



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 855 OF 2013**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 17<sup>th</sup> September 2019)*

**JESSE MUHORO KARIUKI .....CLAIMANT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed the instant Claim vide the Memorandum of Claim dated 5<sup>th</sup> June, 2013 filed in Court on 6<sup>th</sup> June, 2013, through the firm of Kinyua Mwaniki & Wainaina Advocates seeking damages for wrongful dismissal from and termination of his employment by the Respondent herein.

2. The Claimant states that he was employed by the Respondent as a Technician III (Operations) in the year 1994 earning a basic monthly salary of Kenya Shillings Ten Thousand Two Hundred and Seventy Only.

3. He further states that he performed his duties diligently and to the Respondent's satisfaction raising ranks to the position of Technician I with a salary progression to Kenya Shillings One Hundred and Fifty Nine Thousand and Two (Kshs. 159,002/-) as evidenced by the attached payslips and the award for long service issued to him.

4. The Claimant contends that on or about 17<sup>th</sup> March, 2010 he was invited to appear before the Central Region Staff Disciplinary Committee on 25<sup>th</sup> March, 2010. Which meeting was later postponed to 30<sup>th</sup> March, 2010, where he was interrogated on an alleged incident of siphoning of MSP product that occurred on 28<sup>th</sup> February, 2010.

5. The Claimant further contends that he did attend the meeting as requested and subsequently his service summarily dismissed by the Respondent herein. He avers that the dismissal was unfair as no investigations were presented to him to ascertain his participation in the events of 28<sup>th</sup> February, 2010 prior to his summary dismissal.

6. In his Memorandum of Claim the Claimant prays for Judgment be entered against the Respondent for:-

*i. A declaration that the termination of the Claimant from the Respondent's Company was wrongful, null and void.*

*ii. One Month salary in lieu of notice amounting to Kshs. 159,002/-.*

*iii. Four (4) months equivalent of salary from the date of suspension to date of dismissal amounting to Kshs. 636,008/-.*

*iv. Damages for unfair termination equivalent to a period of twelve (12) months which amount to Kshs. 1,908,024/- (i.e 159,002/- x 12)*

*v. Costs of the suit*

*vi. Interest*

*vii. Any other or further remedy this Honourable Court may deem just and expedient to grant.*

7. The Respondent in its Response to the Memorandum of Claim dated and filed in Court on 20<sup>th</sup> June, 2013 admits having employed the Claimant. It further contends that the Claimant's services were rightfully and lawfully summarily dismissed and that due process was followed.

8. The Respondent asserts that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim as his services were terminated after he had been accorded an opportunity to be heard.

9. In conclusion, the Respondent contends that the instant Claim ought to be dismissed with costs.

### **Evidence**

10. On 4<sup>th</sup> April 2019, the claimant (CW1) gave his evidence. He adopted his witness statement dated 29<sup>th</sup> March, 2019 as his evidence in chief. In his statement, CW1 reiterated the averments made in his Memorandum of Claim.

11. CW1 further testified that the investigation report at page 3 to 31 of the Respondent's Bundle of Documents was not shared with him prior to the filing of the instant claim.

12. He further testified that on 28<sup>th</sup> February, 2010 he was on duty as a shift controller and was responsible for any problem that would arise. It was his testimony that there was no incident that was brought to his attention on the said date.

13. CW1 averred that he was not given an opportunity to appear with any witness nor was he informed of his rights at the disciplinary hearing. He urged this Honourable Court to allow his Claim as prayed.

14. On cross-examination, CW1 stated that he was on duty on 28<sup>th</sup> February, 2010 as a shift controller on lane 1. He further testified that there was no theft that occurred on the said date of petroleum product as alleged by the Respondent.

15. On further cross examination CW1 admitted having been taken through disciplinary proceedings to explain how the Respondent's products were stolen. He further testified that following the disciplinary proceedings he was suspended from duty. He further stated that at the disciplinary hearing he was not accompanied by anyone.

