

The Claimant rose through the ranks steadily to become a section head on 16th January 2006 and subsequently to the positions of supervisor and Assistant Manager in 2007 and 2008 respectively.

The Claimant avers that despite giving an explanation concerning the incident that took place on 5th April 2011, the Respondent suspended him for 2 weeks without initiating any investigations into the matter or reporting the same to the police to ascertain the veracity of the account of events as presented by the Claimant. Further, the Claimant's services were terminated with effect from 27th May 2011 without the Claimant being given the opportunity to present his case which action was malicious, arbitrary and unlawful.

Respondent's Case

On or before 4th April 2011, the Claimant unlawfully and without leave of the Respondent, retained the Respondent's property: Tuskys Loyalty Reward Cards No. 012000077210, 002000036987, 7000000128715, 002000097341 and 700000103965 and failed to remit them to the Respondent amounting to gross violation of the Respondent's Loyalty Program's Standard Operating Procedure. The Claimant was given the opportunity to vindicate himself and recorded a statement. The explanation was found to be unsatisfactory, as such internal and independent investigations were launched. The investigations revealed that the Claimant was fraudulently running transactions on loyalty cards and accumulating and/or redeeming loyalty points on behalf of some customers against purchases of other unsuspecting customers who were not loyalty card holders. Consequently, the Claimant's services were lawfully dismissed.

Evidence

The Claimant testified that he was employed by the Respondent from July 2001 as a shelf stocker and he rose through the ranks to be an assistant manager.

On 5th April 2011, the Claimant received a client at the Tuskys Pioneer Branch who wanted to purchase some item. He gave the client a "to collect note" to indicate that he had left some documents. The documents and the reward card remained in the Claimant's possession for confirmation if money had been received and the customer wanted to earn the reward points. The customer informed the Claimant that he was only in a position to pick 2 kg sugar. The Claimant retained the card in his pocket as the transaction was ongoing.

The Claimant averred that one Joshua made a call alleging that the Claimant was in possession of a card and was obtaining points illegally. The Regional Manager was sent to pick the card and he called the Claimant to his office. The Claimant did not deny having possession of the card and presented the same together with all the other cards that were in his possession. He stated that it was normal for a manager to be in possession of a card. Most of the cards had issues of failure to earn points and losing points mysteriously. He testified that they would document the cards and forward to headquarters on a daily basis and especially in the evening.

The Claimant carried on with his work until 29th April when he was called to the head office and given a suspension letter on the ground that he was in the unlawful possession of 5 cards. He was interrogated and asked to do a letter. He did not appear before a disciplinary committee. The Claimant was issued with a termination letter while he was still on suspension.

During cross examination, the Claimant stated that he was mandated to submit the Respondent's cards to the headquarters not later than 24 hours after receiving them. He admitted that 5 cards had been in his possession for more than 24 hours. However, he stated that he had explained that it had been done in good faith. He conceded that most of the cards had IT concerns yet he was not an IT specialist.

He explained that a large number of points had been accumulated by corporate client, Kenya Re as it made bulk purchases. He stated that they used the card from any person who had come with a card and if there was no card, the transaction was done without it. There was no such system for Tusker Mattresses to harvest such points with the Kenya Re customer and he therefore retained the card so that he could load it later. He came back, but the transactions were done in bits. After he had done the first lot, he was told to retain the card because there were pending transactions. The Claimant denied loading the cards with purchases of a different customer who did not own a card.

The Claimant stated that he had been given the opportunity to explain himself in a letter. He was summoned to the headquarters and given another opportunity. He was given the opportunity to appeal but he did not do so because they refused to pick his termination letter thus his appeal was rejected.

He admitted that the Respondent would sometimes pay for the leave days and that his pay slip evidenced payment of leave days and payment of leave days not taken. He further conceded that every year in November they were paid for days not taken. He stated that his termination letter indicated the reasons for termination. He also admitted that he had been paid gratuity of Kshs.198,000.00, May salary, leave pay for 2011 which he collected.

Upon re-examination, the Claimant stated that he was not the one responsible for loading points. And reiterated that the reason he retained the loyalty card for the corporate client was because the transaction had not been completed.

RW1, **Joshua Toroni**, stated that at the material time he had been working as a Front Controller to monitor and control loss in Tusker Mattresses and was in charge of the tilling process. He stated that employees of Tusker Mattresses were not allowed to have magic cards.

According to him, on 4th April 2011 at around 3:30 pm, a customer from Kenya Re-insurance came to shop for KShs. 7,000.00 but did not have the magic card. The cashier stopped the transaction and called for a card from the Claimant who brought it and collected points. He stated that the Claimant always had cards contrary to the regulations. The matter was reported by RW1 and he was instructed to monitor the use of magic cards especially from the Claimant.

