



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

CAUSE NO. 296 OF 2014

ISAIAH GITUKU GITIMU.....CLAIMANT

v

MENENGAI OIL REFINERIES LTD.....RESPONDENT

JUDGMENT

1. Isaiah Gituku Gitimu (Claimant) was employed by Menengai Oil Refineries Ltd (Respondent) as a mechanic through a letter dated 1 October 2013. According to the letter, the effective date of employment was 1 November 2013.
2. On 9 July 2014, the Claimant filed a Memorandum of Claim against the Respondent alleging *unfair termination* of employment and seeking Kshs 217,170/- being one month pay in lieu of notice, 12 months compensation and outstanding leave. The Claimant also sought a certificate of service.
3. The Respondent filed a Response on 17 October 2014, and the Cause was heard on 19 February 2015, 25 February 2015 and 16 April 2015. The Claimant was to file and serve his submissions before 30 April 2015 but the same were filed on 16 June 2015 (the Claimant explained the delay in its letter dated 15 June 2015 as due to being overwhelmed). The Respondent filed its submissions on 22 May 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the summary dismissal of the Claimant was unfair* and if so, *appropriate remedies*.

Whether summary dismissal was unfair

Procedural fairness

5. A hearing before a decision to dismiss is a statutory requirement. This was not always the case as this requirement was introduced into the employment relationship by virtue of section 41 of the Employment Act, 2007.
6. The Claimant contended in the pleadings that he was not given notice nor accorded a fair hearing before the dismissal.
7. During testimony, he stated that on the morning of 13 June 2014, the Transport Manager informed him that he was a thief and therefore he should remove his overall and go see a Human Resource officer called Maina.

8. The Claimant stated he did not find the said Maina but found a Mr. Peter who instructed him to go to the Boardroom. The said Peter informed him that the Transport Manager had alleged he had stolen petrol and gave him a letter.
9. The letter was a show cause notice dated 13 June 2014, and it requested the Claimant to explain the allegation of siphoning petrol and filling the same into his motorbike.
10. The Claimant stated that he responded to the show cause notice in writing denying the allegations (though he stated he was coerced by a Police officer brought by the Respondent, to sign the letter).
11. In the afternoon, the said Peter asked him and other employees who were facing disciplinary action to leave and return on 16 June 2014. He said that the concerned officer was not around on this day and they were instructed to return on 17 June 2014.
12. The Claimant stated that on 17 June 2014, he was given a letter dated 16 June 2014, informing him that his explanation was not satisfactory and therefore he should avail himself for a hearing at 9.30 am.
13. He stated he refused to acknowledge the letter and therefore he was told to go home and wait to be called to collect his dues. At the end of the month a colleague brought him his pay slip showing his dues had been paid into his bank account. Thereafter, he stated he reported to the Labour office.
14. In cross examination, the Claimant stated that the Human Resource officer, Peter, told him he was accused of stealing petrol and he should explain. He was also given a pen and paper and requested to write an explanation.
15. In cross examination, the Claimant admitted that he was not induced to write the explanation.
16. The Claimant also admitted that he was given a letter inviting him to a hearing but which he did not sign and that on 17 June 2014 he went for the hearing in the Boardroom after which he was told to go home and wait to be called to collect his dues.
17. The Claimant denied that he was afforded an opportunity to make representations.
18. From the narration given by the Claimant, it is clear that he was verbally informed that he was suspected of stealing the Respondent's petrol and using the same to fuel his motorbike. He was also given a show cause letter setting out the allegations and he was requested to respond which he did. After the written response, he was invited to a face to face hearing which took place on 17 June 2014.
19. The hearing contemplated by section 41 of the Employment Act, 2007 does not require an employer to hold a mini-court. The process can be conducted either through correspondence or through face to face hearing.
20. The Respondent informed the Claimant both orally and in writing of the charges against him and asked for a written response. The Respondent found the explanation insufficient and called for an oral hearing which took place.
21. Although the Respondent's witness stated that minutes of the hearing were not kept and that the Claimant was not accompanied by a colleague during the hearing, the Claimant did not demonstrate that he suffered any prejudice or injustice.
22. The Court is satisfied that the Respondent complied with the statutory requirement as to a hearing and procedural fairness.

Substantive fairness

23. On this aspect, the roles become reversed somewhat. Under section 43 of the Employment Act, 2007,

the employer should prove the reasons for dismissal and further (under section 45 of the Act) that the reasons are valid and fair reasons. The Court may also consider the equity and justice of the dismissal.

24. The reason given for the dismissal of the Claimant was siphoning of petrol and fueling the same into his motorbike. This is the reason the Respondent had to prove and prove as valid and fair.

25. The Claimant admitted he used a motorbike to work.

26. The Respondent's witness, Peter Kanenje (Human Resources Assistant) stated that the Claimant's duties included servicing motor vehicles and the department had about 10 employees. On 13 June 2014, he received information from the Transport Manager that some employees were stealing fuel and he was given 4 names including the Claimant.

27. When called, the Claimant was not cooperative and offered to leave employment. However, the Claimant denied involvement.

28. The witness stated that the Claimant could not account for the 1 or 2 litres he was taking from the stores for cleaning parts of the vehicles and that the Supervisor never saw him use the petrol for cleaning and put him under watch for sometime.

29. The witness also stated a driver of a forklift had complained that when he brought it for service, it had petrol, but when he went to collect it, the petrol was less and that it was suspected the Claimant took petrol from the forklift and used it to fuel his motorbike.

30. Among the reasons for the suspicion was that the Claimant had changed where he used to park his motorbike to near the garage.

31. The Respondent did not suggest that it had put in place any system for collecting the 1 or 2 litres of petrol from the stores or that there was any verification by another person of the need for petrol. The witness for the Respondent stated that the department where the Claimant worked had about 10 employees. Their role in collecting petrol from the stores or in servicing of vehicles was not explained. The mere fact that the Claimant had a motorbike by itself, in the view of the Court cannot rule out the involvement of others.

32. In the view of the Court, the Respondent has failed to prove that the Claimant siphoned fuel or failed to account for petrol collected from the stores.

33. The Court finds the summary dismissal unfair.

Appropriate remedies

One month pay in lieu of Notice

34. Under this head the Claimant sought Kshs 16,090/-. The Court has reached a conclusion that the summary dismissal was unfair. Pursuant to section 35 and 36 of the Employment Act, 2007, the Claimant is entitled to the equivalent of one month's basic pay as pay in lieu of notice.

35. The Claimant's basic pay was Kshs 16,090/- and the Court awards him the same.

12 months compensation

36. The Court has found the dismissal unfair. The Claimant served the Respondent for less than a year. His chances of securing alternative work as a mechanic are more than average including self employment.

37. Considering these 2 factors, the Court would award him the equivalent of 2 months gross wage of Kshs 37,156/- as compensation.

