



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1838 OF 2011

VERSUS

KENYA PETROLEUM OIL WORKERS UNION.....
CLAIMANT

VERSUS

PETRO OIL KENYA
LIMITED.....RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. John Obure Organizing Secretary of the Claimant, instructed by the Claimant Union

Ms. Wachira instructed by Sheth and Wathigo Advocates for the Respondent

ISSUE IN DISPUTE: REDUNDANCY

AWARD

1. This Claim was initiated through a Statement of Claim filed by the Claimant Union on 7th November 2011. It is brought on behalf of the Claimant’s Member [Grievant] Kennedy Odhiambo Ameyia, a former Employee of the Respondent.
2. The Claimant states that it is a Registered Trade Union, representing Unionisable Employees in the Petroleum Industry. The Respondent’s Business is located in this Industry and its Unionisable Employees fall within the Claimant’s area of representation.
3. The Respondent filed its Statement of Response on 13th January 2012. The Grievant gave his evidence, and closed the Claimant’s case on 27th March 2013. The Respondent called its Zonal Manager Eldoret, Mr. Robert Owuor, who gave evidence on 7th June 2013. Human Resource Officer Sandra Cherotich testified for the Respondent on 30th June 2013 when the hearing closed. The dispute was last mentioned on 21st January 2014, when the Parties confirmed the filing of their submissions and were advised the Award would be delivered on notice.
4. The Claimant states, and the Grievant testified, that the Grievant was employed by the Respondent as a

Pump Attendant at a Petrol Station at Langa Langa Nakuru, on 14th May 2011. He was transferred to Waiyaki Way Service Station by word of mouth, on 7th May 2011. On 2nd June 2011, he was off-duty and travelled to his previous workplace in Nakuru, to pick personal effects he had left there. He had previously demanded from the Respondent that the Respondent pays to him overtime pay for excess hours worked. This demand was made on 13th March 2008. He used a Motorbike [Boda Boda] while in Nakuru. He stopped at his former workplace to fuel the Motorbike. It was while there that a former Colleague of the Grievant, Mr. Vincent Onchwati asked the Grievant to help him sort Pumps 1 and 2 Twin Pump. They Grievant sorted the Pumps without occasioning any damage.

5. On 4th June 2011, the Zonal Manager Mr. Robert Owuor called the Claimant on phone asking him what he had gone to do at Nakuru. The Grievant explained himself on the phone. He was told by the Zonal Manager not to report to work the following day, but to see the Manager on 6th June 2011.

6. The Grievant reported as instructed, and explained once again what he had gone to do at Nakuru. He was asked to fill a Compulsory Leave Form and proceed on leave for 2 weeks from 5th June 2011 to 19th June 2011 to allow the Respondent undertake full investigations of the incident. There was no word on the investigations from the Respondent until on 30th June 2011, when the Grievant was asked once again to explain his presence in Nakuru. The Grievant gave a written explanation on the same day.

7. On 11th July 2011, he received a letter of summary dismissal. His basic salary at the time of dismissal was Kshs. 9,815, and Kshs. 1,472 as house rent allowance. It was alleged by the Respondent that the Grievant was found interfering with the Respondent's Equipment. On the same date the Grievant wrote a letter of appeal to the Respondent. The Respondent did not rescind its decision and instead wrote a cheque of Kshs. 16,759 and discharge voucher, which the Grievant respectively, refused to take and sign. On 21st July 2011 all the Grievant's Colleagues at Waiyaki Way, had their contracts terminated on the ground that their positions had fallen redundant. The Grievant holds and urges the Court to find, that the Respondent terminated his contract through redundancy like in the other cases of his Colleagues. The Claimant prays the Court to Award the Grievant:-

- a. 1 month salary in lieu of notice at Kshs. 11,287;
- b. 11 days' salary for work done in July 2011 at Kshs. 4,774;
- c. Salary for June 2011 and arrears at Kshs. 13,246;
- d. Severance pay at 15 days salary for 4 years at Kshs. 26,047;
- e. Overtime worked at Kshs. 765,576;
- f. 12 months' salary in compensation at Kshs. 135,444; and
- g. N.S.S.F contributions for 3 months at Kshs. 1,200

Total..... Kshs. 957, 574

The Claimant urges the Court to Order the Respondent to release the Grievant's Certificate of Service; refund all costs; and pay the sums granted in the Award, to the Grievant's Co-operative Bank Account Number A/C 01109026696200.

8. Mr. Amenity testified on cross-examination that he had not produced his Trade Union Membership Card. He did not attempt voluntary settlement before he approached the Court. Paragraph 4 of the letter of employment made provision for transfer of the Employee. The Respondent had the power to transfer. By 30th June 2011, the Claimant was stationed at Waiyaki Way. He had left his Identity Card and N.H.I.F Card in Nakuru. These were among other personal effects he left in a Locker. The Grievant did not instruct the Boda Boda Cyclist to fuel at Langa Langa.

9. At Langa Langa, Amenity found his former Colleague Vincent. Vincent was busy with another Customer, and requested the Grievant to assist. Clause 5 of the Grievant's letter of employment stated he was answerable to his Supervisor. Vincent was not his Supervisor. The Pump Display was not functioning properly. Some problems could be sorted by the Pump Attendants and others by Technicians. The Grievant did not touch the Pump, but sorted it out from the Distributor Board. He was not trying to do a

technical task. He did not open the Machine and interfere with the Pump. His position was declared redundant. The 2 Stations are no longer operational. He has not challenged summary dismissal. He refused to take the settlement cheque for good reason. He worked 7 of 8 hours overtime. The Grievant stated he was still challenging the summary dismissal.

10. Redirected, he testified he had filled the Check- Off List on recruitment by the Trade Union, and could avail it to the Court if needed. He transferred to Nairobi on the instructions of the Respondent. He transferred willingly. He traveled to Langa Langa to retrieve his Identity Card and N.H.I.F Card. He sorted the Pumps because he worked there and was familiar with them. The switch was at some distance from the Pumps. It was the switch that the Respondent touched, not the Pumps. He challenges summary dismissal. He did not tamper with the Pumps or damage anything. Technicians only come in when there is a bigger problem. The summary dismissal letter is dated 5th July 2011. The Grievant received it on 11th July 2011. The Claimant prays the Court to allow the Claim.

11. The Respondent agrees the Grievant was its Employee in the capacity stated in the Claim. He earned the monthly rate of remuneration given in the Claim. He was transferred from Nakuru to Nairobi as stated. He returned to Nakuru and unlawfully tampered with the Respondent's Pump 1 and 2, with the intent to defraud the Respondent. He was summarily dismissed in accordance with the Law. His contract was not terminated on account of redundancy. He is not owed any overtime pay. He is not owed any money by the Respondent.

12. Robert Owuor testified he was informed by the Langa Langa Station Manager Salome Kigen, that the Grievant had been seen at the Station in the evening of 2nd June 2011, interfering with the Pumps. Owuor advised Kigen to take statements from the Employees who were on the shift. Kigen recorded statements from Vincent Onchwati and Alfred Kibet who were on duty at the time of the Grievant's visit. Owuor forwarded the statements to the Human Resources Department at the Head Office, and was advised to send the Grievant away on compulsory leave as investigations were carried out. Owuor was asked to take a statement from the Grievant. He took the statement dated 30th June 2011 from the Grievant. It was forwarded to the Head Office, and the Grievant accorded an opportunity to defend. He was dismissed, and the letter passed on to him from the Human Resources at the Head Office through Owuor. The letter, dated 5th July 2011, was accompanied by the Grievant's cheque on terminal dues. He declined to receive the cheque and sign the discharge voucher.

13. A Pump Attendant's duty is to fuel and receive payments. He is not allowed to sort out technical issues. He was supposed to work on the instructions of his Supervisor. He had sought clarification on overtime. His letter seeking such clarification was not received by the Respondent. Owuor acted as the link to the Head Office and the letter would have to go through him. There was no redundancy situation; the Grievant was summarily dismissed. He is not an approved Technician. He is not a Party in a redundancy Claim filed by other former Employees of the Respondent at the Industrial Court. The Stations have not closed. They are still in operation.

14. Answering questions from Mr. Obure, Owuor testified he oversaw 11 Stations. This entailed oversight of staff, sales and technical issues, in all the Stations. The Grievant did not have the authority to sort out the Pumps. The law did not allow him as he was not a Pump Technician. He intended to defraud. He returned to the Station from which he had been transferred. Owuor was not present when the tampering happened. The Station Manager, Supervisor, two other Attendants and Guard were there. The Guard did not take action against the Grievant, and the incident was not reported to the Police.

15. The Grievant was notified about the disciplinary hearing. Owuor had the authority to deal with the incident. Amenity did not go to the disciplinary hearing accompanied by a Representative from his Trade Union or a Workmate. It was Owuor who sent the Grievant on compulsory leave. There were two different dates indicated as the period of compulsory leave- 5th to 17th June 2011 and 5th to 19th June 2011. The latter was not signed by Owuor. The Other Employees were sent home on 20th June 2011. The Other Employees including Managers were sent away on 20th June 2011. Owuor did not know the reason why the Respondent terminated the contracts of employment of these Employees.

