



**Magaju v Bash Hauliers Limited (Cause 920 of 2016)
[2022] KEELRC 12790 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12790 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 920 OF 2016
AK NZEI, J
SEPTEMBER 22, 2022**

BETWEEN

PATRICK MUTEMBEI MAGAJU CLAIMANT

AND

BASH HAULIERS LIMITED RESPONDENT

JUDGMENT

1. *Vide* a statement of claim dated November 22, 2016 and filed in court on December 5, 2016, the claimant sued the respondent and pleaded,
 - a. That the claimant was employed by the respondent as a supervisor in October 2010, earning a monthly salary of ksh 44,104.
 - b. That on December 5, 2014, Anwar Mohammed Bayusuf Limited verified that one container number Triu 499407 and coded No BHL23 had been sold to one Justus Muli of ID No 93xxxx0 who had not taken, removed and/or taken possession of the same, and that the same had been replaced with another container 1X20” BHL-049 under instructions from the respondent’s management.
 - c. That on April 21, 2016, the respondent’s Human Resource Manger wrote to the claimant seeking clarification on the location of the said container, and that the claimant responded on April 22, 2016 and explained that empty container No BHL 027 was in Kibarani yard while empty container No BHL 049 had been given out with the respondent management’s authority.
 - d. That the respondent wrote several show cause letters on the same matter which the claimant had adequately explained, with the intention of unlawfully and unjustifiably terminating the claimant’s employment.



- e. That the claimant was sent on indefinite suspension on May 17, 2016, and was terminated on May 20, 2016.
 - f. That the claimant was unlawfully terminated without following due process of the law and principles of natural justice and equity, and was not given an opportunity to defend himself.
 - g. That several sections of the *Employment Act* were not adhered to as the claimant was not given any notice, and an opportunity to be heard and to invite a witness of his choice as a witness at a hearing.
 - h. That the respondent had not proved the reasons for terminating the claimant's employment as provided under section 43 of the *Employment Act 2007*.
 - i. That termination of the claimant's employment was unfair and unlawful within the meaning of section 45 of the *Employment Act* and that the procedure followed was unfair.
2. The claimant claimed:-
- a. Twelve months' salary for unfair termination (ksh 44,104x12).
 - b. Pension payment for the period of employment (ksh 44,103/2x6 years).
 - c. Unpaid annual leave for 6 years.
 - d. Notice payment
 - e. Payment of accumulated interest on the claimed sum.
 - f. Costs of the suit.
3. The claimant filed his recorded witness statement dated November 22, 2016 and a list and bundle of documents dated the same date, all of which accompanied the statement of claim.
4. Documents listed on the claimant's list of documents included a certificate of service issued to the claimant by the respondent on June 21, 2016, a letter by the respondent to the claimant dated April 21, 2016, the claimant's response dated April 22, 2016 and two annexures/attachments thereto, show cause letters by the respondent to the claimant dated May 5, 2016 and May 16 respectively, the claimant's response dated May 17, 2016, a termination of employment letter dated May 20, 2016, the claimant's payslip for the months of March and April 2016 and a copy of the claimant's national identity card.
5. The respondent entered appearance and filed a reply to the claimant's claim on January 25, 2017. The respondent admitted having employed the claimant as pleaded by the claimant but pleaded that termination of the claimant's employment was based on the claimant's inability to explain the whereabouts of container No BHL-049 which was entirely under his care, and that the termination was lawfully done as per the provisions of section 44(4) (c) of the *Employment Act*.
6. When the suit came up for hearing on March 29, 2022, the respondent did not attend court, and there was no appearance on its part, despite a hearing notice having been served on the respondent's advocate on record and an affidavit of service filed. The claimant adopted his recorded and filed witness statement as his testimony and produced in evidence the documents listed on his list of documents referred to in paragraph 4 of this judgment. The claimant further told the court: -



- a. That he (the claimant) was employed as a general clerk on October 10, 2010, earning a salary of ksh 44,104 per month, and was subsequently promoted to the position of empty container yard supervisor.
 - b. That the claimant was terminated vide a letter dated May 20, 2016 on allegation that some two (2) containers had been lost, which allegations were not true.
 - c. That on May 17, 2016, the claimant received an email instructing him not to work at the yard, upon which the claimant wrote a letter dated the same (May 17, 2016) denying wrong doing.
 - d. That no report on the alleged lost containers was made to the police, and the claimant was not given an opportunity to be heard.
 - e. That during the period of employment, the claimant was neither allowed to go on leave nor paid in lieu thereof, and was terminated without notice.
7. The claimant closed his case, and the respondent's case was also marked as closed as the respondent did not attend court for hearing of the suit against him despite having been served with a hearing notice. The claimant's evidence was, therefore, not in any way controverted and/or rebutted.
8. Having considered the pleadings filed herein and evidence adduced by the claimant, two issues emerge for determination, in my view. These are:-
- a. Whether termination of the claimant's employment by the respondent was unfair.
 - b. Whether the claimant is entitled to the reliefs sought.
9. On the first issue, the respondent stated in its (show cause) letter dated April 21, 2016 as follows:-

“...Re: Disappearance Of Containers Bul-027 And Bhl-049 From Jomvu Yard

Confirmed information tells us that on March 27, 2016, you released a 20” x1 container at around 11.00am without the knowledge of the management to the (sic) destination well known to yourself.....

Investigations were made and established that there were two containers missing and not one reported earlier.

This letter is to kindly ask you to shed light on the disappearance of the BHL-027 and BHL-049 since you are the supervisor incharge of the yard.

Please note that the management expects your full cooperation on this matter and reply within 48 hours from the time of this letter.

