



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 320 OF 2015**

**PASCHAL KHATONO MAFWIRI                      CLAIMANT**

**V**

**BOB MORGAN SERVICES LIMITED              RESPONDENT**

**JUDGMENT**

1. Paschal Khatono Mafwiri (Claimant) acting in person instituted legal proceedings against Bob Morgan Services Ltd (Respondent) on 5 March 2015 and he stated the Issues in Dispute as Unfair termination of employment and refusal by the Respondent to pay terminal benefits due to the Claimant.
2. In its *Response* filed on 6 July 2015, the Respondent contended that the termination of the Claimant's employment was lawful and was because of gross misconduct.
3. The Claimant joined issue with the Response on 9 December 2015.
4. Khalwale & Co. Advocates filed a *Notice of Appointment* to come on record for the Claimant on 19 December 2018 and the Cause was heard on the same day. The Claimant and the Respondent's Human Resources Manager testified.
5. The Claimant filed his submissions on ... while the Respondent filed its submissions on 9 January 2019.
6. The Court has considered the pleadings, evidence and submissions on record and condensed the Issues for determination as examined hereunder.

**Unfair termination of employment**

**Procedural fairness**

7. Section 35(1)(c) of the Employment Act, 2007 demands that an employer issue a *written notice of termination of employment* at least 28 days in advance (unless it is a case of gross misconduct as contemplated by section 44 of the Act).
8. The notice may be the familiar show cause notice, setting out the allegations the employee is expected to respond to.
9. Section 35(1)(c) of the Act is closely linked with section 41 of the Act which prescribes a hearing (may be through correspondence, oral or a combination of both, if contractual agreement so provides).
10. The Claimant testified that he was not issued with a *written notice of termination of employment* but admitted that the Respondent sent a dispatch on 19 November 2013 summoning him to go the head office the next day.
11. The Claimant stated that at the offices, he found shop stewards and Respondent's Managers who inquired from him about his movements the previous day. He also stated that he did not know the agenda of the meeting in advance.
12. The Respondent's witness on his part testified that the Claimant was summoned to explain whether he had incited employees to reject a restructuring exercise, and that 2 shop stewards, the Chief Human Resources Officer and he attended a meeting where the Claimant was afforded an opportunity to make representations.

13. No minutes of the meeting were presented in Court.

14. The Court is therefore unable to confirm whether it was a disciplinary hearing.

15. The Claimant was not issued with a *written notice of termination/show cause*. The Respondent's witness admitted this was not a case of summary dismissal but normal termination.

16. The Court therefore finds that the termination of the Claimant's employment was tainted with procedural unfairness.

#### **Substantive fairness**

17. In terms of sections 43 and 45 of the Employment Act, 2007, an employer should prove the reasons for terminating the contract of an employee and that the reasons are valid and fair.

18. The reasons given for terminating the Claimant's contract was inciting staff. No details of the staff who were allegedly incited were disclosed. Not even one of them was called to testify.

19. The Court can therefore conclude that the Respondent did not have valid and fair reasons to terminate the Claimant's services.

#### **Annual leave**

20. An employee is entitled to at least 21 days annual leave and the Claimant sought Kshs 14,082/- on account of accrued leave.

21. The *Terminal Dues* schedule produced by the Respondent show that the Claimant was paid Kshs 12,540/- on account of 30 days leave.

#### **Pay in lieu of notice**

22. The Claimant was paid Kshs 12,540/- on account of notice and nothing turns on this head of claim.

#### **House allowance**

23. Under house allowance, the Claimant sought Kshs 3,017/-. He was paid Kshs 1,036/- up to date of termination. House allowance therefore cannot be in dispute.

#### **Salary arrears November 2013**

24. The Claimant was paid earned wages up to termination in the sum of Kshs 6,911/- and is not entitled to any other payment on account of earned wages.

#### **Uniform refund**

25. The Claimant was refunded Kshs 3,500/- on account of uniform refund.

#### **Compensation**

26. The Claimant served the Respondent for about 16 years and in consideration of the length of service, the Court is of the view that the equivalent of 8 months gross wages as compensation would be fair (gross wage for October 2013 was Kshs 20,117/-).

#### **Certificate of Service**

27. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 15 days.

#### **Conclusion and Orders**

28. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(a) Compensation **Kshs 160,936/-**

29. Respondent to issue certificate of service within 15 days.

30. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 1<sup>st</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Khalwale instructed by Khalwale & Co. Advocates

For Respondent Mr. Njuguna instructed by Wainaina Ileri & Co. Advocates

Court Assistant Lindsey