic said that the tank had leakage. It is not fare to me to pay fuel that has been leaked underground which was beyond my control.

In response, Ms Lillian Gathara told the claimant;

- *Following your summon to the office, it was communicated clearly about your gross negligence;*
- *Altering and misreporting actual stock movement to head office.*
- *Not following offloading procedure.*
- *Not locking PMS tank. ...*

These matters weighed on their merits, the respondent though with justified reasons as at 10<sup>th</sup> December, 2013 to dismiss the claimant from his employment took the option to send him on suspension. Putting the mandatory procedures of section 41 of the Employment Act, 2007 which ought to have followed upon suspension and which the respondent failed to address, this led to procedural unfairness.

The claimant is also not without blame. During the hearing on 9<sup>th</sup> October, 2013 he admitted he had noted the loss of 1,500 litres of fuel but he failed to report to the respondent for remedial action and for the same to be mitigated.

Proper taking of records was a primary duty of the claimant in his position as station manager at Njoro. Where he was required to take stock reading each day and send reports to the head office and he failed to address, the loss occurring to the respondent as the employer accrue to him.

Where the respondent incurred loss due to the negligence of the claimant, there is no counter-claim herein for the same.

The evidence that the claimant was paid his terminal benefits less what he owed the respondent is not supported by any record. The schedule of what was owed and what was claimed from the claimant is denied of this court.

This is so as the amount of fuel losses stated in the statement of defence and the filed records kept on changing from 3,355 litres of fuel, to 4,500 litres of fuel and to approximately 1,245 litres based on the hydro test conducted by the retained company.

Had these matters been addressed with the claimant before the sanction of summary dismissal issue don 19<sup>th</sup> December, 2013 he would have given his defence and would not have been necessary. To cause the claimant to pay for the loss of fuel whose amounts were not ascertained and given in approximates ended in unfair termination of employment and a double punishment.

Without any records of payment of terminal dues owing to the claimant, his salary for October, November and for 19 days worked in December, 2013 are due. The claimant was last earning ksh.27, 000.00 per month and this translates to ksh.71, 100.00.

Notice pay of one (1) month is due to an employee whose employment is terminated without due process and where the procedures set out under section 41 of the Employment Act, 2007 are not followed. The claimant is hereby awarded ksh.27, 000.00 in notice pay.

The claim for half salary not paid during suspension is addressed with the award for the 19 days worked in December, 2013.

The claim for gratuity for work for 2 years is not justified as this was not an agreed term of employment and the same is not premised on any law.

The payment above is found to be appropriate compensation to the claimant following his summary dismissal.

**Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of the following dues;**

**Notice pay ksh.27, 000.00;**

**Unpaid salary Ksh.71, 100.00;**

**Each party shall bear own costs.**

**Delivered at Nakuru this 25<sup>th</sup> day of April, 2019.**

**M. MBARU JUDGE**

In the presence of:

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