



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 629 OF 2012

JUSTUS OCHIENG ANDAYI.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

Ms Guserwa for Claimant

Mr Thuo for Respondent

JUDGMENT

1. This suit was brought on 17th April, 2014 by the Claimant seeking payment;
 - a. of Gratuity for the period 2006 to 2011
 - b. of Salary and allowance arrears for the month of January to June 2011
 - c. in lieu of notice
 - d. Reinstatement to the position without loss of benefits
 - e. Cost of the suit
2. An amended memorandum of claim was filed on 8th May 2013 to include the prayer for reinstatement.
3. An amended statement of response was filed on 4th March 2014.

Facts of the Claim

4. The Claimant was employed by the Respondent as a shift technician III operations by a letter dated 3rd November, 2006.
5. The Claimant earned a monthly salary of Kshs 130,807.50. He worked continuously until when he was summarily dismissed on 30th June, 2011 following disciplinary hearing on 21st April 2011 where the claimant answered charges of loss of fuel product from Kipevu Oil storage facility depot (Ps 14) to Shiminzi Oil Terminal (SOT) through the spur line on the night of 3rd/4th April 2011 while the Claimant was on duty.

6. The Claimant had been suspended from duty vide a letter of suspension dated 6th April 2011 pending investigations without pay.

7. The Claimant was a unionisable employee and his terms of employment were governed by an agreement for unionisable staff made on 23rd January 2012 between the employer and the union.

8. The minutes of the disciplinary hearing held on 20th and 21st April 2011 are attached to the statement of Claim in which the Claimant and others testified. The Committee made the following findings regarding the Claimant;

i. On the material night, the Claimant did not leave the control room

ii. The Committee “ did not therefore find any evidence to link him with the unexplained movement of product from station”

9. The Committee recommended “ *that he be issued with a warning letter for failing to inform the Depot Manager about the temporary staff changes in his shift*”

10. It is the Claimant’s case that the summary dismissal letter dated 30th June 2011 by Mrs R. A. Osiako which purports to derive the decision from the “*Coast Region Staff Disciplinary Committee meetings held on 21st April 2011*” has no factual basis. The same does not reflect the findings by the disciplinary committee nor did the letter follow the recommendation by the committee.

11. The letter also alludes to earlier incidents that occurred on 11th and 26th December 2010, which were not part of the disciplinary hearing.

12. The summary dismissal was therefore erroneous and at best based on malice. The same violated the disciplinary procedure of the Respondent and the CBA between the parties.

13. The Claimant therefore seeks enforcement of his rights and benefits which include;

a. Sick leave entitlement of Kshs 130,807.00

b. A months’ notice of Kshs 130,807.00

c. 5 months’ salary arrears of Kshs 654,035.00 for the period of termination.

d. Overtime payment of Kshs 130,807.00; and

e. severance pay of Kshs 130,807.00

n. In the alternative, the Claimant seeks reinstatement without loss of benefits.

Amended Response

15. The Respondent denies the particulars of Claim stating that the Claimant was lawfully and procedurally summarily dismissed from employment under clause 10 of his contract.

16. That the Claimant attended a disciplinary hearing and was informed of the reason of dismissal in the letter dated 30th June 2011 which reason was negligently performing his duties by failing to supervise staff working under him where the Respondent lost property worth millions of shillings. That this dismissal was also in accordance with the CBA covering unionisable staff.

17. That the Claimant also admitted that the oil product got lost between 3rd and 4th April 2011. The Respondent denies that the Claimant was exonerated from wrongdoing.

18. The Respondent denies the specific claims made by the Claimant and set out in the amended statement of claim.

19. That the Claimant has not collected his terminal dues inspite that Respondent has always been ready and willing to pay his arrear salary as at 31st June 2011.

20. The Respondent prays that the claim be dismissed with costs.

Oral Testimony

21. The Claimant testified in support of his case in which he explained the operations at the depot, his duties and the events of the night of 3rd – 4th September 2014.

22. He reported to work at 4:15p.m. in the evening. He was with his colleague who he held same position with, Mr Mwadime. Mr Mwadime signed for the fuel in stock and the Claimant released eighteen (18) cubic meters of fuel to Nairobi. This was documented before the Claimant handed over to the morning shift. The pumping from Kipevu to Nairobi was to take 21 hours.

