



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 298 OF 2014

WILSON KHASAKHALA MAGANGA

CLAIMANT

v

MENENGAI OIL REFINERIES LTD

RESPONDENT

JUDGMENT

1. Wilson Khasakhala Maganga (Claimant) filed a Memorandum of Claim against Menengai Oil Refineries Ltd (Respondent) on 9 July 2014 and the issue in dispute was stated as *unfair termination*.
2. The Respondent filed a Response on 17 October 2014, and the Claimant filed a Reply to the Response on 24 October 2014. The Cause was heard on 25 February 2015 and 16 April 2015.
3. The Claimant filed his submissions on 16 June 2015 (one and a half month late) while the Respondent filed its submissions on 22 May 2015.
4. 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 appropriate remedies*.
5. The Claimant attacked his summary dismissal by impugning both the process, and the genuineness of the reasons given.
6. In testimony, the Claimant stated that on 13 June 2014, the Respondent's Transport Manager directed him to go to the Boardroom where he found 2 other employees (they have filed separate suits).
7. In the boardroom, the Respondent's Human Resources Assistant, Peter Kanenje informed him that there were allegations that he had stolen oil, which allegations he denied. The Human Resources Assistant then gave him a pen and paper and sought a written explanation, which he wrote.
8. The Claimant also stated that after giving the written explanation, he was given a letter dated 13 June 2014 (a show cause letter) but he declined to acknowledge receipt.
9. Later in the day, he was instructed to report back on 16 June 2014 but he was not allowed in by the Respondent's guards who instructed him to return the next day.
10. On 17 June 2014, the Human Resources Assistant gave him a letter dated 16 June 2014 (it was a letter inviting him to a hearing) but again he refused to sign it in acknowledgement, and after some 30 minutes, the Assistant told him go home and wait for his dues.

11. Section 41 of the Employment Act, 2007 requires an employer to observe procedural fairness before dismissing an employee.

12. In my view the essentials of procedural fairness are that the employee should be informed of the allegations against him, he should be given sufficient time to prepare a defence or response, he should be heard and where necessary, he should be accompanied by a colleague or a shop steward where he is a member of a union.

13. The Claimant herein was informed verbally and in writing of the allegations against him. He was requested to respond. He responded verbally and in writing.

14. The Respondent did not find the explanations given as sufficient as a result of which he was dismissed.

15. The only ingredient missing in the process was that the Claimant was not accompanied by a colleague during the hearing in the boardroom. But he has not demonstrated that he suffered any prejudice or injustice by that failure.

16. Procedural fairness does not require an employer to hold a mini-court, and in my view the Respondent was in substantial compliance with the requirements of procedural fairness.

17. However, an employer has a burden of proving the reasons for dismissal (section 43 of the Employment Act, 2007) and that the reasons are valid and fair (section 45 of the Act).

18. The reason given for the Claimant's dismissal was that he could not account for 2 litres of engine oil. It was not disputed that the Claimant was usually supplied with 20 litres of engine oil to use in servicing trucks.

19. It is equally not disputed that the Respondent had guards manning the gates and there were cctv cameras.

20. The Claimant admitted in cross examination that he was retaining 2 litres out of each 20 litres issue but asserted that the unused 2 litres was kept in the stores and the Store keeper, one Samuel kept records of the same. The retained oil, he stated was used for top ups.

21. The Respondent called its Human Resources Assistant to testify. He stated that the Transport Manager informed him that the Claimant could not account for all the oil issued to him to service vehicles. When he asked the Claimant to explain, he stated that he used it for top ups but the explanation did not make sense.

22. According to the witness, the information he had was that the Claimant would accumulate the 2 litres of oil until it reached 20 litres and then sneak the same out of the factory while going on rescue missions (service/repair vehicles outside Respondent's factory).

23. In cross examination, the witness stated that he had no evidence that the Claimant took the oil out.

24. The Claimant was not cross examined on his testimony that he would return or keep unused oil in the stores and that a Samuel, storekeeper had the records. The said Samuel was not called to testify and the failure was not explained.

25. On the basis of the uncontroverted testimony that the unused oil was kept in the stores and that there were guards at the gate, the Court reaches a conclusion that the Respondent has failed to prove the reason for the dismissal or that the reason was valid and fair. The summary dismissal was substantively unfair.

Appropriate remedies

One month pay in lieu of Notice

26. The Claimant is entitled to one month pay in lieu of notice by virtue of clause 2 of the appointment letter and operation of sections 35(1)(c) and 36 of the Employment Act, 2007.

27. The Claimant's proved basic pay was Kshs 18,260/- and he is entitled to an equivalent.

12 months wages as compensation

28. Compensation pursuant to section 49(1)(c) of the Employment Act, 2007 is a primary through discretionary remedy. The Claimant served the Respondent for about 2 years.

29. As a mechanic his chances of securing alternative employment or self employment are above average.

30. Considering these factors, the Court would award him the equivalent of 2 months gross wages as compensation and the Court quantifies the same as Kshs 53,200/-.

Leave

31. The Claimant sought Kshs 3,560/- on account of leave not paid. The Respondent produced the Claimant's final dues payments (pay slip) for June 2014 and it indicates that the Claimant was paid Kshs 14,700/- on account of leave. This claim therefore is not merited.

Certificate of Service

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

Conclusion and Orders

33. The Court finds and holds that though the 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.

34. The Court awards the Claimant and orders the Respondent to pay him

(a) 1 Month pay in lieu of Notice	Kshs18, 260/-
(b) 2 months gross wages compensation	Kshs 53,200/-
TOTAL	Kshs 71,460/-

35. The Claimant did not file submissions within the agreed timelines. He is denied costs.

Delivered, dated and signed in Nakuru on this 19th day of June 2015.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon