



Kenya National Private Security Workers Union v KK Security Services Limited (Employment and Labour Relations Cause E039 of 2023) [2024] KEELRC 1701 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1701 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E039 OF 2023**

HS WASILWA, J

JULY 2, 2024

BETWEEN

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT

AND

KK SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. This suit was commenced by the claimant through a Memorandum of claim dated 22nd August, 2023, alleging that one of its union members' Mr. Nelson K. Maiyo had been dismissed unfairly. The claimant sought for the following reliefs; -
 - a. That the Honorable court does find and establish that the dismissal of the grievant in this matter was totally unlawful.
 - b. That after establishing the unfairness by the Respondent, the Honorable court be pleased to order for a remedy in terms of payment as hereunder; -
 - i. That the grievant be paid one-month salary in lieu of notice based on the provisions of the legal notice No.2 of 1st May 2018.
 - ii. That the grievant be paid for ten months pending leave plus travelling allowance as given under the provisions of paragraph 10(1) and sub paragraph 10(2) of the protective security services order legal notices no. 53 of 2003 corr. No. 63 of 2003 as is read together with paragraph 13 of the same legal notice.
 - iii. That the grievant be paid for the 15 days worked in February 2020 but was not paid at termination time. Master roll closes on 25th of every month.



- iv. That the grievant be paid for overtime compensation as given under the provision of section 6 and 7(1)(a)&(b) and (2) of protective security services order, as read together with section 27(2) of the [Employment Act](#).
- v. That the Grievant be paid for rest days based on the provision of section 8 of protective security services order legal notices no. 53 of 2003 corr.No.63 of 2003 as read together with Section 27(2) of the [Employment Act](#).
- vi. That the Respondent pays the grievant compensation based on the provision of section 49(1)(c) of the [Employment Act](#), 2007.
- vii. That the Respondent to issue the grievant with a certificate of service in the meaning of section 51 of the [Employment Act](#) 2007.
- viii. The Respondent to pay costs of this suit.
- ix. Any other award the court may deem fit to grant.

Claimant's case.

2. The summary of the claimant's case is that the grievant Nelson Maiyo, is a member of its Union and at all material times an employee of the Respondent, having been employed by the Respondent as day security guard in Nakuru. That he was earning a salary of Kshs 18,000 per month.
3. The claimant states that the grievant used to work from 6am to 6pm, clocking 12 hours per day. However, that he was granted weekly rest days as prescribed under section 27 of the [Employment Act](#).
4. That the grievant worked for the respondent for one year nine month and within that period, he never enjoyed any leave. That he was terminated on 10th March, 2020, while earning Kshs. 21,500.
5. The circumstances that led to his termination is that on 24th February, 2020, he reported to his place of work at west side mall as usual, when his supervisor approached him and told him that he was smelling of Alcohol. Subsequently, he was taken to mediheal hospital for test and told to await results of the test.
6. The next day on 25th February, 2020, he was served with a Show Cause letter for intoxication and issued with an invitation for disciplinary hearing letter together with a suspension letter till 2nd March, 2020 to pave way for investigations.
7. On 3rd March, 2020, the grievant received another letter extending his suspension to 8th March, 2020 and on 10th March, 2020, he was dismissed from employment.
8. He stated that the termination was unfair as the results of the laboratory test did not match the time the samples were taken and the mobile phone indicated on the result slip was not his. Further that the ample he went for a copy at the hospital did not match, that which the Respondent had shown him.
9. The grievant appealed the decision of the Respondent by the letter of 22nd May, 2020 on the basis that the result issued did not match with his information as there were two alcohol test issued by Mediheal one showing 145.6mx/dcl and another showing 146.5mx/dcl, shedding doubt to the credibility of the tests taken. However, that the Respondent upheld the dismissal regardless of the discrepancies on the said test results.
10. The Claimant stated that the grievants worked long hours without overtime pay.