There was another incident on 9th April 2011 at around 4:30 pm where the customer made transaction for Kshs.112,000.00. When he checked the receipt, the card was from Ann Wangari yet the person who had made the purchases was from Red Cross. The Claimant was the one in possession of the cards collecting the points. He reported that incident.

There was another incident on 13th April at around 2 pm where a customer by the name Robert Onditi came to redeem points yet the name on the card was Grace Akinyi. The rules stipulated that the owner of the card was the one supposed to redeem the points after identifying themselves with an ID. In this case, the person was allowed to redeem with the permission of the Claimant. He questioned the Claimant who stated that it was okay. He then reported the Claimant to his superiors who took action and asked RW1 to report, which he did and forwarded a report to the Respondent. The report recommended that an anomaly done by a member of staff and discipline should be enforced.

During cross examination, he admitted that the report he had written was not signed but countered that by stating that it was sent via mail. He admitted that the clients who did not have cards were not interviewed by him. He conceded that the cashier who called the Claimant in that particular incident had been implicated in his report. He stated that the cashiers were called to a meeting and they admitted that they were given instructions by the Claimant. He testified that he was aware that the Claimant had been taken through a disciplinary process which he never attended but admitted that he was not aware of any show cause notice issued to the Claimant. He further stated that apart from customer care, no other employee was allowed to hold a magic card and there was no case where an employee was allowed to hold a card for more than 24 hours. He admitted to not attaching copies of the loyalty cards referred to.

Upon re-examination, RW1 reiterated that his role was to monitor losses and to ensure every item given through the till had been cashed. It was not part of his job description to interview customers concerning the magic cards. He only questioned the ones who redeemed the cards which was not in their name. He indicated that he was not supposed to be part of the disciplinary process but he was aware that there was a disciplinary process. He asserted that his report was used in the Claimant's disciplinary process.

Submissions by the Parties

The Claimant in his submissions dated 2nd October 2018 and filed in court on even date, submitted that none of the allegations made by the Respondent were proved, there was no fair hearing, the letter for summary dismissal did not outline the reasons for dismissal and there was no letter inviting the Claimant for a disciplinary hearing.

The Claimant submits that he was dismissed without notice or a disciplinary hearing contrary to **section 41 of the Employment Act 2007** and further submitted that at no time did he neglect his duties to warrant summary dismissal as envisaged under **section 44 of the Employment Act 2007**.

The Claimant submitted that the Respondent has not granted annual leave and/or payments for 9 years neither did it give one months' notice of dismissal or payment in lieu of notice to the Claimant. As such, the Court should find that the Respondent's conduct was wrongful and unlawful and it entitles the Claimant to damages to the full extent allowed by law.

The Claimant submitted that the Respondent did not observe the provisions of **sections 43, 45(2), 45 (4) and 47 (5) of the Employment Act 2007**. Further, he was not granted a fair process and the provisions of **section 41 of the Employment Act** were completely ignored.

The Claimant submitted that he had proved his case that the Respondent completely disregarded the law. He argued that courts have held that where an employer fails to observe both substantive and procedural fairness in termination of employment, then the termination is unfair and results in an award for compensation. The Claimant relied on the case of **Mombasa ELRC No. 146 of 2012: Alphonse Mwachanya vs. Operation 680 Limited** and in **Nairobi ELRC No. 2525 of 2012: Abisalom Magomere vs. Kenya Nut Company Limited** where both courts issued awards of 12 months compensation in cases where the Respondent's conduct was not as far reaching and injurious to the Claimant.

Determination

After perusing the documents presented by the parties in court and considering the evidence and arguments made by them, the issues for determination are the following:

1. Whether the Claimant's employment was unlawfully and unfairly terminated.
2. Whether the Claimant is entitled to the reliefs sought

Whether the Claimant's employment was unlawfully and unfairly terminated

The Claimant submitted that none of the allegations made by the Respondent were proved, there was no fair hearing, the letter for summary dismissal did not outline the reasons for dismissal and there was no letter inviting the Claimant for a disciplinary hearing. There were no submissions by the Respondent.

Section 43 of the Employment Act of 2007 provides that the employer is required to give reasons for termination and where the employer fails to do so, the termination shall be held to be unfair. **Section 45 of the Employment Act of 2007** provides that no employer should terminate the services of an employee unfairly. Under **section 45 (2) of the Employment Act**, where the employer fails to prove the following, then the employment is unfair:

- a) That the reason for termination is valid;

b) That the reason for termination is a fair reason relating to employee's conduct, capacity or compatibility or that the employment was terminated in accordance with fair procedure.

