



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 621 OF 2016**

**BETWEEN**

**MATTHEW GOGO GIRIAGO .....CLAIMANT**

**VERSUS**

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

*Rika J*

*Court Assistant: Benjamin Kombe*

*K Bahati & Company Advocates for the Claimant*

*Okello, Kinyanjui & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 23<sup>rd</sup> August 2016. He avers he was employed by the Respondent as a Security Officer on 18<sup>th</sup> January 2015, earning a monthly salary of Kshs. 43, 233. His contract was terminated a year later by the Respondent, 5<sup>th</sup> February 2016. There was no valid reason given to the Claimant for this decision. He was not heard, and had no notice. He was denied his certificate of service, and salary for January and February 2016. He was falsely accused by the Respondent of tampering with a seal of goods on transit. He was investigated and cleared by the Police. The Respondent carried out its own internal investigations and concluded that the seal device was faulty. He prays the Court to grant him Judgment against the Respondent in the following terms: -

a. Declaration that termination was unfair.

b. Mandatory injunction compelling the Respondent to issue the Claimant his certificate of service.

c. The Respondent to pay the Claimant: 1 month salary in lieu of notice at Kshs. 43,233; salary for January 2016 at Kshs. 43,233; salary of 5 days for February 2015 at Kshs. 8,647; annual leave pay of 22.75 days at Kshs. 39,342; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 518,796 - total Kshs. 653,251.

d. Costs.

e. Interest.

f. Any other remedy.

2. The Respondent filed a Notice of Appointment of Advocates on 22<sup>nd</sup> September 2018. There does not seem to have been filed a Statement of Response. Parties did record a consent order in Court on 21<sup>st</sup> February 2018, to the effect that Respondent's new Regional Manager would swear and file an Affidavit in responding to the Claim, and attend Court for cross-examination.

3. The Regional Manager depones that the Respondent was losing e-seals by large number. It, as a result, set up a security department. It employed the Claimant as a Security Officer in this department, on 18<sup>th</sup> January 2015. The Claimant failed in preventing loss. He failed to recover lost devices, raising questions of integrity. The Claimant was involved in loss of seal Number 5031, tagged to Sunship Logistics in

Mombasa. He was arrested by the Police. Prosecution of the Claimant was frustrated by an Officer of the Respondent named Readon Atingo, who had been tasked by the Respondent to follow up the matter. Atingo withdrew the seal Number 5031 from the Police, causing the criminal case against the Claimant to collapse. The Claimant was suspended by the Respondent after arrest, and subsequently summarily dismissed. Respondent's CEO demanded through an e-mail message to the Claimant on 3<sup>rd</sup> February 2016, that the Claimant defend himself, failing which the Respondent would summarily dismiss the Claimant. The Claimant was given the opportunity to defend himself.

4. The Claimant testified and rested his case, on 27<sup>th</sup> November 2017. Regional Manager, Amuyunzu Oscar, gave evidence for the Respondent on 18<sup>th</sup> February 2019, bringing the hearing to a close. The matter was last mentioned in Court on 18<sup>th</sup> March 2019, when the Parties confirmed the filing of their Submissions.

5. The Claimant told the Court that he was suspended on 2<sup>nd</sup> February 2016. It was alleged that he interfered with Seal Number 5031. The seal is fixed on imported vehicles at the Port of Mombasa, and is used in tracking the vehicles.

6. The seal had drained power, and the vehicle on which it was affixed, could not be monitored. The Claimant explained this, in his e-mail of 28<sup>th</sup> January 2016. On 27<sup>th</sup> January 2016, the seal had network problems. Human interference was ruled out. The Claimant did not interfere with the seal. The reports from the Respondent indicated the Claimant deserved to be warned. He was not warned. He was not recalled after suspension. He was not paid his salary after suspension. He made demand for payment. There was a notice from the Police, alleging the Claimant interfered with goods on transit. He was not charged with any offence. He was not charged with any employment offence by the Respondent, and heard in the company of a Colleague. He was not given notice.

7. Cross-examined, the Claimant testified it was his responsibility to oversee security of the seals. He assisted the Police in any investigations concerning security of the seals. If there was tampering, the Claimant would alert the particular Client. In the case concerning seal number 5031, the Client told the Claimant the vehicle was already at Malaba Border. The Driver was contacted and told the Claimant he had already crossed over to Uganda. The Driver could not turn back to Kenya. He removed the faulty seal and left it at Respondent's Office at the Border. The seal was forwarded to Respondent's Mombasa offices. The Claimant sent it to Head of Technical Department at Nairobi. The Claimant did not deserve a warning, little less summary dismissal. He performed his duty in accordance with set down procedures. He expected to be taken through a disciplinary hearing. He unsuccessfully pursued his salary with Management. He was told his salary had been blocked by the CEO. He had no blood relationship with the CEO. He did not receive any letter of dismissal. He did not know the consequences of a seal failing to transmit. Kenya Revenue Authority [KRA] requires transit vehicles to have seals. KRA makes the seals operational. He was not aware that the Respondent would be fined, for having defective seal.

8. Redirected the Claimant testified that his boss went with 2 Police Officers to the workplace. The Claimant was taken to the CID Office. Police did not find reason to continue holding the Claimant. The Claimant emphasized that he was not given the benefit of a disciplinary hearing. Tagging was done by Tagging Operators at the Port. Control Room monitored vehicle movement. If the vehicle was not in the system, Control Room would be first to know. The Claimant did his part as expected. He called the Client. He called Respondent's Officers at Malaba Border. It was not fair for the Respondent to hold Claimant's salary, and suspend him.

9. Amuyunzu Oscar deposed, and testified on cross-examination, that the Claimant was employed by the Respondent before Oscar joined the Respondent. He confirmed details of Claimant's employment history, particulars, terms and conditions of employment, from the Claimant's personnel file.

10. The Claimant was suspended on 2<sup>nd</sup> February 2016. The incident was investigated by Claimant's Colleagues, Mugo and Atingo. They generated a report.

11. The Respondent did not issue the Claimant with a letter to show cause. There was no letter issued containing grounds of termination. The Claimant disappeared when investigation was going on. There was nothing on record to show the Respondent called the Claimant after he allegedly disappeared. Page 3 of Claimant's documents rules out human interference in the seal. Page 4 states the seal had a problem catching data among other problems. There was no final report on the incident. Oscar could not find any dismissal letter relating to the Claimant. There was no copy of Certificate of Service issued to the Claimant.

12. On redirection, Oscar told the Court that he was the Regional Manager Mombasa, and was conversant with the issues in dispute. The Claimant was not working while on suspension. He was supposed to report once a week to Management while under suspension. He did not. The Respondent reported the matter to the Police. The Claimant disappeared until he was invited to collect his January salary. He made himself available and was arrested by the Police. He did not avail himself when given an opportunity to be heard.

13. On 26<sup>th</sup> January 2016 there was a CIF Unit destined for Malaba Border from the Port. It was transmitting while at the point of departure at Mwembe Tayari, Mombasa. The vehicle did not take the usual route. The seal was later switched off, and did not transmit. It then appeared at Malaba, on its way back to Mombasa. It was indicating a straight line on the monitor, showing the point of departure and terminus. It was therefore probably detached from the vehicle, and sent by courier services. If attached all through, the monitor would show it to be meandering, not shown as a straight line. The Respondent's business involves assisting KRA in prevention of dumping of transit cargo in Kenya.

14. The Claimant was one of the Security Officers tasked with the role of following up on the seal. He disappeared, only to come up with this Claim. The criminal case against the Claimant did not proceed. The device could only give readings if it was functioning. There was direct human interference.

**The Court Finds:-**

15. The Claimant was employed by the Respondent as a Security Officer on 8<sup>th</sup> January 2015. He left on 5<sup>th</sup> February 2016, about 1 year

after joining the Respondent. His last salary was Kshs. 43,233.

