



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 41 OF 2019**

**FREDRICK MOCHENGO ONGERI.....CLAIMANT**

**VS**

**GATEWAY MARINE SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's claim brought by Memorandum of Claim dated 24<sup>th</sup> July 2019 and filed in court on 6<sup>th</sup> August 2019 is for compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Statement of Response and Counterclaim on 5<sup>th</sup> December 2019, to which the Claimant responded on 5<sup>th</sup> December 2019.

2. The matter went to full trial where the Claimant testified on his own behalf. The Respondent called Barasa Luvusia and Daniel Kiamba David. The parties further filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent sometime in January 2010. At the time of leaving employment on 26<sup>th</sup> April 2019, the Claimant held the position of Head of Exports, earning a monthly salary of Kshs. 92,993.

4. The Claimant claims that he was summarily dismissed without any reason or justifiable cause and in violation of due procedure. He therefore seeks the following remedies:

- a) 1 month's salary in lieu of notice.....Kshs. 92,993
- b) Salary for the month of February 2018.....92,993
- c) Salary for the month of May 2019.....92,993
- d) House allowance @ 15% of basic salary.....1,673,874
- e) 28 unpaid leave days.....92,993
- f) 12 months' salary in compensation.....1,115,916
- g) Certificate of service
- h) Costs

**The Respondent's Case**

5. In its Statement of Response and Counterclaim dated 23<sup>rd</sup> September 2019 and filed in court on 24<sup>th</sup> September 2019, the Respondent states that the Claimant was employed on 28<sup>th</sup> April 2014, pursuant to a contract of employment of even date.

6. The Respondent further states that the Claimant's employment was additionally governed by the Company Human Resources Management Policy, the Non-Compete Policy and other Standing Orders, issued by the Respondent from time to time.
7. The Respondent avers that the Claimant was paid his terminal dues vide cheque number 008440 dated 28<sup>th</sup> June 2019, which the Claimant duly received.
8. The Respondent further avers that it followed due process, in terminating the Claimant's employment as the contract of employment clearly stipulated that it could be terminated by either party issuing a one month's notice to the other or payment of one month's salary in lieu.
9. The Respondent adds that the contract provided that notice pay did not apply if the employee was terminated on grounds of gross misconduct as per Section 44 of the Employment Act.
10. On the termination process, the Respondent states that:
  - a) The Claimant was suspended for 14 days or thereabouts, while investigations were being carried out;
  - b) After the said investigations, the Claimant was invited to show cause during a hearing in which due procedure was followed and the Claimant put forth his responses to the allegations levelled against him;
  - c) The Claimant was duly informed of his rights beforehand and the letter inviting him to the disciplinary hearing was written in a language he understands;
  - d) During the hearing, the Claimant waived his right to have a colleague present;
  - e) The Disciplinary Committee carefully considered the grounds put forward for disciplinary action and the Claimant's responses during the hearing and those which he had forwarded via email and reached the conclusion that the grounds were valid and that sufficient cause was not shown;
  - f) The Committee found that the Claimant's conduct amounted to gross misconduct, which was also a breach of the terms of his employment contract and his actions and/or omissions not only amounted to gross misconduct but also occasioned the Company financial loss
  - g) The Claimant, being dissatisfied with the decision, lodged an appeal which was duly considered by a different Panel, which still felt that he had not raised any proper grounds on appeal and proceeded to confirm the decision of the Disciplinary Panel, to terminate the Claimant's employment for breach of his employment contract.
11. The Respondent states that the Claimant worked for it from April 2014 and rose through the ranks and at the time of termination, he was working in an acting position as the Head of Exports and that the Operations and Transport Department were under his management.
12. The Respondent further states that breach on the Claimant's part was discovered when 3 company motor vehicles that had been dispatched from Goma in the Democratic Republic of Congo (DRC) were later re-routed to Beni.
13. The Respondent adds that upon inquiry from the drivers of the said motor vehicles, they stated that that they had been given instructions by the Claimant, to pick cargo from Goma and deliver it at a place called Kiwanja.
14. The Respondent goes on to state that the statements of the drivers were forwarded to the Claimant who was accorded an opportunity to speak to the drivers, who were in the office during the time of the disciplinary hearing.
15. The Respondent avers that the re-routing of the motor vehicles caused the Company to incur extra expenses on oil and mileage and resulted in lost revenue and lost manpower, for the duration the vehicles were stuck in DRC, on unscheduled trips.
16. The Respondent further avers that as the Head of Department, the buck stopped with the Claimant and he was obligated to act in an honest and diligent manner to ensure that the company property entrusted to him was not used for personal gain, whether by the persons acting under his instructions or by himself personally.
17. The Respondent adds that the Claimant is yet to provide any sound explanation as to why the company vehicles were offsite and that as the Head of Department, the Claimant had access to the iSpy Software that monitored the movement of the vehicles and thus it was his duty and obligation to monitor the said movement and in case of suspicious activity, to raise the issue with the drivers and report the same to management.
18. The Respondent states that the Claimant had a scarred relationship with it because he was previously riddled with similar allegations but was given a second chance to reform his ways.
19. On the claims for terminal dues, the Respondent states the following:
  - a) The Claimant had no pending leave days and the prorated ones for the year 2019 were calculated and paid to him, upon

termination;

- b) The claim of Kshs. 92,993 in notice pay was paid to the Claimant despite his breach of the employment contract;
- c) The claim for salary for the month of February 2018 in Kshs. 92,993 is denied;
- d) The Claimant was duly paid his salary for the month of May 2019 and thus the said claim is denied;
- e) The claim for house allowance is denied and unmerited because the Claimant's salary was inclusive of his house allowance.

20. By way of counterclaim and set off, the Respondent claims from the Claimant Kshs. 630,000 for loss of revenue on the 3 motor vehicles; registration number KBM 083Y, KCE 768L and KCE 769L being money paid to the drivers while on assignment at Goma, DRC.

21. The Respondent states that the said revenue was collected by the drivers under the instructions of the Claimant and the monies were delivered to the Claimant in the company premises at Kibarani, Mombasa.

22. The Respondent accuses the Claimant of using his position as Head of Exports and Operations to unjustly manipulate the drivers into doing his errands using company machinery/equipment to the detriment of the Respondent.

23. The Respondent further alleges that during the course of his employment, the Claimant issued a credit facility for Kshs. 220,000 which he was not authorised to issue and as a result, the Company lost the said amount, which the Respondent now claims.

24. The Respondent's total counterclaim against the Claimant is therefore Kshs. 850,400.

### **Findings and Determination**

25. There are three (3) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

### **The Termination**

26. The Claimant's employment was terminated by letter dated 26<sup>th</sup> April 2019 stating thus:

*"Dear Sir,*

*RE: TERMINATION OF EMPLOYMENT ON GROUNDS OF BREACH OF*

*EMPLOYMENT CONTRACT AND HUMAN RESOURCE POLICIES*

*We refer to our letter dated the 8<sup>th</sup> day of March, 2019 raising concerns*

*about the manner in which you were handling your duties and allegations that had been brought forth against you and also in which you were requested to show cause why you should not be terminated from employment.*

*A formal disciplinary hearing was held on the 15<sup>th</sup> day of March, 2019 when you were to show cause but the evidence and reasons advanced from your end did not show proper cause why you should not be terminated. Following the concerns raised against you and having considered your responses, the Management is of strong opinion that your actions and omissions while in the course of your duty and as was outlined to you amounted to gross negligence and mismanagement of company property which occasioned the company financial loss which a (sic) breach of your Employment Contract and the Company Human Resource Policies.*

*The accusations against you directly touch on your commitment to the company, your conflicting dealings with company clients without disclosing such dealings which resulted into a conflict of interest on your part and the blatant breach of the Company Human Resource Policies as per information well within your knowledge. The foregoing coupled with your past disciplinary warnings and incidents and after careful consideration the Company is not prepared to continue employing you and with effect from today's date your services are therefore terminated.*

*Due to your long service with the Company, the company is willing to pay your terminations dues as follows despite your gross misconduct.*

2. Unpaid leave days

Kshs. 69,485

3. Pension fund from Alexander Forbes Scheme *(To fill Exit Form)*

TOTAL

KSHS.---

Please note that you are entitled to Appeal against the decision by writing to the Head of Human Resources within fifteen (15) days of the date of receipt of this letter setting forth your grounds of appeal.

