



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Murban Movers Limited v Ombijah (Appeal E090 of 2022)  
[2024] KEELRC 86 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 86 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E090 OF 2022  
J RIKA, J  
JANUARY 31, 2024**

**BETWEEN**

**MURBAN MOVERS LIMITED ..... APPELLANT**

**AND**

**TOBIAS OUMA OMBIJAH ..... RESPONDENT**

*(An Appeal from the Judgment of the Hon. SRM C. Mburu, in Chief  
Magistrate's Court at Kikuyu, CELRC E02 of 2020, delivered on 8th June 2022)*

**JUDGMENT**

1. The Trial Court entered Judgment in favour of the Respondent on 8<sup>th</sup> June 2022, for: -
  - a. 1-month salary in lieu of notice at Kshs. 33,550.
  - b. Leave days to be computed by the Respondent.
  - c. Certificate of Service to issue.
  - d. Compensation for unfair termination equivalent of 12 months' gross salary at Kshs. 402,600.
  - e. Award subject to statutory deductions.
  - f. Costs.
  - g. Interest.
2. Disaffected, the Appellant lodged this Appeal, based on the Memorandum of Appeal dated 4<sup>th</sup> July 2022.
3. There are 5 Grounds of Appeal, namely: -
  - a. The Trial Court erred in law and fact, by finding that termination was unfair and wrongful.



- b. The Trial Court erred in law and fact by failing to find that the Respondent acted illegally, unlawfully and irregularly and breached the terms of his contract.
  - c. The Trial Court erred in law and fact by failing to find that the Respondent acted illegally, irregularly and unlawfully by diverting from his designated route on 3 occasions, leading to contamination of the product, that risked the Appellant to lose business.
  - d. The Trial Court erred in law and fact, by failing to find that there was valid reason to terminate the Respondent's contract, and that due process was followed.
  - e. The Trial Court erred in law and fact by wrongful exercise of jurisdiction, in awarding 12 months' gross salary at Kshs. 402,600 in compensation and 1-month salary in lieu of notice at Kshs. 33,550, whereas there was clear evidence warranting summary dismissal.
4. The Pleadings and Evidence before the Trial Court established that the Respondent was employed by the Appellant as a Truck Driver. He was employed on 25<sup>th</sup> May 2017. The contract was term-indefinite. He was summarily dismissed by the Appellant on 1<sup>st</sup> July 2020, on the ground that he diverted from his designated route, while transporting fuel from Mombasa to Rwanda. It was explained that diversion led to product contamination, which could result in the loss of the client.
  5. The Respondent gave evidence and rested his case before the Trial Court on 6<sup>th</sup> October 2021. Managing Director Vishal Somaia, gave evidence for the Appellant on 9<sup>th</sup> February 2022 when the hearing closed.
  6. It was agreed on Appeal, that the Appeal is considered on the strength of the Record.
  7. The Parties confirmed filing and exchange of their Submissions amplifying the Record, on the 28<sup>th</sup> September 2023.

### **The Court Finds**

8. There are effectively 3 Grounds of Appeal- the Trial Court erred in finding that there was no valid reason to justify termination; it erred in finding that termination did not follow a fair procedure; and award of compensation and notice pay was wrongful exercise of judicial discretion.
9. Validity of reason. This is a prerequisite of the *Employment Act* under Sections 43, 45 and 47[5].
10. The reasons stated in the letter of summary dismissal, to justify termination are: -
  - a. While the Respondent drove the Appellant's truck, registration KC 866 J/ ZD 7939, he stopped at Birikani junction at 1651 hrs, on 5<sup>th</sup> June 2020, knowing fully well that this was a restricted area.
  - b. He diverted to another restricted area, Jomvu-Birikani junction, at 1656 to 1716 hours.
  - c. On 10<sup>th</sup> June 2020, he diverted off the designated route again, ending his journey at a restricted area, Nkalama. On arrival the client confirmed that the consignment was contaminated, which risked termination of the commercial contract between the Appellant and the client.
  - d. The Appellant alleged that in light of the above, it had lost trust and confidence in the Respondent.
11. The Trial Court found that there was no valid reason, or reasons, to justify termination.
12. The Court does not find fault with this conclusion and finding of the Trial Court on validity of reason.



