



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2298 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JULIUS ESHITOLI WAKA.....CLAIMANT

VERSUS

TOTAL KENYA LIMITED.....RESPONDENT

JUDGMENT

On 1st September 2008, the Claimant commenced his employment with the Respondent as a buyer within the Respondent's Corporate Affairs Department, at a monthly basic salary of Kshs.150,000. Sometime in October 2008, the Claimant was issued with 2 Bon Voyage Fuel Cards which he would utilize and thereafter, the Respondent would recover the fuel card balances by deducting the same from his salary.

On 4th September 2015, the Claimant was suspended on account of irregular transactions, high level of card utilization and non-payment of bon voyage. He was later invited for a meeting to explain the identified anomalies and irregularities. The Respondent did not find the explanation satisfactory thereby terminating the Claimant's employment on 6th October 2015. Aggrieved by this decision, the Claimant instituted this claim seeking the following prayers –

- a. A declaration that the Respondent is in breach of the provisions of the Employment Act No. 11 of 2007 and the law in the following respect:
 - i. By failing to provide to the Claimant with reasonable housing accommodation either at or near to the place of employment, or pay to the Claimant such sufficient sum, as rent as would enable the Claimant to obtain reasonable accommodation contrary to section 31 of the Employment Act.
 - ii. By attempting to unfairly terminate the employment of the Claimant contrary to section 45 (1) of the Employment Act in that:
 - (1) There was no valid reason to terminate the Claimant's employment.
 - (2) The procedure adopted for dismissal of the Claimant's employment was inherently unfair.
 - iii. By failing to pay the Claimant the accrued leave days in cash.
 - iv. By failing to pay the Claimant the contractual 1 months' salary in lieu of notice contrary to section 36 of the Employment Act No. 11 of 2007.
 - v. By summarily dismissing the Claimant from employment by terminating the employment of the Claimant with less notice than that to which the Claimant is entitled by the Claimant's contractual term contrary to section 44 (2) of the Employment Act No. 11 of 2007.
- b. A declaration that the Claimant's contract of service is valid and continue to have full force and effect.
- c. Kshs.3,185,822.70 being the Claimant's unpaid house allowance from September 2008 to September 2015.
- d. Kshs.356,457.45 (together with all other employment benefits) being the Claimant's monthly salary from 1st October 2015 to the date when the Claimant's salary in lieu of notice shall be paid in full by the Respondent.

e. Kshs.356,457.45 being the 1 month's salary in lieu of notice.

f. Damages for wrongful dismissal equivalent to 12 months' gross monthly salary at the time of dismissal amounting to Kshs.4,277,489.40 worked out as-

Kshs.356,457.45 (gross monthly salary) x 12 months.

g. Kshs.325,991.52 being the Respondent's 12 months' contribution to the Total Kenya Limited Pension Scheme.

h. Kshs.246,963.31 being the Claimant's expected 12 months' bonus payment.

i. Pursuant to clause 5 of the letter of appointment, Kshs.316,898.43 being the Claimant's 28.23 days' accrued leave worked out as follows-

Accrued leave days as at 30th September 2015 – 28.23 days

Daily rate of leave encashment – Kshs.11,225.29

Being the Claimant's monthly salary divided by 22 days.

j. Costs of this suit.

k. Interest on (c) through (j) above.

l. Any other or further relief that the Honourable Court may deem fit to grant.

Claimant's Case

The Claimant avers that the acquisition of the fuel card was a separate relationship from the employment relationship. He avers that the Respondent has discriminated against him as regards the utilization of the fuel card. He further avers that the Respondent breached the terms of the contract by terminating the contract without a lawful cause, failing to pay his accrued leave days and accrued salary.

It is his case that the Respondent violated the provisions of the Employment Act by failing to provide the Claimant with a reasonable housing or housing allowance, failing to pay him 1 month's salary in lieu of notice and by terminating his services without the issuance of sufficient notice. He avers that a monthly house allowance of Kshs.46,494.45 is owing to him as at the time of the termination, he was earning a monthly salary of Kshs.309,963.

In examination in chief, the Claimant testified that his last gross salary was Kshs.247,963 and he was paid other allowances such as telephone and mileage, which were separate from his basic salary. He testified that there were no policy guidelines or restriction on high utilization of fuel cards. It was his evidence that upon termination he was not taken through the minutes of his hearing.

It was the Claimant's testimony that he had accumulated the sum of Kshs.457,000 on his fuel cards which was recovered from his September salary. It was also his testimony that his leave days for the month of October were used to defray the card charges but he was never issued with a statement. He was only paid his pension and insurance monies.

