



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 524 OF 2014**

**BETWEEN**

**LILIAN W. NGULI.....CLAIMANT**

**VERSUS**

**1. BAYUSUF CARGO HANDLERS LTD.....1<sup>ST</sup> RESPONDENT**

**2. FADHIL BAYUSUF.....2<sup>ND</sup> RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Stephen Oddiaga & Company Advocates for the Claimant*

*J. M. Makau & Company Advocates for the Respondent*

**JUDGMENT**

1. In her statement of Claim filed on 27<sup>th</sup> October 2014, Lilian W. Nguli seeks judgment against the Respondent, in the following terms:-

- (a) Salary arrears for May – August 2014 at Kshs. 70,000.
- (b) Annual leave for 2014 at Kshs. 20,000.
- (c) 1 month salary in lieu of notice at Kshs. 20,000.
- (d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 240,000

**Total ....350,000**

- (e) Alternatively, the Respondent to pay the Claimant all the terminal dues pending.
- (f) An award for damages for unlawful and unfair termination.
- (g) Costs and interest.

The Statement of Claim was subsequently lightly amended through an application filed on 28<sup>th</sup> July 2016.

2. She testified and rested her case, on 29<sup>th</sup> November 2017. She was employed by the 1<sup>st</sup> Respondent Company in the year 2013. The Company had just set up its business. She earned a salary of Kshs. 20,000 per month. She was the Managing Director's Secretary, and had been promised Kshs. 25,000 monthly salary. She was not paid salary for May – August 2014. She did not utilize her annual leave for the year 2014. She was dismissed through a text message from the Respondent, on 27<sup>th</sup> August 2014.

3. Cross-examined, the Claimant testified that the 2<sup>nd</sup> Respondent was the 1<sup>st</sup> Respondent's Managing Director. Employment identity card shows the 1<sup>st</sup> Respondent as the Employer. She never received a warning letter dated 10<sup>th</sup> July 2014. She did not have issues with the 2<sup>nd</sup> Respondent. She received a letter of summary dismissal dated 28<sup>th</sup> August 2014. She had already received text message dismissing her, before receiving the letter of summary dismissal. Dismissal letter issued when she served the Respondents with a demand letter from her Advocates. The monthly salary of Kshs. 25,000 had been agreed upon by the parties, orally. She was deducted Kshs.4000 as shown in petty cash voucher dated 5<sup>th</sup> May 2014, for absenteeism. She was not a habitual absentee.
4. Redirected, the Claimant testified that she was not given a chance to be heard, before dismissal. She worked between 2013 – 2014, and did not receive any warning letters. Salaries as shown in the Vouchers exhibited by the Respondents, were paid late. She had authorization from the Respondents to be away for 8 days, to attend a funeral. Deductions was made unfairly.
5. The Claimant adopts her Pleadings, Witness Statement and Documents which include Company Identity Card, Demand Letter dated 29<sup>th</sup> August 2014, and Letter of Summary Dismissal, dated 28<sup>th</sup> August 2014.
6. She asks the Court to uphold her Claim.
7. The Respondents rely on Reply to the Statement of Claim, filed on 12<sup>th</sup> November 2014 and Reply to Amended Statement of Claim, filed on 26<sup>th</sup> October 2016.
8. It is conceded the Claimant was employed by the 1<sup>st</sup> Respondent. She received verbal and written notice, before termination of her services. Her monthly salary was Kshs. 20,000. She was not promised a salary of Kshs. 25,000 monthly. The Respondent would communicate to the Claimant through cell-phone or short text messages, but termination was in writing.
9. The Claimant was a habitual absentee. This necessitated termination of her contract. Kshs. 5,333 was deducted from her salary for 8 days absent, as shown in Petty Cash Voucher dated 5<sup>th</sup> May 2014.
10. The 2<sup>nd</sup> Respondent states he is a separate person from the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent is a legal entity, which contracted the Claimant independently.
11. Hamidi Abulrehman Ali, an Accountant employed by the Respondents, gave evidence for the Respondents on 2<sup>nd</sup> October 2018, when hearing closed.
12. He affirmed that the Claimant was employed by the Respondents. Her salary was Kshs. 20,000 monthly. There were financial constraints, and her salary was occasionally paid late. He adopted his Witness Statement and Documents, which include Warning Letter, Letter of Summary Dismissal, Petty Cash Voucher and Certificate of Incorporation.
13. The Claimant was demoralized. She reported to work late, or failed to report altogether. There are warning letters on lateness and absenteeism, issued to her.
14. The Director instructed Management to issue the Claimant letter of summary dismissal dated 28<sup>th</sup> August 2014. She then served Court Summons upon the Respondents.
15. She utilized her annual leave for the year 2014. Termination was on the ground of absenteeism. The 1<sup>st</sup> Respondent is a registered Company.
16. Cross - examined, Ali told the Court that he found the Claimant already working, when he joined the Respondents. There were delays in payment of her salary. She was not given details of absenteeism. Arrears of salary of Kshs. 70,000 had not been paid by the time of termination. She used to explain her position before the Director. She was not issued a letter to show cause why she should not face disciplinary action. The Respondents did not have a disciplinary procedure. The Respondents, received Claimant's Advocates demand letter on 28<sup>th</sup> August 2014. It is not true, that dismissal letter was prompted by the demand letter. The Respondents had not supplied the Court with Claimant's annual leave records. It is not true that the Respondents had financial problems, and dismissed the Claimant as a result.
17. Redirected, Ali testified that every Employee was aware of Respondents' problems. Ali left employment and was paid all his dues.

**The Court Finds:-**

18. It is agreed that the Claimant was 1<sup>st</sup> Respondent's Managing Director's Secretary, employed in the year 2013. She was summarily dismissed in writing through a letter signed by the 2<sup>nd</sup> Respondent, dated 28<sup>th</sup> August 2014.
19. There is no written contract issued to the Claimant, which would determinatively show that she was employed exclusively by the 1<sup>st</sup> Respondent, and not by the Respondents.
20. The documents on record suggest the 1<sup>st</sup> Respondent is simply a business vehicle for a businessman named Fathil Bayusuf. Both Respondents are named Bayusuf. In answering the question who was the Employer, either or both Respondents, fit the description of the term 'Employer' under Section 2 of the Employment Act 2007. It cannot be said therefore, that the 2<sup>nd</sup> Respondent, Fathil Bayusuf, is

improperly joined to the proceedings. He seems to have had decisional control of the business, issuing warning letters, as well as the letter of summary dismissal to the Claimant.

21. There is no convincing evidence to establish that the Claimant was supposed to earn a monthly salary of Kshs. 25,000, rather than Kshs. 20,000 paid to her.

22. The Respondents, by the admission of their Witness Ali, experienced financial constraints, which resulted in delayed salaries, non-payment of salaries, and demoralization of the Claimant. If the Court understood Ali properly, this state of affairs led to Claimant's lateness for duty and absenteeism.

23. Ali conceded that the Claimant was owed salaries for May – August 2014, at Kshs. 70,000, by the time of termination. ***She is granted arrears of salary at Kshs., 70,000 as prayed.***

24. She had completed 12 consecutive months, by the time of termination, to qualify for paid annual leave, of at least 21 days, under Section 28 of the Employment Act.

25. She pleads 30 days of annual leave. She has not provided evidence, showing annual leave entitlement of 30 days. ***She is allowed the statutory minimum of 21 days at Kshs. 16,153 in annual leave pay.***

26. The letter of summary dismissal states that the Claimant was dismissed ostensibly for absenteeism. Respondent's Witness explained however, that absenteeism and illness, was on account of Claimant's demoralization, resulting from late payment of salary, and non-payment of salary. The ground stated in the letter of summary dismissal cannot, in the humble view of this Court, be a valid ground for dismissal. The Respondent's own conduct, gave the misconduct attributed to the Claimant.

27. Secondly, there was no evidence availed to the Court establishing repeated absenteeism. The 8 days the Claimant was away, were deducted from the days worked for the particular month. Absence was punished through payroll deduction. Lateness to work was attributed by the Respondent to employee - disincentivization.

28. There was no reason, or reasons shown in the letter of summary dismissal, justifying termination under Section 43 and 45 of the Employment Act.

29. Procedure was admittedly flawed and far short of the statutory minimum standards of fairness, contemplated by Section 41 and 45 of the Employment Act.

30. Ali conceded the Respondents do not have disciplinary procedures at their workplace. In the absence of such procedures, they ought to have fallen back on the minimum standards given under the Employment Act. They did not.

31. The Claimant was initially informed of the decision to dismiss her through a short text message. She was issued letter of summary dismissal only upon serving the Respondent with her Advocate's demand letter. She was not availed a letter to show cause or presented with any specific charges. She was not heard. Ali conceded to these details explaining that the Claimant used to explain herself to the Managing Director and that the Respondent's ordinarily communicated to Employees verbally and through cellphones. The Respondents did not meet the demands of fairness of procedure, imposed upon them by the Employment Act.

32. The Claimant worked for approximately 1½ years, from February 2013 to August 2014. It would not be reasonable to allow her prayer for equivalent of 12 months' salary in compensation for unfair termination. She quite unreasonably pleads a separate award of damages for unlawful and/or other termination. ***She is granted equivalent of 6½ months' salary in compensation for unfair termination at Kshs. 130,000.***

33. Termination was brusque. There was no recognizable notice. There were no grounds justifying summary dismissal under Section 44(4) of the Employment Act. ***The prayer for notice pay at Kshs. 20000 is granted.***

34. ***Costs to the Claimant.***

35. ***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 that termination was unfair.***

***b) The Respondents shall pay to the Claimant; arrears of salary at Kshs. 70,000; annual leave of 21 days at Kshs.16,153; equivalent of 6½ months' salary in compensation for unfair termination at Kshs.130,000 and 1 month salary in lieu of notice at Kshs. 20,000 – Total Kshs. 236,153.***

***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 13<sup>th</sup> day of June 2019.**

**James Rika**

**Judge**