Yours faithfully.

For. Bash Hauliers Limited

Bakari Bweta

Human Resource Manager.”

10. The claimant responded to the aforestated letter on April 22, 2016 and stated as follows:-

“...kindly note that the empty container No BHL027 was in Bob Kibarani Yard and after my search I found it is still there and empty container BHL049 was given to Mama Nuru, authorized by Boss Omar and she later sold it. Secondly, I serve you faithfully and I will



continue to serve you faithfully. It was malicious reported to you that these two empty containers have disappeared. In respect of your letter dated April 21, 2016 and request for explanation. I hope we can have results. I will continue to serve you diligently.”

11. The respondent wrote to the claimant on May 5, 2016 and stated as follows:-

“...kindly refer to our letter dated April 21, 2016 and your subsequent reply dated April 22, 2016 on the disappearance of containers.

We write to demand explanation on the release of the container you authorized out on March 27, 2016 at around 11.00am from Jomvu yard..

Secondly it was discovered and is on record that you recently entered into the HR offices at odd hours, night times with motive best known to yourself. Kindly explain reasons leading to that.

This letter is to demand detailed explanation and show cause why disciplinary action should not be taken against you for both, a release of company container without permission and entering into HR office at night without permission for unknown cause.”

12. It is worth noting that the show cause letter dated May 5, 2016 did not state the period within which the claimant was required to respond to it.

13. On May 16, 2016, the respondent issued yet another show cause letter to the claimant, requiring him to respond to the show cause letter dated May 5, 2016 within 24 hours, and to further show cause why he had not responded to the said letter. The letter (dated May 16, 2016) further stated that the claimant would be under suspension from duty for one week without pay pending further investigations.

14. The claimant responded on May 17, 2016 and stated as follows:-

“...reference is made to the above matter and your two letters dated May 5, 2016 and May 16, 2016.

As indicated in my letter dated April 22, 2016, the two containers are well explained and if you will ask Boss Omar, for container BHL 049, which was handed over to mama Nuru. As for container BHL 027, it is at Kibarani yard. I think if genuine and honest investigations are carried out, this matter should be closed. We are concerned that this is now turning to witch-hunt, and malicious. I have diligently carried out my duties and I am surprised why confirmation cannot be sought from Boss Omar, who on December 8, 2014 confirmed that the management replaced 1x20”-049, under instructions from Bash Management.

...the issue of me being in your office at night is hot-air as I am a Night Supervisor and mine is adjacent to your office...

I did not release any container as it is stated in my first letter.”

15. *Vide* a letter dated May 20, 2016, the respondent terminated the claimant’s employment summarily.

16. The claimant pleaded and testified that there was no truth in the allegations made against him by the respondent, that the claimant was not given an opportunity to be heard before termination of his employment, that termination did not accord with the provisions of the *Employment Act 2007*, and was therefore unfair.



17. Section 41 of the *Employment Act* sets out, in mandatory terms, the procedure that must be followed by every employer contemplating termination or summary dismissal of an employee's employment. The said section 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* on the other hand provides as follows:-

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

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

“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:-

“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 claimant demonstrated that the respondent did not comply with section 41 of the *Employment Act*. The claimant was not given an opportunity to be heard before termination. This rendered termination of the claimant's employment procedurally unfair. In the case of *Cmc Aviation Limited v Mohammed Noor* [2015] eKLR, the Court of Appeal stated as follows:-

“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”



22. In the case of *Kiai Mbaki & 2 Others v Gichuhi Macharia & Another*[2005] eKLR, the Court of Appeal stated:-

“...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.”

23. As already stated in this judgment, the respondent did not attend court during the hearing of the claimant’s suit, and did not, therefore, controvert and/or rebut the claimant’s pleadings and testimony that the allegations levelled against the claimant by the respondent, and on the basis of which the claimant’s employment was terminated, were untrue. The respondent did not, therefore, discharge the burden of justifying the grounds on the basis of which the claimant’s employment was terminated. I find and hold that termination of the claimant’s employment was both substantively and procedurally unfair.

24. On the second issue, and having made a finding that termination of the claimant’s employment was unfair, I award the claimant the equivalent of eight months’ salary being compensation for unfair termination of employment. Copies of payslips exhibited by the claimant show that the claimant’s gross monthly salary at the time of termination was ksh 44,103. The equivalent of eight months salary is ksh 352,824.

25. The prayer for pension is declined as that relief is not one of the remedies set out in section 49 of the *Employment Act*.

26. On the prayer for leave payment, the claimant pleaded and testified that he was employed by the respondent in October 2010, and that his employment was terminated on May 20, 2016, and that he was not allowed to take annual leave during the entire period of employment. This evidence was not rebutted. The claimant prayed for payment for outstanding leave days.

27. The claimant worked for a period exceeding five years. He was entitled to a minimum of twenty-one days leave for each of the five completed years of service. I award him ksh 154,360.5 under this heading.

28. The claim for payment in lieu of notice is allowed, and the claimant is awarded ksh 44,103 being the equivalent of one month salary in lieu of notice.

29. In sum, and having considered written submissions filed by counsel for the claimant, judgment is hereby entered for the claimant against the respondent for:-

- a. eight months’ salary being compensation for unfair termination of employmentksh 352,824.0
 - b. payment on accrued leave days.....ksh 154,360.5
 - c. payment in lieu of noticeksh 44,103.00
- Total ksh 551,287.50

30. The sum awarded shall be subject to statutory deductions pursuant to section 49(2) of the *Employment Act 2007*.

31. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND 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 KITIKU NZEI

JUDGE

Appearance:

Miss Magu for Claimant

N/A for Respondent