16. CW1 insisted that he did not receive any report on any issue on the night of 28<sup>th</sup> February, 2010.

17. CW1 stated that following the decision to dismiss his services he lodged an appeal with the Respondent which appeal was heard by an Appeals committee and the same was dismissed.

18. CW1 contended that he was not given a fair hearing prior to his termination.

19. On re-examination, CW1 stated that there was no evidence adduced at the disciplinary hearing indicating any loss occurring on 28<sup>th</sup> February, 2010.

20. The Respondent on the other hand put up one witness one Mr. Henry Lenairoshi, Senior Human Resource Officer with the Respondent Company. RW1's written statement dated 21<sup>st</sup> March, 2019 was adopted as his evidence in chief in which he reiterated the averments in the Response to the Memorandum of Claim.

21. RW1 further testified that the Respondent received reports on diverse dates on 1<sup>st</sup> January, 2010 and 28<sup>th</sup> February, 2010 that there had been theft of products through a anonymous letter and that the Respondent proceeded to conduct its investigation and found the Claimant among other staff members culpable and suspended them.

22. RW1 further stated that the Claimant was taken through a disciplinary hearing and thereafter he was summarily dismissed. The decision was thereafter appealed by the Claimant and the Appeal duly heard however, the dismissal was upheld.

23. RW1 urged the Court to find that due process was followed and that the instant Claim be dismissed with costs.

24. On cross-examination, RW1 admitted that the investigation report attached to the Respondent's Bundle of Documents does not contain any meter readings. He further admitted that the Claimant was asked in his Notice to Show Cause to explain loss of MSP product and that the suspension letter referred to loss of AGO product.

25. On further cross examination RW1 stated that the Claimant was dismissed as he was expected to be alert and that the loss was attributed to his negligence while on duty.

26. RW1 admitted in his cross examination that the Claimant had not received any warning prior to his termination.

27. On re-examination RW1 confirmed that MSP and AGO were both petroleum products. He further confirmed to this Honourable Court that the Claimant was accorded a fair hearing as envisaged in the Employment Act prior to his dismissal.

28. Parties thereafter filed and exchanged their respective submissions to the instant Claim.

## **Submissions**

29. The Claimant submitted that his dismissal was unfair as no evidence of any wrongdoing on his part was adduced at the hearing by the Respondent to warrant his summary dismissal.
30. The Claimant further submitted that he was not offered an explanation as to why his services were terminated yet those of his co-workers George Mutungi and Patrick Jumba who were also on shift on 28<sup>th</sup> February, 2010 were not disciplined.
31. The Claimant further submitted that his dismissal was procedurally and substantively flawed and that the same was unfair and contrary to the provisions of **Section 43 and 45 of the Employment Act, 2007**. To fortify this argument the Claimant relied on the cases of **Stephen Maina Thumbi Vs Equity Bank Limited (2018) eKLR** and **Jaffar Mohamed Vs Ready Consultancy Co. Ltd (2015) eKLR**.
32. In conclusion, the Claimant urged the Court to allow his Claim as drawn having proved his case.

## **Respondent's submissions**

33. The Respondent on the other had submitted that following her investigations on the happenings of 28<sup>th</sup> February, 2010 where unauthorised commands on the Supervisory Control Automatic Data Acquisition (SCADA) System which the Claimant ought to have been aware of as he was a technician and was on shift as the controller.
34. The Respondent concluded that the Claimant was indeed negligent in the performance of his duties thereby proceeding to summarily dismiss him on account of gross misconduct.
35. The Respondent further submitted that prior to his termination; the Claimant was accorded a fair hearing in accordance with the provisions set down in Sections 41 and 45 of the Employment Act, 2007. To fortify this argument the Respondent relied on the cases of **Kenya Plantation & Agricultural Workers Union Vs Delmonte (K) Ltd (2019)** and the Court of Appeal decision of **Judicial Service Commission Vs Gladys Boss Shollei & Another (2014) eKLR**.
36. It is further submitted that the Respondent was indeed justified to terminate the Claimant from his employment as its investigation found the Claimant guilty of gross misconduct. It is further submitted that the Respondent in terminating the Claimant was guided by the provisions of Section 44 of the Employment Act, 2007.
37. In conclusion the Respondent submitted that it was justified in summarily dismissing the Claimant herein and urged the Court to be persuaded by the decisions in Cause No. 1790 of 2011 and Cause No. 452 of 2012 both filed against the Respondent and were under similar circumstances as the instant case that were dismissed. Similarly, the Respondent prayed that this suit be dismissed with costs.
38. I have examined all the evidence and submissions of both parties. The issues for this Court's determination are as follows:-

