



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 297 OF 2014

FREDRICK OTIENO OKEYO.....CLAIMANT

v

MENENGAI OIL REFINERIES LTD.....RESPONDENT

JUDGMENT

1. Fredrick Otieno Okeyo (Claimant) was appointed as an ungraded Electrician by Menengai Oil Refineries Ltd (Respondent) effective 1 October 2013.
2. On 9 July 2014, he commenced legal action against the Respondent and he stated the issue in dispute as *unfair termination*.
3. In the Memorandum of Claim he sought one month pay in lieu of notice, 12 months wages as compensation for unfair termination of employment, leave pay and a Certificate of Service.
4. The Respondent filed a Response on 17 October 2014, and this prompted the Claimant to file a Reply to Response on 24 October 2014.
5. The Cause was heard on 18 December 2014, 19 February 2015 and 16 April 2015. The Respondent filed its submissions on 22 May 2015. The Claimant filed his submissions on 16 June 2015 and not before 30 April 2015 as directed (explanation offered was being overwhelmed by work).
6. The Court has considered the pleadings, evidence and submissions and identified the issues arising for determination as, *whether the summary dismissal of the Claimant was unfair* and if so, *appropriate remedies*.

Whether summary dismissal was unfair

Procedural fairness

7. The Claimant testified. He stated that on 13 June 2014, the Respondent's Transport Manager requested him to go the Boardroom. In the Boardroom, there were other employees (they have filed separate suits).
8. While in the Boardroom, the Respondent's Human Resources Assistant, Peter Kanenje requested him to write a statement explaining about his involvement in the theft of petrol. He stated that he wrote a letter denying the allegations.
9. In the afternoon, the said Human Resources Assistant asked him to leave and come back on 16 June 2014, but on this date he was refused entry by guards because the person handling his case was not

around.

10. On 17 June 2014, he returned and met the Human Resources Assistant who wanted him to accept the allegations but when he declined he was instructed to leave.

11. The Claimant stated that he was given a show cause letter dated 13 June 2014, but he refused to acknowledge its receipt. He also admitted that the Respondent wrote to him another letter dated 16 June 2014 and again he refused to sign it.

12. As a result, the Claimant stated that he was informed on 17 June 2014 that he had been dismissed and should wait to be paid his dues.

13. The Claimant further stated that he made a complaint to the local Labour office and he was advised to write a letter which he did on 24 June 2014. In the letter he was denying the allegations of theft of petrol.

14. The Claimant also stated that he was not confronted with any witnesses who allegedly saw him stealing petrol and that he was not accompanied during the session in the Boardroom.

15. At the end of June 2014, a colleague brought to him his pay slip. He denied being given a dismissal letter.

16. During cross examination, the Claimant admitted that he was informed of the allegations against him while in the Boardroom, and that the Human Resources Assistant gave him a pen and paper and asked him to respond to the allegations. He responded in writing.

17. Section 41 of the Employment Act, 2007 provides for procedural fairness. It is what is called natural justice (*audi alteram partem* rule) in public law.

18. The essence of procedural fairness is that before taking the decision to dismiss an employee, the employer should inform the employee of the reasons or allegations laid against him and the employee should be given an opportunity to respond to the allegations. The statute also contemplates the employee being accompanied by a colleague or shop steward, if a union member.

19. In the instant case, the Claimant admitted that the Human Resources Assistant informed him of the allegations or charges in the Boardroom. He also admitted that he was issued with 2 show notices dated 13 June 2014 and 16 June 2014. He was asked to respond and was given pen and paper. He made a one paragraph explanation denying the allegations.

20. The only missing link was that he was not accompanied by a colleague. The Claimant has not shown any prejudice or injustice he suffered on account of not being accompanied by a colleague.

21. In the view of the Court, the hearing contemplated by section 41 of the Employment Act, 2007 does not require an employer to hold a mini-court.

22. Consequently, the Court finds that the Respondent was in substantial compliance with the statutory requirements of procedural fairness.

Substantive fairness

23. An employer should prove the reasons for dismissing an employee (section 43 of the Employment Act, 2007) and that the reasons are valid and fair (section 45 of the Act).

24. The Respondent's witness, Peter Kanenje (Human Resources Assistant) stated that he received information about employees siphoning petrol and using the same to fuel their motorbikes. 4 employees were suspected and after interrogations, the Respondent narrowed to 2 employees (including the Claimant and Isaiah Gitimu in Nakuru Cause No. 296 of 2014).

25. He stated that the Claimant was not caught red handed but there was information that he was involved and that the Respondent concealed its witnesses due to concerns about their security. When pressed he mentioned the Transport Manager and a supervisor called Victor.

26. The Claimant had a motorbike and it was not in the designated parking, which had CCTV coverage.

27. The Respondent's witness also stated that the Claimant's work did not involve use of petrol and that he was not caught red-handed. No explanation, however was given of how the Claimant got access or possession of petrol he allegedly stole, or of a shortage of fuel from any particular vehicle.

28. Courts determine cases on the basis of material placed before it. The evidence placed before the Court by the Respondent falls short of what is required of an employer to discharge the statutory burden.

29. The people named as implicating the Claimant were not presented before Court and the Court can only conclude that the Respondent has failed to prove that the Claimant was involved in theft of petrol or that the reason was a valid and fair reason.

30. The Court finds the dismissal substantively unfair.

Appropriate remedies

One month pay in lieu of Notice

31. At dismissal, the Claimant's basic pay was Kshs 17, 240/-. Pursuant to sections 35 and 36 of the Employment Act, 2007 and clause 6 of the letter of appointment, the Claimant is entitled to Kshs 17,240/- under this head.

12 months wages compensation

32. The Claimant served the Respondent for about 1 year. His chances of securing alternative employment or self employment are more than average.

33. Considering these 2 factors the Court would award him the equivalent of 2 month's gross wages of Kshs 42,506/- as compensation for unfair termination of employment.

Leave pay

34. The Claimant served for 9 months and by virtue of section 28 of the Employment Act, 2007 was entitled to 15.75 days as *pro rata* leave.

35. The pay slip for June 2014 he produced indicate he was paid Kshs 9,920/- on account of leave. This claim therefore does not lie.

Certificate of service

36. This is a statutory right and the Respondent should issue one to the Claimant within 7 days.

Conclusion and Orders

37. The Court finds and holds that although the summary dismissal of the Claimant was procedurally fair, the Respondent has failed to prove the reasons for the dismissal and that the reasons were valid and fair and therefore the dismissal was substantively unfair.

38. The Court awards and orders the Respondent to pay the Claimant

(a) 1 month pay in lieu of Notice

Kshs 17,240/-

