



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

**CAUSE NO. 554 OF 2012**

**BORNVENTURE MUNAVI KABBIS**

.....CLAIMANT

**VERSUS**

**BOB MORGAN SERVICES**

**LIMITED**

**[also referred to as BM SECURITY].....**

**RESPONDENT**

**JUDGEMENT**

1. The Claimant here relate to wrongful, unfair and unlawful termination of employment of the Claimant by the respondent.

2. On 3<sup>rd</sup> April 2012 the Claimant Bornventure Munavi Kabbis filed his claim against the respondent, Bob Morgan Services Limited, also known as BM Security seeking reinstatement and payment of his dues and in the alternative payment of compensation for unfair termination. On 13<sup>th</sup> June 2012, the Respondent filed their defence to the claim and admitted that the Claimant was their former employee but on 3<sup>rd</sup> April 2011 he failed to take proper control of a motor vehicle under his control resulting in an accident, this was gross misconduct and thus was summarily dismissed on 12<sup>th</sup> May 2011 and thus deny all the allegations in the claim. In evidence, the Claimant gave his sworn statement in support of his case while the Respondent called Dennis Micheka Orina as their witness. At the close of the hearing, both parties agreed to file their written submissions.

**Claimant’s case**

3. The Claimant was employed by the Respondent as a Security Guard until 12<sup>th</sup> May 2011 when he was summarily dismissed. The dismissal was arbitrary as there was no hearing or payment in compensation. The Claimant is seeking notice pay at kshs.14,136.31, salary due for May 2011 at Kshs.14,136.31, severance pay for 9 years all being kshs.63,613.35. the Claimant is also seeking a reinstatement or a salary pay of 20 years until his retirement age all being kshs.3,392,714.40, a Certificate of Service, duty allowance, and damages for unfair termination.

4. In evidence, the Claimant stated that he was employed by the Respondent on 7<sup>th</sup> March 2003 as part of the crew at the alarms and control room where he could offer security to various clients. He progressed through the ranks to become the Crew Commander and was in charge of a vehicle that he would use while attending to alarms and reach out to clients. He would investigate all reported incidents and file a report. He was allocated a driver for the vehicle. He had two other crew members accompanying him.

5. On 3<sup>rd</sup> April 2011 the Claimant left to attend to an alarm at Ongata Rongai near Laiser Hill at Nkoroi. It was raining and while on the road, another motorist who was overtaking them noticed a bump ahead and applied emergency brake causing the driver of the Claimant to hit this vehicle on the right side hence causing an accident. The Claimant remained at the co-driver's seat. He reported this incident to the control room. They took details and went to report to the traffic police at Ongata Rongai.

6. After one month the Claimant was called for a meeting with the Systems Manager, Human Resource manager and he was asked to explain the accident that took place on 3<sup>rd</sup> April 2011. After this meeting he was asked to return his uniform and return on the 9<sup>th</sup> April for further instructions. In the evening a colleague called him with information that he was to report back to work on 8<sup>th</sup> which he did. On 9<sup>th</sup> the Claimant as called by his supervisor and told to explain why he had reported back to work on 8<sup>th</sup> without authorisation. He was then told to return his uniform and go home.

7. After one month, the Claimant went back to work to make enquiries. At the registry he found his termination letter. It was a summary dismissal. He reported to the labour officer. The Respondent paid kshs.20, 416.00 but did not pay compensation for unfair termination.

### **Respondent's case**

8. The Respondent admitted that the Claimant was their former employee from 23<sup>rd</sup> March 2003 as an Alarms Response Crew and at the time of his dismissal he was serving as the Crew Commander. He had a contract dated 2<sup>nd</sup> September 2010 which was reviewed from time to time but the Claimant breached this contract by failing to discharge his duties as a Crew Commander with due care and diligence where on 3<sup>rd</sup> April 2011 he failed to take control of the vehicle assigned to him as a crew commander resulting in an accident. The vehicle was over speeding and failed to keep a safe distance from other vehicles resulting in an accident. The Claimant as the crew commander was mandated to ensure the driver of the vehicle assigned to him complied with traffic rules and regulations.

9. The Respondent also stated that on 8<sup>th</sup> May 2011 the Claimant was issued with clear instruction not to report to work pending investigations into the said accident but he defied the instructions and reported on duty. On 9<sup>th</sup> May 2011, the Claimant admitted failing to take care of a vehicle assigned to him and for reporting on duty against instruction on 8<sup>th</sup> May 2011. As a result of these breaches, the Respondent summarily dismissed the Claimant on 12<sup>th</sup> May 2011 on the grounds of gross misconduct and failure to obey lawful orders which was as under section 44 (4)(c) and (e) of the Employment Act.

10. The Claimant met with the Respondent human resource manager Mr Ngetich on two occasions where he was heard. While this issues of gross misconduct were pending, the Claimant had a warning letter dated 7<sup>th</sup> October 2010, on 22<sup>nd</sup> February 2011 the Claimant misused Respondent property by taking a vehicle assigned to him on an unauthorised detour and failed to inform the respondent. Upon dismissal, the Claimant was paid all his dues and a clearance certificate issued to him. The Claimant was paid one month's notice; salary for month worked but was not entitled to severance pay as claimed. This was a summary dismissal on gross misconduct and hence the issue of reinstatement does not apply. The Respondent inadvertently omitted to include in the final dues the sum of kshs.647.57 as two month's allowances which the Respondent is willing to pay.

11. In evidence to support the respondent's case Dennis Micheka Orina stated that he is the respondent's Administrative and Quality Assurance Manager and conversant with the claimants case as he worked under him. That the Claimant was talked with duties to take charge of vehicle he used in taking his crew command duties and was responsible for the staff under him, he was supposed to ensure proper use of the vehicle and the overall responsibility of crew command duties with due diligence and attention. On 3<sup>rd</sup> April 2011 while the Claimant was on duty attending to an alarm response, he caused the vehicle under his care to have an accident where it was driven carelessly and hit another motorist and that there was negligence on the part of the Claimant as he did not ensure that his driver kept his distance. As the overall responsible person in the use of the vehicle, the Claimant was to ensure the responsible use of the

Respondent property inclusive of vehicles. He was supposed to ensure the driver followed traffic regulations and stop him when over speeding. He was to caution the driver.

12. The witness also stated that on the 7<sup>th</sup> of May 2011, the Claimant was called to a meeting to explain the circumstances of the accident and present were other crew commanders, the team from the accident vehicle, technical manager and the human resource manager. The Claimant was heard on his defence and advised to report back to work on 9<sup>th</sup> May 2011 but he ignored these instructions and was at work on 8<sup>th</sup> May 2011. On 9<sup>th</sup> May 2011, the Claimant was summoned over his ignoring lawful orders which was a further breach of his contract and was thus summarily dismissed for gross misconduct over the vehicle accident and the report to work on 8<sup>th</sup> May 2011. All his dues were paid upon dismissal save for an omission of kshs.647.00 that the Respondent is willing to pay.

13. The question of summary dismissal though covered under section 44 of the Employment Act should be critically addressed before an employer can cause its application in any case. This is so because, to arrive at the point that an employee has grossly misconducted himself to warrant summary dismissal, there must be clear and unequivocal breach of the employment contract to a point that the situation cannot be salvaged in any other lawful manner other than resort to summary dismissal. Thus the law as under section 44(4) of the Employment Act outline some instances where certain acts when committed by an employee, the employer may invoke the summary dismissal rule.

14. Under section 44 of the Employment Act;

*(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an **employee from respectively alleging or disputing whether the facts giving rise to the same, or whether** any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—*

15. An aggrieved party has a right to dispute the facts giving rise to the summary dismissal and in such a case the court must therefore make an assessment as to the justification of such facts and the lawfulness of such action. In this case, the Claimant is alleged to have committed two acts that formed breaches of his contract of employment with the respondent. In the termination letter, the Respondent states;

*...It has been brought to our attention that on 7<sup>th</sup> May 2011, you were instructed not to report on duty by management over a pending disciplinary case. However, you defied these instructions and reported on 8<sup>th</sup> May 2011.*

*... further reference is made to an accident of 3<sup>rd</sup> April 2011 whereby you failed to take control of the vehicle assigned as a crew commander resulting in an accident.*

*Management has reviewed your performance in light if the above and found to be unsatisfactory. You are therefore terminated from service for gross misconduct in compliance with the Employment Act...*

16. on a charge or allegations that an employee ignored instructions as per section 44 (4) (e) of the Employment Act, such an employee must have been given clear and unambiguous instructions that when assessed with regard to the employee's action, clearly stand out as negating the clear and unambiguous instructions given by the employer. So what instruction did the Claimant fail to obey, follow or ignore to follow on the 8<sup>th</sup> of May 2011 when he reported to work? The evidence of the Claimant is of the nature that after he was told to return his uniform and go home he was later called by a colleague and told to report back to work. He was called over the phone. The Respondent witness on the other hand stated that when the Claimant was told to go home on 7<sup>th</sup> May 2011, he should not have come back until the 9<sup>th</sup> when he was told to report back. When the Claimant reported back to work, he was under supervision by an officer of the respondent; did this supervisor know of the status of the Claimant that indeed he was not

to report back to work until 9<sup>th</sup> May 2011? Was the Respondent in a position and capable of giving clear instructions to the Claimant in this respect? I find, communication with regard to work relations should be in writing, and for the avoidance of doubt, each employee should receive work related instructions in writing and where such an employee does not understand such written instructions, the same should be caused to be explained to the subject employee in a language that the employee understands best. Such clear and unequivocal communication should be clarified to such an employee in the presence of another employee for the avoidance of doubt. This is a duty of the employer. This is the essence of section 9(4) of the Employment Act and a best work place practice thus;

*(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that employee understands.*

17. Section 35 (3) is also important to quote;

*(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.*

18. The above is further given emphasis and affirmation under section 41(1) of the Employment Act thus;

*41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

19. Therefore, the clear and concise communication with an employee especially in disciplinary cases and where their employment is at stake should be done clearly and in a language that the employee understands. Language therefore becomes a critical tool to the employer to use to ensure the employee understands the issues and the decision taken. Apart from written communication, what is verbally shared must be followed with an explanation of what has been put into writing and in most cases this must be done in the presence of another employee as a witness. Where an employee is unionised, such communication must be done in the presence of the union representative.

20. In this case, the fact that the Claimant reported back to work, he was able to access his place of work and did his duties, this is a clear demonstration that either he did not understand the instructions given or his supervisor and his work colleagues who called him back to work did not understand or there was no communication to them that the Claimant was not authorised to report back to work until 9<sup>th</sup> May 2011. The claimant's admission that he indeed reported to work on 8<sup>th</sup> May 2011, is just a confirmation that he did not understand the instruction given to him on the 7<sup>th</sup> May 2011. This is a duty the Respondent failed to perform well hence the mistake by the claimant.

21. On the second issue of the accident, from the termination letter, the Claimant is said to have failed to take control of the vehicle assigned to him and thus management reviewed his performance in this regard and found the same unsatisfactory work. Was this therefore a case of gross misconduct or a case of unsatisfactory performance? Where gross misconduct is cited, the employer must show how the provisions of section 44 apply in such a case and where the issue of *performance* is cited, then the issue shifts to the application of section 41 of the Employment Act. This is so because Section 44 (4) of the Employment Act has laid out clearly the matters which if committed by an employee would attract summary dismissal. Of relevance to the case here, 'poor performance' or 'unsatisfactory performance' is not one of the outlined grounds under the Act that qualify as warranting summary dismissal. See the court decision in the case of **David Witachitsa Luhombo versus Kenital Solar Limited, Cause No. 33 of 2010**. Therefore where the issue of *performance* is made an issue, an employer must satisfy the provisions of section 41 of the Employment Act.

22. In this case, apart from the evidence that the Claimant was heard in the presence of the human resource Manager, I find no evidence that indeed this was a hearing of the claimant's case with regard to the issue of his unsatisfactory performance or the fact that he had received clear instruction not to report back to work on 8<sup>th</sup> May 2011 which he did. A disciplinary process is a crucial step that should be documented and not treated casually as the Respondent witness Dennis Orina attempted to justify when giving evidence. This witness was not present at the disciplinary hearing and could not tell exactly what transpired at such a hearing. Whether this was an investigation or a hearing of the serious allegations against the Claimant could not be clarified. At the end of the day, such a process was disputed by the Claimant as the person affected by the ultimate decision taken, that of his summary dismissal.

23. Where an employer fails to follow a procedure that by law they should guarantee to an employee before dismissal or termination of a contract of employment, such a process and decision becomes a nullity whatever the reasoning behind such a decision. This is one such case where due procedure was not followed the decision to dismiss the Claimant became procedurally unfair.

### **Remedies**

24. The Claimant is seeking reinstatement. Apart from pleading for reinstatement, the Claimant did not address this issue in his evidence at all. This will therefore not be addressed as an option for his consideration as he was not keen on it.

25. The Claimant is also seeking notice pay, salary for May 2011; duty allowances which have been admitted as having been paid save for the amount of Kshs.647.00 for allowances. This will be paid as having been admitted.

26. The Claimant is seeking severance pay. Severance pay does arise under the provisions of section 40 of the Employment Act in redundancy case. This did not stand out as one such a case. This will therefore be declined.

27. On the finding that the Claimant was unfairly dismissed, he is awarded compensation equivalent to six (6) months gross salary as at his time of termination, 12<sup>th</sup> May 2011.

### **Judgment is entered for the Claimant against the responding in the following terms;**

- a. **The Claimant was unfairly terminated;**
- b. **The Claimant is awarded compensation at Kshs.84, 816.86;**
- c. **Claimant is awarded the admitted amount of kshs. 647.00; and**
- d. **Costs of the suit.**

Delivered, dated and signed in open Court at Nairobi this 25<sup>th</sup> day of November 2014.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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