- 1. Whether the Respondent had valid reasons to dismiss the services of the Claimant.***
- 2. Whether the Claimant was given a fair hearing before being dismissed.***
- 3. Whether the Claimant is entitled to the remedies sought.***

39. As a start, the Claimant was dismissed vide a letter dated 16<sup>th</sup> August 2010 which indicated that it had been observed that the company had lost (AGO) Product on 28<sup>th</sup> February 2010 while he was on duty as Shift Controller which made the Respondent observe that he should have been more alert in discharging his duties considering that he was aware of his responsibilities and that the illegal transfer occurred on 1<sup>st</sup> January 2010 with the same shift on duty.

40. The Respondent observed that this reflected negligence on his part leading to the illegal transfer of the Product on 28<sup>th</sup> February 2010.

41. He was therefore dismissed in line with the SRR, Clause 8.F.3 which states as follows:-

***“if an employee neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly”.***

42. Prior to this dismissal, the Respondent case is that the Claimant had been on duty on 28<sup>th</sup> February 2010 standing in for one Andrew Ngaruiya as Shift Controller. That after this theft, the Claimant was placed on suspension pending investigations into the matter.

43. The Respondents averred that the investigations revealed that on 28<sup>th</sup> February 2010, when the theft occurred, there were unauthorised commands on the Supervisory Control Automatic Data Acquisition (SCADA) System which the Claimant ought to have been aware of considering that he was a Technician and was Shift Controller. He was therefore found to have been negligent in performance of his duties.

44. The Claimant on his part denied that there was any theft on 28/2/2010 when he was on duty. He was thereafter taken through a disciplinary process. He denied ever confirming that the theft occurred.

45. The Respondent filed minutes of the disciplinary meeting, which indicate that the Claimant had indicated he was on duty on 28/5/2010 and had left to have super between 22.54 hours and 23.20 hours and that was the same time the produce was siphoned out.

46. The Respondent relied on Appendix 2 – the investigation report upon which the theft was established. It is dated June 2010. At Clause 8.7 of the report show theft occurred while Claimant was on duty and this showed negligence on his part.

47. From the deliberations of the committee and this report, the Claimant was indeed on duty the day the theft occurred. He was the shift supervisor and ought to have discharged his duties diligently.

48. The Claimant contended that he was invited for a disciplinary meeting indicating he was to shed light on alleged siphoning of MSP product in an irregular manner on 28<sup>th</sup> February 2010. He was however found culpable on not explaining how the company lost (AGO Product) and not MSP Product which are two different products. The Claimant appealed against the decision to dismiss him and he was taken through the appeals process and he was still found culpable.

49. In view of the evidence above, I find that the Claimant was shift supervisor. It is also true that some fuel or fuel products belonging to the Respondent were indeed stolen at the time he was on duty. As the supervisor, he ought to have been careful in discharging his duties. It is my view that he displayed some negligence and that is why the Respondent lost their properties. In my view, the Respondent had a valid reason to dismiss the Claimant.

50. I have already alluded to the fact that the Claimant was also taken through the disciplinary process, which he has not denied. It is therefore true that he was accorded a fair hearing before he was dismissed.

51. In view of the above finding, I find the claim by the Claimant has no merit. I therefore dismiss this claim accordingly with no order as to costs.

**Dated and delivered in open Court this 17<sup>th</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ngethe holding brief Mwaniki for Claimant

Respondent – Absent