It was his contention that the terms upon which he was issued with fuel cards were not incorporated in his employment contract hence there was no reason for his dismissal. He stated that his contract made provisions for his summary dismissal and the use of fuel card is not one of those grounds.

During cross examination, it was his testimony that his contract did not specify that he was entitled to house allowance and neither did he make a claim for house allowance or make a complaint regarding his consolidated salary.

He conceded that one of the accusations against him was that he had asked the back office to renew his fuel cards without payment thus misusing his position. He also admitted that during the disciplinary meetings he had been asked about utilizing the cards during office hours. He admitted that the respondent had called him for a second meeting for the purpose of explaining the anomalies.

Upon re-examination, it was his testimony that the minutes of the meeting were never shared with him so he cannot confirm the accuracy of the minutes.

Respondent's Case

The Respondent filed a response on 9th May 2016. It avers that any bonus awarded to the Claimant was in recognition of his and the Respondent's performance in any given year. It is averred that the annual salary increments reflected inflation, price of consumer goods and services, rent and the cost of living adjustment. The Respondent gives the example of the Claimant's last salary review whereby the cost of living adjustment was 4%.

The Respondent contends that although it is statutorily obligated to provide reasonable accommodation, house allowance was part of the

Claimant's consolidated salary. The Respondent further contends that the salary of Kshs.309,963 was composed of a basic salary of Kshs.246,963 and Kshs.63,000 mileage allowance.

The Respondent avers that the Claimant was placed on suspension to pave way for investigations. The suspension was as a result of the Claimant's failure to give a satisfactory explanation at the first meeting. The Respondent further avers that by inviting the Claimant for a follow up meeting with the Respondent's management, he was given another opportunity to explain the identified anomalies.

Mbithe Semo, the Talent Development Manager of the Respondent testified as RW1. She adopted her witness statement dated 29th January 2019 and the documents filed as her evidence in this case.

During cross examination, it was her testimony that the bon voyage cards were post-paid, and would be deducted from an employee's salary every month. She admitted that the persons who allegedly loaded the cards upon the Claimant's instructions, were not before this Court.

It was her evidence that though the fuel card was supposed to be paid for every month, the Claimant was not paying for his card every month and it accumulated over a few months. She conceded that there was no limit as to the amount to be utilized but contended that the transactions were termed irregular since the claimant was in 3 months' payment arrears. She further contended that the cards could not be separated from his employment because it was recovered from his salary and that there were policies governing the same.

She maintained that the Claimant was summarily dismissed because he fraudulently utilized the fuel card. It was her testimony that the Claimant was dismissed for gross misconduct.

Upon re-examination, it was her testimony that the Claimant was dismissed for the outstanding sum in the fuel card from 4th September 2015 to the time of dismissal.

Submissions by the Parties

In his submissions filed on 18th June 2019, the Claimant submits that the termination was unfair and unlawful as the reasons for his dismissal could not be linked to his contract of employment. This was tantamount to introducing new terms to the contract. To reinforce this position, the Claimant relies on the case of **Zephania O. Nyambane and Another v Nakuru Water & Sanitation Service Company Limited [2013] eKLR**.

The Claimant submits that by dint of Section 31(1) of the Employment Act, he is entitled to house allowance. Since he was never provided with housing or housing allowance. He relies on the case of **Stephen Miheso v Kaimosi Tea Estate Limited [2014] eKLR** to fortify this position. He further submits that he is entitled to the reliefs sought because he has discharged the burden of proving his case.

In its submissions filed on 31st July 2019, the Respondent submits that the summary dismissal was justified as it related to the Claimant's misuse of the fuel cards. Further, that the Respondent used the findings from its investigations and not from the testimony of employees from the back office. The Respondent submits that the identity of its informants was kept confidential because clause 6.4.1 of the Respondent's Anti-Fraud Policy and its Group Integrity Policy and Program demanded so.

Additionally, the Respondent submits that by dint of clause 8. (a) (i) of the Appointment Letter and clause 6.2.3 of the Respondent's Employee Separation Procedure, the Claimant was not entitled to the issuance of a notice. Further that the Claimant was afforded a hearing. It submits that the Claimant has not challenged the disciplinary procedure he was subjected to, as such, the dismissal was fair and lawful as the Respondent did not contravene the provision of sections 36 and 41 of the Employment Act 2007. Further, it is the Respondent's submissions that only the Respondent could determine whether the Claimant's explanation was satisfactory and not the Claimant himself.

The Respondent submits that the Claimant is not entitled to house allowance as the salary was consolidated and was inclusive of house allowance. Further, that the Claimant's salary fell within the scope under Section 31(2)(a) of the Employment Act.

