

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 920 OF 2016

PATRICK MUTEMBEI MAGAJU .....

CLAIMANT

VERSUS

BASH HAULIERS LIMITED .....

.....RESPONDENT

JUDGMENT

**Introduction**

1. Via the Memorandum of Claim dated 2nd November 2016, the Claimant sought judgment against the Respondent for;

a) Payment for Unfair Termination at Kshs.44,103 X 12..... KShs. 529,236/=

b) Payment of Superior and Favourable Pension Service for the period of employment, KShs. 44, 103/2 X 6 Years..... Kshs.264,618/=

c) Unpaid Annual Leave for 6 years= $44,103/2 \times 21 \times = \dots\dots\dots$  KShs. 213,730/=

d) Payment of 12 months' notice..... KShs 529,236/=

e) Interest on the above sums.

f) Cost of this suit.

2. The Respondent opposed the Claimant's claim through a statement of Defence dated 16th January, 2017, arguing that the termination of the Claimant's employment was lawful and justified under Section 44(4)(c) of the Employment Act, 2007. Furthermore, the Claimant is not entitled to the reliefs sought in his pleadings.

**Claimant's case**

3. The Claimant asserted that the Respondent initially engaged his services as a Supervisor in October 2010. His introductory salary was KShs. 44,104 per month. He served the Respondent with dedication and diligence, which culminated in his promotion to the role of Empty Container Yard Supervisor.

4. He stated that the Respondent never issued him a clear written job description spelling out his responsibilities, which he contends was a failure by the employer to meet statutory employment obligations.
  
5. On 21st April 2016, the Human Resource Manager sent him a letter seeking clarification regarding the whereabouts of two empty containers. In response, by his letter dated 22nd April 2016, the Claimant explained that the empty container No. BHL 027 was at Bob Kabarani Yard, while the other, BHL 049, had been issued based on direct instructions from Mr. Omar to Mama Nuru.
  
6. On 5th May 2016, the Respondent issued him with a show cause letter requiring him to explain why disciplinary action could not be taken against him for releasing a company container without authorization from management and entering the Human Resources Office at night without permission and for an unknown reason.

7. His explanation, supported by evidence, to the Respondent, that one of the containers was released with authority by the Management of the Respondent, while the other was well under safe custody at the yard, fell on deaf ears.
8. Despite the explanation, the Respondent placed him on indefinite suspension on 17th May 2016 and ultimately terminated his employment on 20th May 2017.
9. The Claimant asserts that the termination was unlawful, unfair, and in breach of the Employment Act 2007, as he was not accorded a fair hearing, was not given notice, and was denied the right to be accompanied by a colleague as mandated under Section 41. Additionally, the termination was without any valid reason.
10. The Claimant avers that the allegations against him regarding theft or mismanagement of company property were never investigated or proven, and that even the police did not find sufficient grounds to charge him. He therefore contends that the allegations were malicious and unfounded.

11. He additionally asserts that if the Respondent suspected misconduct, a proper investigation should have been conducted, and a formal report should have been provided to him. Instead, the employer chose to dismiss him summarily without following due process or offering a reasonable opportunity to present his case, which contravenes the principles of fairness and natural justice.
12. Cross-examined by counsel for the respondent, the claimant testified that he was summarily dismissed from employment based on the accusation of two missing containers. At the time the containers were unaccounted for, he was the Yard Supervisor.
13. He further testified that upon the disappearance of the containers, the Respondent commenced an inquiry into the disappearance. Following the investigation, several letters were exchanged between him and the Respondent. The first letter from the Respondent, dated 21st April 2016, required him to shed light on the disappearance, as he was the supervisor at the material time. He responded to the same.

14. Furthermore, on 5th May 2016, the Respondent issued him another correspondence requesting a response to the two allegations presented therein. He responded to the same on 17<sup>th</sup> May 2016. His response was similar to that which he had made earlier.

15. The Claimant further testified that he was aware of what was expected of him in his role as a Yard Supervisor. His primary responsibility was to ensure the accurate recording of container information. In his two responses to the Respondent's letters, he did not attach any container records. However, he provided them with information regarding the location of the containers.

16. He admitted that, as an employee of the Respondent, he was registered as a member of the National Social Security Fund and the National Insurance Health Fund.

17. In his evidence during re-examination, the Claimant testified that he provided the Respondent with a detailed explanation about the containers. He even physically traced one of them and took a photograph of it.

18. The 2<sup>nd</sup> Container No. 049 was at Bayusuf Company Ltd. The same had been given to them by the Managing Director, Mr. Omar. He requested the Human Resources Manager to follow up with the Managing Director to ascertain.

19. He did not take his annual leave due to work pressure. There was a lot of backlog, including returning containers to shipping lines.

### **Respondent's case**

20. The Respondent presented one witness, George Mwajosi, to testify on its behalf. The witness adopted his witness statement filed herein dated 20<sup>th</sup> November 2024, as his evidence in chief.

21. He stated that on 27<sup>th</sup> March 2016, the Claimant, while working as a Supervisor for the Respondent, allowed a container No. BHL 049 to be taken away from JOMVU YARD. This and another container No. BHL -027 went missing due to the Claimant's negligence.

22. Following the disappearance of the containers, the Respondent's Human Resources Manager wrote a letter requesting the Claimant to explain the whereabouts of the containers. From the Claimant's response, the witness found that the Claimant had permitted the containers to be taken out of the yard without authorisation, and as a result, one of the containers [No 049] had been sold.

23. All the explanations provided revealed the negligence of the Claimant.

24. The Respondent contends that the termination of the Claimant's employment was lawful and justified under Section 44(4)(c) of the Employment Act, 2007, which permits summary dismissal where an employee negligently performs duties or is responsible for loss or damage to an employer's property.

25. It was further argued that the Claimant did not establish how container No. BHL-049 left the yard or was released to third parties without proper authorisation. The Claimant asserted that an individual known as Mr. Omari issued instructions for the release; however, the said individual did

not corroborate the Claimant's explanation nor furnish any evidence to substantiate the release.

26. The witness asserted that the Claimant was dismissed on reasonable grounds of failing to account for containers that he was employed to guard as a supervisor.

27. Cross examined by Counsel for the Claimant, the witness testified that the Claimant was employed as a Supervisor, not a Clerk. He was in charge of the Department of Empty Containers.

28. When the Respondent discovered the loss of the containers, they issued the Claimant with a letter, requiring him to explain the whereabouts of those containers. He responded to the letter. In the letter, he explained in detail where the containers were. Concerning container No. BHL-049, he explained that it was sold with the authority of Mr Omar.

29. After his response, the Respondent carried out investigations and discovered that the contents of his response letter were untrue. In the show cause letter dated

5<sup>th</sup> May 2016, the Respondent did not mention that any investigations had been carried out.

30. The Claimant committed a further infraction by sneaking into the Human Resources Management office at night.

31. The Respondent issued him with another letter dated 16<sup>th</sup> May 2016, to which the Claimant responded on 17<sup>th</sup> May 2016. In this letter, the Claimant referred to a letter by the Managing Director, dated 8<sup>th</sup> December 2015. This letter was a forgery. The Managing Director did not give any statement to support the position that the letter was a forgery. No criminal proceedings were undertaken against him for forgery.

32. The Respondent did not give the Claimant a hearing. They just dismissed him.

33. The witness alleged that the Claimant was invited to a hearing, but he refused to turn up. The Claimant was not given any notice.

34. At separation, the Claimant was earning KShs. 44,103.

## **Analysis and determination**

35. I have carefully considered the pleadings, evidence and submissions by the parties, and the following issues emerge for determination;

- a) Whether the dismissal of the Claimant from employment was fair.
- b) Whether the Claimant is entitled to the reliefs sought.

## **Whether the Claimant was unfairly terminated**

36. It is not in dispute that at all material times, the Claimant was an employee of the Respondent and that by their letter dated 20<sup>th</sup> May 2016, the latter summarily dismissed him from employment. However, the question that this Court must answer is whether the summary dismissal was fair, as the parties took diametrically opposite positions on it.

37. For a summary dismissal of an employee or termination of an employee's employment to satisfy the fairness criteria, in accordance with Section 45 of the Employment Act, it must

be both procedurally and substantively fair. Procedural fairness pertains to the process that leads to the employer's decision to dismiss or terminate, whereas substantive fairness concerns the merits of the decision itself. From the submissions filed by both parties, this Court notes their appreciation of this legal position.

38. In a dispute relating to unfair termination or wrongful dismissal, the law places a duty on the employer to prove the presence of these two aspects. This duty was elaborately captured in the case of Pius **Isundu Machafu v Lavington Security Guards Ltd [ 2017] eKLR.**

39. Section 41 of the Employment Act, 2007, provides for procedural fairness in the Kenyan context. The provision outlines a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing an employee must follow. The procedure includes the elements of notification, a hearing, and consideration. The employer shall notify the affected employee of the grounds for the proposed action, provide the employee with an adequate opportunity to prepare and defend themselves against the accusations, and consider the

employee's representations before reaching a final decision. Concomitant with the right to a hearing under this provision is the right to accompaniment; the employee must be allowed to be accompanied by a colleague of their choice or a trade union representative, if they are a member of a trade union.

40. The counsel for the Respondents extensively argued that the Claimant was subjected to a process in accordance with the provisions of section 41 of the Employment Act. It was stated that there were correspondences between the Respondent and the Claimant; he was served with a show cause letter and provided with an opportunity to be heard. Counsel for the Claimant sees it otherwise. The process was totally non-compliant with the statutory procedure.

41. I have carefully considered the material placed before this Court, and it is not difficult to conclude that the process only satisfied one of the ingredients of procedural fairness set out hereinabove, the notification. This Court has numerously stated that where all three ingredients are or any one of them is demonstrated to have been absent, in the process

leading to the termination/dismissal, such termination shall be by dint of Section 45 of the Employment Act, unfair.

42. There is no doubt that the Claimant was served with show cause letters setting out clearly what the Respondent was accusing him of. It is for this reason that I hold that the notification ingredient of the process contemplated under Section 41 of the Act was satisfied.

43. The Respondent's witness was explicit in his evidence. The Claimant was not subjected to a disciplinary hearing. Furthermore, he made a bald assertion, without evidence, that the Claimant was invited to a hearing but failed to attend. Consequently, the Court is not hesitant to conclude that the second and third elements of procedural fairness, as outlined in the provision mentioned above, were not satisfied. The summary dismissal of the Claimant was therefore procedurally unfair.

44. Section 45 of the Employment Act places a duty on the employer to prove that the reason for the termination of an employee's employment was on account of a fair and valid reason. In the context of summary dismissal, a fair and valid

reason can only be one whose existence is proved, and that is owing to an employee's infraction[s], in the nature contemplated under Section 44[3] and 44[4] of the Employment Act. Therefore, before I delve into the nature of the infraction, I must first satisfy myself that a legitimate reason for the summary dismissal existed.

45. I note that from the onset, by his correspondence through to his pleadings and evidence in this matter, the Claimant asserted and maintained that one of the containers was sold to a third party under the instructions and authority of the Managing Director of the Respondent, and that the other was safely within one of the Respondent's Yards. He even took a photograph of this other container and put it forth to the Respondent.

46. In my view, in light of this insistence, a reasonable employer who reasonably suspected that the Claimant had committed gross misconduct would present the Managing Director to discount the Claimant's assertion, and even demonstrate that the letters that were alleged to have been authored by him regarding the 1<sup>st</sup> container were forgeries. No doubt, the Managing Director was a central figure in the

controversy. Inexplicably, he was not called to testify in this matter. His input does not feature in the correspondence between the Respondent and the Claimant, despite the presence of grave and criminal allegations of forgery.

47. The Claimant's evidence concerning the second container could be readily rebutted by any reasonable employer through the straightforward action of procuring a record and a witness from the particular yard referenced by the Claimant, thereby demonstrating the absence of the alleged container at that location, at the relevant time, or at any time.

48. The Respondent's failure to give the matter the reasonable approach mentioned above leaves this Court with no option but to make an adverse inference that had they opted to give the matter the approach, it would have been prejudicial to their case.

49. In sum, I am not persuaded that the Respondent proved a valid and fair reason to dismiss the Claimant from his employment summarily. As such, I hold that the dismissal was substantively unfair.

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

### **Payment for unfair termination at Kshs.44,103 X 12**

**KShs. 529,236/=**

50. Section 49 [1][c] of the Employment Act, 2007, bestows upon the Courts the authority to grant a compensatory award for an employee who has successfully challenged their employer's decision to terminate their employment unfairly. The power is exercised in a discretionary manner depending on the circumstances of each case. I have carefully considered the length of service [5 years] of the Claimant, and that the summary dismissal was without adherence to procedural and substantive fairness, and conclude that the Claimant merits the compensatory award. I hereby award him six months' gross salary, KShs. 264,618.

**b) Payment of superior and favourable pension service for the period of employment.  
KShS.44, 103/2 X 6 years. Kshs.264,618/=**

51. What informed the seeking of this relief does not come out sufficiently or at all from the Claimant's pleadings and or

evidence. As such, his entitlement to the relief was not proved. It is hereby declined.

**c) Unpaid annual leave for 6 years= $44,103/2 \times 21 \times =$   
**KShs. 213,730/=****

52. The Respondent's Counsel submitted that, having not presented any evidence concerning the exact leave days earned but not taken, there can be no legal basis for the award sought under this head, in favour of the Claimant. I have carefully considered the Claimant's Statement of Claim, and note that in the body thereof, the Claimant did not lay any factual foundation for the relief "Unpaid Annual Leave for 6 years = $445,103/26 \times 21 \times 6$ " which just sprang up in the reliefs section of the pleading. I also note that the Claimant neither mentions nor lays a factual foundation for the award of the relief. This is a relief that wasn't sufficiently pleaded for, nor was sufficient evidence given to justify its award. Litigants and Counsel alike should take note that a mere mention of a relief in the reliefs section of a statement of a pleading does not entitle a party to that relief without evidence. Ultimately, I reject this remedy sought.

53. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

- a) Compensation pursuant to section 49[1][c] of the Employment Act, six [6] months' gross salary, KShs. 264,618.
- b) Interest on the awarded amount in [a]above, at court rates from the date of this Judgment till full payment.
- c) Costs of the suit.

Read Signed and Delivered this 13<sup>th</sup> Day of November 2025.

OCHARO KEBIRA

JUDGE