23. The Claimant noted that Mr Mwadime signed to leave the control room at 6.30 p.m. and he left at 7.00 p.m. He said he was to meet his '*matatu*' driver. The Claimant further testified that the Quantity of fuel pumped is communicated on the other end in Nairobi so that at the time the Claimant signed off at 8 am in the morning he could not tell how much fuel was received at Nairobi.

24. Later on 6th April 2011, the Claimant was suspended on allegations that a theft of fuel had occurred during his shift.

25. The fuel is said to have been diverted along the pipeline. The Claimant was made aware of the diversion on 4th April at 10.00 a.m. after he had left.

26. The pipeline was guarded by security guards. There was no lapse in the control room. The security officers were in place. The only unusual occurrence was the movement by Mr Mwadime from the control room.

27. The allegations regarding incidents of 11th and 26th December was made for the first time and was not true. The Claimant told the court he had a good record, was honest and was not involved in the alleged theft at all.

28. That he was exonerated by the investigations team and there was therefore no basis whatsoever to dismiss him summarily from work.

29. The Claimant did not receive a show cause letter, however he explained himself at the disciplinary hearing itself. The team only blamed him for allowing Mr Mwadime to take leave of absence at 7 a.m. on the night of 4th April 2011 and Mr Mwadime was suspected to have pulled off the theft with others during that period he was away from the control room.

30. The Claimant added that the matter was investigated by police and Mr Mwadime was implicated in the theft. The Claimant recorded a statement with the police and was exonerated from the matter. Frankline Mwadime was charged with the offence of theft and the Claimant was a state witness.

31. The Claimant withstood well, very close cross examination. The Claimant admitted he was in charge of the operations that night but stated that he could not see what took place outside the control room. That other players, especially the security along the pipeline were to ensure that the pipeline was not infiltrated as had happened on the material night.

32. A valve outside the control room was opened to siphon the fuel during the pumping of the product to

Nairobi on the material night. The Claimant had no control over that at all, he testified. The diversion took place about 400 metres from the control room. The control room did not record any unusual occurrence on the material night and therefore there is no way the Claimant would have detected the theft while it took place.

33. The Claimant denied any collusion, negligence or any kind of participation in the theft. The Claimant also denied that unrelated discussion by staff on the night on theft of product was in any way connected to the occurrence that took place on the same night.

34. RW1 was Henry Lewairoshi the Human Resource Manager of the Respondent. He had worked for the Respondent for 19 years. RW1 told the court that he knew of the theft of fuel on 4th April 2011. The conclusion by the investigation team was that seals to valves on the pipeline were broken and product was diverted.

35. Alarm was raised by the Kenya Revenue Authority (KRA) from their metres, RW1 did not participate in the investigation and disciplinary hearing. He was not the Human Resource Manager at the time. RW1 said that the Claimant's position has since been filled and so it is not possible to reinstate him to his previous position.

36. The Claimant had worked for four (4) years and had a good work record. RW1 could not tell what role the Claimant played in the theft. The Claimant was not asked to show cause before or after the suspension. He attended the disciplinary hearing. The disciplinary committee recommended that the Claimant be given a warning letter since his role if any in the matter was minimal. No other disciplinary hearing was subsequently held.

37. The Chief Human Resource Manager who was not in court and the Managing Director subsequently deliberated on the matter and decided that the entire team on duty that day be dismissed from employment. RW1 did not have the recommendation by the two.

38. RW1 said that the Respondent does not pay gratuity where any employee is employed on contract terms.

39. RW2 was Wilkinson Kithinji Ntwiga, Senior Security Officer of the Respondent. He had served the Respondent for 12 years.

40. RW1 testified that the fuel theft was reported to him on 4th April, 2011. It took place along the spur pipeline which is 3 kilometres long. RW2 told the court that the valve at Kipevu which connects to the spur line is chain padlocked and sealed by security personnel. That safety personnel from the control room have the Keys to the chain padlock. Opening is done in the presence of KRA staff who cut the seal.

41. The valve is in a custom bonded house. The keys are kept by the station controller under lock and key (in a rack at the control room). The station controller does this.

42. RW2 confirmed that though there was no notice to pump oil from the Kipevu valve, 321,500 litres of diesel was moved. The area was guarded by security guards and there were police men around the perimeter fence. The seal had been cut and therefore the chain padlock must have been opened. KRA denied having witnessed the breakage of the seal and the opening of the chain padlock.

43. A person called Daniel had registered access to the valve. Finger prints examination revealed, Mr Frankline Mwadime, the claimants colleague visited the valve on the material night. He had taken the access documents. He was at the time a staff on duty under the Claimant's supervision.

44. Mr Franklin Mwadime was charged with theft with others. The Claimant was not charged. The witness was of the view that the entire team including the claimant were to blame for the loss either due to negligence or direct participation. RW2 did not agree with the findings by the investigations team that exonerated the claimant from any blame.

45. RW2 confirmed that the valve could not be opened by remote control. One had to physically open it. There were no fingerprints on the valve and nobody knows who cut the seal on the material night.

46. Determination

- i. Was the Claimant summarily dismissed for a valid reason?
- ii. Was the summary dismissal effected in terms of a fair procedure?
- iii. What remedy if any is available to the Claimant?

Issue i

47. The Respondent conducted internal investigations and a disciplinary hearing against the Claimant and others upon a report of theft of fuel product on the night of 3rd/4th April 2011.

48. The disciplinary panel interviewed key witnesses in the matter including the Claimant and found *inter alia* that the Claimant was not involved directly in the theft of fuel. The police conducted investigations and pinned the theft of fuel on Mr Frankline Mwadime who though held the same position as the Claimant was on the material day under the supervision of the Claimant.

49. The investigators found finger prints of Mr Mwadime at the place where the pass to the relevant valve was obtained to access the fuel. The Claimant admitted having permitted Frankline Mwadime to take a short break from work on the material evening. Mr Mwadime had left under pretext that he was going to meet his 'matatu' driver shortly.

50. The Claimant was blamed for allowing Mr Mwadime to take that short break and the disciplinary team recommended that the Claimant be given a warning letter for that minor lapse in supervision.

51. An employer is bound by its own internal procedures and processes. A properly conducted disciplinary committee found it fit to give a warning to the Claimant for a minor infraction which may have allowed a colleague to commit a theft unknowingly.

52. The Respondent was bound by the outcome of the disciplinary panel and had no valid reason therefore to, without conducting any further investigations and or hearing to dismiss the Claimant from employment summarily.

53. RW2 told the court that the Claimant had a good record at work and therefore received favourable consideration by the disciplinary panel in the absence of any evidence linking him to the theft of fuel.

54. It is the court's considered view that the Claimant was not at all linked to the said theft of fuel. He was summarily dismissed for no valid reason at all contrary to the provisions of his contract of employment, the CBA and the Employment Act, 2007 and is entitled to compensation for unlawful and unfair summary dismissal.

55. The court does not consider this an appropriate case for reinstatement especially because the employer appears not to trust the Claimant notwithstanding that there is clear evidence that the Claimant was a clean employee. It would be inappropriate to impose the Claimant on the Respondent considering all the circumstances of the case.

56. However, the Claimant is a young technical employee and has shown a desire to continue serving the Respondent. It is now over four years since the Claimant lost his job and has not found alternative employment. He was not paid salary for five months he was under suspension. He was falsely implicated in the theft and subjected to police investigations. He lost very good career development in a public institution unlawfully and unfairly and the Claimant has suffered loss and damage.

57. Considering all the circumstances of the case, the court awards the Claimant ten (10) months salary as compensation for the unlawful and unfair summary dismissal in the sum of Kshs 1,308,070.

Terminal Benefits

i. The Claimant is entitled to one month's salary in lieu of notice in the sum of Kshs 130,807 since the summary dismissal was unlawful and unjustified.

ii. The Claimant was exonerated by the investigations team and the disciplinary panel from the theft of fuel. He had been suspended without pay due to the seriousness of the allegations made against him. Having been exonerated from the same, a finding the court agrees with, the Claimant is entitled to payment of three months arrears salary in the sum of Kshs 654,035.

iii. The Claimant had 28.30 pending leave days according to the payslip of 24th March 2011, the court therefore awards him one month salary in lieu of leave days not taken in the sum of Kshs 130,807.

iv. No evidence was adduced in respect of the overtime claimed and the court makes no award in respect thereof.

No evidence was adduced with regard to severance pay and the court makes no award in respect thereof.

58. In the final analysis the award by the court in favour of the Claimant as against the Respondent is as follows;

i. Kshs 1,308,070 being ten (10) months compensation

ii. Kshs 130,807.00 in lieu of notice

iii. Kshs 130,807.00 in lieu of leave

iv. **Total award 1,569,684**

v. The Award is payable with interest at court rates from date of this judgment till payment in full.

vi. The Respondent is to pay the costs of the suit.

Dated and Delivered at Nairobi this 21st day of August, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE