



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 1345 OF 2013**

**PATRICK OMUSULA LUPERE.....CLAIMANT**

**VERSUS**

**PETRO OIL KENYA LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is the wrongful, unlawful and unfair termination of the employment of the claimant, Patrick Omusula Lupere by the respondent company, Petro Oil Kenya Limited
2. On 21<sup>st</sup> August 2013 the claimant filed his claim seeking payment of terminal dues and compensation for unfair termination. The defence was filed on 25<sup>th</sup> September 2013 and admitted that the claimant was their employee and following incidents of theft he was arrested and charged in court and was thus terminated and paid all his dues. At the hearing the claimant gave his sworn evidence while the respondent called Moses Mwanja Okumu as their witness. At the close of the hearing both parties filed their written submissions on 14<sup>th</sup> and 23<sup>rd</sup> October 2014 for the claimant and respondent respectively.

**Claimant's case**

3. The claimant was employed by the respondent as a Pump Attendant at their Othaya station on 1<sup>st</sup> December 2005. On 10<sup>th</sup> April 2012 the claimant was charged at the Principal magistrate's Court at Othaya in criminal case No.154 of 2012 with three counts of conspiracy to commit a misdemeanour, and theft. That On 5<sup>th</sup> April 2012 while at the place of work, the claimant together with others stole 30 litres of Diesel, 19 litres of super petrol all valued at kshs.5,343.00 the property of the respondent. Judgement was entered on 18<sup>th</sup> April 2013 with an acquittal as the prosecution had failed to prove the case beyond reasonable doubt. Despite the acquittal the respondent refused to reinstate the claimant. Despite the criminal charges the claimant was never suspended or terminated. He was not paid his salaries. He is seeking notice pay, severance pay, housing allowance, compensation and unpaid salaries and or a reinstatement to his position.
4. In evidence, the claimant stated that he was employed by the respondent on 1<sup>st</sup> December 2005 as a Pump Attendant at Othaya branch at a monthly salary of kshs.8, 724.00. He was however terminated in April 2012 when together with others he was arrested and charged in court but was acquitted and discharged. It took a year to conclude the criminal trial and while this was ongoing he was not paid any salary or put on suspension. At the time he was earning a gross salary of kshs.14, 024.00. After his acquittal he reported back to work and the respondent told him that they would prefer an appeal and would not take him back. That it was wrong to be terminated as there was no conviction against him. The respondent did investigations but he was never involved. He thus seeks his prayers as under the

memorandum of claim. This includes April 2012 salary that was not paid and the subsequent months as no salary has been paid since. He is also seeking service pay, house allowance and compensation.

### **Respondent's case**

5. The respondent stated that the claimant was their employee and in April 2012 he was summarily dismissed following huge fuel losses at its Othaya branch where the claimant was based. This followed extensive investigations on 19<sup>th</sup> March 2012 and on 10<sup>th</sup> April 2012 it was established that the claimant was involved in the losses. On 17<sup>th</sup> March 2012, the respondent officer ceased the fuel pumps with seal numbers MF 109007 and MF 109008 and those seals were intact until 6<sup>th</sup> April 2012 at 7am when the respondent officer realised that the seals were replaced with seals Numbers MF 154223 and MF 154224 by the claimant and his colleagues who were working on night shift of 5<sup>th</sup> and 6<sup>th</sup> of April 2012. The matter was reported to the police who arrested and charged the claimant accordingly and the claimant was acquitted on a technicality. That the claimant was in breach of his contract by engaging in acts of stealing the property of the respondent and were thus justified in terminating the claimant. He is not entitled to the claims made.

6. In evidence the respondent witness Moses Okumu stated that he is the Retail Zonal Manager and does enforce the respondent policy at the filling stations. He knew the claimant while working for the respondent at Othaya branch. Fuel was lost and the claimant was involved and was charged with criminal case No. 154 of 2012. The matter arose that the Othaya branch was making huge losses of fuel and the respondent needed to establish the cause. In this case there was pump tampering by the staff. There was manipulation of the pump where fuel was siphoned without the pump records. The witness therefore was charged with the duty to carry out investigations and used seals that once broken could not be replaced. On 17<sup>th</sup> March 2012 the seals remained intact until 6<sup>th</sup> April 2012 when it was discovered that they had been broken by the staff at the night shift. There were new seals inserted. This was reported to the police who arrested all the staff on night shift and were charged before the magistrate's court.

7. The witness also stated that once the claimant was charged in court he never reported back to work. He was on cash bail but was not able to pay it immediately and he remained in custody. The claimant can therefore not be paid for time he was not at work. The claimant absconded. The claimant was not issued with a letter of suspension or a termination letter but after he was charged in court he simply did not report back to work.

