



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 366 OF 2013

ROBERT NJIHIA MWANGI.....CLAIMANT

- VERSUS -

BIDCO OIL REFINERIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 27th June, 2014)

JUDGMENT

The claimant **Robert Njihia Mwangi** filed the memorandum of claim on 29.10.2013 through Nancy W. Njoroge & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **One month salary in lieu of notice Kshs.19,667.10.**
- b. **12 days pay for July 2013 Kshs.7,866.80.**
- c. **Gross underpayments Kshs.209,437.20.**
- d. **4 years annual leave payment Kshs.35,541.50.**
- e. **Compensation under section 49 (1) (c) Kshs.236,005.20.**
- f. **Damages for unfair loss of employment Kshs.5,192,114.40.**
- g. **Grant total Kshs.5,700,632.20.**

The respondent **Bidco Oil Refineries Limited** filed the memorandum of response on 29.11.2013 through Guram & Company Advocates. The respondent prayed that the suit be dismissed with costs. The reply to response was filed on 17.12.2013.

The claimant testified to support his case. The respondent's witnesses were Kelly Wambua, the respondent's Human Resource Officer (**RW1**) and Robert Liboso, the respondent's Chief Security Officer (**RW2**).

The claimant was employed by the respondent as a casual electrician effective 5.8.2008. Effective 17.12.2012, the claimant was emplaced on a fixed term employment for one year and on 26.06.2013, he was placed on permanent service.

On the night of 11.07.2013, the claimant testified that he was serving on the night shift as the electrician on duty. He performed all the work as required and there was no more work to be done for the night. He decided to go and rest at the preparation plant which was warmer and located at the farthest point from the respondent's main gate. The claimant left work at 7.30 a.m. at the end of the night shift and was released as usual. His supervisor that night was the production supervisor, Gilbert who was new at the job. On 12.07.2013, the claimant was telephoned at about 11.00 am and asked by the respondent's security officer called Nyongesa to report at work because there was a serious problem at work. The claimant reported at work and was asked about theft of crude oil on the night of 11.07.2013 and he was

also asked to record a statement. It was the claimant's case that he was not aware of such theft. The claimant and five others were taken to the Central Police Station at Nakuru and they were held at police cells for the night. The following morning, the claimant was interrogated and he gave a written statement. The claimant was subsequently set free at about 6.00 pm and no criminal charges were preferred against the claimant. The claimant testified that the theft of the crude oil was not known to him as he was not involved in security work.

On 15.07.2013, the claimant reported on duty for assignment of duties to continue working. The claimant was locked out and on 23.07.2014 and 24.07.2014, he wrote complaining about the lock-out. On 29.07.2014, he telephoned the respondent and the respondent's receptionist advised him to go and pick something from the respondent. The claimant complied and he was given a termination letter by the respondent's Human Resource Officer. The letter was dated 19.07.2013.

By that letter dated 19.07.2013, the claimant was dismissed on account of theft of crude oil. The termination letter stated that the management had noted with concern that during the night shift of 11.07.2013, the claimant together with others planned and executed theft of 15 Mts of crude oil being the property of the respondent. The letter conveyed that the act amounted to gross misconduct and was a violation of the terms of employment, the respondent's rules and regulations, and the provisions of the Employment Act, 2007. The letter stated that in the premises, the claimant was summarily dismissed from the respondent's employment. The claimant was dissatisfied and he filed the suit.

The issues for determination include whether the termination was unfair and whether the claimant is entitled to the remedies as prayed for.

RW1 testified that according to the records and investigations, between 11.30 pm to 1.30 am on the night of the theft, the claimant left the respondent's compound and walked out of the gate. RW1 testified that about that time of that night, the truck that ferried the stolen crude oil had checked in and left the respondent's premises. RW1 testified that the claimant was arrested but not charged with a criminal offence for reasons known only to the police officers. The claimant testified that at about 11.00 pm on the night of the theft, he had requested the security officer at the gate to allow him to step out of the gate with a view of going to smoke. The production department from which the crude oil had been stolen cleared the claimant following the termination. RW1 testified that the claimant was suspended to pave way for investigations but there was no formal suspension letter. RW2 testified that he relied on the police records and the claimant was never charged with a criminal offence.

