



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**CAUSE NO. 145 OF 2012**  
**(Originally Nairobi Cause No. 1034 of 2010)**

**KENYA PETROLUEM OIL WORKERS UNION**

**CLAIMANT**

v

**TOTAL KENYA LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Kenya Petroleum Oil Workers Union (the Union) filed a Memorandum of Claim against Total Kenya Ltd (the Respondent) on 8 September 2010 and the issue in dispute was stated as *the wrongful termination of Mr. Michael Mailu* (the Grievant).
2. The Respondent filed its Memorandum of Response on 6 January 2011 and the Cause was mentioned severally but never took off for reasons which are on record. Eventually the Cause proceeded to hearing on 20 February 2013, 8 April 2013 and 29 May 2013.

**Case for the Union: Pleadings and testimony**

3. The Grievant was employed by the Respondent on 1 December 1987 as a General Hand Grade 8 and confirmed with effect from 1 March 1988 after successfully completing the probation period. From 1 January 1997 the Grievant was promoted to Grade 4.
4. On or around 1 November 2002 the Grievant was seconded to Mombasa Joint Terminal as a Production Assistant Category 2 and was evaluated and rated positively as an Operations Assistant in 2006 and 2007.
5. Sometime in 2008 the Respondent requested the Grievant to resign but he declined through a letter dated 4 July 2008. The letter made reference to loss of some 5000 litres of fuel. A few days later, on 9 July 2008, the Respondent suspended the Grievant until 28 July 2008 on the ground of alleged loss of products at Shimanzi depot. The suspension was to facilitate investigations.
6. On 29 July 2008, the Grievant was summarily dismissed on the ground that the Respondent had lost *confidence in you* and in accordance with Clause 1-20 of the Collective Bargaining Agreement. The dismissal letter indicated that the Grievant was to be paid salary up to date of dismissal and prorated leave days. At time of dismissal Grievant was earning Kshs 29,942/- per month.
7. The Grievant and Union were not happy and a trade dispute was reported to the Minister for Labour for conciliation.
8. In testimony, the Grievant added that he was based at Changamwe depot but would occasionally

- move to Shimanzi depot. The depots were co owned between the Respondent and two other oil marketers.
9. On why he considered the dismissal wrongful, the Grievant testified that he was not confronted with the allegations of loss of 4923 litres of fuel nor were details given of the loss in the dismissal letter. He further testified that he had not been given any verbal warnings nor taken through a disciplinary process.
  10. The Grievant therefore seeks reinstatement, maximum compensation, general damages, costs and a Certificate of Service.

### **Respondent's case: Pleadings and testimony**

11. The Respondent admitted having employed the Grievant and that the Grievant was transferred to Mombasa Joint terminal as a Product Assistant in November 2002 and that the duties of the Grievant included gauging bulk storage tanks, recording dips in gauge books and providing accurate stocks accounting as well as lining up product tanks and pipelines for loading/receiving products.
12. Regarding the termination of the Grievant, the Respondent pleaded that on 20 June 2008 a loss of 4923 litres of fuel worth about Kshs 500,000/- was established at Shimanzi depot and that a meeting was held with the Grievant on 3 July 2008 to ascertain the cause of the loss and that the Grievant failed to provide an explanation for the loss, thus necessitating the suspension of the Grievant on 9 July 2008 to facilitate investigations and that the investigations established the Grievant had exposed the Respondent to loss by unlawfully and improperly calibrating wagons leading to loss of 4923 litres of fuel on 20 June 2008 when the Grievant was on duty.
13. According to the Respondent, the Grievant was therefore dismissed for gross negligence leading to product loss and the dismissal was fair in that due process was followed and that the Grievant willfully neglected to perform work he had a duty to perform carefully and properly.
14. And to justify the dismissal and prove the reasons and that the reasons were valid and fair the Respondent called two witnesses.
15. Regarding procedural fairness it was the testimony of Ms. Mbithe Semo, the Respondent's Employee Relations Manager that on 3 July 2008 a meeting was called in which the Grievant was given an opportunity to explain the loss but he failed to give any and therefore the Grievant was suspended to facilitate investigations.
16. Further it was testified that a disciplinary hearing was held on 4 September 2008 in which the Grievant was accompanied by a shop steward Francis Omurwa and minutes were kept ( Respondent's Appendix 6), and that the Grievant was given the chance to appeal and all the five steps provided for in the Collective Bargaining Agreement were followed.
17. On justifying and proving the reasons, the Respondent called Cyprian Mungune, an engineer in charge of the Joint Terminal. He testified that investigations established that there was actual loss of 4923 litres of fuel on 20 June 2008 from tank number 267. This was established after reconciling the stock records/gauge book and physical stock in the tank.
18. The witness further stated that the Grievant's responsibility included safeguarding the Respondent's interests at the depot and that the loss was due to unauthorized loading and the Grievant was part of the group responsible for the loss.
19. The witness also testified that there was an elaborate loading process in place involving various entities/persons such as Kenya Revenue Authority, customers, marketing/accounts department/supervisors/manager/truck drivers.
20. On cross examination the witness stated that the Grievant did not sign any of the loading orders on either 19 June 2008 or 20 June 2008 and that he could not relate the Grievant to any of the loading orders. The loading orders were signed by one of the Supervisors. The witness also stated that he did not know whether the Grievant was on duty at Shimanzi depot on 20 June 2008 and that staff could be interchanged between Shimanzi and Changamwe depots.