Respondent's case

11. The Respondent entered appearance on 20th September, 2023 through the firm of Oseko & Ouma Advocates LLP and filed a response to claim on 24th October, 2023 denying the entire claim and stating that the termination of the grievant was regular and legal as the Respondent followed due process.
12. The Respondent stated that the grievant earned Kshs 14,480 per month. Also that he worked within the hours provided by the law and thus did not work overtime.
13. On leave pay, the Respondent stated that the grievant utilized some of his leave days during his employment. Further that he was paid all his salary at the time of termination.
14. It is averred that the circumstances leading to the grievant termination is that the grievant reported to work late at 6:50am instead of 6.00 am, prompting his supervisor to find out the reason for delay only to realize that the grievant was intoxicated and unable to discharge his duties. That the Respondent, in the bid to ascertain that fact, took the grievant to mediheal hospital for blood test for traces of alcohol, which was confirmed.
15. The Respondent stated that the grievant was served with a show cause letter, together with an invitation letter for disciplinary hearing on 25th February, 2020 and granted an opportunity to defend himself on 10th March, 2020 where the allegations were confirmed and the Respondent resolved to terminate the services of the grievant.
16. On the discrepancies on the phone number, it was stated that Mediheal hospital explained that the anomaly arose as the grievant's blood sample had to be taken to India for analysis. But that it was conformed that the grievant was intoxicated on the fateful morning.
17. The Respondent maintained that the grievant was terminated for reporting to work while intoxicated and that he was subjected to due process recognized under the law, as such the termination was justified.

Evidence

18. During hearing, the grievant, Nelson Maiyo, testified as CW-1 and adopted his witness statement of 24.2.2020, then produced the claimant's documents as his exhibit 1-5.
19. Upon cross examination, he testified that he has not produced any documentation to show that he used to work from 6am to 6pm. He told this court that on the fateful day, he reported to work quarter to 7am and confirmed that he was late that day. He testified that he was approached by his supervisor and told that he was smelling Alcohol and on 10th March, 2020, he sacked. He told this court that the reason for termination was of smelling Alcohol and being late. He testified that the Respondent subjected him to disciplinary hearing. He stated that the report from medical showed that his blood had traces of Alcohol. Also that he appealed the decision of the Respondent but that the Respondent upheld its decision. He testified that he reported the issue to its Union who took the matter for conciliation and that the conciliator made recommendations that were not complied with by the Respondent, leading to the filling of this case. He confirmed that he was issued with Certificate of Service.
20. On re-examination, he testified that there were two results from the same hospital and he was not informed that it showed traces of alcohol in his blood. He testified that he had not taken any alcohol on the said day as such the reason for termination was not justified.
21. The Respondent summoned its supervisor stationed at Westside Mall, Ms. Nancy Cherop as RW-1 who adopted her witness statement of 16/10/2023 and stated that she has been a supervisor at KK security for 5 years and known the grievant for the last one year as his supervisor. She confirmed that



the grievant arrived to work late while intoxicated, prompting her move to have him taken to hospital to check Alcohol levels as it was a company policy not to work while intoxicated.

22. The respondent second witness was Christine Madanji, Respondent' Human resource office testified as RW-2 and also adopted her witness statement of 16/10/23 and produced the Respondent documents as exhibit 1-26. It is her testimony that she was informed by Nancy Jerop, the grievant's supervisor that the grievant had reported to work while smelling alcohol, a fact that was confirmed in mediheal hospital through blood test. That the grievant as subjected though proper procedure as such the termination was justified in both reason and procedure.
23. Both witnesses were not cross examined by the claimant as they were not present in Court during the hearing of these witnesses.

Claimant's Submissions.

24. The claimant submitted on two issues; whether the dismissal of the grievant was fair and whether the claimant is entitled to the reliefs sought.
25. On the first issue, it was submitted that the law governing termination is sections 41, 43, 45 and 47 of the *Employment Act*, which require that for a termination to be justified the Employer has to demonstrate that the reason for termination was valid and that due disciplinary procedure was followed before the said termination. In support of this, the Claimant relied on the case of Walter Ogal Anuro V Teachers Service Commissions [2013] eKLR.
26. Accordingly, it was submitted that the reason for termination was for reporting to work while drunk, when the result given by mediheal hospital differed in both the percentages of alleged alcohol, the time when the said samples were taken and the phone number indicated in the said results kit, confirming that the alleged intoxication claim was not proved by the claimant to warrant the dismissal. In support of this, the claimant relied on the case of Kenfreight(EA) Ltd V Benson K Nguti[2016] eKLR where the court held that;-

“ termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is in itself not fair.”

27. The claimant also relied on the case of Charles Musungu Odana V Kenya Ports Authority [2019] eKLR, where the court held that;-

“ it is now clear that the burden placed on the employer by section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”

28. The claimant submitted that the grievant was terminated for being intoxicated and or being under the influence of Alcohol, however that there was nothing to show that the alleged intoxication affected the duties of the grievant, in a way that he was not able to discharge his duties as is required of him. In support of this, he relied on the case of *AVC Management Company Ltd t/a Mnarani Club v Washe (Employment and Labour Relations Appeal 03 of 2022)* [2022] KEELRC 4153 (KLR) , where the court held that;-

“ Section 44 of the *Employment Act* entitles an employer to terminate an employee if the employee is shown to have committed acts of gross misconduct while on duty. Under section 44 (4) (b) of the Act, one of the acts that comprise gross misconduct is if an employee



gets intoxicated while at work. However, mere intoxication is not a sufficient reason to terminate an employee. Intoxication becomes a ground for gross misconduct only when it is shown to have rendered the employee incapable of performing his duties. Indeed this fact is acknowledged by the appellant's counsel in his submissions before the trial court.”

29. To buttress its argument, the claimant relied on the case of John Rioba Maugo v Riley Falcon Security Services Limited [2016] eKLR, where the court held that;-

“The employer therefore has the burden not only of proving intoxication, but also the unwillingness or incapability of the employee to perform his work due to such intoxication. I however do not agree with the Claimant's argument about scientific proof of drunkenness. It is inconceivable that the employer would be required to bundle an employee into a vehicle and transport him to a medical facility then make agree to extraction of his blood to be used in the test for the level of alcohol in his blood. Even if this were possible, there is no legally set limit for drunkenness for all types of engagements. Again people react differently to alcohol. Some people become intoxicated by very low doses of alcohol while other can consume large volumes without showing any signs of intoxication. Not all people would render themselves unwilling or incapable of performing their duties at the same level of intoxication. There is therefore no generic scientific measure of intoxication. For instance, the level at which a pilot would be considered incapable of performing his duties is quite different from that at which say a teacher would be considered so. That is not to say that intoxication cannot be a ground for summary dismissal. Section 44(4)(e) provides that it is a ground for summary dismissal. In my opinion what an employer ought to do is come up with a policy of determining intoxication making an employee unwilling or incapable of performing his work. This can include observation of the employee's response to certain questions or commands, asking the employee to perform simple tasks such as standing on one leg, writing a specific sentence and or any other function that an intoxicated person cannot perform. These can then be recorded in the presence of at least two witnesses. Physical observation is in my opinion the best way to determine if an employee is so intoxicated as to be incapable or unwilling to perform his work. In this day and age of smart phones, all these can be audio-recorded.”

30. Accordingly, it was submitted that the Respondent only evidence that showed that the grievant was intoxicated was done via blood sample that was highly contested as the hospital gave two contradicting results, which called for another test that was never taken as such the alleged intoxication was never ascertained.

31. On procedure, the claimant submitted that the grievant was not subjected to fair procedure as required under section 41 of the *Employment Act* and reiterated by the Court in Jacqueline Kanja Vs Visa Cemea Holdings Limited [2014] eKLR. He argued that the Respondent did not tender any minutes of the disciplinary hearing to confirm that the charges were read to the grievant and also that the grievant was afforded an opportunity to face his accuser in the disciplinary hearing. Additionally, that since the results were contested, the Respondent ought to have addressed the discrepancies before making a decision to dismiss the grievant from employment. It is on that basis, that the claimant submitted that the procedure followed was not proper.

