



**Apwokha & 5 others v Borderless Tracking Limited (Cause 939 of 2016)  
[2022] KEELRC 4094 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4094 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 939 OF 2016  
AK NZEI, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**CHRISESTOM N. APWOKHA ..... 1<sup>ST</sup> CLAIMANT  
JUMA J. SIGIRA ..... 2<sup>ND</sup> CLAIMANT  
MWANGANGI KAMENE ..... 3<sup>RD</sup> CLAIMANT  
MARK M. MBITI ..... 4<sup>TH</sup> CLAIMANT  
ERIC ODHIAMBO OOKO ..... 5<sup>TH</sup> CLAIMANT  
ESAU OTENYO ..... 6<sup>TH</sup> CLAIMANT**

**AND**

**BORDERLESS TRACKING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimants sued the respondent *vide* a statement of claim dated November 1, 2016 and pleaded:-
  - a. that the respondent employed the claimant on January 9, 2014, May 1, 2014 and July 10, 2015 until August 5, 2015 when the respondent terminated the claimant's employment without giving the claimant's written notices to show cause why their employment could not be terminated.
  - b. that the respondent changed the claimants' terms of employment to a contract employment without the claimant's consent.
  - c. that the respondent's issuance of letters of termination of employment was unfair and unlawful for failure to give notice to show cause why the claimants could not be dismissed from employment.



- d. that the respondent did not comply with the mandatory provisions of the *Employment Act* as far as the claimant's employment is concerned.
  - e. that at the time of dismissal, the claimants' salary was as follows:-
    - 1<sup>st</sup> claimant.....ksh 17,500
    - 2<sup>nd</sup> claimant .....ksh 20,000
    - 3<sup>rd</sup> claimant .....ksh 17,000
    - 4<sup>th</sup> claimant .....ksh 17,000
    - 5<sup>th</sup> claimant .....ksh 17,000
    - 6<sup>th</sup> claimant .....ksh. 30,000
  - f. a declaration that termination of the claimants' employment was unlawful/unfair.
  - g. costs and interest.
2. Each of the claimants claimed one-month salary *in lieu* of notice, compensation for unfair termination of employment, severance pay and salary for months worked in August 2016.
  3. The claimants filed in court their respective lists of evidential documents whereon they listed several documents which included their respective employment agreements and termination letters. These documents accompanied the statement of claim.
  4. The claimants' recorded witness statements are shown to have been filed on July 5, 2017.
  5. The respondent filed a statement of defence on February 22, 2017 and pleaded:-
    - a. that the claimants were appointed on contract terms for a duration of three months as follows:-
      - i. The 1<sup>st</sup> claimant from July 20, 2016 to October 20, 2016.
      - ii. The 2<sup>nd</sup> claimant from October 10, 2015 to January 10, 2016.
      - iii. The 3<sup>rd</sup> claimant from October 10, 2015 to January 10, 2016.
      - iv. The 4<sup>th</sup> claimant from October 10, 2015 to January 10, 2016.
      - v. The 5<sup>th</sup> claimant from October 23, 2015 to January 23, 2016, and
      - vi. The 6<sup>th</sup> claimant from July 10, 2016 to October 10, 2015.
  6. The respondent denied the claimants' claim and put them strict proof thereof.
  7. On February 24, 2017, the respondent filed a witness statement of one Anne Lutta Wando, dated February 23, 2017.
  8. On September 19, 2021, the respondent filed a witness statement by one Oscar Amuyunzu, dated August 16, 2021, and a list of documents (and bundle of documents) dated the same date.
  9. When the suit came up for hearing on February 8, 2022, the 2<sup>nd</sup> claimant testified on behalf of himself and the other claimants, as the cause of action herein is common to all the claimants, having been authorized by his co-claimants to testify on their behalf *vide* a written authority dated August 7, 2019. The 2<sup>nd</sup> claimant adopted his recorded and filed witness statement (filed on July 4, 2017) as his testimony. He also adopted the witness statements filed by the other claimants on the said date as part



of his testimony. The witness (CW-1) also produced in evidence the documents listed on the lists of documents filed by each claimant.

