



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 53 OF 2012
(Originally Nairobi Cause No. 584 of 2012)

KENYA PETROLEUM OIL WORKERS UNION

CLAIMANT

v

PETRO OIL KENYA LIMITED

RESPONDENT

JUDGMENT

1. Geoffrey Muhanga Katambani (Grievant) was summarily dismissed by Petro Oil Kenya Ltd (Respondent) through a letter dated 5 July 2011. The Respondent had just offered him employment as its Station Manager two months earlier.
2. The Grievant was dissatisfied with the dismissal and he reported to the Kenya Petroleum Oil Workers Union (Union) which in turn lodged a Statement of Claim in the Industrial Court at Nairobi on 10 April 2012 alleging that the Grievant had been declared redundant unlawfully and therefore sought terminal dues.
3. The Court will treat this Claim as one for unfair termination/wrongful dismissal rather than as one for redundancy because of the clarity of the dismissal letter. This is on the basis that though the Claim was pleaded as one of redundancy, the Respondent in its Response filed on 15 November 2012 admitted summarily dismissing the Grievant for misconduct and the question was taken up and made an issue in testimony.
4. The Court also notes that the Respondent in its written submissions went to some length to address the issue of redundancy.
5. The law on unfair termination/wrongful dismissal is clear and the Court is enjoined to examine the procedural as well as the substantive fairness of the termination. In this regard sections 41, 43, 45 and 47(5) of the Employment Act, 2007 are germane.

Procedural fairness

6. According to the Grievant's testimony, prior to the dismissal he had no previous warning letters (admitted in cross examination that he was suspended) and that no investigations were carried out to ascertain loss of alleged Kshs 28,000/- and that he was not given an opportunity to be heard before his dismissal.
7. In cross examination, the Grievant stated that his Zonal Manager visited Othaya Petro Station and found Kshs 13,000/- missing from the safe and he confirmed that he wrote a letter dated 7 June 2011 to the Respondent's Head of Marketing explaining that he had sold fuel on credit to a loyal customer and that later he was summoned to Nairobi and handed a dismissal letter.
8. The parties' testimony as to the process leading to the dismissal was very scanty. All that the

- Grievant stated that he was not given an opportunity to explain before his dismissal. For the Respondent, reference was made to and a letter written by the Grievant produced.
9. The Court must therefore examine whether on the scanty evidence (letter written by Grievant on 7 June 2011) there was compliance with procedural fairness as enunciated in section 41 of the Employment Act.
 10. Section 41 of the Employment Act places a statutory duty upon an employer to notify and hear any representations to be made by an employee before taking the decision to terminate.
 11. In the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR, this Court considered what procedural fairness entailed and stated that

And what does section 41 of the 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.

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.

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 possible.

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.

12. In the case under discussion, there was no material placed before Court to demonstrate that the Respondent framed or confronted the Grievant with the allegations it had and was contemplating to use to terminate his services or that any representations made by Grievant were considered. It is granted that the Grievant wrote a letter on 7 June 2011 and the dismissal came on 5 July 2011. What prompted the letter by the Grievant is not clear.
13. Section 41 of the Employment Act expects an employer to inform an employee in clear and unambiguous language of the charges against him and that disciplinary action is being contemplated against him and seek his response to the allegations.
14. A spot audit report by Robert Owuor (Zonal Manager) was produced by the Respondent. But the report by the Zonal Manager leaves no doubt it was an audit or investigation to establish facts upon which a disciplinary process could be commenced against the Grievant. The audit or investigations cannot substitute the hearing section 41 of the Employment Act obligates an employer to conduct.
15. The meeting between the Grievant and the Respondent's director in Mombasa also came after the dismissal and therefore cannot be said to have been part of the expected hearing.
16. With the scanty material placed before Court, the Court is unable to find that the Respondent followed due or fair process before taking the decision to dismiss the Grievant.
17. Considering the conclusion reached and the provisions of section 45(2)(c) of the Employment Act, it is not necessary to consider whether the Respondent has proved the reasons for the summary dismissal and that the reasons were valid and fair reasons to dismiss the Grievant. This approach is taken despite the material placed before Court on alleged fraud in March 2011.

Appropriate relief

One month pay in lieu of Notice

18. Having found that the dismissal of the Grievant was procedurally unfair, and invoking the provisions of sections 35 and 36 of the Employment Act, the Court finds that the Grievant is entitled to one month pay in lieu of notice.
19. The evidence which was presented before Court was that the Grievant was earning Kshs 17,499/- gross per month.

Salary for June 2011

20. The Grievant pleaded and testified that he was not paid his salary for June 2011. The Respondent did not produce any documentary evidence to demonstrate that the Grievant was paid salary for June 2011. Sections 10(3) and (7) and 20 of the Employment Act place this burden on an employer.
21. The Grievant is entitled to wages earned in June 2011.

Outstanding leave days

22. The dismissal letter indicated that the Grievant would be paid 17 pending leave days. The Respondent did not give any figures and relying on section 10(7) of the Employment Act, the Court finds in favour of the Grievant.

Salary arrears for May and June 2011

23. No statutory/evidential basis or foundation for this head of claim was laid. No suggestion was made that the Grievant was being paid below the gazetted minimum wages. Blanket reference was made to Legal Notice No. 64 of 2011 but the said notice has no category of petrol station manager. This head of claim is not proved and stands to be dismissed.

Certificate of Service

24. An employer is under a statutory duty to provide an employee with a certificate of service. The corollary to this duty is that an employee has a right under section 51 of the Employment Act to a certificate of service. The Respondent should issue one to the Grievant.

12 months maximum compensation

25. The equivalent of a number of months' gross wages not exceeding twelve months is one of the primary remedies for unfair termination. The remedy however, is discretionary.
26. The Grievant did not inform the Court which of the thirteen factors enumerated in section 49(4) of the Employment Act should be considered in exercising this discretion in his favour.
27. The Grievant had served the Respondent for about 2 months as a Manager and about 6 years as an ordinary employee.
28. Considering the length of service and the circumstances under which the Grievant was dismissed, the Court is of the view that an award equivalent to five months gross pay would be just.

Costs

29. The Court record reveals that the Claimant filed written submissions on 4 April 2014 while the Respondent filed its submissions on 13 May 2014 instead of on or before 24 April 2014.
30. Considering the above factor and that the Claimant has incurred expenses as a result of the termination, the Court would award him costs assessed at Kshs 20,000/-.

Conclusion and Orders

31. From the foregoing the Court finds and holds that the summary dismissal of the Grievant was not

carried out through a fair procedure. It was procedurally unfair and the Grievant is awarded and Respondent ordered to pay him

a. One month pay in lieu of Notice	Kshs 17,499/-
b. Salary for June 2011	Kshs 17,499/-
c. Outstanding leave	Kshs 7,931/-
d. Five months compensation	Kshs 87,495/-
e. Costs	Kshs 20,000/-

TOTAL **Kshs 149,524/-**

32. The Respondent is also ordered to issue a Certificate of Service to the Grievant.

33. The Claim for salary arrears for May and June 2011 is dismissed.

Delivered, dated and signed in open Court in Mombasa on this 23rd day of May 2014.

Radido Stephen

Judge

Appearances

Mr. Olala, Branch Secretary

Kenya Petroleum Oil Workers Union

for Claimant/Grievant

Mr. Ojode, instructed by

Ojode Udoto & Onjoro Advocates

for Respondent