



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA AT KISUMU**  
**CAUSE NO. 252 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JAMES ONDIMA KABESA ..... CLAIMANT**

**VERSUS**

**TROJAN INTERNATIONAL LIMITED ..... RESPONDENT**

**JUDGMENT**

The Claimant filed this suit against Trojan International Limited, a company dealing in petroleum products all over Kenya, for unfair termination of his employment. He prays for orders as follows:-

- (a) A declaration that the decisions to suspend the Claimant herein on 2nd day of June 2015 and also the one dated 11th day of June 2015 terminating/summarily dismissing the claimant herein were in constitutional, improper and wrongful.
- (b) That the Respondent herein be compelled to reinstate the claimant to his employment and in the alternative to pay the claimant general loss and/or damages.
- (c) Leave allowance for four years and salary arrears from May 2015 and two days worked for June 2015 all amounting to Kshs.224,000/- as pleaded hereinabove.
- (d) Interest at court rates.
- (e) Costs of the suit.
- (f) Any other relief this court deems fit to grant.

The Respondent filed a response to the claim in which it states that the Claimant was summarily dismissed for reasonable and sufficient grounds and was given an opportunity to defend himself, that the summary dismissal was therefore in accordance with the law, rules of natural justice and equity. It prays that the claim is frivolous and vexatious and should be struck out with costs.

At the hearing the Claimant testified on his behalf and the Respondent called one witness IBRAHIM ADAN.

**Claimant's Case**

The Claimant testified that he was employed by the Respondent on 30th July 2012. His employment was confirmed on 9th November 2012. His designation was Station Manager of a Petrol Station in Busia Town.

On 30th March 2015 he was summoned by the Marketing Manager to the Head Office and informed that some super petrol and diesel delivered to the station could not be accounted for. They did some reconciliation and he was told to go back to his station. On 2nd June 2015 he was served with a letter of suspension and asked to respond to the accusations levelled against him which he did. He testified that on 2nd June 2015 while at the head office he was told he will be contacted and given a date for a disciplinary hearing. On 11th June 2015 he was called to the station at Busia and handed a letter of termination of his employment contract. He testified that he was not given a hearing. He testified that he worked for 4 years without leave and was not paid salary for May 2015. He stated that he was entitled to 21 days leave every year.

The Claimant prayed for payment of leave for 4 years, salary for May and 11 days of June 2015, reinstatement or damages for unlawful termination. His last salary was Shs.45,000/=.

Under cross-examination the Claimant denied that the fuel alleged to have been lost was received at the station. He stated that when he was called to Nairobi to explain the loss it was more than one year later and he was not able to check the records. He stated that full reports are sent to head office daily and the loss should have been detected the day after it occurred. The Claimant further stated that the station did not have capacity to sell in one day the 10,000 litres of petrol and 10,000 litres of diesel alleged to have been delivered. He stated that whenever reports made to head office had errors the reports would be sent back for correction.

### **Respondent's Case**

IBRAHIM ADAN testified that the Claimant's employment contract was terminated because of low professional standards, inferior work performance and negligence of duty leading to a loss of Shs.2.2 Million by the Respondent. He testified that the Claimant was not sending reports at all or whenever he sent, the reports were full of mistakes. He testified that when asked about the unsent reports or the reports with errors the Claimant always asked for time.

He testified that he asked the Claimant about the discrepancy on stocks by email on 2nd January 2015 and the Claimant quoted stocks not tallying with those in head office. He testified that he summoned the Claimant to head office on 3rd June 2015. The Claimant was also called to head office in May.

Mr. Adan testified that on 3rd June the Claimant was asked to explain and minutes of the disciplinary hearing were taken.

On pending annual leave Mr. Adan stated that the Respondent's Human Resource Policy provides that leave not taken is forfeited.

Under cross-examination Mr. Adan stated that the Claimant was issued with a show cause letter on 2nd June 2015 which he responded to. That the disciplinary hearing was on 3rd June 2015 and the Claimant was in attendance. He stated that the decision to dismiss the Claimant was made on 11th June 2015. He stated that the Claimant was accorded an opportunity to defend himself on 3rd June 2015 which he did not do. He testified that the reason for termination was that there was fuel worth Shs.2.2. Million that was lost and the Claimant was the one responsible. He stated that the product was delivered according to the reports received by the supervisor which the Claimant acknowledged in the report. He stated that the Claimant's claim was that the fuel was never received at the station. He stated that the Claimant did not report the loss.

### **Determination**

I have considered the pleadings, the evidence adduced in court and the written submissions filed by the

parties. The issues for determination are whether the termination of the Claimant's contract of employment was fair and whether the

Claimant is entitled to the remedies he has prayed for.

### **Fair Termination**

In considering if termination is fair the court must consider two different limbs; Whether fair procedure as provided in Section 41 of the Employment Act was complied with; and, if there was valid reason for termination as provided under Section 43. Section 45 provides that if either of the two was not complied with then the termination is unfair.