10. The witness (CW-1) further testified that the claimants were not employed on fixed terms, but continuously. He particularly referred the court to his own list of documents and to his own employment agreement commencing on May 1, 2014 which indicated that his employment was permanent. The witness further testified that in July 2015, the respondent's human resource officer started calling the claimants to his office and asking them to sign some agreements for fixed terms, failing which one would leave employment. CW-1 further told the court that not all the claimants had been given copies of the initial employment contracts which they had signed when first employed.
11. The witness CW-1 further testified that the claimants' employment was terminated on August 5, 2016, after having signed three months' contracts on July 20, 2016. That the termination letters were given to them on the same date (August 5, 2016); and that no reason for termination was given.
12. The respondent called one witness (RW-1), Oscar Amuyunzu, who adopted his recorded witness statement dated August 16, 2021 as his testimony and produced in evidence the documents listed on the respondent's list of documents dated the same date (August 16, 2021). The witness testified that the claimants were employed by the respondent as tag operators, and that as the respondent company's policy, tag operators are employed on three months' contracts which are not automatically renewable.
13. RW-1 further testified, under cross examination: -
  - a. that the 5<sup>th</sup> claimant was employed as a technical installer.
  - b. that the claimants' contract agreements were dated July 20, 2016, and were terminated on August 5, 2016 before the contract period lapsed, and that there was nothing to show that the claimants' dues were calculated and paid.
  - c. that the claimants' letters of termination do not show the reasons for termination.
14. The respondent's witness did not say anything on the claimants' permanent employment contracts with the respondent that subsisted before the claimants started signing three months' fixed term contracts. The witness did not tell the court how and when those contracts were terminated by the respondent.
15. The three months' contracts shown by the respondent to have been signed by the claimants on July 20, 2016 were terminated by the respondent *vide* termination letters dated August 5, 2016 without giving any reason and without according the claimants an opportunity to be heard.
16. The following issues emerge for determination: -
  - a. whether termination of the claimant's three months' contracts on August 5, 2016 was unfair.
  - b. whether the claimants are entitled to the reliefs sought.
17. On the first issue, section 41 of the [Employment Act](#) sets out mandatory procedural requirements which every employer contemplating termination of an employee's employment contract, for whatever reason, must adhere to. It matters not whether or not the employment contract is for a fixed term of employment. Section 41 of the [Employment Act](#) provides as follows:-

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer



is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

18. Section 45(1) of the [Employment Act](#) provides as follows:-

“No employer shall terminate the employment of an employee unfairly.”

19. Section 43(1) of the Act provides as follows:-

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

20. Section 47(5) of the [Employment Act](#) provides as follows:-

“for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or unlawful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or unlawful dismissal shall rest on the employer.”

21. The Court of Appeal stated as follows in the case of [Kiai Mbaki & 2 others v Gichuhi Macharia & another](#) [2005] eKLR

“...it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

22. The Court of Appeal held as follows in the case of [CMC Aviation Limited v Mohamed Noor](#) [2015] eKLR

“In view of the foregoing, we find that the appellant’s act of summarily dismissing the respondent without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the [Employment Act](#). In [Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Ssacco Limited](#) [2013] eKLR, the industrial court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under section 41 of the [Employment Act](#). That applies in a case of termination as well as in a case that warrants summary dismissal. See also [Mary Chemweno Kiptui v Kenya Pipeline Company Limited](#) [2014] eKLR”

23. The respondent was not shown to have complied with the mandatory requirements of section 41 of the Act. Termination of the claimant’s employment was done without any reason, valid or otherwise. The claimants were not accorded an opportunity to be heard before termination of their employment. I make a finding that termination of the claimants’ contracts of employment by the respondent on August 5, 2016 was procedurally and substantively unfair; and I so declare. I award each of the claimants six months’ salary as compensation for unfair termination of employment. I also award each



of the claimants their salary for days worked in August 2016. The respondent did not dispute the amounts pleaded by the claimants as their salaries at the time of termination.

24. The claims for notice pay is declined as the termination letters contained an element of termination notice (twenty four hours' notice). The claim for severance pay is declined as termination of employment was not on account of redundancy.

25. Ultimately, judgment is hereby entered for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> claimants as follows: -

a. 1<sup>st</sup> claimant

i. six months salary being compensation for unfair termination of employment  
.....ksh 105,000

ii. salary for days worked in August 2016 .....ksh2,916

Total ksh107,916

b. 2<sup>nd</sup> claimant

(i) six months' salary being compensation for unfair termination of employment  
.....ksh 120,000

(ii) salary for days worked in August 2016.....ksh3,000

Total ksh 123,000

c. 3<sup>rd</sup> claimant

i. six months' salary being compensation for unfair termination of employment  
.....ksh 102,000

ii. salary for days worked in August 2016.....ksh2,800

Total ksh104,800

d. 4<sup>th</sup> claimant

i. six months' salary being compensation for unfair termination of employment  
.....ksh 102,000

ii. salary for days worked in August 2016 .....ksh2,800

Total ksh104,800

e. 5<sup>th</sup> claimant

i. six months' salary being compensation for unfair termination of employment  
.....ksh 180,000

ii. salary for days worked in August 2016 .....ksh5,000

Total ksh 185,000

f. 6<sup>th</sup> claimant

i. six months' salary being compensation for unfair termination of employment  
.....ksh 105,000

ii. salary for days worked in August 2016 .....ksh 2,916



Total ksh 107,916

26. Judgment accordingly.
27. The claimants are awarded costs of the suit and interest. Interest to be calculated from the date of judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2022**

**AGNES KITIKU. NZEI**

**JUDGE**

Order

In view of restrictions on physical Court operations occasioned by the Covid-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES K. NZEI**

**JUDGE**

Appearance:

Mr. Odhiambo. for the Claimant

Ms. Letuya for the Respondent

