REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E498 OF 2021

GEORGE MORARA OGETO………………………………..…….CLAIMANT

VERSUS

FARGO COURIER LIMITED……………………………..….. RESPONDENT

JUDGMENT

The suit is founded on a Statement of Claim dated 2/6/2021 in which the Claimant seeks the following reliefs from the Respondent:

(a) Kshs. 200,000.00 unpaid salary for the month of March and April 2021.

(b) Kshs. 100,000.00 in lieu of notice.

(c) Kshs. 1,300,000.00 service pay calculated at one month's salary for each completed year of service for 13 years and

(d) Maximum compensation for unlawful termination of employment.

CW1, the Clamant adduced evidence in support of the claim by adopting a witness statement dated 2/6/2021 as his evidence in chief. The Clamant was employed by the Respondent under two employment contracts dated 26/1/2008 and 6/5/2015 respectively. The 1st contract was for the position of Courier Escort at a basic salary of Kshs. 5,373.00 and the contract of employment dated 6/5/2015 was for position of courier Assistant Operations Manager at a gross monthly salary of Kshs. 80,000.00.

The Respondent served the Claimant with a notice to show cause on 23/3/2021 while serving his outstanding leave days. The Respondent alleged that the Claimant absented himself from work without authority.

The Claimant responded by a letter dated 23/11/2021 and stated that he would attend a disciplinary hearing with his lawyer but was to be accorded a hearing.

The Respondent summarily dismissed the Claimant by a letter dated 9/4/2021. The Claimant denied that he failed to attend the hearing.

The Claimant states that the Respondent unlawfully and unfairly terminated his employment.

Under cross-examination, the Claimant said that he had filled a leave form for 24 days. The Human Resource Department wrote back to him stating that he had no 24 days leave yet he had not taken the days. The Claimant said he wrote back to the Respondent stating that he needed to complete his leave days to finish what he was doing at home. That he received no response from the Respondent and he was then interdicted was called to a disciplinary hearing.

The Respondent refused to allow the Claimant appear with his lawyer at the hearing. The hearing date was postponed to 8/4/2021. Claimant was told to bring a fellow staff member. The Claimant brought an Advocate and

both were denied entry to the Respondent's premises. The Claimant said he was not paid salary for March and April and was summarily dismissed on account of failure to attend disciplinary hearing.

The Claimant said he was entitled to 24 days leave and did not desert work from 12/3/2021 and had filled the appropriate leave form. That he had gotten an oral approval to proceed on leave from his supervisor. Claimant said he had not read the company Human Resource Policy document. Claimant said his leave was to start on 8/3/2021 and he filled the form and left it for approval by the supervisor as they were at different locations. That he later was told the leave was not approved and he should return to work on 12/3/2021 but did not as he had already travelled to the country side and had personal engagements.

Claimant said the letter dated 8/3/2021 reached him on 10/3/2021. The Claimant said that once an employee fills a leave form and the supervisor signs it, an employee proceeds on leave and it is signed by Human Resource department while the employee is gone.

RW1, Mr. Grey Cullen Smith, the Operations Director of the Respondent testified in defence of the suit and adopted a witness statement dated 30/4/2025 as his evidence in chief.

RW1 said he was not involved in the disciplinary hearing of the Claimant but from the record, the Claimant had received 3 warning letters. RW1 said the company does not allow Advocates to attend disciplinary hearings. He

said that was per the labour law of Kenya which he was familiar with. RW1 said no hearing took place because the Claimant could not attend with a lawyer.

RW1 said Claimant had accrued leave. He had been given 4 days leave but he took 24 days without approval despite being asked to return back to work by a letter dated 8/4/2021 written by Director Human Resource Mr. Ayieko Willis. RW1 said the claim lacks merit and it be dismissed with costs.

DETERMINATION

The parties filed written submission which the court has considered together with the evidence adduced by the CW1 and RW1. The issues for determination are:-

(a) Whether the summary dismissal of the Claimant was for a valid reason following a fair procedure?

(b) Whether the Claimant is entitled to the reliefs sought?

There is a dispute of fact as to whether the Claimant got permission from his supervisor to proceed on 24 days leave upon filling a leave form. The Claimant stated that upon filling the form he forwarded it to the supervisor for signature since he was not at the same station with him. The Claimant testified that he was verbally authorised by the supervisor to proceed on leave, which he did.

It is not in dispute that the Claimant was recalled from leave and asked to come back to work after 4 days. The Claimant called back and said he was already in his rural home and had embarked on important chores he had planned to do while on 24 days leave. He asked to be allowed to complete his leave.

Instead the Respondent sent the Claimant a notice to show cause why he should not be disciplined for absconding work. The Claimant responded offering to attend the disciplinary hearing with his lawyer. The Claimant came twice to attend the scheduled disciplinary hearing but was denied entry upon coming with his lawyer. He was told he could only bring a fellow employee. The Claimant was therefore summarily dismissed without being afforded an opportunity to attend a hearing.

From the facts, it is clear that the Claimant had 24 days untaken leave and that he had actually obtained permission to utilize the leave from his supervisor which leave was countermanded when the Claimant had already embarked on his leave and had travelled to the country side.

The Respondent did not give any reasons why it was necessary to recall the Claimant despite having left for his leave. It is not explained why it was prejudicial to the Respondent for the Claimant to attend the disciplinary hearing accompanied by his lawyer.

