



**Mwashegwa v Apm Terminals Limited (Cause 55 of 2018)  
[2022] KEELRC 1671 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1671 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 55 OF 2018**

**B ONGAYA, J**

**MAY 27, 2022**

**BETWEEN**

**JAMES WANGIO MWASHEGWA ..... CLAIMANT**

**AND**

**APM TERMINALS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim on 29.01.2018 through Chamwada & Company Advocates. The claimant's case is that the respondent employed him on 01.01.2001 and was terminated from employment on 18.01.2018 without prior notice or payment in lieu of the termination notice. His further case is that he was not accorded leave or compensated in lieu thereof. His monthly salary was Kshs.61, 000.00. He pleads that there was no justifiable cause for the termination and he was not notified of the impending dismissal and was not heard at all so that the dismissal was in breach of sections 41, 43, 45 and 49 of the *Employment Act*, 2009, *ILO convention on termination of employment*, 1982 and article 41 of *the Constitution* of Kenya. His case is that he had served for a long period of time and he expected to retire normally. The claimant pleaded that section 41 was not complied with as per the following particulars:
  - a. The ground for termination was not explained to the claimant in a language he understood.
  - b. He was accused of process manipulation, unethical practices and fraud without appreciation that the reason was not justified.
  - c. He was not accorded an opportunity to have another employee or representative of his choice present during explanation.
  - d. The respondent failed to hear and consider his representations on the grounds for removal.
  - e. The claimant was not furnished with the reports and documents the respondent relied on.



- f. The action to dismiss the claimant was discriminatory and unfairly targeted him because the security officer in charge of manning the gate entry were not summoned.
- g. The final dues were not paid.
- h. Failing to pay the claimant during suspension and being dismissed before suspension lapsed.  
The claimant claimed for:
  - a. Two-months payment in lieu of notice Kshs. 66, 000.00 x 2 thus Kshs. 132, 000.00.
  - b. Leave pay for one month Kshs. 66, 000.00.
  - c. Overtime 8 hours daily for 12 months Kshs. 792, 000.00.
  - d. January salary Kshs. 66, 000.00.
  - e. 12 months' salary compensation for unfair dismissal Kshs. 20, 800.00 x 12 months Kshs. 792, 000.00.
  - f. Total claim Kshs. 1, 782,000.00.

**The claimant prayed for judgment against the respondent for:**

- a. Payment of Kshs. 1, 782, 000.00.
  - b. A declaration the termination was unlawful and unfair.
  - c. Certificate of service to issue.
  - d. Costs and interest at Court rates.
  - e. Any other relief that the Honourable Court may deem fit to grant.
2. The respondent filed on 17.03.2018 the reply to memorandum of claim through Ndegwa & Sitonik Advocates. The respondent changed advocates to Hamilton Harrison & Mathews Advocates per the notice of change of advocates filed on 2011.2019. The respondent pleaded that the claimant worked as an Operations lead and Depot Surveyor at the respondent's Mombasa Empty Depot Station. The respondent admitted that the letter for employment provided for 2 months' termination notice, the claimant was employed effective 01.01.2001 and his monthly salary was Kshs. 61, 000.00. Further the claimant was suspended pending investigation and service of termination notice or pay in lieu thereof did not apply. The respondent further pleaded as follows:
- a. The reason for termination was valid being claimant engaged in process or system manipulation, unethical practices and fraud resulting in the respondent incurring penalties amounting to Kshs. 366, 000.00 in charges from shipping lines.
  - b. Prior to termination the claimant was notified the charges by the letter of suspension and notice to show cause and was given an opportunity to defend himself both in writing and orally.
  - c. The termination was in accordance with the *Employment Act*, 2007 and the respondent's disciplinary policy. The contract was terminable any time in accordance with the contractual terms. The termination was per section 41 of the Act as notice to show cause was served, he replied in writing, he was invited and he attended disciplinary hearing and invitation clearly advised him to bring along a fellow employee to act as a witness or to represent



him at the hearing, and prior to termination the respondent considered his written and oral representation.

d. The claims and remedies prayed for were denied.

4. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Juliet Wachiuri, respondent's Human Resource, Business Partner.

5. To answer the 1st issue, the court returns that there is no dispute that parties were in a contract of service terms of which were pleaded by the claimant and admitted by the respondent. The claimant's last monthly salary was Kshs. 61, 000.00 with a termination notice or pay in lieu thereof of two months.

To answer the 2nd issue for determination, the court returns that the contract of service was terminated by the letter of summary dismissal on account of gross misconduct dated 18.01.2018. The particulars of the reason for dismissal were stated as process or system manipulation, unethical and fraud relating to un-procedural gate in-out of the Maersk Line Unit MIEU0037385 at Portreitz Depot. The letter stated that the claimant had been found culpable.