Lastly, the Respondent submits that the Claimant is not entitled to any of the reliefs sought for reasons that the pension payment will be paid separately by the service providers once the Claimant has completed, signed and submitted the requisite forms. That the bonus payments were not a term of the Claimant's employment and that he did not do any work to justify the same. That the payment in lieu of leave was used to offset the Claimant's fuel card arrears of Kshs.457,500.

Analysis and Determination

I have considered the pleadings by the parties, their evidence as well as written submissions and find the issues for determination are –

- a. Whether the Bon Voyage Fuel Card contract was independent of the Claimant's employment contract.
- b. Whether the Claimant's summary dismissal was fair and lawful.
- c. Whether the Claimant is entitled to the reliefs sought.

The Bon Voyage Fuel Card Contract

The Claimant has submitted that the employment contract was independent of the bon voyage fuel card contract and was of a client and

supplier contract. He contended that the employment contract did not make any reference to the bon voyage contract. Further, that it was not a condition that an employee ought to be a card holder while in employment. As such, the card was immaterial to his employment.

On the other hand, the Respondent submits that the fuel card contract and the employment contract are inseparable as the former is a benefit accorded to the Claimant which was deductible from his salary by the Respondent at the end of each month.

The reasons for the claimant's dismissal are captured in the letter of dismissal dated 6th October 2015. The letter is reproduced below–

TOTAL KENYA LIMITED

IM/MS/HR/45/2015

October 6, 2015

Mr. Julius Waka

P. O. Box 3186 – 00100

Nairobi

Dear Mr Waka,

RE: DISMISSAL FROM EMPLOYMENT

We refer to the various meetings held between yourself and Management: Representatives on 3rd and 4th September, 2015 regarding the irregular usage of your Bon Voyage (BV) Cards. (90047 & 90043), leading to an accumulated outstanding, amount of Kshs.457,500/- as at 3rd September 2015.

During the various; meetings held: to afford you an, opportunity to explain your side. Management brought the following issues to your attention for your explanation; -

- 1. Your obtaining credit facilities irregularly during the period between April to 2nd September 2015 amounting to Kshs.618,000/- through verbal, requests which is in contravention of the existing company policy relating to loading of pre-paid cards.*
- 2. Numerous irregular BV transactions as indicated on the BV statements availed to you (copy attached) leading to high level of BV Caro utilizations in disregard of BV utilization procedures.*
- 3. Failure on your part to repay the outstanding BV amounts on a monthly basis as per procedure*

During the initial meeting held between yourself and Management representatives on 3rd September 2015, you acknowledged and admitted the accuracy of the transactions as stated on your BV Statement. You further admitted that you have been using the BV card to finance your personal businesses contrary to the company policy and committed to settling the account balance of Kshs.457,500/- at the time.

As part of the disciplinary process to enable objective investigations, you were served with a suspension letter on 4th September 2015 to pave way for further investigations owing to the fact that your verbal and written responses to the issues raised by management were not satisfactory.

Our investigations over the subsequent four weeks has established' that, that you knowingly, contravened the. Company policy in obtaining excessive credit facilities without any approvals leading to a high level of indebtedness to the tune of Kshs.457,500/- as at 3rd September, 2015. Further, it is noted that on a number of occasions; the card was swiped without evidence, of any actual services being rendered on site. An illustrative case is a BV transaction for Kshs.22,500/- carried out on 2nd September 2015 at Total Service Station on Limuru Road. It is also noted that on the same day, another transaction amounting to Kshs,24,500/- was carried out at Total Muthaiga Road Service Station under similar circumstances.

To complement the investigations process, you were invited for a follow up meeting between yourself and Management representatives on 25th September 2015 where you were accorded a further opportunity to explain the identified anomalies and irregularities. However, you did not provide any satisfactory explanation to the issues raised. It is noted that during the said meeting, you again acknowledged all the accuracy of the BV transactions in your statement claiming that you were using the BV card, to support your relatives and for personal business activities.

The management's finding is that the foregoing, amounts to serious and deliberate breach and abuse of Company policy, practices and assets amounting to gross misconduct warranting summary dismissal as per Section 44(4e) and Section 44(3) of the Employment Act. and leading to management's loss of confidence in you.

In light of the foregoing and in accordance with your terms and conditions of employment, the Management has with effect from 6th October 2015 summarily dismissed you from employment on grounds-of gross misconduct as detailed above. Consequently, your last day of work will be 7th October 2015.

