



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 179 OF 2013

BETWEEN

EUNICE MWANYALO CLAIMANT

VERSUS

1. KIPROP BUNDOTICH

2. PAUL MAIYO

3. MINESH PANDYA

**[Sued as Chairman, Secretary and Treasurer respectively, of
Kenya Transporters Association, on their behalf and behalf of all
Members of the Association.....RESPONDENTS**

Rika J

Court Assistant: Benjamin Kombe

Mr. Asewe Advocate instructed by Nyagaka S.M. & Company Advocates for the Claimant

Ms. Isoe instructed by Mogaka Omwenga & Mabeya Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed her initial Claim, registered as Cause Number 20 of 2013. This was struck out on grounds of mis-joinder. The Claimant filed a fresh Claim registered as Cause Number 179 of 2013. She, acting in person, named Kenya Transporters Association Limited as the Respondent. She eventually engaged Counsel, who amended her Claim, naming the current Respondents.

2. The Court does not think Employees should be unduly harangued over joinder or mis-joinder of Employers. It is always difficult for Employees to uncover the multiple layers of business and legal structures adopted by their Employers, in avoiding regulatory burdens. In the initial Claim, the Claimant sued the Chairman, Kenya Transporters Association. It was the view of the Respondent, upheld by then

Trial Judge that her Claim against the Chairman was unsustainable. The Association has registered a Limited Liability Company, with a shared name. In their Closing Arguments, the Respondents name the Respondent as Kenya Transport Association Limited. How is the Employee to know with exactitude, the nature of the Employer, if this is not clear even to the Employer? In the respectful view of this Court, requiring Employees to unmask the various business and legal forms assumed by Employers would be inimical to enforcement of expeditious industrial justice. Employment disputes cannot be treated like any other commercial transactions.

3. The Claimant's *factum*: She was employed by the Kenya Transporters Association as the Executive Officer; she at first was employed as the Personal Assistant to the National Executive Officer in the year 2002; she acted as the Executive Officer from the year 2007; she became the substantive Executive Officer on 19th November 2008, earning a salary of Kshs. 66,000 per month; this was revised to US\$2,000 per month effective 7th May 2010; however, her contract was unfairly and unlawfully terminated through the Association's Secretary Paul Kirwa Maiyo, on 1st September 2010. She claims 1 month salary in lieu of notice at US\$2,000, unutilized annual leave days for 2 years and 10 months at US\$5,600, 12 months' salary in compensation at US\$ 24,000, the termination is declared unfair and unlawful, and she is issued with her Certificate of Service.

4. The Respondents filed their Amended Statement of Response on 24th October 2013. *Respondents' Factum*: They state that the Claimant was employed as an Administrator in the Respondents' Association. Termination of her contract of employment was legal and fair. She was offered notice pay and other terminal dues. The Respondents concede the Claim to this extent: 1 month basic pay in lieu of notice at US\$2,000; 6 days of unutilized annual leave at US\$2,400- less deductions of US\$893- total conceded US\$1,507. Other claims have no merit.

5. The Claimant gave evidence and closed her case on 28th July 2014. The Respondents testified through their CEO Mr. Wellington Kiberenge on 4th November 2014 when the hearing closed. The Parties confirmed the filing of their Closing Arguments to the Court on 2nd December 2014, and Award was reserved for delivery on 27th February 2015.

6. Eunice testified she currently works as a Logistician. She was employed by the Respondents from the year 2002 to the year 2010. She started off as an Administrative Assistant, later on ascending to the position of the Executive Officer. She was appointed to this position in a letter issued by the Respondents, dated 19th November 2008. Her contract was revised on 7th May 2010, granting her a monthly salary of US\$2,000. Her contract was terminated by the Respondents on 1st September 2010, on the ground of alleged poor performance.

7. There was no performance appraisal carried out by the Respondents, before the termination decision. She was not warned of any shortcomings. There was no warning. The Association's Secretary Paul Maiyo, the Organizing Secretary Sam Machio and the Vice Chairman Timothy Nguo, approached the Claimant and asked her to resign. They said they were not satisfied with the Claimant's performance. She was told she had no choice but to resign. She asked for written instructions asking her to resign. The 3 Officials slammed her with the letter of termination.

8. She was not given an opportunity to defend herself. Termination was immediate. Her performance was not wanting. She had been overseeing a grant given to the Association by USAID. When she left employment, she was paid nothing. The termination letter offered her 1 month salary and 6 days of annual leave; nothing was paid. She owed the Respondents nothing. She handed over to the IT Manager. She was not issued her Certificate of Service. She does not owe the Respondents US\$197 as claimed. She did not take annual leave after she became the Executive Officer.

