



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 51 OF 2013**  
**(Originally Nairobi Cause No. 1119 of 2010)**  
**KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANT**  
**v**  
**KENYA SHELL LIMITED.....RESPONDENT**

**JUDGMENT**

1. On 27 September 2010, the Kenya Petroleum Oil Workers Union (the Union) lodged a Statement of Claim at the Industrial Court of Kenya, Nairobi against Kenya Shell Ltd (the Respondent) and the issue in dispute was stated as *wrongful termination of Mr. Bernard Mkungo and Mr. Faustin Righa* (1<sup>st</sup> and 2<sup>nd</sup> Grievants respectively).
2. The Respondent was served and it filed a voluminous Statement of Reply on 29 October 2010. A Supplementary Statement of Reply was filed on 30 May 2012.
3. With the establishment of an Industrial Court station in Mombasa in 2012, the Cause was transferred to Mombasa for hearing and determination. The Court heard the Cause on 26 June 2013 and 8 October 2013.
4. The union filed its written submissions on 22 October 2013 while the Respondent filed its submissions on 11 November 2013, five days after the set date.

**Case for 1<sup>st</sup> Grievant**

5. The Union pleaded and submitted that the 1<sup>st</sup> Grievant was employed on 1 August 1975 as a Laboratory Assistant by the Respondent. On 11 September 2008, the 1<sup>st</sup> Grievant received a notice to appear before a disciplinary hearing on 24 September 2008. The letter informed the 1<sup>st</sup> Grievant of two charges against him, and informed him of his rights to representation by a union person or other employee, to question witnesses and to call witnesses. The letter also informed the 1<sup>st</sup> Grievant he would be on suspension with full pay.
6. On 17 November 2008, the 1<sup>st</sup> Grievant received a letter terminating his services with immediate effect, the ground being that he had *neglected to perform your duties causing loss and damage to the Company*. At time of termination the 1<sup>st</sup> Grievant was earning Kshs 40,766/- basic salary and house allowance of Kshs 8,600/- per month.
7. The union pleaded that the termination was wrongful and unfair because, the 1<sup>st</sup> Grievant was not on duty on 22 July 2008 when stock loss was reported to have taken place, that the suspension exceeded 30 consecutive days contrary to clause 1-19 of the Collective Bargaining Agreement, the

- 1<sup>st</sup> Grievant had no previous warning letter, no police investigations implicated the Grievants', the charges were faulty, Respondent did not produce records of financial loss, there was a practice to allow third parties to carry out 1<sup>st</sup> Grievants duties due to understaffing and that no security report was produced.
8. During oral testimony, the 1<sup>st</sup> Grievant stated that he was a Tank Farm Foreman and that he received the notice to the disciplinary hearing with two charges and he was informed of his rights. He confirmed attending the disciplinary hearing and that he was represented and that he received a termination letter after the hearing. He also testified on his duties. He stated that dipping into the tanks was the duty of tank farm hands according to clause 5.1.1.2(h) of the Storage Manual and the tank farm hands would report to him.
  9. Regarding the sealing of the tanks, the 1<sup>st</sup> Grievant stated that according to clause 5.2.2.2(i) the responsibility to record the seals in the register was upon the person taking the seals from the Supervisor. It was also not his duty to seal the valves.
  10. The 1<sup>st</sup> Grievant further stated that he was present and took dips on 15 and 16 July 2008 after which he went off duty and that he was not on duty on 22 July 2008 when the alleged loss occurred, but was questioned but not charged by the Police. The 1<sup>st</sup> Grievant stated he was not seeking reinstatement but compensation, damages, certificate of service and costs.
  11. In cross examination, the 1<sup>st</sup> Grievant confirmed he was given a job description and was aware of a Procedure Manual and that his duties included ensuring/verifying valves were closed, maintain a discharge log and personally seal the valves and record the same. He further stated third parties would take dips under his supervision and that it was a Mr. Richard Odero who sealed tank no. 21 according to the records (loss alleged to have been from this tank).