### **Issues for determination**

21. The issues arising for determination are mainly whether the summary dismissal of the Grievant was unfair/wrongful and if so what would be the appropriate remedies.

## **Whether the summary dismissal was unfair**

### ***Procedural fairness***

22. The Grievant testified in chief that he was never given any warning letters, that he was not informed about the loss and or any investigations regarding the loss of 4923 litres of fuel oil. But he confirmed he appeared before the Joint Industrial Council.
23. On cross examination the Grievant admitted that he was summoned to Nairobi where he was informed about the loss and that he was suspended to facilitate investigations. He further stated that he was with a shop steward, one Francis Omurwa at a meeting held with the Respondent's Human Resources Manager.
24. For the Respondent, it was urged that a meeting was held on 3 July 2008 and the Grievant failed to explain the loss thus leading to his suspension on 9 July 2008. Minutes of a meeting held on 4 September 2008 between the Union and Respondent and of the Joint Industrial Council meeting held on 17 March 2010 were produced. Overall, I am satisfied that the Respondent substantially complied with due process in dealing with the case of the Grievant.

### ***Substantive fairness***

25. It is a statutory obligation placed upon the shoulders of an employer to justify a dismissal, prove the reasons for the dismissal and that the reasons were valid and fair.
26. I have set out in outline the Respondent's case. The Respondent's second witness testified that he could not relate the Grievant with the loading orders and that the Grievant's signature did not occur anywhere on the records kept for 20 June 2008 when the loss occurred. Indeed both the Respondent's witnesses were categorical that the loss occurred on 20 June 2008.
27. The Grievant had maintained during the Joint Industrial Council meeting that he was not present at Shimanzi depot on 20 June 2008 when the loss occurred. The Respondent's second witness testified that it used to interchange its staff between Changamwe and Shimanzi depots but that he did not know whether the Grievant was present at Shimanzi on 20 June 2008. No attendance records were availed to Court.
28. On the basis of the loading orders and gauge records, and that it has not been shown that the Grievant was at the depot where the loss occurred, it is my considered view that the Respondent has failed to prove the reasons for the dismissal or that the reasons were fair and valid reasons. The Respondent has failed to justify the dismissal of the Grievant.

## **Appropriate relief**

### **Reinstatement**

29. The Grievant was dismissed in 2008. Section 12(3)(vii) of the Industrial Court Act allows reinstatement within three years of dismissal. More than three years have elapsed since the dismissal.
30. Under section 49 (4)(a) (c) of the Employment Act the wishes of the employee and the practicability of ordering reinstatement are also material considerations. The Grievant in the pleadings sought reinstatement but in his evidence he did not allude at all to the prayer for reinstatement. For the Respondent, it must have replaced the Grievant or restructured its operations. In my view reinstatement would not be a just order to make in the circumstances of this case.

### **Compensation**

31. Compensation is a statutory and primary remedy for unfair termination or wrongful dismissal. It is subject to any or all of the thirteen factors set out in section 49(4) of the Employment Act. The Grievant had served the Respondent for 21 years. During that period he did not get even one warning letter.
32. Other monies payable to a Grievant is also a factor to consider. I was not addressed on the