16. The Grievant's letter of summary dismissal is dated 5th July 2011. It was effective 5th July 2011. Owuor could not confirm if the letter was received by the Grievant. The terminal dues were detailed in the letter of summary dismissal. Reexamined, Owuor testified that Amenyha was not a stranger at Langa Langa. Vincent and Albert were his former Colleagues. The Guard would not have known that the Grievant was bent of defrauding the Respondent. The Grievant was not a Party to the other Industrial Court case on redundancy.

17. Sandra Cherotich confirmed that the Grievant was employed by the Respondent a Pump Attendant, and transferred from Langa Langa to Nairobi. Vincent was not his Supervisor; he was a Pump Attendant. Pumps were sorted by the Respondent's Maintenance Office. The Station Manager would report to the Zonal Manager if there were problems to be sorted. The Zonal Manager contacted the Maintenance Office. Investigations showed Amenyha tampered with the Pumps. He was summarily dismissed. His position was not declared redundant. Other Employees left through redundancy. Later the Respondent recruited fresh Employees and the Stations are operational. He was paid salary including for the days worked in July 2011. His pay slips show he was compensated for overtime worked. His certificate is ready for collection but the Claimant has not gone for it, or cleared with the Respondent. N.S.S.F contributions were deducted and remitted. There was no deduction of Trade Union dues, and the Respondent was not aware that the Grievant was a Member of any Union. His letter seeking clarification of overtime was not received by the Respondent.

17. She testified on cross-examination that the Grievant's transfer was by word of mouth. She was not aware if he was off- duty when he visited Nakuru. He said he had gone to say hello to his former Colleagues. He tampered with the Pump. It could not dispense fuel. The Respondent was supposed to generate the Incident Report after the tampering. No Report was made available to the Court. Investigations took place. The evidence of the Investigator was not available before the Court. Human Resource matters at the Zonal level were dealt with by the Zonal Manager. Employees were compensated for overtime worked. He went on leave for 2 weeks from 5th June 2011. The leave would lapse 17th June 2011. The other Employees at Waiyaki Way were dismissed for fraud. Sandra did not know exactly when this happened. She clarified in reexamination that all transfers were communicated verbally. The Grievant was paid transfer allowance of Kshs. 10,000. In the Statement of Claim, he confirms leave was in June, not July 2011. He had left by the time the other Employees at Waiyaki Way were investigated and dismissed. The Respondent prays that the Claim be dismissed with costs.

The Court Finds and Awards:-

18. The Claimant has the right to represent the Grievant. Membership of an Employee in a Trade Union is not exclusively demonstrated by the presence of Check-Off Lists; Section 52 of the Labour Relations Act Number 14 of 2007 allows Employees to pay subscription fees directly to the Trade Unions. The Grievant was a Unionsable Employee, and eligible to belong to the Claimant Union, and be represented by the Claimant Union in matters of labour rights and interests. The Court has no reason to conclude as suggested by the Respondent that the Claimant has *no locus standi*.

19. It is common ground the Grievant was employed by the Respondent as a Pump Attendant, on 12th October 2006. He was initially posted to Langa Langa Petrol Station in Nakuru. He was transferred on 7th May 2011 to Waiyaki Way Petrol Station in Nairobi. It is agreed that on 2nd June 2011, the Grievant travelled back to his former workplace in Nakuru. He conceded that while there, he was asked by his former Colleague Vincent Onchwati to assist him to sort Pumps 1 and 2. The Grievant's evidence is that he did so without occasioning any damage to the Pumps. The Respondent's position is that the Grievant had no instructions to revisit his former workplace, or sort the Pumps, and intended to defraud the Respondent. The Pumps were tampered with and could not dispense fuel.

20. The Grievant testified that he was asked to explain his presence in Nakuru by the Zonal Manager Owuor, which he did verbally, and was then asked to go on compulsory leave on 6th June 2011, for 2 weeks. There was no report from the Respondent at the end of the 2 weeks. The Respondent called the Grievant to give further explanation which he did in writing on 30th June 2011. He received a letter of

summary dismissal on 11th July 2011. The date of dismissal was shown to be 5th July 2011.

21. He seemed to suggest that the action by the Respondent was a redundancy decision couched as a summary dismissal, as the entire Staff Members of Waiyaki Way, were sent away on redundancy and operations closed, on the 21st July 2011.

