



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1986 OF 2017

MICHAEL OIMO.....CLAIMANT

- VERSUS -

ICEA LION LIFEASSURANCE COMPANY LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

JUDGMENT

The claimant filed a statement of claim on 04.10.2017 through Rachier & Amollo Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the decision by the respondent to terminate the claimant's employment was substantively unjustified and the subsequent termination of the claimant was wrongful, unfair and unlawful.
- b) That the Honourable Court do issue an order that the respondent pay the claimant damages as compensation for unfair and unlawful termination as particularised below:
 - i) Payment of one month salary in lieu of notice in the sum of Kshs. 691, 029.00.
 - ii) Payment of 12 months' salary for unlawful termination in the sum of Kshs. 8, 292, 348.00.
 - iii) Payment for unpaid leave days.
- c) Costs to the suit.
- d) That the Honourable Court make an order on any other award or benefit that the Honourable Court may deem fit to grant in the circumstances of the case.
- e) Interest on (b), (c) and (d) above at the Court's rate from the date of filing the suit until full payment.
- f) Any other orders that the Court may grant in the interest of justice.

The memorandum of response was filed on 20.11.2017 through Wamae & Allen Advocates. The respondent prayed that the claimant's memorandum of claim be dismissed with costs.

There is no dispute that the claimant was employed by the respondent per the letter dated 24.05.2016 to the position of Business Development, Group Business, Life & Pension Division. The claimant was subsequently promoted to the position of Assistant General Manager, Business Development. The claimant's basic salary as at termination was Kshs. 691, 029.00 per month and a gross pay of Kshs. 699, 529.00.

By the letter dated 20.02.2013 the respondent informed the claimant that the respondent had purchased a company car registration KBU 364L for the claimant's use under stated terms including, **"5. You will be paid a fixed allowance of Kshs. 37, 500.00 per month towards maintenance and running expenses. This amount is on a reimbursement basis and therefore supporting documents and the prescribed form must be filled and submitted. The car can also be fuelled at the designated company approved petrol station."**

The claimant received the letter dated 29.08.2016 stating that a routine review of mileage claims the claimant had submitted and paid for over the past few months revealed trends of major concerns as follows:

- a) Between 28.02.2015 and 25.06.2015 it was evident that more fuel was taken than the tank capacity of the claimant's vehicle KBU 364L being 70 litres of diesel tank capacity. On 11 out of 15 instances, the claimant's vehicle ostensibly took 15 or more litres above its full capacity. The letter stated that the same amounted to a practical impossibility and pointed to an actionable irregularity.
- b) Between 15.04.2015 and 12.12.2015 the vehicle was inexplicably fuelled twice within two days as depicted in the provided table. The letter stated that on three occasions the vehicle took an average of 148 litres of low sulphur diesel which was practically way beyond the capacity of the vehicle considering that the fuelling took place in Nairobi. The letter stated that the same amounted to a blatant and unauthorised abuse which could not be tolerated nor condoned.
- c) For the mileage claim of 04.12.2015 there were 2 receipts from the same service station issued on the same date and bearing the same serial number 281794 but with different amounts submitted for fuelling on 17.11.2015 for Kshs. 2, 203 and Kshs. 6,000.00. Further receipt 259 of 09.01.2016 from Wanjovi Auto Spares, Nairobi for purchase of oil filter, air cleaner, and engine oil at Kshs. 650, Kshs.850 and Kshs.1800 respectively were by far lower prices for price of such items for the vehicle KBU 364L so that it was inferred that the claimant had bought the items for a vehicle of lower capacity.
- d) One of the receipts submitted for February and December 2015 were for unleaded petrol whereas the official car consumed diesel.
- e) Some receipts submitted between 15.01.2015 to 03.12.2015 were in a handwriting matching the claimant's handwriting.
- f) The fuel receipt submitted for February 2015 had an altered figure from Kshs. 1, 500.00 to Kshs. 7, 500.00. The date on another receipt had been altered to 30.06.2015.

The letter concluded that the irregularities amounted to gross misconduct and want of integrity. The same had resulted in irreversible loss of trust in the claimant as a senior officer of the respondent. The claimant was required to explain in writing why the company should not take serious action against the claimant. He was required to respond in writing by Friday 02.09. 2016.

The claimant responded by his letter dated 01.09.2016 to the following effect:

- a) He had never had the intentions to defraud the respondent on mileage claims in the past, present or future. He was committed to the respondent's objectives, goals and aspirations for the bigger picture to realise extremely challenging business development and growth initiatives.
- b) On occasions that he did not use the official car or the official car was taken for service he used his personal car and not taxis or substitute respondent's car. In such cases he transferred the mileage to the company car.
- c) If he had an option he would rather be given the fixed monthly allowance and a vehicle be made available to be used on need basis and strictly on company business during official hours or official travel.
- d) The respondent had approved his mileage claim requisitions and cheques issued over 9 years and such concerns that were emerging could easily have been picked and highlighted much earlier if the audit was to be taken further backwards. It was not fair to go backwards to audit the same claims that were duly reviewed and authorised by the same senior management.
- e) It was apparent that there was misunderstanding or misinterpretation on conditions and practice over the years. He suggested that the matters of past practice be reviewed and clarified and perhaps include alternative option such as exiting the existing arrangement and vehicle be made available for use during official working hours and travel.

The claimant was invited by the letter dated 08.03.2017 to attend a disciplinary hearing scheduled for 13.03.2017. The claimant attended as was scheduled and he opted to be present alone without a witness or representative. The Court has perused the minutes of the disciplinary hearing and makes the following observations:

- a) The claimant on being pressed to explain why on some instances he fuelled beyond the capacity of the official car, he replied that he did not want to repeat himself and that if the respondent saw that it was so much abnormal, then he left the matter for the respondent (to determine). The Court has considered that response and returns that the claimant failed to offer exculpatory explanation in that regard.
- b) The claimant replied that some receipts could be in his own handwriting because sometimes the petrol stations failed to provide receipts (so he would be constrained to put them in writing). The claimant confirmed to the meeting that he had written some of the receipts but in situations that lead him to do so.
- c) On altered receipts the claimant replied that the receipts he presented had been approved for reimbursement because he understood that and the management must be taken to have forgiven the things they never saw and all of a sudden they were seeing the discrepancies.
- d) The claimant admitted that when he used his private car in cases the official one was not available he fuelled his car and claimed because there was no alternative provision on how he would recoup in such instances. The claimant responded that there had been a previous practice of fuelling private cars when used on official duty and claims for reimbursement were allowed.

The respondent subsequently terminated the claimant from employment by the letter dated 12.06.2017 with immediate effect. The letter stated that the termination was on account of the allegations levelled amounting to betrayal of trust and being in violation of the respondent's employee code of conduct and ethics namely clause 1.1 on highest standards of honesty and ethical conduct; clause 1.2 on compliance with applicable laws and regulations; and clause 5.1 on accounting records and reports to be accurate and complete.

The claimant appealed against the termination by his letter dated 13.06.2017.

The Court has considered the pleadings, the evidence, the submissions and all material on record.

The **1st and main issue** for determination is whether the termination of the claimant's employment was unlawful and unfair. It was submitted for the claimant that under section 44 (3) of the Employment Act, 2007 an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. It was further submitted that the claimant through his testimony had shown that he never breached the obligations of his contract in any way. Further it was submitted that the audit report (which the claimant saw in court for the first time) was allegedly made on 30.08.2016 and relied upon on 29.08.2016 as a basis of issuance of the show-cause letter – and therefore it was urged that the respondent had failed to show that as at termination it had a valid reason to dismiss the claimant. The receipts as produced or exhibited in court did not have the accompanying claim forms as was alleged.

For the respondent it was submitted that section 47(5) of the Employment Act, 2007 required the respondent as the employer to justify the grounds for the termination of employment. Section 43 of the Act required the respondent to prove the reason or reasons for termination - which were matters the employer genuinely believed to exist, and which caused the employer to terminate the services of the employee. It was further submitted for the respondent that the test was as held by the Court of Appeal in **Co-operative Bank of Kenya Limited –Versus- Banking insurance & Finance Union (K) [2017]eKLR** where the holding in **British Leyland UK Ltd –Versus- Swift (1981)IRLR 91** was quoted thus, **“...Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that all these cases are subjective, within which an employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”**

The Court has carefully considered the parties' respective cases. The Court has carefully revisited the record of the disciplinary hearing. The Court finds that the claimant substantially admitted to fuelling his private car on need basis when the official car was not available. He also admitted that he wrote some of the receipts in his own hand writing. He also explained that he understood that he was entitled to claim reimbursement up to the allowable maximum amounts and the questionable claims were to be understood in that manner. Taking into account that evidence, the Court returns that as at the time of termination, the respondent had genuine grounds to terminate the contract of service as envisaged in section 43 of the Act as read with section 47(5) of the Act.