In this case the Claimant was issued with a show cause letter dated 2nd June 2015 which he responded to although his response has no date. In the minutes titled **“MINUTES OF THE MEETING FOR DISCIPLINARY PROCEEDINGS FOR JAMES KABESA HELD AT TROJAN NAIROBI HEAD OFFICE ON 3RD JUNE 2015”** it is stated that *“He was suspended and was told to write to the management how the product was lost on or before 10th June 2015 when the final hearing will be made.”*

In the minutes of the meeting held in Busia on 10th June 2015 it is stated that *“In the meeting James was asked if he has any question concerning this matter. But he did not have any question. He was told to wait for final communication from the company and the meeting was adjourned...”*

Mr. Adan stated under cross-examination that it was after the meeting of 3rd June 2015 that a decision was made to suspend the Claimant. This begs the question as to whether the show cause letter dated 2nd June 2015 was written before the meeting of 3rd June 2015 at which Mr. Adan claims the decision to suspend the Claimant was made.

It is also interesting that there are minutes of a meeting held on 10th June 2015 at which the Claimant was informed to wait for final communication and then a letter of termination was issued to the claimant on 11th June 2015.

Although the titles of the minutes state they are disciplinary hearings, the contents of the minutes do not refer to any disciplinary hearing. Even the agendas of the minutes do not reflect that they were disciplinary hearings.

The agenda for the meeting of 3rd June 2015 reads:

1. *James to give us over view on how the loss occurred.*
2. *Busia Report Review*
3. *A.O.B.*

The Agenda for the meeting of 10th June reads:

1. *James to give a show cause/final report on product loss.*
2. *A.O.B.*

Under Section 41 of the Employment Act an employer is required to inform the employee in the presence of a fellow employee or a shop floor union representative of his choice, the reasons for which the employer contemplates to terminate the services of the employee. The employer is then supposed to hear the employee's representations and the representations of the person who has accompanied the employee to the disciplinary hearing.

The employer is also expected to observe the rules of natural justice of giving the employee notice of the

impending hearing and the grounds for the disciplinary hearing to enable the employee prepare to defend himself.

In the present case there is no formal notification to the employee of the disciplinary hearing, no mention of whether the employee was informed of his right to be accompanied by a fellow employee to the hearing and no mention in the minutes of a disciplinary hearing. Further the letter of termination does not make any reference to a disciplinary hearing on 10th June 2015. The minutes are also not signed by the Claimant.

From the foregoing it is evident that there was no disciplinary hearing as envisaged in Section 41 of the Employment Act.

### **Validity Of Reason**

The reason for termination as stated in the Claimant's letter of termination is poor performance and serious misconduct being:-

- Repeated instances of low professional standards.
- Consistently inferior work performance.
- Negligence of duties based on job description.
- Loss of product amount to Shs.2,210,759 due to negligence on your part by giving inaccurate report and failure to report this loss in time.

All these grounds, apart from the last ground, were not part of the discussion at the “disciplinary hearings” or the show cause letter. This means that the Claimant's employment was terminated on grounds that he had not been required to defend himself against and which had therefore not been proved.

For these reasons I find that there were no valid grounds for termination. Besides, the letter of termination is so long and so vague, the only message clear about it is the fact that the Claimant's employment had been terminated.

For the foregoing reasons I find that the termination of the Claimant's employment contract was unfair.

### **Remedies**

The Claimant prayed for reinstatement or in the alternative damages for unfair termination. The remedy of reinstatement is not appropriate taking into account the circumstances under which the claimant's employment was terminated. Taking into account all the circumstances of the case it my opinion that compensation in the sum of 6 months' salary is reasonable. The Claimant's last salary having been Shs.45,000/= I award him Shs.270,000/= as compensation for unfair termination of his employment.

The Claimant prayed for leave for 4 years. The Respondent did not prove its allegation that according to its Human Resources Policy leave not taken is forfeited. No copy of the Human Resource Policy was produced. Even if it was, the court would still have to satisfy itself the the provision is compliant with the section 28 of the Employment failing which it would be invalid. I award the Claimant pay in lieu of 21 days annual leave per year for 4 years being Shs.126,000/-.

The Claimant further claimed salary for May and June 2015 which he stated was not paid. Having worked up to 11th June 2015 when his employment was terminated, and in the absence of denial of the allegation by the Respondent that the Claimant was not paid, I award him salary for May 2015 at Shs.45,000/= and salary for 11 days of June at Shs.16,500.

The Respondents shall pay Claimant's costs for this suit and the decretal sum shall attract interest from

date of judgment.

**Judgment Dated, signed and delivered this 2nd day of February, 2017**

**MAUREEN ONYANGO**

**JUDGE**