### **Submissions**

8. In submissions the claimant stated that in the termination of the claimant, there was no compliance with section 45(2) of the Employment Act as there was no interrogation with regard to the alleged theft of fuel and there was therefore no valid reason for the termination that could be said as being fair or justified in this case. Also there were no valid reasons given to the claimant before he was dismissed. In this case a hearing before termination was necessary as provided for under section 41 of the Employment Act which right the respondent failed to accord to the claimant. Where the law was not followed the resultant decision was unfair. The claimant should therefore be reinstated as held in the case of **Mary Chemweno Kiptui versus the Kenya Pipeline Company Limited [2014] eKLR** or be paid compensation and his terminal dues.

9. The respondent submitted that the claimant was charged with criminal offences following investigations by the respondent and the police. Upon being charged he absconded duty and therefore has the burden of proof that he was unfairly terminated. Under section 47(5) the burden shifted to the claimant with regard to his alleged unfair termination. The reason why the claimant who had been granted bail failed to report to work until his criminal case ended amounted to desertion of duty. The claimant's contract of employment had provision for summary dismissal for being involved in gross misconduct which was the case here as the criminal charges against the claimant was gross misconduct. Section 44 of the Employment Act allow summary dismissal and the claimant is not entitled to any claims against the respondent. No notice pay is due as he deserted duty, severance does not apply in this case and the

claimant was paid his house allowance. No compensation is due as the termination was justified. A reinstatement is not an appropriate remedy as trust has been lost with the employer.

10. It is now trite that whatever the case that require an employee to be terminated from employment or dismissed as under section 44 of the employment Act, the reasons must be communicated in writing. This is important because any employee dismissed or terminated retains the right to challenge such reasons as to their validity as under section 43 and 45 of the Employment Act. Where no written communication is issued to the employee, such an employee remains in limbo as it were.

11. In this case I note the claimant was arrested and charged in Criminal Case No. 154 of 2012 before the Principal magistrate Othaya, but following a yearlong hearing he was acquitted. The claimant was out on bail. He went back to his place of work after the acquittal seeking to be reinstated. He did nothing with regard to his employment pending the criminal trial process. Likewise, the respondent did nothing pending the criminal trial with regard to the claimant's work status. There was no suspension, a disciplinary hearing at the work place or a communication with regard to either summary dismissal or a termination. Despite the criminal trial that was ongoing before the principal magistrate court at Othaya, this was a prosecution process. The respondent had the duty to undertake their internal disciplinary process where they felt the claimant was in breach of his contract. To stand back and wait for the outcome of the criminal trial was to abuse the employment relationship between them and the claimant. The claimant did not help or mitigate his circumstances as well. Despite being out on bond, he did not seek to have his job back until a year later.

12. The duty here rests with the employer to inform the employee of any disciplinary process and where such an employee does abscond duty, similarly employ the appropriate disciplinary procedures. It does not matter that there is a criminal hearing ongoing. The status of the employee must be explained in writing either through a letter of suspension while awaiting the close of the criminal trial, or a notice of summary dismissal whichever is applicable. To remain silent add to poor work relations and a bad labour practice.

13. I find no evidence that the claimant was ever terminated. There is no notice whatsoever with regard to his current work relationship with his employer despite his letter of employment stating categorically that termination was to be communicated and the same was to be with notice. The provisions in the contract with regard to summary dismissal have equally not been followed. These are practices outlined at article 41 of the Constitution as unfair labour practices. This is also contrary to section 41, 43 and 45 of the Employment Act.

## **Remedies**

14. On the remedies sought, where he is seeking reinstatement, this is a specific performance remedy that is only granted in the rarest of cases. This does not stand out as one such case. This will not be ordered.

On the finding that there was unfair labour practice against the claimant, he was entitled to notice before he was deemed to have been terminated. He will be awarded one month's pay in lieu of such notice.

15. Severance pay only arises in cases of redundancy under section 40 of the Employment Act. This is not such a case. This is declined.

16. Housing allowance was incorporated in the claimant's work contract. This was a term agreed by both parties. This cannot therefore be granted outside the contract. This is declined.

17. On the finding that both parties did not act with regard to their status as at the time the claimant was charged, the claimant has to bear 50% blame. He was not vigilant in seeking his job back. He sat back on his rights awaiting the outcome of the criminal trial. The respondent also did not communicate to the claimant about his work status at all. In making award and compensation for unfair termination, this is put into account.

18. The claim for days not worked is not granted on the basis that the claimant did not render any services. However in the context that the respondent has not to date issued the letter of termination, this will be put into account in computing the compensation due. In this regard and based on the above assessment, the claimant will be awarded 6 months gross salary as compensation for the unfair termination.

**Judgement is entered for the claimant against the Respondent in the following terms;**

**(a) The termination of the claimant's was unfair**

**(b) Compensation is awarded at kshs. 84,144.00**

**(c) Notice pay at Kshs.14,024.00**

**(d) Each party will bear their own costs.**

Delivered, dated and signed in open Court at Nairobi this 18<sup>th</sup> day of November 2014.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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