### **Case for 2<sup>nd</sup> Grievant**

12. The Union pleaded and submitted that the 2<sup>nd</sup> Grievant was employed on 23 October 1980 as a Laboratory Assistant by the Respondent and that on 11 September 2008 he received a notice to attend a disciplinary hearing on 24 September 2008. The notice letter informed the 2<sup>nd</sup> Grievant of two charges against him and informed him of his rights to representation by a union person or other employee, to question witnesses and to call witnesses. The letter also informed the 2<sup>nd</sup> Grievant he would be on suspension with full pay.
13. On 17 November 2008, the 2<sup>nd</sup> Grievant received a letter terminating his services immediately. The letter was similar to the one sent to the 1<sup>st</sup> Grievant in all material particulars.
14. Attempts to resolve the trade dispute relating to the termination were not successful hence the lodging of legal proceedings before the Court. It was submitted that the termination was wrongful and unfair because the 2<sup>nd</sup> Grievant did not plead guilty, that it was common practice for third parties to take readings, the Respondent acted hastily, the termination was a witch hunt, discriminatory, warning letters should have been given and that there were operational weaknesses in the Respondent's systems.
15. The 2<sup>nd</sup> Grievant gave sworn testimony and stated that on 22 July 2008 he reported to work at about 6.30 am and was given readings taken by Cyka employee (outsourced staff) and he informed a supervisor that there was a problem with the readings and that he could not resolve the problem within 4 hours as required by the rules. The readings taken from the roof were different from the auto gauge. He also stated that the taking of the readings by a third party was not an abdication of duty, as this was a usual practice.
16. He also confirmed his duties included placing seals, taking readings and to filling/signing in the daily stock sheet/book and that the seals to tank no. 21 were intact though he did not know who sealed it and that about 8800 litres of product worth about Kshs 8,000,000/- was lost.
17. The 2<sup>nd</sup> Grievant further stated that the dips he gave to the Stock Accountant were taken by a third party.
18. He further confirmed going through a disciplinary process and later being issued with a termination letter, and that his basic salary at time of termination was Kshs 32,823/- and house allowance of Kshs 8600/- per month.
19. On why he was faulting the termination, the 2<sup>nd</sup> Grievant stated that he had not been given any

previous warnings and that he is seeking compensation and certificate of service.

### **Respondent's case**

20. The Respondent pleaded that the employment of both Grievants were governed by a Collective Bargaining Agreement and ISO 9001:2008 Product Receipt Through Pipeline and Storage Document KSL/A40..PO8.10/MSA TANK.PCD and that the Grievants performed their duties as Tank Farm Foremen *negligently thereby occasioning great loss to the Respondent.....by contravening tank dipping procedures as set out in Clause 5.2.2.2 of the ISO 9001.2008 Product Receipt Through Pipeline and Storage Doc...*
21. It was also pleaded that the Grievants were taken through a disciplinary process on 24 September 2008 and were informed of their rights, were heard before termination and paid for days worked.
22. To prove and justify the terminations, the Respondent pleaded that the Grievants willfully neglected to perform work which it was their duty to perform or carelessly and improperly performed work which it was their duty to perform, and that the Respondent acted in accordance with the provisions of the Employment Act.
23. The Respondent called one witness, Henry Kariuki, a Distribution Manager in charge of Operations.
24. The witness informed the Court that the Grievants were Tank Farm Supervisors in charge of receipt, storage and tank farm operations. The witness produced the Grievants' job descriptions.
25. The witness also stated that sometime in 2008, loss of product about 90,000 litres over two days was detected and the Grievants were found responsible for falsified dips, because they were responsible for taking dips every morning and evening to confirm amounts and closing and sealing the tanks.
26. He further informed the Court that the seals are kept under lock and key and should not be accessed by unauthorized persons except the Foremen/Supervisors and that the 2<sup>nd</sup> Grievant was under a duty to physically take/verify the dips and give the readings to the Stock Controller but failed to do this and abdicated his duties to third parties.
27. Regarding the disciplinary process, the witness stated that he was present in the disciplinary hearing and the Grievants were notified of the charges and given an opportunity to be heard and that the terminations were in accord with the Collective Bargaining Agreement.
28. During cross examination, the witness stated that Cyka employees were to provide a helping hand such as opening valves, carrying equipment and other handiwork and that the 1<sup>st</sup> Grievant must have been on duty on 22 July 2008 but he needed to check with the records.

### **Questions for determination**

29. In a complaint for unfair termination, there are questions/issues which fall for determination purely because of the requirements of the law whether raised in the parties' pleadings and evidence or not.
30. Section 47(5) of the Employment Act, 2007 requires an employee to prove that an unfair termination or wrongful dismissal has occurred. The Court is therefore enjoined by the Statute to consider the issue.
31. The section also requires an employer to justify the grounds for the termination. The grounds which the employer is expected to justify are mentioned in sections 40 and 41 of the Act in broad terms as redundancy, misconduct, poor performance or physical incapacity.
32. From the respective parties pleadings, documents, testimony and submissions, the questions which arise for discussion are broadly two, whether the termination of the Grievants were unfair and if the answer is in the positive, appropriate remedies.