13. Allegations of diversion from the designated route, and contamination of the transported product by the Respondent's client, were mere allegations. They were not established by the Appellant. There was no evidence before the Trial Court, establishing these allegations as objective grounds, to sustain the decision to summarily dismiss the Respondent.
14. The Appellant appears to have relied on its own report titled "KCF –Violations and Possible Case of Contamination," on trial.
15. It is not clear from the record who prepared the report. The report states that, "while we await Faith, Kobil RW to give us a final report after conducting her sampling tests, we at Murban can point out violations of the abovementioned driver..."
16. The report is alleged to have been authored by "we at Murban." Its author and his credentials is unspecified. The author was not called as a witness at the Trial. The policy which the Respondent was found to have violated was not placed before the Trial Court. There is no policy document, establishing that Birikani, Jomvu and Nakalama areas were restricted areas. Contamination of the product delivered by the Respondent, was still pending confirmation from sampling tests to be carried out by one Faith from Kobil. The Respondent told the Court that the fuel was tested, and it was not found to be contaminated. The Managing Director Vishal Somaia did not contradict the Respondent on this, stating only that the Respondent had stopped at places which were known for fuel contamination. There was no evidence before the Trial Court, establishing the allegations made by the Appellant against the Respondent, as valid reasons, to justify summary dismissal.
17. There is no merit to the challenge made by the Appellant on the finding of the Trial Court, that termination was not based on valid reason or reasons, as required under Sections 43, 45 and 47[5] of the *Employment Act*. This Ground of Appeal is rejected.
18. Procedure. The Respondent told the Trial Court that he was not given an opportunity to explain himself. He was just called by the Human Resource Manager, and told that there his letter was to be collected from the Human Resource Office. It was the letter of summary dismissal. There was no hearing. He did not meet the Managing Director, Vishal Somaia.
19. The Appellant pleaded at paragraph 12 of its Statement of Response, that the Respondent was given an opportunity to be heard. Vishal Somaia stated that he met the Respondent on 29<sup>th</sup> June 2020, and gave the Respondent a chance to explain himself.
20. The Appellant exhibited minutes of the alleged meeting between the Respondent and Vishal Somaia, held on 29<sup>th</sup> June 2020.
21. It was not established by the Appellant that such a meeting was held, or that even if it was held, it was in the nature of a disciplinary hearing, held in accordance with Section 41 of the *Employment Act*.
22. The minutes prepared by Vishal Somaia indicate he was alone with the Respondent at the meeting. There was no disciplinary committee. Just the Managing Director, who discharged all the functions of a normal disciplinary committee.
23. He alone read out the charges to the Respondent, made findings, observations and recommendations, before summarily dismissing the Respondent.
24. There was no letter to show cause why disciplinary action should not be taken against the Respondent. There was no invitation to a disciplinary hearing. There were no witnesses and no documents shown to have been presented at a properly convened disciplinary hearing, before summary dismissal. The Respondent did not attend any disciplinary hearing, accompanied by a colleague of his choice or a trade



- union representative. The minutes exhibited by the Appellant, alleging that there was a disciplinary hearing, are a mockery of industrial justice.
25. The Trial Court correctly found that the Appellant did not meet the minimum statutory standards of fairness on termination, under Sections 41 and 45 of the *Employment Act*. The challenge on procedural fairness has no merit and is declined.
  26. Remedies. The Appellant states that the Trial Court exercised its discretion wrongfully, by granting 1-month salary in notice pay, and compensation equivalent of 12 months' salary.
  27. The Trial Court based its grant of the 2 remedies on case law, and relevant statutes in its Judgment. It cited Sections 35 and 49 of the *Employment Act*, as elaborated in decisions of various Superior Courts. There was a catena of judicial authorities cited by the Trial Court, none of which was argued by the Appellant, to be inapplicable. The Trial Court took into account that the Claimant had served for 3 continuous years, and that his contract was open-ended. Termination was infirm, substantively and procedurally. The Trial Court considered Section 49 of the *Employment Act* objectively. The grant of 12 months' gross salary in compensation was well-founded in case law and statute, and explained in detail, in the Judgment of the learned Trial Court.
  28. The Court would only interfere with an award of damages on Appeal, where that award is inordinately high or low, so as to represent an entirely erroneous estimate. There were other remedies open to the Respondent such as reinstatement and re-engagement, particularly as termination was not based on valid reason and fair procedure. The Court does not think that grant of a monetary award, can be considered excessive, while the remedy of reinstatement or re-engagement, which enables the Employee to continue earning an income, in an indefinite term contract, are potential remedies. The grant of 12 months' salary in compensation for unfair termination was within the law, within the discretionary power of the Trial Court, and was reasonable. The Trial Court was convinced that the Respondent earned a modest salary, and the final award could not be described as unusually high or excessive, as it fell within the range of the monetary statutory limits of compensation.
  29. Appellate Courts must avoid the tendency to interfere with the discretionary powers of Trial Courts on award of compensation for unfair termination, unless there is a clear case of injudicious exercise of discretion, by the Trial Court. The *Employment Act* confers discretionary powers to Trial Courts on grant of remedies for unfair termination- monetary or full restoration of the contract. That discretionary power must be jealously guarded, in the interest of industrial justice. Trial Courts, while required to exercise their discretion judiciously, must not be led by higher jurisdictions [Appellate Courts], into self-censorship, or partake in the degradation and death of important remedies, such as the equivalent of 12 months' salary in compensation, re-instatement or re-engagement, in their Judgments on claims of unfair termination.
  30. The Court is not able to agree with the Appellant, that the Trial Court exercised its discretion improperly, in granting any of the remedies.

#### **It Is Ordered**

- a. The Appeal is declined.
- b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**



**JAMES RIKA**  
**JUDGE**