32. On reliefs sought, the claimant submitted that the grievant was terminated without notice as such, he should be paid notice pay.

33. On leave pay, it was argued that the grievant did not take his leave for the period between 1st August, 2019 to 1st March, 2020 and thus entitled to Kshs. 5,611 being pro-rata leave pay for the said period.



34. On overtime pay, the claimant submitted that the grievant reported to work at 6am and clocked out at 6pm, working for 12 hours a day, which result to 4 overtime hours which was not paid for the period between 1st June, 2018 to 28th February, 2020 save for the months of January to March, 2020 which the Respondent paid him Kshs 5838.22. therefore, that the overtime pay for the unpaid period is Kshs. 44,877.48. Additionally, the claimant prayed for payment of rest days for the entire period of employment because none was paid to the grievant, neither was he granted any rest day throughout his employment.
35. On days worked and not paid, the claimant submitted that the grievant was paid Kshs. 4,850 leaving a balance of Kshs. 3,458.50.
36. The claimant submitted that having argued that the termination was unfair in both fonts, the grievant should be awarded maximum compensation for the unfair termination in line with section 49(1)(c) of the *Employment Act*.
37. On costs, it was submitted that costs follow event and therefore that the Claimant should be awarded costs of this suit.

Respondent's Submissions

38. The Respondent submitted on three issues, whether the dismissal was fair, whether the claimant is entitled to the relief sought and who should bear costs of this suit.
39. On the first issue, it was submitted that the claimant was dismissed for reporting to work while intoxicated, a fact which was confirmed in Mediheal hospital through blood test. Further that he was subjected to elaborate disciplinary hearing including Appeal mechanism where he was accompanied by an employee of his choice during both disciplinary and Appeal process therefore that proper process was followed.
40. To support is argument, the respondent relied on the case of Janet Nyandiko Vs Kenya Commercial Bank Limited [2017] eKLR where the Court held that;-

“the parameter for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are in build in the same provisions. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and the capability of the employee up to the date of the termination. The extent to which the employer had complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.”
41. On reliefs sought, it was submitted that the dismissal of Nelson Maiyo from employment was regular and lawful and thus the claimant does not deserve the relief sought. Further that the claimant demanded to be paid his dues as per the recommendation of the conciliator as such, he is estopped under section 120 of the *Evidence Act*, from demanding for any relief outside that which was ordered by the Conciliator, In any case, that the grievant was paid all his dues as per the conciliators



recommendations and issued with certificate of Service. In support of this, the Respondent relied on the case of Serah Njeri Mwobi Vs John Kimani Njoroge [2013] eKLR where the Court held that;-

“the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

42. Accordingly, that the Claimant is estopped from seeking for anything outside that which was granted by the conciliator being the sum of Kshs 38,370 as his terminal dues, that were paid by the Respondent to the grievant on 22nd February, 2024.

43. It was also submitted that the claimant and by extension the grievant approached this court with unclean hands as they failed to inform this court that they had been paid terminal dues and only mentioned the same upon cross examination contrary to the maxim of equity that states that, Equity calls to those seeking its aid to come before it with clean hands and also do equity. This was reiterated by the court in Mohammed Shally Sese (Shah Sese) V Fulson Company Ltd & Another [2006] eKLR and the case of John Njue Nyaga V Nicholas Njiru Nyaga & Another [2013] eKLR where the Court held that;-

“it is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings. The Applicant has not done so and is under-deserving of the Orders he seeks.”

44. On costs, the Respondent submitted that section 27 of the [Civil Procedure Act](#) provides that costs follow event as such having submitted that the termination was justified, the claimant should be condemned to pay costs of this suit for pursuing a claim that had been settled prior to hearing of this suit. In support of this, he relied on the case of Farah Awad Gullet V CMC Motors Group Limited [2018] eKLR where the Court reiterated and adopted the position of Retired Justice Richard Kuloba in his book; *Judicial Hints on Civil Procedure*, 2nd Edition, 2nd Edition, where the Judge opined that;-

“the law of costs as is understood by the courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part- no omission or neglect and no vexatious or oppressive conduct is attributed to him which could reduce the court to deprive him of his costs- the court has no discretion and cannot take away the plaintiff’s right of costs if the defendant however innocently has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct is entitled to the costs of the suit as a matter of course .”