### **Whether the terminations were unfair**

#### ***Procedural fairness***

33. Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not

- part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations, for public entities.
34. An employer was generally free to dismiss for a bad reason or a good reason, but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.
  35. The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin maxim *audi alteram partem rule* into the employment contract. Whatever the reasons, the Employment Act, 2007 has fundamentally changed the employment relationship in Kenya.
  36. And what does section 41 of the Employment Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.
  37. The ingredients of procedural fairness, as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed, to the employee.
  38. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative, if desired.
  39. Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.
  40. The Court needs to discuss whether the Respondent demonstrated that the procedure or process it adopted fitted in with the principles I have attempted to set out herein above.
  41. The reasons for termination of both Grievants were negligence. This falls under the ground of poor performance. Both Grievants were served with notices to a disciplinary process dated 11 September 2008. The notices informed the Grievants of two charges against each one of them and informed them of their rights. The hearings were held on 24 September 2008 (nearly 12 days after service of the notices) and both were represented by Union representatives. Minutes of the disciplinary hearings were annexed to the pleadings.
  42. The Court is satisfied that the Respondent complied with the procedural fairness requirements of section 41 of the Employment Act and the terminations of the Grievants were procedurally fair.

### ***Substantive fairness***

43. Section 43 of the Employment Act on its part requires an employer to prove reasons for termination while section 45 of the Act expects the employer to prove that the reasons for termination are valid and fair. These issues go to the substantive fairness of the termination/dismissal. In many instances the practice is developing in the Industrial Court to treat the grounds under the general rubric of whether the termination/dismissal was (un)fair.

### **1<sup>st</sup> Grievant**

44. The letter of termination dated 17 November 2008 gave the reason of dismissal as ***neglected to perform duties*** causing loss and damage. The letter further stated that the 1<sup>st</sup> Grievant was  
  
*repeatedly were careless in the performance of your duties and failed to follow the company's laid down rules and procedures, leading to loss to the company.*
45. The 1<sup>st</sup> Grievant right from the outset had maintained that he was not on duty on 22 July 2008 when the loss was reported to have occurred. His testimony was that he was off duty from 16 July 2008. The Respondent did not attempt to deal with this defence put up by the 1<sup>st</sup> Grievant.
46. The issue was raised during the disciplinary hearing. The Respondent barely gave it any attention or explanation. During cross examination, the Respondent's witness stated that the 1<sup>st</sup> Grievant

- must have been on duty on 22 July 2008 but he needed to confirm with the records. The Respondent had known from the outset that the 1<sup>st</sup> Grievant would rely on this defence and should have produced attendance records for the 1<sup>st</sup> Grievant.
47. It was the evidence of the Respondent that dips would be taken every morning and evening. The readings would be shared with the Respondent's Stock Controller/Accountant/Depot Manager. The Respondent did not produce/make much of the records it kept to show that the loss might have not occurred during the 1<sup>st</sup> Grievant's off duty.
48. Considering the above, one issue has gnawed at the Court right from the outset. The issue is one which would affect whether the termination of the 1<sup>st</sup> Grievant's was in accord with justice and equity in the circumstances of the case as envisioned under section 45(4)(b) and (5)(b) and (f) of the Employment Act.
49. In the view of the Court, the Respondent has failed to prove that the reasons for terminating the services of 1<sup>st</sup> Grievant or that the reasons were valid and fair.

## 2<sup>nd</sup> Grievant

50. The letter terminating the services of the 2<sup>nd</sup> Grievant was also dated 17 November 2008 and the reason given was *neglected to perform your duties causing loss and damage*. The letter further stated that the 2<sup>nd</sup> Grievant *repeatedly were careless in the performance of your duties and failed to follow the company's laid down rules and procedures, leading to loss to the company*.
51. The Respondent produced the job descriptions for the Grievants (job description was the same for both Grievants). The Respondent also produced ISO 9001:2000 Product receipt through pipeline and storage document. Clauses 5.1.1.2, 5.1.1.3, 5.1.1.4 and 5.2.2.2, which are all relevant.
52. According to the oral testimony of the 2<sup>nd</sup> Grievant,

*it was usual and the Respondent knew that third parties used to take dips.....and the dips I gave to the Stock Accountant were taken by third parties and not myself.*

