



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 142 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSEPH ONYANGO.....CLAIMANT**

**VERSUS**

**GULF ENERGY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

The Claimant, Joseph Onyango filed his Memorandum of Claim on 31<sup>st</sup> May 2016 against the Respondent on grounds that he had been summarily dismissed by the Respondent on allegations of gross misconduct without any warning or hearing. The Claimant seeks the following reliefs:

1. Kshs.13,184,000.
2. Aggravated damages for unfair dismissal.
3. Costs of the suit.
4. Interest chargeable at court rate
5. Any other relief the Court may deem fit to grant.

The Respondent filed its Statement of Response dated 9<sup>th</sup> November 2016 denying having unfairly and unlawfully terminated the Claimant's employment. The Respondent avers that the termination was procedurally undertaken pursuant to the provisions of the Employment Act and the Respondent's Human Resource Policy Manual and pray that the Memorandum of Claim be dismissed with costs. The Respondent in particular states that it summoned the Claimant for a disciplinary hearing and issued the Claimant with several warnings.

**Claimant's Case**

The Claimant, Joseph Onyango Ogutu, testified that he was employed at Gulf Energy Limited as the Depot Manager, Kisumu on 20<sup>th</sup> March 2006 until his dismissal on 7<sup>th</sup> March 2016. At the time of his dismissal the Claimant earned a monthly salary of Kshs.206,000.

He further testified that on 7<sup>th</sup> March 2016 he was issued with a Letter of dismissal dated 7<sup>th</sup> March 2016 in which the grounds of dismissal were that he had instructed the Station Manager in Kisumu to release a truck belonging to Topaz Network Limited that had been detained at the Station. He stated that the Station Manager was Stephen Odhiambo while his office was at the Depot in Pipeline and was in charge of operations and sales of the petroleum products. Furthermore, that the truck was not under his control but under the Station Manager's, Stephen Odhiambo, control.

He testified he was invited for a hearing on 15<sup>th</sup> February 2016 at the Respondent's Headquarters in Nairobi. He stated that during the hearing he said he knew nothing about the matter as there was no communication to him concerning the truck and he did not promise the Company to collect debts as he did not ordinarily collect debts.

He further testified that he heard that the truck had been released on Saturday, 6<sup>th</sup> February and learned about it on Monday when he received a call from Peris Maina the Logistics Manager who informed him that the transporter had sold the product and the Respondent had not been paid but the 10,000 litres of fuel had been sold.

He did not receive any email communication between the Respondent and Topaz Network Limited before his dismissal. He received the emails after his dismissal, from Mr. Thuo of Topaz Network Limited's upon request after informing him of his intent to institute these proceedings.

It was his case that he went to Nairobi pursuant to a phone call. Thereafter on 15<sup>th</sup> February 2016 he was issued with a warning letter and required to sign the letter. He stated that between the date of his warning letter on 15<sup>th</sup> February 2016 and his dismissal letter dated 7<sup>th</sup> March 2016 he did not receive any prior warning. The warning letter dated 15<sup>th</sup> March 2016 was in respect of the release of the same truck.

In respect of the claim for Kshs.100,000 for the Corporate Social Responsibility activity in support of Jubilee Orphanage in Kisumu the Claimant stated that he had misplaced the receipts but had taken photos of what he bought. The Respondent had also recovered the money from his salary in 2015.

In the written submissions the Claimant stated that it was clear from the contents of the summary dismissal letter that the Claimant did not commit any act or omission that would amount to gross misconduct to warrant summary dismissal. The Claimant further submitted that the Respondent did not follow the disciplinary procedure laid down in the Human Resource Manual. The Claimant prayed that the claim be allowed.

### **Respondent's Case**

RW1, **Jenipher Kananu**, testified that she was the Human Resource Business Partner at the Respondent from 2012 and her duties entailed recruitment, training and all matters to do with employee relations. She testified that she was aware that the Claimant had been dismissed in March in relation to the release of the truck.

She stated that the Claimant was not dismissed due to the sum of Kshs.100,000 in support of Jubilee Orphanage but for the release of the truck as the Kshs.100,000 had been deducted from the Claimant's salary.

RW2, **Peris Wairimu Maina**, testified that she was the Respondent's Logistics and Distribution Manager having worked for the Respondent since 1<sup>st</sup> February 2012.

RW2 testified that they had a truck that had diesel and had sold the product to a customer who rejected the product for reasons that the product was contaminated. She stated that the driver was instructed to go and wait at the Station. She testified that this being a commercial case she called the Claimant and instructed that the truck should not leave the station until without her approval.

She testified that on Monday she called Edward who stated that he was authorised by his boss the Claimant to release the truck. Edward had informed her that Mr. Onyango was his boss and he obeyed his instructions. She stated that she called the claimant and asked him why he released the truck. She testified that she could not confirm if the claimant acknowledged but it was her thinking that he released the vehicle because Topac was recruited as a client of the respondent by the claimant.

In cross-examination she stated that the truck was kept in the Gulf Energy Kisumu Service Station. The manager was taking care of the truck and she had instructed the manager not to release the truck. However, she stated she did not come across any instructions from the Claimant to the Manager. She stated that in the emails between Topaz and herself she did not blame the transporter and this was the reason the Claimant was dismissed.

In re-examination, she clarified that the Claimant was not addressed or copied in the emails with Topaz.

In its submissions the Respondent stated that it had valid and legal grounds to summarily dismiss the Claimant from employment under Section 44 of the Employment Act. The Respondent submitted that the act of the Claimant having received Kshs.100,000 and the eventual deduction clearly demonstrated to the Claimant that a breach of the Respondent's code of conduct and regulations would jeopardise his employment. The Respondent relied on the case of **CMC Aviation Ltd v Mohammed Noor [2015] eKLR** to buttress that the Claimant may have caused or contributed to his dismissal.

The Respondent further submitted that it had duly followed the process set out under Section 41 of the Employment Act relying on the case of **AMM v Spin Knit Ltd [2013] eKLR**.

The Respondent therefore prayed that the matter be dismissed with costs.

### **Determination**

#### **Issues for determination**

1. Whether the Claimant's dismissal was wrongful/unfair
2. Whether the Claimant is entitled to the relief's sought

## 1. Whether the Claimant's dismissal was wrongful/unfair?

The Claimant was summarily dismissed from employment by the Respondent by in the letter dated 7 March 2016 on grounds that the Claimant had contravened instructions from his senior colleague not to release the truck owned by Topaz Limited from the Kisumu station. It was the Claimant's testimony that he was not involved in the release of the truck as it was not in his custody. According to the evidence presented in Court, the Claimant was neither copied in the email conversations between RW2 and the Director of Topaz Limited nor was he adversely mentioned in the emails as having released the truck. The reasons for his dismissal as explained in the letter dated 7<sup>th</sup> March 2016 were that he had failed to collect the debt as besides having released the truck. The Claimant testified that debt collection was not part of his duties and that he had been made to sign the warning letter after the discussions on the 15<sup>th</sup> February 2016. The Claimant testified that the warning letter stated that he would be personally liable to collect the debt though debt collection was not part of his duties and this could not be sufficient reason to lead to his summary dismissal. In addition, despite stating that the Claimant issued instruction for the release of the truck, the Respondent did not prove that such instructions were indeed issued by the claimant. The Respondent did not call the Station Manager, Stephen Odhiambo who was in charge of the station's operations to testify on the release of the truck which under his watch.

During cross-examination, the Claimant stated that he was invited to Nairobi for a meeting whose agenda was the release of the truck. He stated that he was given an opportunity to explain himself and that after the meeting he was issued with the letter dated 15<sup>th</sup> February 2016. Indeed the warning letter refers to a disciplinary hearing, which took place on the same day, 15<sup>th</sup> February 2016. The Claimant was therefore issued with a warning letter after disciplinary hearing contrary to the Respondent's Human Resource Policy Manual. Clause 4.8 of the Manual states:

### ***“Written Warnings***

*These will be given where the initial offences merit serious action or oral warnings do not result in the necessary improvement.*

*An employee whose work or conduct is unsatisfactory but not sufficiently so to justify an immediate recommendation for termination of service, should be advised in writing of this fact by his/her supervisor or manager....*

### ***Final Warnings***

*These will normally be given following the failure of the written warnings to produce satisfactory improvement or if the nature of the offence is severe enough to warrant more action than first or second warning...in the event that an employee is dismissed, a discussion followed by a dismissal letter will be given to the employee.*

### ***Summary Dismissal***

*This will normally occur after the employee has received final written warning.”*

The Respondent failed to follow the procedure stated in its own HR Policy Manual which requires the issuance of the first warning letter and summary dismissal after a discussion and the issuance of a final warning letter. The issues raised in the warning letter are the same issues that the Claimant was expected to address during the said disciplinary hearing and the same that led to his summary dismissal as stated in the letter dated 7<sup>th</sup> March 2016. It would be of no essence to issue a warning letter after a disciplinary hearing has been held as there would be nothing to achieve having already held a disciplinary hearing. In fact this warning letter does not seem to be the kind of warning referred to in Clause 4.8 of the Respondent's Human Resource Policy Manual.

In respect of the disciplinary hearing the Respondent only called the Claimant and expected him to respond to the issues raised on the very day. Section 41 of the Employment Act provides:

**(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.**

Clause 4.8 of the Human Resource Disciplinary Manual states that an employee is to be given prior notice in writing or by phone or in person of the purpose of the meeting, the nature of the offence, a copy of the Disciplinary Procedure and reminded of his right to be accompanied by a fellow employee. The claimant's disciplinary hearing did not comply with the requirements in the Human Resource Policy Manual. In particular a note of the meeting is to be prepared and if a warning is given the employee is to sign the note. In this case the note was not issued to the Claimant for signature rather a warning letter was issued. According to this Clause the note must be prepared and is to be signed by the employee if a warning is given.

The termination of the Claimant fell short of the procedure stipulated in the Employment Act and in the Respondent's HR Policy Manual. Section 45 of the Employment Act provides that termination is unfair if the employer fails to prove the reason for termination and if the termination was not in accordance with fair procedure. In the absence of there being a valid reason to terminate the Claimant and for the failure to follow procedure the Claimant's dismissal was unfair.

The Court of Appeal in **CMC Aviation Limited v Mohammed Noor [2015] eKLR** the Court of Appeal held;

*“In view of the foregoing, we find that the appellant’s act of summarily dismissing the respondent from its employment without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the Employment Act. In **Kenya Union of Commercial Food And Allied Workers V Meru North Farmers Sacco Limited, [2013] eKLR**, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case for termination as well as in a case that warrants summary dismissal. See also **Mary Chemweno Kiptui -v- Kenya Pipeline Company Limited [2014] eKLR**. We respectfully agree. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract.”*

In respect of the Kshs.100,000 that was subject to Corporate Social Responsibility, the amount was already recovered from the Claimant’s salary hence it should not have featured in the claimant’s disciplinary hearing again.

**Whether the Claimant is entitled to reliefs sought**

The Claimant in cross-examination stated that what he was paid was set out in the dismissal letter which was his salary and outstanding leave. In determining the remedies due to the Claimant the Court is to be guided by the factors listed under Section 49 (4) of the Employment Act.

The prayer for housing and gratuity should fail as the claimant’s letter of appointment did not provide for the same. The prayer for aggravated damages must also fail as it is not payable in the circumstances of the claimant’s case.

The Claimant is therefore entitled to the following reliefs; -

1. 2 months’ salary in lieu of notice based on gross pay as per payslip for March 2016 Kshs.412,140/- as provided in the employment contract.
2. 12 months’ salary compensation for unfair dismissal Kshs.2,472,840/-
3. Costs of the suit
4. Interest on (2) and (3) above from date of judgment till payment
5. Certificate of service

**DATED AND SIGNED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**