16. The Respondent is a cargo tracking business. It assists the KRA in tracking of transit goods, including vehicles destined for other Countries. According to the evidence of Regional Manager Oscar, the Respondent assists KRA in ensuring transit goods are not dumped in Kenya. This is done by affixing seals on the transit goods, which enables KRA and the Respondent monitor movement of the goods from the Port up to the Border.

17. On 28<sup>th</sup> January 2016, KRA reported to the Respondent that seal 5031 was still being tracked to Mombasa, while it was meant to have reached Malaba Border point.

18. According to Oscar, the seal had been interfered with by human hand. It was detached from the vehicle and couriered to the Border point. It indicated a straight line on the monitors, suggesting it was ferried while detached. If affixed it would have been meandering.

19. According to the Claimant, the seal was defective. The Claimant called the Client who advised that the vehicle was already at Malaba. The Driver was contacted. He confirmed he was already at Malaba. He had crossed the Border into Uganda, and could not reverse. He had removed the seal and entrusted it to the Respondent's Office at the Border. The device was forwarded to Mombasa. The Claimant in turn forwarded the device to Respondent's Nairobi Office for technical evaluation.

20. The position adopted by the Claimant above, is supported by email exchanges involving Security, Control and Technical personnel of the Respondent, captured at page 2 and 3 of Claimant's documents, filed on 23<sup>rd</sup> August 2016.

21. The evidence gleaned from these e-mails is this: the device was faulty; there was rapid power drainage; and human interference was ruled out, unless there was tampering in the last transmission at Mwembe Tayari. No such interference was reported.

22. This is evidence from the Respondent's own Staff.

23. Assuming they were all wrong, and somewhat complicit in dumping of transit cargo, it is noted that the matter was reported to the Police. It was a matter initially raised by the KRA. The 2 Government Agencies, with specific interest in the matter, would not be expected to let the Claimant loose, if he had anything to do with the malfunctioning of seal number 5031. The Claimant was arrested and found by the Police not culpable. He was not arraigned in Court.

24. The allegations against the Claimant were not tested even at the workplace through a disciplinary hearing. He was not presented with any employment offences. He was not asked to show cause, why he should not be disciplined. Oscar conceded as much, adding that there was no letter of termination of employment, containing grounds of termination, availed to the Claimant. He conceded further that there was evidence ruling out human interference with the seal. This was an interim report generated by the Respondent. There was no other report.

25. The Court is persuaded through this evidence that termination was unfair. ***It is declared that termination was unfair.*** It was not based on valid and fair ground. It did not meet the minimum statutory standards of fairness. It was far short of the standards of fairness contained in Sections 41, 43 and 45 of the Employment Act. He merits compensation for unfair termination and notice pay.

26. He worked for 1 year from 18<sup>th</sup> January 2015, to 5<sup>th</sup> February 2016. He does not merit compensation equivalent of salary for the entire period worked. ***He is allowed equivalent of 5 months' salary in compensation for unfair termination at Kshs. 216,165.***

27. ***He is granted 1 month salary in lieu of notice at Kshs. 43,233.***

28. There is no doubt that he was denied salary for January 2016, and salary for 5 days in February 2016. He was still an Employee of the Respondent, even while on suspension. ***He is allowed the prayers for unpaid salary at Kshs. 51,880.***

29. There was no evidence in form of annual leave records, availed to the Court by the Respondent, showing that the Claimant utilized his annual leave for the 12 months, and a few days, worked. ***He is allowed annual leave and pro-rata annual leave days, which he computes at 22.75 days, amounting to Kshs. 39,342.***

30. ***Certificate of Service to issue.***

31. ***Costs to the Claimant.***

32. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM IT IS ORDERED:-

***a. It is declared termination was unfair.***

***b. The Respondent shall pay to the Claimant: equivalent of 5 months' salary in compensation for unfair termination at Kshs. 216,165; notice at Kshs. 43,233; unpaid salary at Kshs. 51,880 and annual and pro-rata leave at Kshs. 39,342- total Kshs. 350,620.***

***c. Costs to the Claimant.***

*d. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

**Dated and delivered at Mombasa this 20<sup>th</sup> day of June, 2019.**

**James Rika**

**Judge**