In terms of section 41 of the Employment Act read with Article 47(1) of the Constitution of Kenya 2021, whereas, it is not an express requirement for

an employee to be represented by his Advocate, once an employee expresses a desire to be so represented at a disciplinary hearing the burden shifts to the employer to demonstrate what prejudice they would suffer if the employee was represented by an Advocate.

The right to be given opportunity to be heard before an adverse decision is taken against an employee is well established in our jurisprudence. The case of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR is** on point as follows:

> ***"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. The situation is dire where such an employee is terminated after such flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets."***

With regard to Article 47(1), the Claimant had a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Absent any demonstrated prejudice, there cannot be a proper rationale for an employee to be denied the right to attend a disciplinary hearing before

an adverse and indeed drastic action is taken against him simply because he is accompanied by an Advocate of choice.

The court 'reads in' the word "including representation by an Advocate of choice" in section 41 of the Employment Act, 2007 in interpreting the section to determine who is eligible to represent an employee in a disciplinary hearing especially where the employee demonstrates a strong desire for representation by a person other than a fellow employee or union official.

Accordingly, the Respondent violated sections 41, 43 and 45 of the Employment Act, 2007 in summarily dismissing the Claimant from employment without availing him and themselves the opportunity to establish that there was a valid reason to so dismiss him in an objective environment and fair manner.

The dismissal was therefore unlawful and unfair and the Claimant is entitled to compensation in terms of section 49(1)(c) of the Employment Act, 2007.

The Claimant had served the Respondent for 13 years in a senior position. The Claimant incurred warnings in respect of this matter leading to dismissal in circumstances that are contentious. The right of an employee to take leave, though regulated by the employer in terms of timing, is nonetheless a right in respect of which where there is a dispute, the circumstances should be construed in favour of an employee, where an employee has untaken leave days to cover the period he was away on

leave, and where the supervisor has not testified to contradict the fact that he had verbally allowed the employee to be on leave pending the full execution of the leave form, which is a mere formality for good order.

The Claimant lost his job unfairly and was denied salary and terminal benefits. The Claimant lost his career progression and means of livelihood. The offence in question is one, that needed proper interrogation and a lighter sentence preferred instead of a summary dismissal. The Claimant was not compensated for the loss of the job and had not found alternative employment as at the time of the hearing of the suit.

The Court refers to the Court of Appeal case of **Nation Media Group Limited v Munene (Civil Appeal E603 of 2021) [2025] KECA 114 (KLR) (24 January 2025) (Judgment**) where it was held that;

> **It is notable that an award equivalent to a number of months' wages or salary not exceeding twelve months and based on the gross monthly wage or salary of the employee at the time of dismissal is an allowable remedy under section 49 (1) of the Employment Act where termination of a contract of an employee is unjustified. In addition, the considerations and factors that a Court is required to take into account in awarding this remedy come into play in this appeal, particularly those stated in section 49(4) (a)-(f) of the Employment Act, namely: "**
>
> **(a) the wishes of the employee;**
>
> **b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**

c. the practicability of recommending reinstatement or re-engagement; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. the employee's length of service with the employer;

f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; …"

Having been removed from work for no valid reason, the respondent was entitled to compensation for the unfair termination. In addition, taking into account the manner and circumstances in which the employment was terminated, not only without reasonable notice, but also in a most cavalier mode, we are of the view that the award of 10 months' salary compensation was reasonable. It is also notable that the trial Judge did clearly state the basis of the award, which was that the respondent was "unfairly terminated without notice".

The Court awards the Claimant the equivalent of 10 months' salary in compensation for its unlawful and unfair summary dismissal in the sum of Kshs. 1,000,000.00.

With regard to the claim for severance pay for every completed year of service, he who alleges must prove. The Claimant did not tender any evidence to demonstrate that he was entitled to service pay upon termination; some cadre of security officers are entitled to terminal gratuity calculated at 18 days salary for each completed year of service. The Claimant did not tender evidence to bring himself in that category of employees. The claim for severance pay has no merit and is dismissed.

The Claimant had from perusal of his filled leave form produced by the Respondent 24 days untaken leave as at the end of 31/12/2020. The Claimant having utilised those 24 days in the impugned leave was entitled to a full salary for the month of March 2021. The claim for salary for April 2024 is limited to 9 days salary being the date of summary dismissal.

In the final analysis judgment is entered in favour of the Claimant against the Respondent as follows:

(a) Kshs. 100,000.00 in lieu of one-month notice.

(b) Kshs. 129,987 being unpaid salary for March 2021 and 9 days in April 2021.

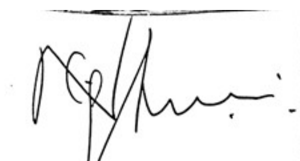
(c) Kshs. 1,000,000.00 (one million) being the equivalent of ten (10) month salary for unlawful dismissal

Total Kshs. 1,229,987.00

(d) Interest at court rates from date of judgment till payment in full.

(e) Costs of the suit

Dated at Nairobi this 2nd day of April 2026



Mathews Nduma

JUDGE

Dated, signed and delivered in open court at Nairobi this 9th day of March 2026

Gakeri J.

JUDGE

In presence of:

Mr. Morara for Claimant

Mr. Mwendwa for Respondent

Mr. Kemboi – Court Assistant