



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 984 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**ANTHONY ASEKA.....CLAIMANT**

**VERSUS**

**HAGGAI MULTI CARGO HANDLING SERVICES.....RESPONDENT**

**JUDGMENT**

Vide his statement of claim dated 30<sup>th</sup> May 2014 and filed in Court on 17<sup>th</sup> June 2014, the claimant avers that his employment was unfairly terminated by the respondent, a registered limited liability company.

His case is that he was employed by the respondent on or about 1<sup>st</sup> February 2008 in its Plastic department. He contends that despite signing an employment contract a copy of the same was not issued to him.

The Claimant further contends that he worked diligently, faithfully and to the Respondent’s satisfaction until 10<sup>th</sup> April, 2014 when his services were unfairly, wrongfully and unlawfully terminated by the Respondent following his request that the employer issues a notice of an occupational accident to an employee on his behalf.

The Claimant avers that he was not issued with any warning letter nor was he invited for any disciplinary hearing prior to his termination. He further averred that he was earning a weekly wage of Kshs.280 at the time of separation.

In his Memorandum of Claim the Claimant seeks the following reliefs:

- a) A declaration and finding that the termination of employment was null and void for all intents and purposes
- b) A declaration and finding that the Claimant’s services were unlawfully and unfairly terminated
- c) Special damages consisting of the following:
  - i. 1 week’s wage in lieu of notice (832 x 5)..... Kshs.4,160
  - ii. 12 months’ salary for unfair termination  
(Kshs.13,170 x 12)..... Kshs.158,040
  - iii. Leave days (21 x 6 years x 832).....Kshs.104,832

**Total                    Kshs. 267,032**

- d) Costs of the suit
- e) Interest on (c), (d) and above

f) Any other relief the Court deems fit to grant

The Respondent in its Reply to the Memorandum of Claim dated 18<sup>th</sup> July 2014 and filed in Court on 22<sup>nd</sup> July 2014 admits having engaged the Claimant from 1<sup>st</sup> February, 2008 but contends that it issued the Claimant with a copy of the signed contract.

The Respondent further avers that the Claimant was issued with numerous warnings both verbal and written on the issue of carelessness and lack of concentration while on duty thus putting himself at the risk of injury.

The Respondent contends that the Claimant was paid a consolidated salary comprising of all his entitlements. It is further the Respondent's position that the Claimant was paid all his dues at the time of separation. The Respondent urged this Court to dismiss the Claim with costs.

The matter proceeded for hearing on 19<sup>th</sup> October 2018 in the absence of the respondent who failed to attend court

The claimant testified that his services were terminated by the Respondent after he was injured while on duty and had asked to be compensated for the injuries sustained.

He denied that he was ever served with any warning letter prior to his termination. He urged the Court to allow his Claim as drawn as his termination was without notice and with no valid reason.

### **Claimant's Submissions**

It is submitted on behalf of the Claimant that his termination was unlawful, unfair and wrongful as the respondent failed to follow the laid down mandatory procedure under Sections 41 and 43 of the Employment Act, 2007. The Claimant cited and relied on the Authorities of ***Kennedy Nyanguncha Omanga Vs Bob Morgan Services Limited (2013) eKLR*** and ***Augustine Peter Obirika Vs Card Centre Limited (2012) eKLR***.

The Claimant submitted that he is entitled to compensation as provided under Section 49 of the Employment Act, 2007.

He Claimant urged the Court to allow the Claim as prayed.

### **Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the Claimant, the following are the issues for determination:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively.
2. Whether the Claimant is entitled to the reliefs sought.

The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is provided for in section 47(5) of the Employment Act to the effect that –

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

There is no doubt that the claimant was terminated. In its response, the respondent did not produce any evidence of compliance with Sections 41, 43 and 45 on fair procedure and valid reason for termination of employment. It pleaded that the claimant was served with warnings but did not produce any. No hearing was referred to in the defence. No letter of termination was issued to the claimant. In sum, the respondent did not controvert the evidence of the claimant either by way of production of records or by viva voce evidence. The reply to the memorandum of claim is but bare denials of facts pleaded by the claimant.

In the case of ***Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR*** the Court held that:

*“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”*

Further in the case of Francis Mbugua Boro –***VS- Smartchip Dynamics Ltd (2017) eKLR*** the court held that:

*“..It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”*

Section 46(h) expressly provides that the initiation of a complaint or other legal proceedings against an employer is not a valid ground for termination of employment except where the complaint is shown to be irresponsible and without foundation. The termination of the

claimant's employment for reason that he asked the respondent to file a report of his occupational accident is thus not a valid reason for termination of his employment.

The termination was therefore unfair both procedurally and substantively and I accordingly declare so.

**Whether the Claimant is entitled to the reliefs sought**

In absence of any evidence adduced by the Respondent to rebut the averments made by the Claimant he is entitled to compensation for unfair termination of employment which I award him at 10 months salary, taking into account the length of service and the manner in which his employment was terminated, as well as the reason thereof, being a reason expressly prohibited by the Employment Act. I award the claimant the sum of Kshs.131,700/=. I further award him salary for one week worked and not paid being Kshs.4,160 and leave in the sum of Kshs.104,832 as prayed.

**In sum, I award the claimant Kshs.240,692.00/= The respondent shall pay the claimant's costs. Interest shall accrue from date of judgment.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**