



**REPUBLIC OF KENYA**

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

**CAUSE NO 693 OF 2016**

**GIDRAF NJOROGE THIGAH.....CLAIMANT**

**VS**

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

**JUDGMENT**

**Introduction**

1. Gidraf Njoroge Thigah, the Claimant in this case, was an employee of Borderless Tracking Limited, the Respondent herein. He brought this claim following the termination of his employment on 5<sup>th</sup> September 2016.
2. The claim is contained in a Memorandum of Claim dated 20<sup>th</sup> September 2016 and filed in court on 21<sup>st</sup> September 2016. The Respondent filed a Statement of Defence on 18<sup>th</sup> October 2016.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Mombasa Regional Manager, Oscar Amuyunzu. Both parties subsequently filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent on 1<sup>st</sup> January 2014, initially as a Technical Support and later in the position of Assistant Operations Manager. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 55,000.
5. By electronic mail dated 4<sup>th</sup> August 2016, the Claimant was sent on compulsory leave. He was subsequently dismissed on 5<sup>th</sup> September 2016.
6. The Claimant avers that his dismissal was unlawful and unfair in that there was no justifiable cause and he was not allowed an opportunity to be heard. He adds that he was not paid his full terminal dues. He now claims the following from the Respondent:

- a) Notice pay.....Kshs. 55,000.00
- b) Leave pay (1<sup>st</sup> January 2014-5<sup>th</sup> September 2016).....196,333.30
- c) Salary for July 2016.....55,000.00
- d) Half pay during suspension.....27,500.00
- e) 12 months’ salary in compensation.....660,000.00
- f) Costs plus interest

**The Respondent’s Case**

7. In its Statement of Defence dated 17<sup>th</sup> October 2016 and filed in court on 18<sup>th</sup> October 2016, the Respondent admits having employed the Claimant as Technical Support and subsequently as Assistant Operations Manager.

8. The Respondent however denies that the Claimant's employment was unlawfully terminated. The Respondent states that the termination was occasioned by the Claimant's complicity in facilitating or covering up fraud in the operations of the Company, resulting in the Kenya Revenue Authority fining the Respondent, leading to huge losses. The Respondent adds that the termination was effected in accordance with the law.

### **Findings and Determination**

9. There are two (2) issues for determination in this case:

a) Whether the Claimant has made out a case of unlawful termination against the Respondent;

b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

10. On 4<sup>th</sup> August 2016, the Respondent wrote to the Claimant as follows:

*"Dear Gidraf,*

#### **RE: COMPULSORY LEAVE**

*The above subject refers.*

*You have been adversely mentioned as being involved in suspect activities to beat tracking, leading to potential loss of seals.*

*Given the serious nature of the matter at hand, the Management has resolved to place you on a one (1) month Compulsory Leave (without pay) pending investigation. Accordingly, you are not to report to work, effective immediately.*

*This is intended to allow the management to examine the issues thoroughly and to determine appropriate action.*

*During the course of investigation, you will be provided with the details of the allegations and given an opportunity to respond to them. You must ensure you are available for interviews during this period.*

*If you do not make yourself available management will proceed with the investigation and make a determination based on the information we have available to us.*

*Regards,*

*Pamela Oluoch*

*(Signed)*

*Administrator*"

11. This letter makes serious allegations against the Claimant, bordering on gross misconduct. There was however no evidence that the Claimant was allowed an opportunity to respond to the said allegations at the shop floor.

12. The Respondent's Branch Manager, Oscar Amuyunzu told the Court that the Claimant's employment was terminated effective 5<sup>th</sup> September 2016. This coincided with the end of the one-month compulsory leave. It would appear therefore that the Claimant transitioned seamlessly from unpaid compulsory leave to termination.

13. While in a proper case an employer may be allowed to send an employee on compulsory leave as an interim measure, this must not derogate from existing terms and conditions of service. In the instant case, the Claimant was sent on compulsory leave without pay.

14. The Court did not find any statutory or contractual basis for this drastic action which had all the hallmarks of a disciplinary action. Moreover, there was no evidence that the Claimant was availed the details of the allegations against him and allowed an opportunity to respond to them, as promised in the letter sending him on compulsory leave.

15. For these reasons, the Court finds and holds that the Respondent failed to establish a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act. The Respondent also failed the procedural fairness test set by Section 41 of the Act. The termination of the Claimant's employment was thus substantively and procedurally unfair and he is entitled to compensation.

### **Remedies**

16. Pursuant to the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in handling his case.

17. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for July 2016. Additionally, I award him full salary for the period he was on unpaid compulsory leave.

18. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

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

a) 6 months' salary in compensation.....	Kshs. 330,000
b) 1 month's salary in lieu of notice.....	55,000
c) Salary for July 2016.....	55,000
d) Salary during unpaid compulsory leave.....	55,000
e) Leave pay for 2 years (55,000/30x21).....	38,500
f) Prorata leave for 8 months (55,000/30x1.75x8).....	<u>25,667</u>
<b>Total.....</b>	<b>559,167</b>

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

21. The Claimant will have the costs of the case

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MAY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Okanga for the Claimant

Mr. Okello for the Respondent