



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.452 OF 2012

ANDREW M. NGARUIYA..... CLAIMANT

- VERSUS -

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 19.03.2012 through Wachira Nderitu & Company Advocates. He prayed for:

- 1) Declaration that the claimant's summary dismissal from employment by the respondent on 12.10.2010 was illegal, wrongful and unlawful.
- 2) An order against the respondent to forthwith reinstate the claimant.
- 3) An order against the respondent to pay in arrears the claimant's full salary and allowances and interest thereon as from 12.10.2010 to the date of such reinstatement or judgment of the Honourable Court.
- 4) General damages and interest thereon for breach of contract to be assessed on the basis of the salary the claimant would have earned until his retirement.
- 5) Any other or alternative relief that the Honourable Court may deem fit to award.
- 6) Cost of the claim herein.

The response was filed on 19.04.2012 through Munga Kibanga & Company Advocates.

It is not in dispute that the respondent employed the claimant in the position of a Chief Technician at the Nairobi Terminal as at the time of termination. The claimant had been employed in 1987 as Technician II and had been promoted through the ranks. As a Chief Technician his basic monthly pay was Kshs.163, 200.00 per month.

The claimant was suspended from work by the letter dated 05.03.2010 upon an investigation report which indicated that MSP product was siphoned out in an irregular manner on or about 01.01.2010. The letter stated that the claimant was one of the people on duty in the control room and related environs on the material date and was therefore being suspended on that account. The claimant was invited for disciplinary hearing on 25.03.2010 but which appears to have been adjourned and subsequently held on 30.03.2010.

The claimant was summarily dismissed from employment by the letter dated 12.10.2010. The letter stated that it had been observed that the claimant had not been vigilant with his team as expected given that some of the staff on duty on 01.01.2010 had questionable backgrounds from past incidents of product theft of which the claimant was well aware. Thus, the letter stated that the same reflected negligence on the claimant's part leading to the illegal transfer of the product on 01.01.2010. The claimant was therefore summarily dismissed as per clause 8.F.7 of the respondent's Staff Rules and Regulations which stated, "**If an employee commits, or on reasonable and sufficient ground is suspected of having committed, any criminal offence against or to the substantial detriment of his/her employer or his/her employer's property.**" The claimant administratively appealed against the dismissal and the respondent's board considered it on 29.09.2010 and dismissed it.

The minutes on record for the respondent's meeting held on 25.08.2010 show that at the disciplinary hearing before the Board Human Resource Committee (BHRC), the claimant was remorseful for the irregular pumping of the product and accepted that he should take responsibility for the actions of his supervisees. The BHRC made observations as follows:

a) The claimant admitted that things went wrong under his watch.

b) The claimant admitted that he should take responsibility for his own actions or inactions and the actions of his supervisees leading to the theft of products on the material date.

c) Evidence showed that his name appeared on the products daily transfers' summary form (OPS 10) for 01.01.2010 which provided misleading data on products gains and losses on the material date whereas it was his responsibility as station controller to check the accuracy of the data.

d) Witnesses had stated that on 01.01.2010 the claimant entered the control room soon after 22.30 hours when the rest were having their dinner. That had given the claimant the opportunity to issue commands to the SCADA system for the illegal transfer of products. The commands had been recorded to have commenced from 22.36 hours and included the starting of a pump at 22.38 hours. Product flow rates were recorded from 22.40 hours.

The respondent filed the relevant investigation report.

The claimant testified to support his case. The court has revisited that testimony. The claimant stated that his dismissal was unfair for want of a valid reason. He alleged that he was not shown any documentation on the loss. The Court finds that throughout the claimant's evidence in Court, he did not rebut any of the respondent's findings as filed in Court and reproduced earlier in this judgment. The Court finds that the claimant was remorseful, admitted the case as was leveled against him, and he was liable to dismissal. He was accorded due process as per section 41 of the Employment Act, 2007 on notice and hearing. He failed to exculpate himself. The Court finds that the respondent had a genuine reason to dismiss the claimant as envisaged in sections 43 and 45 of the Act. The dismissal was not unfair both in procedure and substance.

Accordingly, the Court returns that the claimant is not entitled to any of the remedies as prayed for.

In conclusion the claimant's memorandum of claim is hereby dismissed with costs to the respondent.

Signed, dated and delivered in court at **Nairobi** this **Friday 22nd June, 2018**.

BYRAM ONGAYA

JUDGE