Section 41 (1) of the Employment Act provides that subject to section 42 (1) 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.

The Court in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** stated that:

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.”

In the instant case the claimant was found with five Tuskeys Reward Cards. He was given an opportunity to show cause why disciplinary action should not be taken against him which he did following which he was suspended to pave way for investigations. The show cause memo is dated 1st April 2011. The claimant's response thereto is undated but a copy is at page 32 of the claimant's bundle. The suspension letter is dated 28th April 2011.

Thereafter the claimant received a letter of termination dated 26th May 2011 and taking effect on 27th May 2011.

From the foregoing it is evident that there was valid reason for the respondent to take disciplinary action against the claimant who admitted being in possession of the 5 reward cards. The claimant's explanation point to the fact that he was keeping the cards in circumstances that were questionable as disclosed in the investigation report by **HIPORA BUSINESS SOLUTIONS (EA) LIMITED** at page 9 of respondent's bundle.

It is however clear even from the letter of termination that the claimant was not afforded a hearing as envisaged under Section 41 of the Act, besides his response to the notice to show cause. The letter of termination captures the circumstances and reasons for termination and is as produced below –

"Private & Confidential"

26th May 2011

William Ojwang Asembo

P.O. Box 97

NGIYA,

SIAYA.

Dear Mr. Ojwang,

RE: TERMINATION OF SERVICES

We refer to the incident: of 4th April 2011, in which you were found in possession of five (5) Tuskeys Loyalty Reward Cards. On 1st April 2011, you were given an opportunity to explain the circumstances leading to your being in possession of the cards and to show cause disciplinary action should not have been taken against you. This you did in an undated statement received on 18th April 2011, which was found to be unsatisfactory prompting an independent investigation to be instituted.

The investigation's findings show that on numerous occasions you violated the loyalty program's standard operating procedures. You abetted and participated in the unprocedural awarding of loyalty points by running cards belonging to disgruntled customers against transactions of other unsuspecting customers who were not card handlers. Also in awarding points earned from sales to corporations into personal loyalty cards belonging to employees of those corporations.

The findings of our investigations show that you breached your fundamental obligations as an Assistant Branch Manager and that you performed your duties improperly by failing to award loyalty reward points as prescribed within the operating procedures.

Consequently, for contravening Section 4, (c) of the Employment Act, 2007 and rule No. 1 of the company's rules your employment with the company is herewith terminated with effect from 27th May 2011. You are therefore required to immediately hand over to the B.M - Pioneer all company property for which you were responsible during your employment and get a clearance letter from him.

Any valid grounds for appeal against this termination should be submitted to the company in writing within the next seven (7) days from the date of receipt of this letter. You may collect your terminal dues, if any, from the H.R Office on Saturday, 4th June 2011 at 11.30 A.M.

Yours Sincerely

TUSKER MATTRESSES LIMITED

SIGNED

F.N. Kamau

Director

Yours Sincerely

TUSKER MATTRESSES LIMITED

SIGNED

P.M. Mwenda

General Manager

Human Resources”

As is provided under Section 45(2), for termination to be fair there must be both valid reason and fair procedure. The respondent having failed to comply with the statutory requirements for fair procedure as set out in Section 41 of the Act, the termination of the claimant was unfair for want of fair procedure. I declare accordingly.

Remedies

Upon termination the claimant was paid the following as reflected in the payslip for May 2011 –

Salary	Kshs.99,000
Gratuity	Kshs.198,000
Leave pay	<u>Kshs.34,269</u>
Total	<u>Kshs.331,269</u>

The claimant has prayed for one month's salary in lieu of notice which he was not paid and which I award him at Kshs.99,000.

He prayed for leave days for nine years worked. I have noted from the claimant's payslips (the few) attached to the claim that several of them reflect leave pay. These include the payslip for May 2011, November 2005 and November 2007. During cross examination the claimant conceded that he was sometimes paid in lieu of leave. This means that his prayer for leave of 21 days for all the nine years worked is not correct. The same is accordingly dismissed.

The prayer for service pay for nine years at the rate of two months' salary for each year of service must also fail as it is not grounded on contract or on the law. The claimant did not even mention it in his testimony.

The claimant prayed for compensation under paragraph 14 although he did not pray for the same under the prayers. The termination of his employment having been procedurally unfair, he is entitled to compensation. However taking into account his contribution to the circumstances leading to the termination of his employment which border on self-enrichment from irregular activities, I do not think he is entitled to any compensation. I decline to grant the same.

Each party shall bear their costs

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE