



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO.367 OF 2013**

**KENYA PETROLEUM WORKERS UNION.....CLAIMANT**

**-VERSUS-**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> October, 2014)

**JUDGMENT**

The claimant union filed a memorandum of claim on 26.11.2013 with respect to claims by its members Wycliff Wanambisi Wangila (1<sup>st</sup> grievant) and Justus Kizito Wanyama (2<sup>nd</sup> grievant). The claimant prayed for:

- a. A declaration that the dismissal of the grievants was wrongful and unfair.
- b. The grievants to be paid their respective terminal benefits.
- c. The respondent to compensate the grievants for wrongful and unlawful dismissal at equivalent of 12 months gross salaries.
- d. General damages for breach of the employment contract.
- e. The respondent to pay costs of the claim.
- f. Interest at court rates and any other reliefs that court may find suitable to grant.
- g. The grievants to be issued with their respective certificates of service.

The respondent's memorandum of defence was filed on 18.02.2014 through Kinyanjui Njuguna & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The 2<sup>nd</sup> grievant was employed by the respondent as a security guard on 4.4.1995 and deployed to the Eldoret pump station No.27. As at termination he was earned Kshs. 26, 950.00 as basic monthly pay, Kshs. 10, 000.00 monthly commuter allowance and Kshs.20, 400.00 monthly house allowance making a gross pay of Kshs. 57, 350.00. The grievant received a suspension dated 12.10.2005 alleging that the grievant had been involved in corrupt activities by colluding with outsiders in siphoning fuel which the grievant was expected to secure on behalf of the company and its clients. The grievant was suspended without pay effective 12.10.2005 pending further investigations. By the letter dated 17.10.2005 the grievant was summarily dismissed effective 17.10.2005 on account of the allegations.

The 1<sup>st</sup> grievant was in same pay scale as the 2<sup>nd</sup> grievant. He received the suspension letter on

13.10.2005 implicating him in the conspiracy to steal fuel. He was summarily dismissed on 21.10.2005 without an opportunity to defend himself.

The grievants testified that he was not given particulars of the alleged theft of fuel and he was terminated without any hearing or a chance for self defence. After the summary dismissal, the grievants were arrested and charged in Criminal Case No. 7290 of 2005 with the offence of stealing contrary to section 275 of the Penal Code. They were acquitted on 14.06.2006 under section 210 Of the Criminal Procedure Code. In acquitting the grievants, the learned trial magistrate stated thus, **“The accused persons are victims of circumstances. There were twenty two stages through which clearance was to be done they are the only ones who were picked for reasons best known to Major Shiroya.”**

After the acquittal, the claimant wrote to the respondent the letter dated 2.05.2007 seeking reinstatement of the grievants. The claimant reported a labour dispute to the labour office by the letter dated 5.07.2010. A conciliator was appointed and there was no amicable resolution culminating into the conciliator’s letter of 1.08.2012 that either party could refer the dispute to the Industrial Court.

The respondent’s 1<sup>st</sup> witness was the retired Major Shiloya (RW1). His evidence was that the grievants were dismissed following their implication in a conspiracy to steal fuel at the respondent’s loading bay. The respondent’s 2<sup>nd</sup> witness was Emily Wanjuki Thathi (RW2) the respondent’s human resource officer, industrial section. RW1 testified that there were no complaints received from the respondent’s customers about the grievants’ performance.

The court has considered the pleadings, the evidence and submissions on record. The court makes findings on the issues in dispute as follows.

The **1<sup>st</sup> issue** for determination is whether the suit was time barred. It was submitted for the respondent that the applicable section 4(1) of the Limitation of Actions Act Cap. 22 provided that actions founded on contract may not be brought after the end of six years from the date of accrual of the cause of action. It was submitted that the cause of action had accrued on 17.10.2005 being the date of the dismissal and the suit was filed on 26.11.2014, long after lapsing of the 6 years. It was a time barred suit as far as the respondent was concerned. For the claimant it was submitted that the suit was not time barred because the letters of summary dismissal were served upon the grievants while they were in police custody; the grievants were acquitted on 14.07.2006 and the parties submitted themselves to a conciliatory proceeding culminating into the conciliator’s letter of 1.08.2012 that either party could refer the dispute to the Industrial Court.

The court has considered the submissions and finds that the conciliatory proceedings were time barred under the relevant statutory provisions and the same did not accord the claimants a reprieve in view of the prescribed 6 years limitation period. Thus, in the letter dated 13.01.2012, while encouraging the parties to attend a conciliation meeting to strike an amicable agreement, the conciliator also in the same letter reminded the parties that the statutory period allowed for conciliation had already lapsed and if the parties failed to reach an agreement the matter would have to be referred to the court. Accordingly, the court finds that the cases cited for the claimant by way of authorities that the time of limitation does not run until after conclusion of the statutory conciliation proceedings do not apply to the present case.