By a copy of this letter the Payroll Supervisor is advised to pay you the following less any statutory deductions and liabilities:

- (a) Salary up to including 7th October 2015
- (b) Leave days accrued as at 7th October 2015

Your Pension payments (Local and Defipro) will be paid, separately by the respective Service Providers as per the Trust Deed and rules and the Swiss Life rules respectively once you complete and sign the requisite forms and return them to Human Resources department.

It is regretted that you have to date not honoured your commitment to settle the debt owed to the Company which stands at Kshs.457,500/-. You are therefore required to settle the outstanding amount of Kshs.457,500/- being amount owed to the Company, within thirty (30) days from the date of this letter failure to which the Company will use the available mechanisms to recover the debt.

Please find enclosed your Certificate of Service. Your final dues will be released after you will have completed the enclosed clearance certificate and handed over all the company property in your possession.

Yours sincerely

TOTAL KENYA LIMITED

SIGNED

IRENE MUINDE

HUMAN RESOURCES & ADMIN MANAGER”

The letter sets out in detail the reasons for dismissal and the disciplinary process accorded the claimant.

Although the card was not an integral part of the claimant’s employment contract, the card facility cannot be divorced from the claimant’s contract as in this case he was issued with the card as an employee and arrangements made for recovery of the fuel credit from his salary.

Further, Section 44(4)(g) allows an employer to dismiss an employee on grounds of commission of an offence to the substantial detriment of the employer. In this case the claimant unlawfully obtained credit from the fuel cards and in addition had the card renewed without paying the outstanding monthly credits, using his position to get the cards renewed. These were valid grounds for dismissal.

Termination

Section 45(1) and (2) of the Employment Act provides as follows-

- (2) **No employer shall terminate the employment of an employee unfairly.**
- (3) **A termination of employment by an employer is unfair if the employer fails to prove—**
 - (a) **that the reason for the termination is valid;**
 - (b) **that the reason for the termination is a fair reason—**
 - (i) **related to the employee’s conduct, capacity or compatibility; or**
 - (ii) **based on the operational requirements of the employer; and**
 - (c) **that the employment was terminated in accordance with fair procedure.**

The Respondent stated that the sole reason for the Claimant’s dismissal was his disregard for the Respondent’s policy and procedure on BV utilization and repayment. The Respondent’s major concern was that the Claimant asked employees from the back office to renew cards without payment, thus misusing his position. The respondent further concerned that the claimant had drawn cash from the card and had failed to pay for the card as required. These accusations are not disputed by the claimant.

The Claimant has not made any complaints regarding the conduct of the disciplinary hearings or the contents of the minutes. His only contention is that he was not given a copy the minutes so he could not ascertain their veracity. He admitted that he owed the Respondent a

sum of Kshs.457,500 which he promised to pay.

I find that there was valid reason for dismissal of the claimant and the disciplinary process met the procedural requirements under Section 41 of the Employment Act. I thus find no evidence of unfair dismissal.

The charge of conflict of interest on account of conducting farming activities is irrelevant in this instance because it did not form part of the investigation as indicated in the suspension letter, neither did it form the basis for the Claimant's summary dismissal.

Reliefs Sought

Having found that the termination of the Claimant's employment was fair, the claimant is not entitled to a declaration that the Claimant's contract of service is valid and should continue to have full force. The prayer is denied.

The claim for house allowance fails as the claimant has not demonstrated that his salary did not include house allowance. Section 31 of the Employment Act allows employers to pay a consolidated salary inclusive of house allowance. The fact that the claimant had worked for the respondent from 2008 to 2015 and had never once demanded for payment of house allowance means he was aware that he was paid a consolidated salary. In his letter of appointment, it is clearly stated at the last paragraph thereof that by signing the letter he signified acceptance of the terms in the letter which did not include house allowance, and which he did into question until after termination of the said employment contract.

The claim for payment in lieu of leave fails as the Claimant admitted that the same was used to offset the amount of Kshs.457,500 owed to the Respondent.

The claim for bonus fails. Payment of bonus was not a term of the Claimant's employment. Further, he has not justified the claimed figure.

The claim for compensation for unfair termination of employment fails as I have found the termination was not unfair.

The claim for Kshs.356,457.45 (together with all other employment benefits) being the Claimant's monthly salary from 1st October 2015 to the date when the Claimant's salary in lieu of notice shall be paid in full by the Respondent, fails as the same has no basis in law and in contract.

The claim for Kshs.325,991.52, being the Respondent's 12 months' contribution to the Total Kenya Limited Pension Scheme, fails. The Respondent submitted that the pension payment would be paid separately by the service providers once the Claimant has completed, signed and submitted the requisite forms. Any complaint against payment of pension would be dealt with under the Retirement Benefits Act

In conclusion the entire claim collapses and is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE