



**Fresco v Camusat Kenya Limited & another (Cause 1884 of 2017)
[2023] KEELRC 2116 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2116 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1884 OF 2017
L NDOLO, J
SEPTEMBER 21, 2023**

BETWEEN

EMMANUEL FRESCO CLAIMANT

AND

CAMUSAT KENYA LIMITED 1ST RESPONDENT

CAMUSAT MAURICE LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claimant in this case, Emmanuel Fresco filed a Memorandum of Claim dated 19th September 2017, which he later amended on 14th September 2018. He states the issues in dispute as:
 - a. Unfair and unlawful termination of employment of the Claimant by the Respondents; and
 - b. Compensation for wrongful and unfair dismissal.
2. The 1st Respondent, Camusat Kenya Limited, filed a Memorandum of Defence dated 17th November 2017 and amended on 2nd March 2018. The 2nd Respondent, Camusat Maurice Limited, filed a Reply dated 17th June 2021.
3. At the trial, the Claimant testified on his own behalf while the 1st Respondent called three witnesses; Petterson Githinji, the Human Resource Manager; Priscilla Balgobin-Bhoyrul, an independent Barrister based in Mauritius hired by the Respondents to preside over the disciplinary proceedings and Sebastian Martin, the Vice President, Africa and Indian Ocean. The 2nd Respondent called Robert Njogu, the Regional Human Resource Manager for East Africa and Indian Ocean.



The Claimant's Case

4. The Claimant states that the 1st and 2nd Respondents are related companies with the 2nd Respondent being the parent company of the 1st Respondent. The Claimant adds that he was employed by both the 1st and 2nd Respondents vide separate contracts by which he received two different salaries from both entities.
5. The Claimant avers that he was employed by the 1st Respondent vide a contract of employment dated 11th November 2008. He adds that vide a subsequent contract commencing on 1st July 2014, he became the Regional Managing Director, East Africa in charge of operations within the Region.
6. The Claimant claims to have been simultaneously employed by the 2nd Respondent vide an unlimited term employment contract dated 2nd July 2014.
7. According to the Claimant, he served with diligence and dedication as the Regional Managing Director, East Africa until the termination of his employment on 2nd June 2017.
8. On 12th May 2017, the Claimant was served with a letter suspending him from duty and asking him to appear before a Disciplinary Committee on 29th May 2017, to answer to the following allegations:
 - a. Ordering a company transaction in the course of his professional duties from which he earned a financial gain namely, ordering the sale of his personal motor vehicle, Toyota Landcruiser HDJ101-Registration No. KAW 500E to Camusat Kenya of which he was Regional Managing Director for a price of USD 30,000 without obtaining the appropriate approval, against company policy and procedures and against the rules of professional ethics;
 - b. Failing to ensure that the said vehicle was effectively transferred to the name of Camusat Kenya such that he was the illegal owner of a company asset;
 - c. Orchestrating, inducing and/or conspiring to make a false and malicious declaration to the Kenyan immigration authorities in respect of the Chief Finance and Accounting Officer (CAFO) of Camusat Africa, Ms. Beatriz Meijide, with the intention of causing prejudice to her.
9. By his letter dated 12th May 2017, the Claimant acknowledged the letter inviting him for a disciplinary hearing on 29th May 2017, which he duly attended.
10. At the disciplinary hearing, the Claimant rebutted the charges preferred against him, which he termed as false, malicious and outrageous. He claims that the sale of his personal motor vehicle, Toyota Landcruiser HDJ101-Registration No. KAW 500E to Camusat Kenya was duly approved by the Board of Directors in France in February 2014. He adds that the value of the vehicle was ascertained by a reputable Kenyan valuation company and that the sale price was lower than the valuation.
11. The Claimant avers that the Finance and Administration Director for Africa, Ms. Beatriz Meijide was among the staff who approved the sale of the subject motor vehicle to Camusat Kenya.
12. According to the Claimant, the disciplinary process he was subjected to, was a charade with a premediated and predetermined outcome. He claims that a new Managing Director had been hired even before the disciplinary hearing.
13. The Claimant accuses the Disciplinary Committee of bias and states that his representations were not considered. He further states that he was not issued with minutes of the disciplinary proceedings.



14. By letter dated 2nd June 2017 from the 1st Respondent, the Claimant's employment was terminated. The reasons for termination were given as follows:
- a. That the Claimant had made a false and malicious declaration to the Kenyan immigration authorities with the intention of causing prejudice to Ms. Beatriz Meijide; and
 - b. That the Claimant failed to obtain express approval from Sebastian Martin as to the purchase price of his personal vehicle by the 1st Respondent.
15. The Claimant's case is that the termination of his employment was in breach of the *Employment Act* and his contract of employment. He maintains that there was no valid reason for the termination and due process was not followed.
16. In addition, the Claimant states that his emoluments were not properly computed and his local holidays were not paid.
17. The Claimant therefore seeks the following remedies:
- a. A declaration that his dismissal by the Respondents was wrongful, unfair and in breach of the express provisions of the *Employment Act*, 2007 and in breach of Articles 25 and 50 of *the Constitution* of Kenya, 2010;
 - b. An order for payment of compensation by the 1st and 2nd Respondents as follows:
 - 1st Respondent (Kshs.)
 - 12 months' salary in compensation - 7,778,952
 - 3 month's salary in lieu of notice - 1,944,738
 - Annual leave equivalent - 648,246
 - Service pay @ ½ month salary per year - 2,917,107
 - Pay for balance of contract (20 years) - 155,579,040
 - 2nd Respondent (Euros)
 - 12 months' salary in compensation - 124,632
 - 3 month's salary in lieu of notice - 31,158
 - Annual leave equivalent - 10,386
 - Service pay @ ½ month salary per year - 46,737
 - Pay for balance of contract (20 years) - 2,492,640
 - c. Kshs. 10,000,000 in compensation for breach of fundamental rights under *the Constitution* of Kenya, 2010;
 - d. Costs plus interest.



The Respondents' Case

18. In its Memorandum of Defence dated 17th November 2017 and amended on 2nd March 2018, the 1st Respondent states that its Directors received reports that there were issues of mismanagement and misuse of funds occasioned by the Claimant that warranted investigation.
19. Subsequently, the Directors posted Ms. Beatriz Meijide to the Company in the position of CAFO, with the mandate to streamline the Company's financial operations and prevent loss.
20. The 1st Respondent further states that on 24th April 2017, its Directors were informed that the Claimant had been involved in initiating a false claim with the Directorate of Immigration and Registration of Persons, Ministry of Interior and Coordination of National Government, against Ms. Beatriz Meijide.
21. The 1st Respondent alludes to some anonymous letters containing allegations of mistreatment of Kenyan workers, which according to the 1st Respondent, were intended to incite the immigration authorities to deport Ms. Beatriz Meijide.
22. The 1st Respondent avers that an internal investigation identified two employees as the most probable authors of the anonymous letters. A third employee is said to have confessed being part of the scheme which was orchestrated by the Claimant.
23. The 1st Respondent accuses the Claimant of executing a personal attack against Ms. Meijide, with the aim of impeding investigations into the financial circumstances of the 1st Respondent, during the Claimant's tenure as Regional Managing Director.
24. The Claimant was suspended by letter dated 1st May 2017, pending further investigations into his conduct. On 12th May 2017, he was invited to attend a disciplinary hearing. The 1st Respondent maintains that the disciplinary hearing was conducted in accordance with applicable laws.
25. The 1st Respondent states that in due recognition of the senior position held by the Claimant, he was provided with safeguards above the requirements stipulated by the applicable laws, including having an external and independent referee present at the disciplinary hearing to make a determination as to the Claimant's liability in respect of the allegations brought against him.
26. The 1st Respondent claims that the Claimant admitted at the disciplinary hearing that he had failed to obtain approval in respect of the purchase price of motor vehicle registration number KAW 500E, meaning that the purchase was not approved by the Board.
27. The 1st Respondent points to another discrepancy, being that the motor vehicle was not transferred to the Company, despite the purchase price having been paid in full.
28. The 1st Respondent's case is that the disciplinary hearing duly and properly determined that the Claimant had knowingly made a false and malicious declaration to the Directorate of Immigration regarding the CAFO of the Company and had induced his subordinates to record false statements against the CAFO with the intention of prejudicing her.
29. The 1st Respondent asserts that the Claimant was afforded a reasonable opportunity to be heard and to controvert the evidence brought against him, before the decision to terminate his employment was made.
30. In the alternative and without prejudice to the foregoing, the 1st Respondent avers that letters dated 1st January 2016 and 12th May 2017 were issued to the Claimant by Camusat (Mauritius) Limited,



a separate limited liability entity, pursuant to a contract between the Claimant and the Mauritius Company.

31. In its Reply dated 17th June 2021, the 2nd Respondent admits having employed the Claimant in Mauritius on a contract of service under Mauritius law.
32. The 2nd Respondent states that the Claimant entered into a foreign contract of service with the 1st Respondent, a separate legal entity registered in Kenya under Kenyan law.
33. The 2nd Respondent avers that its management was made aware of the Claimant's failure to obtain approval in respect of the purchase of motor vehicle registration number KAW 500E. The 2nd Respondent adds that the Claimant made no attempts to transfer the vehicle to the 1st Respondent.
34. The 2nd Respondent avers that after investigations, the Claimant was issued with a notice to show cause on 12th May 2017, after which he was summoned to a disciplinary meeting on 29th May 2017.
35. The 2nd Respondent states that during the disciplinary hearing, the Claimant admitted that he had failed to obtain approval in respect of the purchase of motor vehicle registration number KAW 500E.
36. The 2nd Respondent denies that there was a breach of the Claimant's rights under Kenyan law. According to the 2nd Respondent, due process was followed in dismissing the Claimant.
37. The 2nd Respondent challenges the jurisdiction of this Court and states that articles 11 and 12 of the Claimant's contract of employment expressly provided that the applicable law would be the law of Mauritius.

Findings and Determination

38. From the parties' pleadings and the evidence adduced before the Court, the following issues emerge for determination:
 - a. Jurisdiction and applicable law;
 - b. The nexus between the 1st and 2nd Respondents;
 - c. Whether the termination of the Claimant's employment was lawful and fair;
 - d. Whether the Claimant is entitled to the remedies sought.

Jurisdiction and Applicable Law

39. At the interlocutory stage, the issue of jurisdiction and applicable law was raised by the 2nd Respondent, by way of a notice of Preliminary Objection dated 21st March 2019. The substance of the Objection was that any dispute arising from the contract of employment in issue would be decided by the courts in Mauritius in accordance with Mauritius law and this Court therefore lacks jurisdiction to hear and determine the Claimant's claim as against the 2nd Respondent.
40. In his ruling delivered on 22nd November 2019, Makau J drew the following conclusions:
 - a. That the contract was performed in Kenya;
 - b. That the Claimant was resident in Nairobi, Kenya where the 2nd Respondent had a regional office;
 - c. That the alleged misconduct and breaches leading to the suit took place in Kenya;



- d. That referring to the case to Mauritius would increase costs of the trial in travel expenses for the Claimant and witnesses from Kenya to the foreign court;
- e. That the Claimant enjoyed protection of Kenyan employment law under international law.

41. From the foregoing, it is evident that the twin issues of jurisdiction and applicable law, which the 2nd Respondent sought to resuscitate in final submissions, were exhaustively determined by my brother Judge and are therefore spent.

Nexus Between the 1st and 2nd Respondents

- 42. The parties chose to skirt around the issue of the relationship between the 1st and 2nd Respondents. On his part, the Claimant pursued the line that he held two jobs; one with the 1st Respondent and another with the 2nd Respondent.
- 43. The 1st and 2nd Respondents attempted to take cover under the principle of corporate identity. Their responses to the Claimant's claim were however strikingly similar. It was also not lost on the Court that the two Respondents flashed a similar brand name. Further, the two contracts of employment whose termination constitutes the subject matter of this dispute were issued to the Claimant within a span of one (1) day.
- 44. In the premises, it is safe to conclude that the Claimant's engagement by the 1st and 2nd Respondents constituted a blended and indivisible employment relationship and no one contract of employment could survive termination of the other.
- 45. In this regard, I am persuaded by the holding by Rika J in Phillip Ateng Oguk & 27 others v Westmont Power (Kenya) Limited & another [2015] eKLR that the existence of various legal entities at the workplace should not be used to obfuscate employment rights and obligations. The Judge went further to hold that such entities should be viewed as economic units, rather than legally separate bodies.

The Termination

46. On 2nd June 2017, the 1st Respondent wrote to the Claimant as follows:

“Monsieur Emmanuel Fresco

Van Deventerlaan 69

2271 TW Voorburg

Netherlands

Nairobi, on 2nd June 2017

Object: Termination letter

Dear Mr Emmanuel Fresco,

We refer to the disciplinary hearing which was held and concluded on Monday 29th May 2017.

This serves to inform you that Management has received the findings of the Chairperson of the Disciplinary Committee who has, in the light of the evidence which had been adduced at the said hearing, come to the conclusion that you have indeed orchestrated, induced and conspired to make a false and malicious declaration to the Kenyan immigration authorities



in respect of the CAFO of Camusat Africa, Ms Beatriz Meijide with the intention of causing prejudice to the said Ms Meijide.

Management also notes that you have admitted before the said disciplinary committee that you never sought the express approval of your immediate superior Mr Sebastien Martin as to the purchase price of your personal vehicle prior to the acquisition of same by the Company for USD30,000/-.

Management considers that by your acts and doings which are tantamount to gross misconduct, you have also breached the bond of trust that ought to exist between your employer and yourself.

In the light of all the above, Management considers that it cannot, in all good faith, take any other course but to dispense with your services.

Your contract of employment with the Company is accordingly terminated with immediate effect.

We wish to assure you, Mr Emmanuel Fresco, of our highest consideration.

[Given in hands by Mr Sebastien Martin the 02 of June 2017]

Sebastien Martin

VP Africa & Indian Ocean”

47. The first question to ask under this head is whether the Respondents had a valid reason for terminating the Claimant’s employment. The test to be applied is contained in Section 43 of the Employment Act, which provides as follows:

43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

48. The termination letter accuses the Claimant of two counts; first, orchestrating, inducing and conspiring to make a false and malicious declaration to the Kenyan immigration authorities in respect of the CAFO of Camusat Africa, Ms Beatriz Meijide and second, selling his personal motor vehicle to his employer at USD 30,000 without the express approval of his immediate superior.

49. A review of the record of the disciplinary proceedings against the Claimant reveals that the Claimant was in fact cleared of the charge relating to the sale of his personal motor vehicle to his employer. The relevant section of the record states the following:

“...the employee has not earned any financial gain from the sale of the motor vehicle and that it was not his personal responsibility to effect the transfer of the motor vehicle. Although he



is the Managing Director of the Company, it does not necessarily have to be his responsibility to effect such transfers. Mr. Fresco stated that it was up to the fleet management to do so and there is no reason or evidence that Mr Fresco tried to intentionally keep the motor vehicle on his own name. Although it is not disputed that the price was not approved, it is not disputed that the sale was approved and that no clear policy was in place at the time where reference is made specifically to the price having to be approved. Moreover, I bear in mind that Mr Fresco was not the only signatory on the cheque.”

50. By relying on a charge of which the Claimant had been cleared, to terminate his employment, the Respondents in effect ignored the findings of a disciplinary process set up by themselves. I do not think an employer has the latitude to set aside the findings of a disciplinary process, without a valid reason, which must be explained. I say so because it is during the disciplinary process when the employee gets a chance to rebut the accusations levelled against them.
51. By their action therefore, the Respondents trashed the findings of the disciplinary process and went ahead to find the Claimant culpable without complying with the mandatory procedural fairness requirements set out under Section 41 of the *Employment Act*.
52. Regarding the charge of orchestrating false accusations against Ms Beatriz Meijide, the Disciplinary Committee relied on anonymous letters, which were allegedly authored by employees, at the Claimant’s instigation. On this charge, the Disciplinary Committee believed the word of Getachew Beyene who claimed to have been given the letters to deliver to the Immigration Department.
53. Regarding this charge, the disciplinary record tersely states:

“...I find the witness deponed in a straightforward manner and that he had no reason to lie about the fact that Mr Fresco remitted the said documents to him to hand over to immigration. I therefore find charge 3 proved.”
54. This Court is aware that the standard of proof imposed on an employer under Section 43 of the *Employment Act* is on a balance of probability and a valid reason is one that would lead a reasonable employer to terminate employment.
55. According to the record of the disciplinary proceedings, Beyene did not deliver the letters to the Immigration Department nor did he bring them to the attention of Ms Meijide or any other officer of the Company. In fact, the record reveals that the letters were discovered in Beyene’s bag, by the Financial Controller.
56. Apart from Beyene’s uncorroborated word, there was no evidence adduced to prove that the letters emanated from the Claimant. In light of the fact that the letters were themselves anonymous, the Disciplinary Committee ought to have required the Respondents to provide independent evidence linking the Claimant to them.
57. Further, Beyene’s failure to bring the letters to the attention of his superiors, prior to their discovery by the Financial Controller, dented his credibility as a witness. Significantly, the Respondents did not avail Beyene as a witness before the Court.
58. On the whole, I find and hold that the Respondents failed to establish a valid reason for terminating the Claimant’s employment as set out in Section 43 of the *Employment Act*. For the reasons already stated, I also find that the disciplinary process fell short of the requirements set by Section 41 of the Act.



Remedies

59. I therefore award the Claimant four (4) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have considered the contractual period served by the Claimant as well as the Respondent's culpability in the termination transaction.
60. I further award the Claimant three (3) months' salary in lieu of notice as provided in the employment contract dated 1st July 2014.
61. No basis was established for the claims for annual leave equivalent, service pay and pay for balance of contract which therefore fail and are dismissed.
62. The claim for breach of fundamental rights under *the Constitution* was not proved.
63. Finally, I enter judgment in favour of the Claimant as against the 1st Respondent and 2nd Respondent severally as follows:

As against the 1st Respondent: Camusat Kenya Limited(Kshs.)

- a. 4 months' salary in compensation.....Kshs. 2,592,984
- b. 3 months' salary in lieu of notice.....1,944,738

Total.....4,537,722

As against the 2nd Respondent: Camusat Maurice Limited (Euros)

- c. 4 months' salary in compensation.....Euros 41,544
- d. 3 months' salary in lieu of notice.....31,158

Total.....72,702

64. These amounts will be paid net of statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
65. The 1st and 2nd Respondents will meet the costs of the case.
66. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023

LINNET NDOLO

JUDGE