Nevertheless, the court has considered the acquittal order of 14.07.2006 and finds that the grievants’ and claimant’s cause of action was properly grounded upon that acquittal order. Section 4(4) of the Limitation of Actions Act provides 12 years as the limitation period for actions based on a court judgment or order and the court finds that the claimant’s suit was not time barred as based on the acquittal order.

To answer the 1<sup>st</sup> issue for determination, the court finds that the suit was not time barred because it was based and founded upon the court order acquitting the grievants. It is the opinion of the court that without the acquittal order, there would be no timely cause of action in favour of the claimants or the grievants.

The **2<sup>nd</sup> issue** for determination is whether there was a valid reason for termination. It was submitted for

the respondent that the grievants neglected their duties and allowed containers to pass through the gates and which containers were used to facilitate the siphoning of fuel in the alleged theft of fuel. Thus, the summary dismissal was lawful and fair as it was based on a valid reason. For the claimant it was submitted that the grievants were summarily dismissed without being accorded a chance to defend themselves. Further, it was submitted that the grievants were acquitted by the criminal court of the alleged offence of theft which had been the substantial reason for their summary dismissal so that in view of the acquittal, beyond reasonable doubt, there was no valid reason for the summary dismissal.

As regards disciplinary cases in the employment relationship and where in the opinion of the employer there exist a criminal element, this court set out the guiding applicable principles in the case of Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013 at Nakuru. At page 13 to 14 of the judgment, the court stated as follows:

**“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:**

- a. **Where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer’s decision without involving the relevant criminal justice agency.**
- b. **If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**
- c. **If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer’s administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.**
- d. **To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.”**

In the present case, after the respondent concluded the disciplinary case by summarily dismissing the grievants, the respondent further pursued the criminal process and the court found that the grievants were not guilty as alleged. The court in upholding the guiding principles set out in its earlier judgment finds that guiding principle (c) is applicable thus, **“If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer’s administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.”**

Accordingly, the court finds that there was no valid reason for the grievants’ summary dismissal as the respondent is bound by the subsequent findings of the criminal court that the grievants were beyond all reasonable doubt not guilty of stealing the fuel as had been alleged against them.

The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The court has found that the reason for termination was not genuine as it was not valid. The court further finds that the dismissal letters were not copied to the union as required under clause 38 of the collective agreement. The court finds that the claimant is entitled to the declaration that the dismissal of the grievants was wrongful and unfair.
- b. The claimant prayed that the grievants be paid their respective terminal benefits. The court has found that the termination was unfair. However, the claimant did not urge and submit on the measure of the terminal benefits as claimed. The court has seen the respondent's Staff Rules and Regulations 1992 which provided for the contributory pension scheme. As the court has not been guided in an elaborate manner in that respect, the court finds that the grievants are entitled to be paid the respondent's and their own respective contributions to the pension scheme as at the date of summary dismissal together with all accrued interest running till the date of such payment.
- c. The claimant prayed that the respondent compensates the grievants for wrongful and unlawful dismissal at equivalent of 12 months gross salaries. The court has considered the unfair manner the grievants' employment was terminated. The court finds that awarding each of them 12 months gross salaries is reasonable as will meet the ends of justice and each claimant is entitled accordingly. While making that finding, the court has considered that such prayer might have been founded upon the provisions of section 49 of the Employment Act, 2007 but which was not in force at the time of dismissal in 2005 but is reasonable in the circumstances especially that the alternative measure of compensation would be the future lost earnings which would be more favourable but was not pleaded or urged for on the part of the claimant. Thus each of the grievants is entitled to **Kshs.688, 200.00** at the rate of Kshs. 57, 350.00 gross monthly pay.
- d. The claimant prayed for general damages for breach of the employment contract. The court finds that no specific submissions were made in that regard and the prayer is deemed to have been abandoned.
- e. The court finds that the grievants are entitled to be issued with their respective certificates of service.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The declaration that the dismissal of the grievants by the respondent was wrongful and unfair.
2. The declaration that the grievants are entitled to be paid the respondent's and their own respective contributions to the pension scheme as at the date of summary dismissal together with all accrued interest running till the date of such payment.
3. The respondent to pay each of the grievants **Kshs.688, 200.00** by 1.12.2014 failing interest thereon to be payable at court rates from the date of judgment till the date of full payment.
4. The respondent to deliver to each grievant the certificate of service by 1.12.2014.
5. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nakuru this Friday, 17<sup>th</sup> October, 2014.**

**BYRAM ONGAYA**

**JUDGE**