



**Lagat v Great Lakes Port Limited (T/A APM Terminals Mombasa) (Employment and Labour Relations Cause 20 of 2019) [2022] KEELRC 12808 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12808 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 20 OF 2019**

**AK NZEI, J**

**OCTOBER 6, 2022**

**BETWEEN**

**JUDAH LAGAT ..... CLAIMANT**

**AND**

**GREAT LAKES PORT LIMITED ..... RESPONDENT**

**T/A APM TERMINALS MOMBASA**

**JUDGMENT**

1. The Claimant herein sued the Respondent vide a Memorandum of Claim dated April 5, 2019 and filed in Court on the same date, and pleaded as follows:-
  - a) That the Claimant was on January 14, 2013 employed by the Respondent as a Reach Stacker Operator on permanent and pensionable terms, earning a basic salary of Ksh 75,600 and a house allowance of Ksh 20,000 as at the time of dismissal.
  - b) That the Claimant worked diligently until March 27, 2016 when he was arrested on allegation of stealing, among other charges.
  - c) That on being released from custody on April 4, 2016, the Claimant was issued with a show cause letter on April 5, 2016, to which he responded on the same date.
  - d) That on April 7, 2016, the Claimant was issued with an invitation to attend a disciplinary hearing on April 8, 2016.
  - e) That the Claimant attended the hearing and explained himself and that shortly thereafter, he was issued with a summary dismissal letter and a certificate of service while still at the meeting as the Respondent had already made up its mind that the hearing was, but a formality.
  - f) That the Respondents' action was malicious, and without any justifiable cause.



- g) That the allegations levelled against the Claimant were not true as the Claimant was not on duty on the day of the alleged offence and was, indeed, acquitted by the Court of all charges on a no case to answer.
2. The Claimant set out his claim against the Respondent as follows:-
- a) One month salary in lieu of notice Ksh 75,600
  - b) Twelve months salary in compensation for unfair termination Ksh 907,200
  - c) Exemplary damages.
  - d) Costs of the suit and interest.
3. The Claimant further filed his written witness statement dated April 5, 2019 and a list of documents dated the same date, listing some ten documents. The listed documents included the contract of employment signed on December 10, 2012, a show cause letter dated April 5, 2016, response to the show cause letter dated April 5, 2016, letter of invitation for a disciplinary hearing dated April 7, 2016, summary dismissal letter dated April 8, 2016, a Certificate of Service dated April 8, 2016, payslip, letter dated November 24, 2017, a demand letter and Court proceedings and judgment.
4. The Respondent entered appearance on May 13, 2019 and filed a statement of Response on the same date, denying the Claimant's claim and pleading:-
- a) That on the night of March 27, 2016, the Claimant accessed the Respondent's terminal without authorization and attempted to steal a 20ft container from the Respondents' yard, an act which constituted breach of the Claimant's contract of employment.
  - b) On March 28, 2016, the Claimant was arrested by Port Police and charged with the offence of conspiracy to commit a felony, namely stealing contrary to Section 393 of the Penal Code, stealing contrary to Section 26(1) as read with Section 275 of the Penal Code and handling stolen goods contrary to Section 322 of the Penal Code.
  - c) That as a result of the Claimant's arrest, the Respondent considered dismissing the Claimant and issued him with a show cause letter, to which the Claimant responded and was invited for a disciplinary hearing on April 8, 2016.
  - d) That the Claimant attended the disciplinary hearing and made his representations, which the disciplinary panel considered and recommended that the Claimant be dismissed for misconduct.
  - e) That the Claimant was summarily dismissed for a lawful cause and is not entitled to payment in lieu of notice, compensation for unfair termination and exemplary damages.
5. On July 20, 2020, the Respondent filed a written witness statement of one Juliet Wangechi Wachuri, dated July 10, 2022, and a list of documents dated the same date and listing one document, a copy of the Respondent's code of conduct.
6. When the suit came up for hearing, the Claimant adopted his filed witness statement, which basically replicates the averments made in the memorandum of claim, and produced in evidence the documents referred to in paragraph 3 of this Judgment; save for the document described in the Claimant's list of documents as Court proceedings and judgment; which was struck off on application by the Claimant's Advocate in that regard. The Claimant further testified:-



- a) That the disciplinary process against him was unfair because he was invited for hearing on April 7, 2016, when the hearing was on April 8, 2016; and that the duration between the date of invitation and the hearing date given was hours apart.
  - b) That the Claimant was not on duty on the date of the alleged offence/material date, which was a holiday, and that he told the disciplinary panel as much and told them that they could even check the CCTV footage.
  - c) That there was no valid reason for his dismissal, and even the Court had acquitted him on no case to answer.
  - d) That the representations made by the Claimant were not considered and the disciplinary panel did not deliberate on the same as the dismissal letter and Certificate of Service had already been prepared, and were given to the Claimant at the disciplinary hearing, which lasted less than thirty minutes.
  - e) That the Claimant was not paid any dues.
7. The Respondent called one witness, Juliet Wachuri (RW-1), who adopted her recorded and filed witness statement dated July 10, 2020 as her testimony, and produced in evidence the document listed on the Respondents' list of documents referred to at paragraph 5 of this Judgment. The statement basically replicates the averments made in the Respondents' Statement of Response.
8. Cross-examined, the Respondent's witness (RW-1) further testified:-
- a) That the Claimant was charged in a criminal Court and was acquitted.
  - b) That the Respondent company conducts disciplinary proceedings based on their internal investigations, and that the outcome of the Respondents' internal investigations regarding the Claimant was not in Court.
  - c) That the purpose of a disciplinary hearing was for the Claimant to challenge the charges levelled against him, based on the internal investigations.
9. Based on the pleadings filed by both parties and evidence adduced, two issues emerge for determination. These are:-
- a) Whether termination of the Claimant's employment was unfair.
  - b) Whether the Claimant is entitled to the reliefs sought.
10. On the first issue, the show cause letter, dated April 5, 2016 levelled the following charges against the Claimant:-
- ' You accessed the terminal and used RS1 without authorization on the night of March 27, 2016.'
11. In his response to the show cause letter, the Claimant stated:-
- ' I did not access the terminal on the night of March 27, 2016. On the said date, I was officially on off days and did not report for work nor enter company's premises.'
12. In the invitation letter for disciplinary hearing dated April 7, 2016, the Respondent stated:-
- ' In particular, we will discuss:-



Accessing the company premises and using its equipment without authorization.'

13. Section 45(1) of the *Employment Act* provides: -

' No employer shall terminate the employment of an employee unfairly.'

14. Section 43(1) of the *Employment 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.'

15. Section 47(5) of the *Employment Act* on the other hand 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.'

16. It was held as follows in the case of *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*

' For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.'

17. Whereas the Respondent is shown to have substantially complied with the mandatory procedural requirements set out in Section 41 of the *Employment Act* in terminating the Claimant's employment, the notice of the disciplinary hearing given to the Claimant on April 7, 2016 to attend a disciplinary hearing on April 8, 2016 was unreasonably short. As stated by the Claimant at the trial herein, the duration between 7<sup>th</sup> and April 8, 2016 was just hours, and this was unfair. An employee facing disciplinary proceedings, for whatever reason, must be given a reasonable period to prepare his representations before appearing before a disciplinary panel to present the same. In my view, reasonable period in this context would be days, not hours. The employer must be seen to have acted in accordance with justice and equity.

18. Indeed, under Section 45(4) (b) of the *Employment Act*, termination of employment shall be unfair where:-

' In all the circumstances, the employer did not act in accordance with justice and equity in terminating the employment of the employee.'

19. The Respondent did not establish the validity of the reason for terminating the Claimant's employment, either during the disciplinary hearing or at the trial before this Court. Indeed, the record or minutes of the disciplinary panel that is said to have heard and/or deliberated on the Claimant's case before termination of his employment were not produced in Court. The Court cannot, therefore, know what transpired at the alleged disciplinary hearing. The Claimant told this Court that his representations were not considered. In the absence of record, this assertion cannot be wished away.

20. I find and hold that termination of the Claimant's employment was procedurally and substantively unfair.



21. On the second issue, I award the Claimant the equivalent of seven months' salary in compensation for unfair termination of employment. I have taken into account the circumstances in which the claimant's employment was terminated. I also award the Claimant one-month salary in lieu of notice. The claim for exemplary damages is declined as such relief is not one of the reliefs available to the Claimant under Section 49(1) of the *Employment Act*.
22. The Claimant produced in evidence copies of his payslips whereon his basic salary is shown to have been Ksh 75,600 per month. He sought reliefs based on this amount.
23. Ultimately, and having considered submissions by Counsel for both parties, Judgment is hereby entered for the Claimant against the Respondent as follows:-
  - a) One month salary in lieu of notice Ksh 75,600
  - b) Seven months' salary in compensation for unfair termination of employment Ksh 529,200Total Ksh 604,800
24. The awarded sum shall be subject to statutory deductions pursuant to Section 49(1) of the *Employment Act*.
25. The Claimant is awarded costs of the suit and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF OCTOBER 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:**

**Mr. Ondieki for Claimant**

**Mr. Lelu for Respondent**