45. I have considered all evidence and submission of the parties herein. The grievant case is that he was unfairly terminated by the Respondent on account of being intoxicated based on a false and contradictory report.

46. The grievant gave evidence before court and when cross examined he admitted he was to report to work at 6 am but he reported late at 6.45 am.

47. As concern being intoxicated, it is also true that when his supervisor suspected that the grievant was intoxicated she took him to Medihill Hospital for a checkup.

48. From the documents produced by the grievant, blood was drained from him and taken to SRL Laboratory India and they showed the alcohol content was high 50-100.



49. The doctor one Dr. Nun Diyanals indicated that the blood was drawn on 24th February 2020 but the test was conducted on 26th February 2020.
50. Despite the Claimant indicating that the documents were contradictory, I do not find this contradictory.
51. That notwithstanding, it is true it is true that the grievant came to work late and as he admitted and this is the ground for summary dismissal as per section 44 of the Employment Act which provides for grounds summary dismissal and section 44 (a) states: “without leave or other lawful case, an employee absents himself from the place appointed for the performance of his work”.
52. In my view, the grievant having agreed that he reported to work late, I find that there were valid reasons for his dismissal.
53. The grievant has also agreed that he was taken through disciplinary process. He was invited for the disciplinary hearing vide a letter dated 25th February 2020. He was to appear on 3rd March 2020 at 10 hours.
54. The minutes of the disciplinary hearing were produced in court by the grievant as exhibit for the hearing that proceeded on 10th March 2020.
55. Section 45 (2) of the Employment Act 2007 states as follows:-
- “ 45.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
related to the employees conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”
56. Having found that there were valid reasons to warrant the grievant dismissal and that he was taken through a fair disciplinary process, I return the verdict that his dismissal was fair and justified.
57. The grievant sought various remedies from this court. Having found he was fairly and justly dismissed, his claim for 1 months’ salary in lieu of notice is not payable.
58. He also sought to be paid 10 month pending leave plus travelling allowance as provided under paragraph 10 (1) and 10 (2) of the protective security services under legal notice No. 63 of 2003.
59. Leave is not calculated as per a Legal notice but as per the employment contract and the law. There is no indication that the grievant’s contract was pegged on Legal Notice No. 63 of 2003.
60. As per the Employment Act 2007, he was entitled to 21 days leave per year under section 28 of the Employment Act.



61. That being the case and the grievant having worked for 1 year 9 months, on pro rata basis, he is entitled to leave days for the period being from 1st August 2019 to 1st March 2020 as pleaded which is Kshs 5,611.
62. On overtime the grievant submitted that he worked from 6 am to 6 pm working 12 hours a day which resulted to 4 overtime hours per day. He avers he was paid overtime of 5,838.22= from January to March 2020 but the rest of the period he was not paid being 50,715.10/=
63. The Respondent indicated that they paid the grievant all that was recommended by conciliator. The conciliator had recommended that the grievant be paid one month salary, prorata leave, days worked in February, underpayment of wages, overtime worked and not paid and be issued with a Certificate of Service.
64. Indeed the grievant indicated that he was issued with a Certificate of Service but there is no evidence that he was paid as recommended by the reconciliation.
65. I therefore find the Claimant is also entitled to salary for days worked and not paid in March 2020 = 8,308.50/=
66. I also award him overtime pay as pleaded = 50,715.70/=
Total payable = 64,635.2/=
Less statutory deductions
67. The Respondent will pay costs of this suit plus interest at court rates with effect from the date of the judgment.

JUDGMENT DELIVERED VIRTUALLY THIS 2ND DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Opar holding brief for Claimant – present

Omurimba for Respondent – Present

Court Assistant - Fred