6. The 3rd issue for determination is whether the summary dismissal was unfair. The evidence is that the claimant received the suspension letter dated 30.12.2017, he received a letter dated 06.01.2018 to give an explanation, he gave a written explanation dated 08.01.2018, he attended the disciplinary hearing on 11.01.2018 and he denied allegations but the respondent's investigations implicated him as culpable and he was thereby summarily dismissed. The letter inviting the claimant to attend the hearing advised him that he was allowed to come with any employee to act as a witness or for representation at the hearing. In view of that flow of disciplinary procedure and the evidence, the court returns that the respondent complied with section 41 of the Act on notice, hearing and giving the claimant chance to attend at the hearing with a representative of his choice. The Court finds the claimant's allegations of unfair procedure as was pleaded for him was unfounded so that the submissions made for the respondent in that regard are upheld.

7. As to the reason for termination, the evidence is as follows. The containers in issue involving the allegations arose at respondent's Depot B situated at PortReitz. The claimant was deployed at the material time at the respondent's Depot A at Miritini. By his own testimony he confirmed that he was as well assigned to offer guidance for Depot B. His testimony was that at the material time he assisted new staff get emails and as the supervisor he assisted them to log in. In the instant case under the allegations, his testimony was that he was involved by giving guidance to the staff who were new. The claimant testified that the containers should be entered in the system on arrival but in the case of the containers in issue, the documents were missing when the containers arrived so that they were not entered in the system as required. Further, as the supervisor and investigator, the claimant had not identified employees responsible for allowing the containers enter without being posted in the system and without relevant documents.

8. RW testified as follows, "I see page R.14 of Alex's statement. I see line 3. (Read). Alex called James. James shared passwords. But passwords were not to be shared but staff specific. He said some employees did not have passwords. James asked Collins to give James Collin's password. Collins did so. James gave it to Alex. Alex used the password at Depot B for the 2 containers



to appear as though they had been entered in the system. It was a conspiracy to help Alex get out of trouble. Dismissal letter is at page R. 47.”

9. The court has considered the evidence and returns that the claimant was involved in the respondent’s work at Depot B at PortReitz even though he was ordinarily deployed at Miritini Depot A. Further, he accessed staff passwords and in the instant case, as per RW’s testimony and per exhibits on record, he shared the passwords which facilitated the conspiracy subject of the allegations that were levelled against him. The Court returns that the respondent has thereby established that as per section 43 of the Act the reasons for termination were valid and existed as at the time of termination. Further, the reason for the termination related to the claimant’s conduct and compatibility or capacity as per section 45 of the Act and is found to have been fair as a ground justifying the summary dismissal as envisaged in section 47(5) of the Act.
10. The respondent’s submission that the termination was not unfair because due procedure was followed and the reason was valid is upheld. The prayer for a declaration and compensation in that regard will collapse as unjustified and not established at all.

The 4th issue is whether the claimant is entitled to the remedies as prayed for. The court finds as follows:

- a. The termination was not unfair and the Court declines to grant the two-months payment in lieu of notice Kshs.66, 000.00 x 2 thus Kshs. 132, 000.00. The Court considers that the respondent was entitled to dismiss with no, or, with a shorter notice, on account of the gross misconduct per section 44 of the Act.
- b. The claimant testified that at end of 2017 he was on leave. The Court upholds the respondent’s submission that the claimant has not pleaded the particulars of the period he is claiming for leave payment and he did not offer evidence in that regard. The prayer for leave pay for one month Kshs. 66, 000.00 is declined accordingly.
- c. He prays for overtime 8 hours daily for 12 months Kshs. 792, 000.00. While testifying that he was required to leave work at 3.00pm but left at 11pm for 12 months, the claimant offered no base in computing the overtime as claimed and instead testified, “Rate per hour of overtime was indicated but I cannot remember amount.” The Court finds that particulars of rate per hour during the alleged overtime was not pleaded and established and in the circumstances, the prayer is declined as granting it would amount to an arbitrary award.
- d. The claimant prayed for January salary Kshs. 66, 000.00. As submitted for the respondent he left employment on 18.01.2018 and he is entitled only to prorate pay being  $18/31 \times 61,000$  making Kshs. 35, 419.40.
- e. The respondent has issued and delivered the certificate of service per exhibit at page R.52 and the prayer on certificate of service is found superfluous.
- f. In view of parties’ margins of success, each to bear own costs of the suit.

**In conclusion the suit is hereby determined and judgment entered for parties for:**

1. The declaration that the summary dismissal was not unfair or unlawful.
2. The respondent to pay the claimant Kshs. 35, 419.40 by 01.07.2022 failing interest to be payable thereon at court rates from the date of filing the suit till full payment.



3. Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS  
FRIDAY 27TH MAY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