53. He repeated in cross examination that the readings were taken by a Cyka employee and further stated that the tanks were many. He confirmed he was on duty on 22 July 2008.
54. It is clear that daily records of the readings were being taken. Under the clauses mentioned in paragraph 51 above, the Grievant as a Tank Farm Foreman had overall responsibility.
55. Assuming, as the Court does, that it was the practice that third parties would take the dips and readings the buck would still stop with the Grievants. But the role and rules of engagement with the third parties (Cyka) who were allowed into the Respondent's depot was not fully clarified and whether the Respondent had signed any formal agreement with them.
56. During the disciplinary hearing the Respondent acknowledged operational shortcomings in the system and that an independent team had been set up to investigate.
57. The Respondent did not deny that the system in place had weaknesses. The office where the seals were kept appeared accessible to many people. The amount of product loss appears colossal (90,000 litres). Investigations appear to have been carried out in a dilatory way.
58. In its written submissions, the Respondent made reference to the minutes of the disciplinary proceedings and in particular minute 4 para 42 that

*Mr. Righa therefore decided to advise his supervisor of different readings and mentioned to him that he will be conducting some more checks or random dips to see if this was true.....*

59. The minutes were referred to demonstrate that the 2<sup>nd</sup> Grievant falsified readings with the intention of deceiving his supervisors.
60. But a look at the same minute paragraph 3 seems to suggest to the contrary. The minutes capture that the said supervisor Mr. Ntakai (Mr. Mtakai?) informed the Grievant that the issue had been resolved and an explanation given in the day book.
61. To my mind, the minutes of the disciplinary proceedings do not show that the 2<sup>nd</sup> Grievant had

falsified readings with an intention to deceive or conceal a loss given the unexplained role of a third party (Cyka) who appear to have been engaged by the Respondent.

62.The 2<sup>nd</sup> Grievant had served the Respondent for nearly 27 years without any complaint or warning.

63.In the view of the Court, the summary termination of the 2<sup>nd</sup> Grievant was not in accord with justice and equity, in the circumstances of the case.

### **Appropriate remedies**

#### ***Reinstatement***

64.Reinstatement is one of the three primary remedies where the Court reaches a conclusion that a termination was unfair. The 1<sup>st</sup> Grievant stated he was not seeking reinstatement.

65.Both Grievants were terminated more than three years ago. By virtue of section 12(3)(vii) of the Industrial Court Act and section 49(4)(c) of the Employment Act this remedy would not be a just remedy.

#### ***12 months compensation***

66.The equivalent of a number of months gross wages not exceeding twelve months is another of the primary remedies for unfair termination. The remedy is discretionary and the Employment Act has set out some thirteen factors to be considered. The Court can consider any, some or all of the factors.

67.The Respondent complied with the requirements of procedural fairness in respect of both Grievants.

68.The 1<sup>st</sup> Grievant had served the Respondent for nearly 29 years with a clean record and has lost any terminal dues which would have been payable on retirement or termination with notice.

69.Considering the said factors, the Court is of the view that an award equivalent to 6 months' gross wages which the Court assesses at Kshs 296,196/- would be just and reasonable.

70.The 2<sup>nd</sup> Grievant on the other hand served the Respondent for about 28 years with a clean record.

71.Considering similar factors adumbrated in the case of the 1<sup>st</sup> Grievant, the Court is of the view that an award equivalent to 6 months' wages which the Court assesses at Kshs 248,538/- would be just and reasonable.

#### ***Terminal dues***

72.These were not particularized nor a contractual or statutory foundation laid before the Court. The Collective Bargaining Agreement does not appear to provide much guidance at clauses 1-20 and 1-22 which deal with termination and retirement. The prayer is therefore dismissed.

#### ***Certificate of service***

73.An employee is entitled to a certificate of service as of right. The Respondent has a corresponding obligation to issue each of the Grievants with a certificate of service.

#### ***Costs***

74.Costs in the Industrial Court do not follow the event like under the civil procedure framework. The protagonists in this Cause are social partners who have had a relationship for quite some time. The relationship is an ongoing one and the appropriate costs order would have been that each party bears its own costs.

75.However a trend is developing where parties do not file/exchange submissions within agreed timelines. This sorry development inevitably means that the Court is negatively impacted in that judgments may not be delivered as scheduled. The practice must be discouraged and one way of discouraging the practice is an appropriate costs order against a non complying party.