9. Questioned, the Claimant testified she was the Executive Officer for the period between 2008 and 2010. She did not go on annual leave and did not recall signing any leave forms. She acknowledged signing the leave application forms dated 14th October 2008, 9th October 2009, 20th November 2009 and

26th July 2010. The Claimant was the link between the Association and the Kenya Revenue Authority [KRA]. This was in relation to the electronic cargo system. Not all Members of the Association were willing to embrace the system. She had no link with NAVISTAT which was implementing the system. The Association had filed responses on behalf of Members, to challenge the system. She organized meetings between the Association and the Respondent's Executive Committee. She was not paid terminal dues. She cleared with the Respondents and returned everything belonging to the Association, including phones and laptop. She did not engage in activities leading to conflict of interest. No such reason was stated in the letter of termination. She worked for NAVISTAT immediately after termination. She currently works as a business lady, working variously under contracts. She clarified on redirection that she had applied for short terms leave days, on the application forms attached to the Response.

10. Wellington Kiberenge testified that the Claimant was initially employed as a Receptionist. She left employment in September 2010, while holding the position of the Executive Officer. The Association's Executive Committee met on 31st August 2010. It concluded the Claimant was not performing her duties as required. The Association was opposed to the electronic cargo transport system introduced by KRA. The KRA has imposed these gadgets on the Association's Members. The Association went to Court, and obtained an injunction against the implementation of the system.

11. The Claimant was bound by Clause 10 of her contract of employment, not to disclosed confidential matters of the Association. She breached this Clause. The gadgets were quite expensive. It would adversely affect the businesses of the Association's Members. The Claimant involved herself with NAVISTAT in disregard of her contractual obligation and the subsisting injunction.

12. The Association's Executive Committee Members explained to the Claimant of the decision to summarily dismiss her. These reasons were communicated to her by 3 Committee Members, in her Office. She utilized her annual leave days in 2008, 2009 and 2010. She was only owed 6 leave days on termination. The Respondents conceded her claim for notice pay. These payments were processed, but the Claimant failed to collect her dues. The Association is funded by donors. There were some deductions to be made on her terminal benefits. She is entitled to US\$1,507 in notice pay and 6 days of annual leave.

13. On cross-examination Kiberenge testified he was employed in February 2011. He was not there at the time Eunice left. He was familiar with the circumstances of her departure. One must be a good performer to rise from the position of a Receptionist to an Executive Officer.

14. The Committee Members approached the Claimant in her Office at the Secretariat. They met before going to her Office to communicate the decision. She did not attend the initial meeting. She was not notified about the meeting. Termination was because of conflict of interest. The termination letter said performance was unsatisfactory. Conflict of interest was not directly mentioned. Her performance was not appraised. There was no written warning issued to the Claimant. It was verbal. There was a confidentiality Clause; it was not mentioned in the termination letter. There was no disciplinary hearing. Leave forms showed she utilized her annual leave. The one dated 14th October 2008 indicates she was to attend a 5 day residential training course at Mombasa.

15. The contract was in US\$. The Facilitator was from the US. It was not the Claimant who sourced the Facilitator. The Respondents state in the Response, that they were to pay the Claimant a total of US\$2,400. This was before deductions. She accepted she owed the Association money. There was no evidence of this debt tendered before the Court. She was informed of the reason for termination. Kiberenge is the current CEO of the Association. The Association was later incorporated as a limited liability company. Its property is in the name of the company. Redirected, the Witness testified the Claimant indicated in her application for leave in 2008, that she was proceeding on annual leave. Termination had nothing to do with the US donor. The cheque for her terminal dues is available for her take.

16. The Claimant submits the issues for the determination of the Court are:

- Whether the Respondents complied with the procedural requirements on termination under

Section 41 of the Employment Act 2007;

- Whether the Respondents proved the reason for termination, proved the reasons were valid, and proved the reason were fair under Section 43 and 45 of the Employment Act 2007; and,
- Whether the Claimant merits the prayers sought.

17. Relying on *the Industrial Court of Kenya at Nairobi Cause Number 681 of 2012 between Simon Muguku Gichigi v. Taifa Sacco Society Limited* and *High Court at Nakuru Civil Case Number 810 of 2005 between Issak Matungo Mogoi v. Municipal Council of Nakuru*, the Claimant urges the Court to find that an Employee must be heard before adverse action is taken against him. Specifically in matters of performance, the Employer must demonstrate consistent path towards supporting the Employee to improve their performance. No evidence of poor performance was shown against the Claimant. The Respondents did not discharge their obligations under Sections 41, 43 and 45 of the Employment Act 2007. She is entitled to the terminal benefits and compensation for unfair termination as pleaded.

18. The Respondents submit that the Claimant is entitled to US\$1,507 and no more. She was dismissed for valid and fair reason. She was involved in activities amounting to conflict of interest. She dealt with NAVISTAT TELEMATICS. She knew the Respondents and the Associations' Members were opposed to the electronic cargo tracking system. She knew the Respondents had obtained Court Injunction against the system. She conceded she was employed by NAVISTAT immediately upon leaving the Association. If the Court is inclined to award compensation, the Respondents urge the Court to adopt the *Industrial Court at Nairobi Case of Stephen Musyoka Muia v. Munyiri 64 Traders Limited t/a Munyiri Fish and Chips [2014] e-KLR*, find the Claimant secured alternative employment, and grant her 1 month salary in compensation. Her annual leave status is captured in the leave forms attached to the Response. She utilized her annual leave days from 2008 to 2010. She is only entitled to 6 days of annual leave. She owes the Respondents US\$ 197. The Respondents reiterate they are ready to pay to the Claimant US\$ 1,507 in full and final settlement of the Claim.

The Court Finds:-

17. The issues in dispute fall within a very narrow compass, and the issues for determination, are fairly set out in the Claimant's Closing Arguments, as recorded in paragraph 16 of this Award.

18. There is common evidence of both Parties that the Claimant was initially employer in the lower echelons of the Association in the year 2002. It is agreed she rose to become the Executive Officer, and left employment on 1st September 2010. Her contact was terminated through a letter signed by the Association's Secretary Paul Maiyo, dated 1st September 2010. The monthly salary is uncontested at US\$2,000.

19. In justifying termination as demanded of Employers under Section 43 and 45 of the Employment Act 2007, the Respondents informed the Claimant their decision was necessitated by dissatisfaction with the Claimant's performance of her duties. The procedure leading to the decision is captured in paragraph 2 of the termination letter. The Respondents write their Executive Committee Members met on 31st August 2010, and decided to terminate her employment, in accordance with paragraph 11 of her employment letter. On terminal dues, paragraph 3 of the letter states the Claimant would be paid 1 month salary in lieu of notice, and 6 days of accrued annual leave.

20. The evidence of the Respondents is at variance with the reason for termination given in the letter of termination. There is nothing about NAVISTAT, and conflict of interest alluded to in the letter of termination. The Respondents' Witness Kiberenge conceded as much. Without straining judicial economy, the Court finds there was no fair and valid reason shown under Section 43 and 45 of the Employment Act 2007, justifying termination.

21. The decisions cited by the Claimant are all relevant and persuasive in determination of the present dispute. The Industrial Court has, in a catena of decisions, set out the principles of law to apply in cases where an Employer charges that the Employee is a poor performer. In the *Industrial Court at Nairobi Cause Number 2177 of 2012 between Maina Mwangi v. Thika Coffee Mills Limited [2014] e-KLR*, the

Court stated:

“Performance management at the Workplace involves the planning of work and the setting of expectation; continued monitoring of performance; building the Employee’s capacity to perform; periodically rating the performance; and rewarding good performance by the Employer. Performance standards and elements must be reasonable, understandable, verifiable, measurable, equitable and achievable. The standards must be clear to the Employee.”

Where the Employee fails to meet these standards, the Employer is to do the following:

“The first duty of the Employer is to let the Employee know that his performance has fallen below the expected standards. The Employer should then propose training, guidance and fresh instructions to the Employee. The Employer is required to allow time to the Employee to improve. If no improvement is noted after a reasonable passage of time, the Employer should issue a formal warning to the Employee and advise the Employee he may be separated on account of performance. The next phase involves investigations by the Employer and consideration if the Employee could fit better in another role within the Organization. At investigations, the Employer should engage the Employee, and if at the end of these steps, dismissal of the Employee is the course that commends itself to the Employer, then Section 41 of the Employment Act 2007 must come into play.”

22. The record shows the Respondents did not adopt any of these steps in the process leading to the Claimant’s departure. There was no performance appraisal carried out. There were no targets set, which the Claimant failed to meet. There was no counseling and time given to her to rectify any shortcomings pointed out to her by the Respondents. There were no investigations, no warning and no hearing. The Committee Members allegedly met. The meeting is not captured in any minutes. It was a meeting in which the Claimant played no active role. The 3 Committee Members then visited her Office the following day, attempted to prevail upon her to resign, and when she did not, slammed her with the letter of termination alleging unsatisfactory performance. Nothing was said of conflict of interest.

23. The termination was fundamentally flawed, and did not meet the minimum statutory threshold for fair termination. The Claimant is entitled to compensation under Section 49 of the Employment Act 2007 and Section 12 of the Industrial Court Act 2011. The Respondents submit the Claimant should be granted 1 month salary in compensation as she secured alternative employment

24. The Court has considered that the Claimant mitigated her loss of employment by immediately securing alternative employment with NAVISTAT. She presently does not seem to work for NAVISTAT, describing herself as a business lady, occasionally serving enterprises on contracts. These mitigatory actions however do not change the gravity of the decision made against her by the Employer. She was denied substantive and procedural justice. The proposal to compensate the Claimant by payment of the equivalent of 1 month salary is disproportionate to the economic injury inflicted upon her by the Respondents. ***It is declared termination was unfair. The Court grants the Claimant the equivalent of the Claimant’s 10 months’ salary in compensation for unfair termination, at US\$20,000.***

25. She claims she did not go on leave from the time she became the Executive Officer, a period of 2 years and 10 months. The Respondents produced leave forms showing various leave days taken by the Claimant between 2008 and 2010.

26. She took leave from 24th November 2008 to 28th November 2008, which is a period of 5 days. The reason given was that she was to attend a 5 day residential course on governance at Serena Beach Hotel in Mombasa. The second leave record for 2008 is a letter dated 23rd June 2008 from the Claimant’s doctor, recommending she is placed on sick off of 7 days. With tremendous respect to the Employer, these do not appear to the Court to be the normal annual leave days, utilized by the Claimant. The first was absence from duty, occasioned by an official function. The second was sick off, unrelated to annual leave. The contract under which the Claimant served, does not state the number of annual leave days, which the Claimant was entitled to. She is entitled 21 days of annual leave, being the minimum number allowed under the Employment Act 2007, covering the year 2008.

27. For the year 2009, she took annual leave from 12th October 2009 to 16th October 2009, a period of 5 days. She indicated it was necessitated by personal reasons. It would qualify to be termed as annual leave utilization. It was not necessary to state the reason- compelling personal reasons- as if she had outstanding annual leave days, it was hers to utilize by right. She took another 5 days from 30th November 2009 to 4th December 2009. She indicated she applied for this 'prior to the transport workshop on 14th December 2009.' The Court finds these were days of annual leave properly utilized. In total she took 10 days in 2009, leaving her with a balance of 11 days.

28. In 2010, she went on leave from 2nd August 2010 to 6th August 2010. Characteristic of the past annual leave utilization, these amounted to 5 days. She again unnecessarily indicated the reason for annual leave utilization as 'traveling.' It fits within the regular annual leave entitlement. There was no other instance shown when the Claimant took any form of leave. She worked for 10 months' in 2010. Her last contract gave her 22 days of annual leave. She is entitled to $18 - 6 = 12$ days of annual leave for the 10 months worked in 2010.

29. Her full annual leave entitlement should therefore be $21 \text{ days} + 11 + 12 = 44$ days. The Respondents did not supply the Court with any other record supporting the claim that the Claimant was owed only 6 days of annual leave on termination. Translated into cash, the 44 days result in $-\text{US\$ } 2,000 \text{ divide } 20 \text{ working days} = \text{US\$ } 100 \text{ per day} \times 44 \text{ days} = \text{US\$ } 4,400$. ***The Respondents shall pay to the Claimant US\$4,400 in annual leave pay.***

30. ***The prayer for 1 month salary in lieu of notice is uncontested, merited and supported by law and fact, and is allowed at US\$2,000.***

31. ***The Claimant shall be issued her Certificate of Service forthwith, as required under Section 51 of the Employment Act 2007***

In sum, IT IS ORDERED:

- a. ***Termination of the Claimant's contract of employment was unfair;***
- b. ***The Respondents shall pay to the Claimant 1 month salary in lieu of notice at US\$2,000; 10 months' salary in compensation at US\$20,000; and 44 days of unutilized annual leave at US\$4,400- total US\$26,400;***
- c. ***The total sum to be paid within 30 days of the delivery of this Award;***
- d. ***The Respondents to release to the Claimant her Certificate of Service forthwith; and***
- e. ***No order on the costs and interest.***

Dated and delivered at Mombasa this 27th day of February 2015

James Rika

Judge