



**Jason v Bobmil Industries Ltd (Cause 409 of 2019)  
[2024] KEELRC 2504 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2504 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 409 OF 2019  
B ONGAYA, J  
OCTOBER 18, 2024**

**BETWEEN**

**WILFRED MBITHI JASON ..... CLAIMANT**

**AND**

**BOBMIL INDUSTRIES LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim dated June 25, 2019 through Kalwa & Company Advocates praying as follows:
  - a. A declaration that the claimant’s termination from his employment was wrongful.
  - b. The claimant be paid his terminal benefits as set out in paragraph 9.
  - c. The respondent be allowed to compensate the Claimant for wrongful termination at the equivalent of twelve (12 months gross salary).
  - d. That the Honourable Court do order that the respondent do issue the claimant with a certificate of service.
  - e. The Respondent do pay the cost of this action.
  - f. Interest on the above at Court rates.
2. The claimant averred that he was employed by respondent on 28.12.2015 as a Logistic Manager at a starting salary of Kshs. 185,000/= and that he received a written contract that stipulated all the duties he was to discharge.
3. The claimant’s further case was that on 06.03.2019, the respondent’s Managing Director, without any lawful cause, notice and or explanation, verbally instructed him that his services were no longer required. He averred that he was extremely trained in logistic operations and that for the entire period



he was in the respondent's employment, he never received any caution, warnings or concern raised regarding the manner he executed his duties. That consequently, he could have worked beyond the 65 years as per the respondent's practice.

4. The claimant further averred that his request for particulars and reasons for the said termination of his services was met with extreme hostility and communication between him and the respondent ended when he was locked out at respondent's gate. He asserted that the respondent refused to pay him his dues made up of three (3) months' salary in lieu of notice Kshs. 555, 000, leave pay for one (1) year Kshs. 185, 000.00, salary for March 2019 Kshs. 185,000.00, service pay for four (4) years Kshs. 426, 925.00, lost years to retirement at 65 years Kshs 11, 840, 000.00, 12 months' salary compensation for wrongful termination of employment Kshs. 2, 200, 000.00, and, a certificate of service.
5. The respondent's memorandum of response is dated 22.11.2019 and filed through the firm of Macharia-Mwangi & Njeru Advocates. The respondent averred that the claimant is not entitled to the reliefs sought as claimed as devoid of merit. The respondent prayed that the claims be dismissed with costs.
6. It was the respondent's case that the claimant was employed as a Transport and Security Manager effective 28.12.2015 earning a gross monthly salary of Kshs. 120,000/=. The respondent asserted that the claimant's employment contract did not provide for retirement at the age of 65 years as alleged or at all.
7. According to the respondent, it lawfully terminated the claimant's services in accordance with the law. It pleaded that the reasons for termination were based on the claimant's operational irregularities and which genuinely existed before termination of his contract of service. The respondent pleaded that the claimant's acts of commission and omission amounted to gross misconduct as envisaged under section 44(4) of the *Employment Act* thus leading to his summary dismissal. It noted that it accorded the claimant a fair hearing as guided by the rules of natural justice.
8. The respondent's case was that it made the decision to terminate the claimant's services upon the following reasons:
  - a. The claimant was hardly in the office as he reported to work during normal working hours and would subsequently leave to perform his own business engagements to the detriment of the respondent, as the same had no positive impact on the respondent's business portfolio.
  - b. The claimant's performance was poor and one indicator was lack of financial management of the respondent's resources in terms of fuel consumption, which a good and efficient Manager would have ensured to minimize the respondent's daily and monthly operational costs.
  - c. That during the subsistence of the claimant's employment, the respondent's overheads for fuel consumption were on a higher scale compared to the year 2019 during which it experienced a marked reduction of the expenses, meaning the respondent's overheads were substantially reduced.
  - d. That during the subsistence of the claimant's employment, the claimant was working in the Kenya Police Service as a Commissioner, which it explains why he was never at work to perform his assigned duties as expected by the respondent.
  - e. That in view of the fact that the claimant worked in the Kenya Police Service this greatly impeded on his work performance as his attention was wholly in the Police Service.



- f. That the claimant, in the execution of his duties when available, utilized his working hours to host his own personal guests as opposed to furthering the agenda and growth of the respondent's business.
  - g. That the claimant never handled the respondent's theft or fraud cases and instead delegated all his duties to those working under him with zero participation and supervision of the claimant.
  - h. That the claimant, at all material times, acted and behaved like he was a Director of the respondent Company and was in most instances untouchable due to his intimidating character, nature and conduct.
  - i. That the claimant, whilst in the respondent's premises, had a gun that made it more difficult to invoke disciplinary proceedings against him as he acted in a manner to suggest that he was above the law and no wrong could attach to him.
9. The respondent further pleaded that upon termination of the contract of service, the claimant's dues were calculated and a cheque prepared but he declined to collect the same. The respondent's case was that the claimant's contract of employment was terminable by either party giving one (1) month notice and the three (3) months' notice pleaded does not therefore suffice. It noted that the claimant took all his leave days and that he never performed any duties in March 2019. In addition, that the claimant's employment contract did not provide for service pay and that it subjected his salary to statutory deductions. The respondent argued that the claim for lost years to retirement is a pigment of the claimant's imagination because his employment contract does not provide for working until retirement, and that he is not entitled to compensation of 12 months as it lawfully terminated his employment.
10. The parties tendered their respective evidence before the Court and thereafter filed their final submissions. The Court has considered all the material on record and returns as follows.
11. To answer the 1<sup>st</sup> question, the respondent employed the claimant as the Security Manager effective 28.12.2015 and by the letter of the same date. The claimant testified that the designation changed to Logistics Manager in 2017 but no written redesignation letter issued. The Court finds that the claimant served as a Security Manager throughout the service with the respondent. The claimant's last pay was Kshs.185, 000.00 per month.
12. To answer the 2<sup>nd</sup> question, the Court returns that the contract of employment was terminated by the letter dated 05.03.2019. The letter referred to clause 13(a) of the letter of the contract of employment. The letter stated that the termination was effective 06.03.2019. The letter of termination of employment further stated that upon clearance, the claimant would be paid Salary upto 06.03.2019; three months in lieu of notice, leave earned and his credit as at February 2019; and a certificate of service.
13. The 3<sup>rd</sup> question to answer is whether the termination was unfair. The claimant pleaded that he was not given a notice to show cause and he did not go through a disciplinary hearing as was provided for in section 41 of the *Employment Act*, 2007. Confirming that claimant's position, the respondent submitted thus, "The Respondent's witness was candid through cross examination that the claimant was not taken through a disciplinary process. The reason as to why the process was not followed was by virtue of the fact that they were thrown in to an intimidating position with the Claimant being a gun holder. The Claimant walked with the gun in the Respondent's premises, and the fear of repercussions was evident." The respondent's witness No. 1 (RW1) testified that the claimant was intimidating in the manner he placed his gun on the table and further that no grievance had been reported to the management. The claimant's evidence that he was hired because he was a gun holder and that at the recruitment interview he was asked to at all times report on duty in possession of the gun has not been



rebutted. The Court finds that the respondent failed to undertake fair disciplinary proceedings with respect to alleged misconducts of lateness or absenteeism or even intimidating conduct as a gun holder.

14. The Court further returns that the termination letter did not mention intimidation or any other particulars of misconduct or unsatisfactory performance. Instead, the letter stated that the termination was per clause 13(a) of the letter of the contract of employment. The clause states thus, “(a) This contract may be terminated by either party giving the other three months’ notice in writing expiring on any day of the calendar months or by the Company paying you or offering you at any time basic salary up to the date and in lieu of notice three months basic salary or by you paying to the Company one month basic salary in lieu of notice.” While the termination letter purported to refer to that clause, the respondent’s pleaded case deviated from that position and instead alleged failure to accord due process because of claimant’s alleged intimidation but which the Court has found not to have been the case or not established at all. The respondent being bound by the pleaded case, the evidence being that no intimidation was established, and the purported termination upon the provisions of the termination contractual clause being abandoned for the respondent, the Court returns that the termination was unfair for want of due process and valid reasons as per sections 41 and 43 of the *Employment Act*, 2007.
15. While making that finding the Court has been guided by the holding in *Peter Kimanthi Mbuvi v Mombasa Water Supply and Sanitation Company Limited* [2022] eKLR on the principle against unjustified or unqualified soft landing thus, “The Court has also considered its opinion against the principle of soft landing in *Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013* at Nakuru [2013]eKLR where in the judgment it was stated thus, “The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer’s discretion, it is the court’s considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.

The Court returns that in the instant case it was not open for the respondent to conceal the alleged poor performance by invoking the cited termination clause 8 by paying in lieu of notice - but the respondent ought to have subjected the claimant upon a disciplinary process and in event of culpability, considered the soft landing as appropriate. Thus, the termination by payment in lieu of notice is found to have been improperly invoked on account of soft landing as was urged for the respondent.”

16. The 4<sup>th</sup> question to answer is on the remedies. As per the respondent’s submissions, the following appear not to be in dispute:
- a. Salary for March 2019 Kshs. 185, 000.00.
  - b. Leave payment or encashment Kshs. 107, 917.00.
  - c. 3-months’ salary in lieu of notice Kshs.555, 000.00.
  - d. Subtotal .....Kshs.847, 917.00, awarded accordingly.



17. The Court has considered the factors to consider in awarding compensation for unfair termination. The claimant was offered the terminal dues less Kshs. 149, 195.00 of unexplained absence of 193.5 hours. The Court finds that he was entitled to reject the offer and the cheque that was drawn in that regard. He had worked for over 3 years and desired to continue in employment. The Court has considered the respondent's offer of full salary for March 2019 and the willingness to pay three months in lieu of notice as mitigating factor. The Court returns that an award of 3 months' salaries will meet ends of justice making Kshs. 555, 000.00.
18. The Court further returns as follows:
- a. As submitted for the respondent there was no contractual provision that the claimant would retire upon attaining the age of 65 years. The claimant offered no evidence to show that the respondent implemented a staff retirement policy of attainment of age of 65 years as was alleged for the claimant. Further, nothing has been shown attributable to the respondent that may have diminished the claimant's capacity or ability to engage gainfully after the termination. The claim for lost salaries or income up to age of 65 years at Kshs. 11, 840,000.00 is, declined.
  - b. The claimant confirmed that he was a member of NSSF and per section 35 of the Act, he is excluded from claiming service pay because, in any event no contractual provision to justify the award has been established.
  - c. The claimant is entitled to a certificate of service and costs of the suit.

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

1. The declaration the termination was unfair as was wrongful.
2. The respondent to pay the claimant Kshs.1, 402,917.00 (less PAYE) by 01.12.2024 failing interest at Court rates to run thereon from the date of this judgment until payment in full.
3. The respondent to pay claimant's costs of the suit.
4. The respondent to deliver the certificate of service by November 1, 2024.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 18TH OCTOBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

