



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO 1032 of 2011**

***(Before: D.K.N.Marete)***

**ABRAHAM MARKS MITAO MUTIKHA .....CLAIMANT**

**Versus**

**MAY FREIGHT LIMITED.....RESPONDENT**

**JUDGEMENT**

By a memorandum of claim dated 20th June, 2011 this matter was brought to court. The issue in dispute has been cited as;

**(a) Unlawful/unfair termination**

**(b) Nonpayment of outstanding dues**

The respondent, by a respondent memorandum of response dated 15th July, 2011 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times he was employed by the respondent pursuant to a contract of service of 1st June, 2005 which contract set out the terms of employment – appendix 1 of the memorandum of claim.

On 20th January, 2009 the respondent terminated the claimant's contract in accordance with S.36 and S.45(2)(b)(ii) of the Employment Act, 2007 and clause 9(a) and (b) of the subsiding Collection Bargaining Agreement signed on 27th May, 2007 *inter partes* that detailed his clearance with the Finance Department. The claimant was on termination paid an amount of Ksh.14,929.00 through the District Labour Office, Nairobi. The claimant denies he was paid for leave accrued for six years as alleged by the respondent.

At all material times and particularly from early August, 1997 to 20th January, 2009 he was employed by the respondent as a porter and his last salary was Ksh.12,233.00. He was terminated on 20th January, 2009 a termination he deems unfair and unlawful and unjust and did not comply with the provisions of law relating to redundancy.

He prays as follows;

- (i) *One month's salary in lieu of notice..... Kshs.12,233/=*
- (ii) *Payment in lieu of untaken leave for 6 years*

(from 1997 to 2003) being Kshs.12,233/=X6 years.... Kshs.73,398/=

(iii) Statutory service payable @ 18 days

Salary for every completed year of service being

$18/30 \times \text{Kshs.}12,233/= \times 11 \text{ years} \dots\dots\dots \text{Kshs.}80,737/=$

**Total Claim.....Kshs.160,368/=**

The claimant avers that as a result of the abrupt unfair, wrongful and discriminatory termination from his employment, he suffered abrupt loss of income and trauma and inability to meet his continuing obligation for which he seeks compensation in damages at 12 months gross salary being:-

**Kshs.12,233/= x 12 months .....Kshs.146,976/=**

**Total.....Kshs.313,344/=**

**Less what was paid.....Kshs. 14,929/=**

**Net balance due.....Kshs.298,415/=**

The claimant further submits that despite demand and notice of intention to sue the respondents have refused and or neglected to acknowledge or meet the claim.

The respondent denies and submits that he lawfully terminated his claimant's employment vide a letter dated 20th January, 2009 and in accordance with S.36 and S. 45(2)(b)(i) of the employment Act, 2007 and clause 9(a) and (b) detailing his payments upon clearance. A cheque for Ksh.28,084.00 was released to the District Labour Office, Nairobi in respect of the claim for two of the employees, the claimant included. The claimant's terminal dues were Kshs.14,929.00

The respondent therefore denies owing the claimant a farthing in that his terminal dues were met. He also submits that the claimant is not entitled to prayers (c) and d as he was not declared redundant.

The matter came for hearing severally until the 12th November, 2012 when it was heard. At the hearing, the claimant reiterated and built on his case for unfair termination arguing that he was a member of the union but the same was not notified of his termination. The union raised the issue but this was ignored by the company. The Ministry of Labour intervened but this was not taken seriously and failed.

DW1, Duncan Okoth Oyoga on oath stated that he was the respondent's Human Resource Officer and knew the claimant who was a permanent employee. He had a contract of employment dated 20th February, 2005 and backdated to June 2003. He was employed as a porter, a loader of goods on to the plane. The contract was open ended with a clause 8 and 9 on termination of contract. At the time of engagement the claimant earned Ksh.7,670.00 but at departure this was Ksh.10,500.00

On 20th January, 2009, the claimant's services were terminated and the termination took into account the terms of engagement, the Collective Bargaining Agreement and the claimant was paid his terminal dues amounting to Ksh.14,929.00. The termination was not on redundancy but on seasonal fluctuations in the industry.

On cross examination, the witnesses testified that the letter of termination was given to the union. There is no indication of copying the same to the union. The union was also informed of the said termination.

The issues for determination in the circumstances are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?

2. Is the claimant entitled to the relief sought?

3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the claimant's employment was wrongful, unfair and unlawful. The respondent justifies the termination of the claimant's employment on S.36 and S.45(2)(b)(ii) of the Employment Act. These provide as follows;

45.(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

*(b) that the reason for the termination is a fair reason-*

*(ii) based on the operational requirements of the employer*

The respondent submits that this was based on lack of raw materials that affected the operations of the company and that the termination was in accordance with the law and terms of service as expressed in the employment contract. The law on unfair employment is stipulated under S. 45, Employment Act, 2007. S.45 2(c) and 45 (4)(c) are applicable to this case.

45.(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

*(c) that the employment was terminated in accordance with fair procedure.*

*(4) A termination of employment shall be unfair for the purposes of this Part where-*

*(c) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

The claimant testimony on oath is that he reported to work on 20th January, 2009 only to be served with a letter of termination and shown the door despite eleven years of service. There had not been any notice issued on this termination or at all. No reasons were proffered for termination and if any, these did not touch on the conduct or service of the claimant who had had a blemish free service of eleven years. The termination of employment is therefore unsustainable and untenable. It is wrongful, unfair, unlawful and unjust.

The law sits in the prove for legitimate grounds and methodology for termination of employment. It does not offer blanket conditions for termination of employment at the whims of the employer as was in this case. I therefore find a case of wrongful, unfair and unlawful termination of the employment of the claimant in this case.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. I therefore award compensation for the claimant as follows;

1. (i) Payment in lieu of notice.....Ksh.12,233.00

(ii) Statutory service payable @ 18 days

Salary for every completed year of service being

18/30 x Kshs.12,233/= X 11 years.....Kshs.80,737.00

(iii) 6 months compensation for

unlawful termination.....Kshs.73,398.00

Total

**Kshs.166,368.00**

2. I declare that the dismissal/termination of the employment of the claimant was unfair and unlawful.
3. The costs of this cause shall be borne by the respondent.

The claim for payment in lieu of untaken leave is not proven and therefore shall not be awarded.

Dated, delivered and signed the 4th day of March, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Mr. Makokha instructed by Namada & Company Advocates for the claimant/respondent.
2. Mr. Nyaberi instructed by Omwoyo, Momanyi and Gichuki & Company Advocates for the objector.