The court has considered the evidence. It is clear that the respondent did not comply with the provisions of section 41 on notice and hearing. The respondent's case was that in a case of summary dismissal, there was no need for notice. However, the court upholds its previous holding that even in cases of alleged summary dismissal, the employee is entitled to a notice and hearing under the section only that the notice may be shorter than was agreed. The court upholds its opinion in SHANKAR SAKLANI -VERSUS-DHL GLOBAL FORWARDING (K) LIMITED [2012]eKLR, Industrial Court Cause No. 562 of 2012 at Nairobi, thus,

“Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the

employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract.”

The court finds that the summary dismissal in this case was unfair for want of due process of a notice and hearing as provided for in section 41 of the Act.

The court has considered the validity of the reason for termination. In the court’s opinion, in absence of a notice and a hearing, it is difficult to establish the basis upon which the respondent could have validated the reason for the termination. The court further finds that the police having arrested the claimant and not charged the claimant like it happened to the others who were arrested after the theft of the crude oil on the material night, the court finds that the irresistible conclusion is that the police investigations exculpated the claimant from liability in view of the theft that had taken place. Throughout the hearing, there was no evidence linking the claimant to the theft. The court finds that the reason for termination was not valid and the termination was unfair under section 43 of the Act.

The court has considered that the action of leaving his work station to rest and stepping out of the respondent’s gate to smoke on the material night were two actions by the claimant that led to his alleged implication and subsequent termination. In the opinion of the court, those were careless contributory acts on the part of the claimant that led to his termination. The court finds that in the circumstances, the claimant is not entitled to the full 12 months’ gross salaries but 7 months salaries at a gross pay of Kshs.19,369.41 making **Kshs.135,585.87** will meet the ends of justice in this case.

The next issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a. The court has found that a notice was necessary, the termination was unfair and further finds that the claimant is entitled to the one month salary in lieu of notice being **Kshs.19,667.10**.
- b. The claimant prayed for 12 days pay for July, 2013 being Kshs.7,866.80. RW1 testified that the claimant was paid Kshs.14,000.00 as the last salary and the court finds that the claimant is not entitled as prayed for.
- c. The claimant claimed gross underpayments and prayed for Kshs.209,437.20. The claim was based on the claim that the claimant was initially engaged as an Artisan Grade II and he was underpaid in view of the minimum statutory pay. It was RW1’s evidence that between 1.05.2009 and 30.04.2010, the claimant was employed as a general worker so that there were no underpayments as claimed. The court finds that the claimant did not establish that he was employed as an Artisan Grade II and there is no reason to doubt RW1’s evidence on the issue. Accordingly, the court finds that the claim and prayer will fail.
- d. The claimant prayed for 4 years annual leave payment at Kshs.35,541.50. It was submitted for the claimant that he was entitled to the annual leave because he served continuously without a break from August, 2008 to July, 2013. Further, the claimant was entitled as prayed because section 28(1) of the Employment Act, 2007 provides that after every twelve consecutive months of service with the employer, the employee is entitled to not less than twenty one working days of leave with full pay. The court finds that the claimant was not given paid annual leave and is entitled to **Kshs.35,541.50** as prayed for.
- e. The claimant prayed for damages for unfair loss of employment being Kshs.5,192,114.40. The claimant is a skilled electrician, energetic, youthful and there is all opportunity for him to access and obtain alternative gainful and productive engagement. In the circumstances, the court finds that the claimant is not entitled as claimed. The claim will therefore fail.

As the claimant has substantially succeeded, the court finds that the respondent will pay costs of the suit.

In conclusion, the court enters judgment for the claimant against the respondent for:

1. A declaration that the respondent's termination of the claimant's employment was unfair.
2. The respondent to pay the claimant **Kshs.190,794.48** by 1.08.2014, failing, interest to be payable at court rates from the date of this judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday 27th June, 2014**.

BYRAM ONGAYA

JUDGE