



**Mukhusi v Radar Limited (Cause 971 of 2018)
[2024] KEELRC 1113 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 971 OF 2018
NJ ABUODHA, J
MAY 9, 2024**

BETWEEN

BERNARD MUHATI MUKHUSI CLAIMANT

AND

RADAR LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 10th February, 2022, the claimant averred in the main that;-
 - a. In or about 1.3.1999 the Respondent engaged the services of the Claimant as Permanent Guard at a monthly salary of Kshs 5,505.45
 - b. The Claimant was issued with a written contract of employment and used to work /from 6:00am to 6:00pm or thereafter as directed by the Respondent.
 - c. The Claimant exerted his efforts and skills to the best of his abilities whole heartedly.
 - d. The Claimant did his work honestly and diligently throughout his work schedule as had been agreed that lasted 228months.
 - e. On or about 23.3.2018 the Respondent without notice or justifiable reason I terminated the Claimant and did not pay the Claimant terminal dues. '
 - f. The Claimant was dismissed verbally without any payment and was not even given reasons for his dismissal or audience.
 - g. The Respondent did not make the necessary statutory contributions.
 - h. The Claimants last salary was 18,706.00.



- i. The Claimant was dismissed without a hearing contrary to the principles of natural justice and section 41 of the [employment Act](#).
2. The respondent filed a response dated 23rd November, 2018 and averred among others that:
 - i. The Respondent admits to the averments of the Claimant in paragraphs 3,4,5 and 6 that the Claimant was employed by the Respondent as a security guard save for the fact that the Claimant was involved in disciplinary issues, to which he was issued with warning letters.
 - ii. In response to Paragraph 7, the Respondent denies the Claimant's averments that the Claimant was dismissed without justifiable reasons. The Respondent avers that the claimant was summarily dismissed due to gross misconduct.
 - iii. In further response to paragraph 7, the respondent avers that on 19th march 2018 the claimant reported to work late while drunk and failed to report to work the following day.
 - iv. The Respondent denies the contents of paragraph 12 that he was not paid salary in lieu of notice. The Respondent avers that it did not owe salary in lieu of notice since the Claimant was summarily dismissed for his gross misconduct and was therefore was not entitled to it,
 - v. Further In response to paragraph 12, the Respondent denies owing the Claimant any statutory contributions, allowances or overtime payments and therefore puts the Claimant to strict proof thereof.
 - vi. The Respondent further states that it is true that he was summarily dismissed for gross misconduct vide a Summary dismissal letter dated 23rd March 2018. However, this was after reporting to work late while drunk and absconding from work preceding his summary dismissal as enunciated upon above.
 - vii. Related to the above, the Claimant has been issued with his Certificate of Service and therefore, he has no valid claim against the Respondent herein whatsoever.
3. Counsel in the matter consented to dispose of the suit by way of written submission relying on the witness statements and documents filed in support. From the record however it would seem only the claimant filed submissions.
4. In his undated statement filed with the claim, the claimant averred that he was employed on 1st March, 1999 as a security guard at a monthly salary of Kshs. 5,505.45 and that he was issued with a letter of appointment. It was his statement that he was neither housed nor paid house allowance. According to him he worked whole heartedly and to the best of his abilities yet on or about 23rd March, 2018 the respondent terminated his service without notice and justifiable reason and further was never paid his terminal dues. At the time of dismissal, he had worked for 228 months and his monthly pay was Kshs.18,706/-. According to the claimant, he was dismissed without a hearing contrary to rules of natural justice.
5. The respondent's witness Sharon Sambu stated among others that she was the respondent's Human Resource Manager. She admitted that the claimant was respondent's employee and that he was involved in disciplinary issues during his employment in respect of which he was issued with warning letters. The claimant was later on dismissed summarily for gross misconduct after he reported to work late and drunk on 19th March, 2018 and failed to report to work the following day.
6. In his closing submission, Mr. Khalwale for the claimant submitted in summary that on 19th March, 2018, the claimant went to visit his sick child at Huruma and got stuck in traffic and requested his



colleague who was a day guard to hold for him. The claimant immediately received a call from the supervisor informing him that he should not report to duty as he had been replaced. The supervisor dismissed the claimant for gross misconduct for being drunk and absent from duty without any proof and without following due process. Counsel further submitted that the claimant was dismissed without notice. This according to Counsel was contrary to sections 43, 44 and 45 of the Employment Act.

7. On prayers sought, the claimant submitted since the dismissal was without notice and without following due process the claimant was entitled to compensation for unfair termination. Further, for the period the claimant worked he was not provided with a house or a housing allowance. The claimant also never went on leave during the period. No submission was made on the issue of underpayments and overtime.
8. The parties herein consented to have the matter disposed of by written submissions meaning the parties they were satisfied with the evidence and documents on record in support of their respective cases. The Court however noted that the claimant did not provide any evidence or document to support his allegation of underpayment, non-payment of overtime and house allowance. These heads of claim though pleaded in the statement of claim, the claimant neither alluded to them in his witness statement nor provided any evidence in their support. In any event the payslip attached at page 9 of his bundle of documents shows he was allowed a constant figure of Kshs. 3,260/- as overtime further there was a housing allowance of Kshs. 1,026/-. These heads of claim will therefore be disallowed for lack of proof.
9. On the grounds for dismissal, the respondent dismissed the claimant on the grounds of reporting to work late while drunk. The respondent provided previous warning letters issued to the claimant in that regard. From the record the claimant did not refute the warning letters.
10. The claimant in his statement merely alleged that he was dismissed without reason and that the dismissal was without notice. This however cannot be true since the respondent placed on record the two previous warning letters to the claimant stating clearly the respondent's disapproval of his constant lateness to work and coming to work while drunk. The claimant was subsequently dismissed summarily in writing. It therefore cannot be right that the claimant was not aware of the reasons for his dismissal. The allegation by his counsel that the claimant was dismissed by his supervisor despite having informed him that he went to see his sick child in Huruma cannot be admissible as evidence. Even if that was the case, Counsel cannot in submissions adduce evidence. The claimant neither pleaded nor stated such a thing in his witness statement. The allegation by Counsel is irregular and cannot be considered as evidence.
11. Absence from work without authority or lawful cause and further reporting to work too intoxicated to work is a ground for summary dismissal. In the absence of any sufficient evidence from the claimant displacing the allegations against him, he has failed to discharge the burden of proof cast upon him by section 47(5) of the Employment Act.
12. In conclusion the claim is found without merit and is hereby dismissed with costs.
13. It is so ordered.

DATED THIS 9TH DAY OF MAY, 2024

DELIVERED THIS 9TH MAY OF MAY, 2024

ABUODHA NELSON JORUM

JUDGE