Yours faithfully,

(signed)

Rachael Tsuma

**HUMAN RESOURCE OFFICER”**

27. This letter accuses the Claimant of gross negligence and mismanagement of company property, leading to financial loss. In a prior show cause letter issued to the Claimant on 8<sup>th</sup> March 2019, the particulars of gross misconduct were given as:

- a) *Using company resources for own gain without the knowledge of management leading to loss of revenue; and*
- b) *Doing business with the Respondent’s clients which was a breach of the terms of employment under the HR policy on conflict of interest.*

28. The Respondent’s first witness, Barasa Luvusia, who had previously worked for the Respondent, testified that the Claimant had approached him sometime in November 2018, asking for introduction to a company engaged in clearing and forwarding, to which the Claimant could refer clients. Luvusia further testified that he had introduced the Claimant to a company known as Georene Agencies Limited, which the Claimant used to clear cargo for clients.

29. Apart from Luvusia’s word however, the Respondent did not adduce any evidence to show any connection between the Claimant and Georene Agencies Limited or any other third party engaged in the Respondent’s line of business. More importantly, there was no evidence of the Claimant having received any payment for work done by him for third parties.

30. At any rate, Luvusia was not called as a witness during the internal disciplinary proceedings and the Claimant was therefore not afforded a chance to test his accusations at the shop floor as required by Section 41 of the Employment Act.

31. In his witness statement dated 12<sup>th</sup> February 2020, the Respondent’s second witness, Daniel Kiamba David stated that on the Claimant’s instructions, he took cargo to Beni and was given USD 2,000 to deliver to the Claimant. Kiamba added that upon handing over the money to the Claimant, he was given Kshs. 20,000.

32. When he appeared before the Court however, Kiamba changed the amount of money given to him at Beni to USD 200 and added that after the Claimant gave him Kshs. 20,000 the Claimant was not left with any money.

33. Just like Luvusia, Kiamba was not called to the disciplinary hearing and the Claimant was thus denied an opportunity to test the veracity of his accusations at the shop floor.

34. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee and the only way to do this is by following the procedural fairness requirements of Section 41 of the Act which 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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.***

35. The import of Section 41 is that the allegations leading to termination of employment must be fully interrogated prior to the termination. In this case, serious allegations were made against the Claimant but the people making these allegations were not availed during the disciplinary proceedings. The Claimant was therefore denied an opportunity of face his accusers with the result that the allegations made against him were unverified. Additionally, there was no evidence that the grounds raised by the Claimant in his appeal were given any consideration.

36. What is more, it seems as if the Respondent was on a fishing expedition to find some fault against the Claimant. I say so because in its counterclaim, the Respondent introduces yet another charge of issuing an unauthorised credit facility, which was not even mentioned in the

disciplinary proceedings or in the termination letter itself.

37. As held by this Court in *Walter Ogalo Anuro v Teachers Service Commission [2013] eKLR* for a termination of employment to be lawful and fair, there must be substantive justification and procedural fairness. In this case, both requirements were absent and the Claimant is therefore entitled to compensation.

#### **Remedies**

38. I therefore award the Claimant eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

39. In the absence of evidence to the contrary, the claim for salary for March 2018 succeeds and is allowed.

40. From the evidence on record, the Claimant was paid notice pay and leave pay. These claims are therefore without basis and are disallowed. There is no evidence that the Claimant worked in the month of May 2019 and the claim for salary for that month is therefore misplaced.

41. The Claimant also claims house allowance. However, clause 2 of his letter of confirmation dated 28<sup>th</sup> April 2014, expressly provides that he was to be paid a consolidated salary, which would ordinarily be inclusive of house allowance. The claim thereon is therefore disallowed.

#### **The Respondent's Counterclaim**

42. The Respondent's counterclaim against the Claimant is based on the allegations of gross misconduct, which the Court has ruled have not been proved. Moreover, the Respondent did not tell the Court how the counterclaim figures were arrived at.

43. In the circumstances, the only finding to make is that the Respondent's counterclaim was not proved and is consequently dismissed.

#### **Final Orders**

44. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 8 months' salary in compensation.....	Kshs. 743,944
b) Salary for March 2018.....	<u>92,993</u>
<b>Total.....</b>	<b>836,937</b>

45. This amount will attract interest at court rates from the date of judgment until payment in full.

46. The Claimant will have the costs of the case.

47. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY JULY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in 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.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyange for the Claimant

Ms. Arika h/b Ms. Nzamsa for the Respondent