The Court has considered the procedural aspects of the disciplinary process the claimant was subjected to. The claimant laments that it was unfair because it took too long to conclude the case commencing with the show cause letter on 29.08.2016 and ending with the letter of dismissal on 12.06.2017. The claimant further laments that the audit report as the basis of the allegations was never given to him throughout the disciplinary hearing until he saw it in Court. The audit report was allegedly done and concluded by 30.08.2016 but the disciplinary decision was not made until 12.06.2017. Thus, the audit report not having been provided as at the time of disciplinary process, and the process having taken too long due to unexplained reasons, it was submitted for the claimant that the procedure was unfair. Further, the claim forms were not attached together with the receipts in issue and therefore the claimant was not provided sufficient material towards his exculpation.

It is submitted for the respondent that the show-cause letters were issued and he was given chance to reply and to attend the disciplinary hearing. As for delay between show cause letter and the dismissal, the respondent submitted that unlike in **Donald Mumo Moses-Versus-Midwave Freighters Limited [2014]eKLR**, where the claimant had been on suspension for so long and it amounted to unfair labour practice, in the instant case the claimant had not been on suspension.

The Court has considered the submissions and returns that although the claimant was not on suspension, it was unfair disciplinary procedure to place him under serious anxiety due to unexplained delay in finalising the case from the date of the show cause letter to the date of the dismissal. The Court finds that it was unfair labour practice for the respondent to fail to conclude the disciplinary process expeditiously in circumstances whereby the claimant faced serious consequences of a termination. It was obvious that the claimant was subjected to unreasonable anxiety and painful dilemma over a long time about the looming fate of his contract of service. The respondent having failed to justify the delay, the Court returns that such disciplinary process was unfair. The Court further observes that the respondent failed to consider and determine the administrative appeal against the dismissal. The Court finds that the procedure while purporting to comply with section 41 of the Act was unfair under section 45 (2) (c) of the Act due to the stated reasons.

Thus, to answer the 1st issue for determination the Court returns that the dismissal was not unfair in substance but it was unfair procedurally.

The **2nd issue** for determination is whether the claimant was entitled to the remedies as prayed for. The Court makes the following findings:

- a) The claimant is entitled to a declaration that the termination was unfair.
- b) The termination being unfair, the claimant was entitled to a contractual termination notice and the Court returns that he is entitled to payment of one month salary in lieu of notice in the sum of **Kshs. 699, 529.00** as per the pay slip on record.
- c) The claimant prayed for payment of 12 months' salary for unlawful termination in the sum of Kshs. 8, 292, 348.00 (amended to

Kshs. 8, 292, 348.00 at Kshs. 699, 529.00 per month). The Court has considered the provisions of section 49 of the Act and the factors to consider in that regard. The Court considers that the claimant desired to remain in employment. The Court also considers that while the claimant substantially admitted the allegations as was levelled, as submitted for the claimant, it was a mitigating factor in favour of the claimant that as was held in Grace Gacheri Murithi -Versus- Kenya Literature Bureau [2012]eKLR, it is unfair labour practice for an employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. In the instant case the claimant had a valid position that the claim forms in issue had been approved without the matters in the allegations being highlighted promptly and further, there was no clear policy about the mileage reimbursement when the claimant used his private car in cases whereby justifiably, the official car was not available. The Court has considered the procedural unfairness and also balanced it against the claimant's substantial admissions to the allegations. The Court finds that such admissions significantly contributed to his termination. Taking all the factors into consideration, the Court returns that 3 months' gross salaries in compensation under section 49 of the Act will meet the ends of justice in the case making **Kshs.2, 098, 587**.

d) The claimant prayed for payment for unpaid leave days but the same being liquidated damages, the particulars were not pleaded and were not strictly proved as required. The Court finds that the prayer will fail as unjustified.

e) The amount awarded will be payable less income tax as per section 49 of the Act.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination was unfair for want of a fair procedure.
- 2) The respondent to pay the claimant a sum of **Kshs.2, 798, 116.00** by 31.12.2018 failing interest to be payable at Court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this **Friday 7th December, 2018**.

BYRAM ONGAYA

JUDGE