22. There is no ground to conclude that the action against the Grievant was related to the decision against the other Employees. The decision sending the Grievant on compulsory leave was made on 6th June 2011. The initial period of 2 weeks was to lapse on 17th June 2011. He was called on to give written explanation on 30th June 2011. He was dismissed on 5th July 2011. The decision against the other Employees, which is or was the subject matter of another dispute in Court, happened on 21st July 2011. The Claimant was not able to show the Court that the decision against the Grievant and the other Employees were related. Ameyia is not a Party to the Claim filed by the other Employees. He was not given any indication by the Respondent that his contract was terminated on the ground of redundancy; he was advised termination was through summary dismissal for conduct which the Respondent considered to amount to an employment offence. The Claimant's document attached to the Claim and titled 'Redundancy Tabulations' has no foundation. The issue plainly is one of summary dismissal, which the Court is bound to resolve by answering the traditional questions in unfair termination Claims:-

- Did the Respondent have valid reason or reasons to justify the dismissal of the Grievant?
- Was the Grievant taken through a fair procedure?
- Is he entitled to compensation, terminal benefits and the other sundry reliefs sought?

23. The Grievant does not deny that he was transferred from Nakuru to Nairobi, and that he travelled back to Nakuru, and sorted the Respondent's Pumps. He has no business to undertake any duties at Nakuru after transfer. He was bound by the terms of his employment, to work in accordance with the instructions of the Respondent, not of any Colleague. He was a Pump Attendant, not a Pump Maintenance Technician. The Respondent had a Maintenance Office, and Technicians from that Office, had the responsibility of remedying faulty Pumps. There was in place a system for reporting technical problems involving the Station Manager; the Zonal Manager; and the Maintenance Office in that order. The Grievant may have been on off duty, and free to travel and even collect his personal items or greet his former Colleagues at Langa Langa; he definitely was not free to undertake any duty at the previous Station, little less undertake technical work which was not in his area of competence. It is irrelevant that he sorted the Pumps without occasioning any damage. The Respondent had valid reason to summarily dismiss the Grievant.

24. The procedure adopted by the Respondent was in departure from the statutory minimum disciplinary procedure contemplated under Section 41 and 45 of the Employment Act 2007. The record indicates the Grievant was called to explain his visit to Nakuru, by word of mouth and in writing. Explanation was given to the Zonal Manager and a written explanation forwarded to the Human Resource Office at the Head Office. It was the Head Office which determined that the Grievant was guilty as charged. At no time was the Grievant required to appear before a Disciplinary Panel accompanied by a Trade Union Representative of Co-Employee as required under Section 41. He is not recorded anywhere, as having appeared before the Human Resource Office at the Head Office, before the decision was made. There are no formal charges which were put to the Grievant at such a forum. It was a disciplinary process conducted entirely on the basis of correspondence. It fell short of the standards required under Section 41 and 45 of the Employment Act 2007. Termination was unfair on account of procedure.

25. The Grievant was offered salary for days worked up to 5th July 2011. ***The Respondent shall pay to the Grievant arrears of salary as offered in the letter of summary dismissal, up to 5th July 2011.*** There was substantive justification for the termination decision and the procedural fault notwithstanding, the Grievant is not entitled to notice pay. The prayer for 1 month salary in lieu of notice is rejected. There was no redundancy situation and the claim for severance pay is groundless. Overtime pay was shown in the Grievant's pay slips. He did not disclose to the Court why this item would be shown on the pay slip and the only clarification he ever sought on overtime pay, was 3 years before termination, in March 2008.

The evidence supporting the sum of Kshs. 765,576 as overtime pay was clearly lacking. The claim is refused. The Court did not understand the claim for 3 months of N.S.S.F contributions at Kshs. 1,200. The Grievant did not explain to the Court why he should be refunded these contributions. He did not produce any records from the N.S.S.F showing that his former Employer failed to remit deductions. **The claim is disallowed. The Grievant is granted 4 months' salary in compensation at Kshs. 45,148. He shall be availed the certificate of service forthwith.** In sum:-

[a] Termination was based on valid reason, but flawed procedure and therefore unfair;

[b] The Grievant through the Claimant, shall be paid by the Respondent within 30 days of the delivery of this Award, the terminal benefits offered in the letter of summary dismissal dated 5th July 2011, and 4 months' salary at Kshs. 45,148 in compensation for unfair termination;

[c] The Respondent to release the Grievant's Certificate of Service to him forthwith; and

[d] No order on the costs.

Dated and delivered at Nairobi this 1st day of April 2014

James Rika

Judge