



**Chemengich v Radar Limited (Cause 36 of 2017)  
[2025] KEELRC 638 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 638 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 36 OF 2017  
K OCHARO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**SAMMY CHEMENGICH ..... CLAIMANT**

**AND**

**RADAR LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By Statement of Claim dated 19<sup>th</sup> December 2016, the Claimant sued the Respondent seeking the following reliefs;
  - a. KShs. 273,500.00
  - b. Costs of the Claim.
  - c. Interest on (a) & (b) above at Court rates from the date of filing this suit until payment in full.
  - d. Return of Original academic and professional certificates.
2. The KShs. 273,500.00 is tabulated as;
  - a. W554R4REDSalary for October Kshs. 14,300.00
  - b. Two months' salary in lieu of notice Kshs 28,600.00  
@Kshs 14,300/= per month
  - c. Severance pay for 2 years Kshs 14,300.00
  - d. Compensation for earned but untaken Leave day KShs. 42,900.00
  - e. NHIF Remittances from April 2015 to October 2015 @Kshs 300 per Month KShs.1,800. 00



f. Damages for unfair termination 12 months' gross salary, KShs. 171,600.00

Total Kshs. 273,500.00

3. The Respondent resisted the Claimant's Claim through a Memorandum of Reply dated 30<sup>th</sup> January 2017, contending the summary dismissal against the Claimant was lawful and justified on account of his absenteeism from work, and as such, the reliefs he has sought cannot be availed to him.

#### **Claimant's case**

4. It was the Claimant's case that he first came into the employment of the Respondent as a guard in December 2012. He worked as such for the Respondent until October 2015, when his employment was terminated. At the time of the termination, his monthly salary was KShs. 14,300/=.
5. In October 2015, he got sick. He informed his supervisor and sought permission to be off duty to seek medical attention. The supervisor granted permission. He was supposed to utilize his off days. He remained off duty for seven more days as he was unable to access treatment due to lack of money and his NHIF card had a problem. It hadn't been updated, as the Respondent had not remitted contributions on his account for six [6] months.
6. Upon his return to work, his employment was verbally terminated by the Human Resource Manager, Mr. James Mwanzia, who asked him to return his work uniform.
7. He asked for his original academic certificates, which had been retained by the Respondent to be returned, but the same were not.
8. He asserted that the summary dismissal against him was unlawful and in contravention of provisions of Sections 41 and 45(1) of the *Employment Act*. The reasons for the dismissal were not explained to him, and he was not given an audience before the dismissal.
9. Cross-examined by Counsel for the Respondent, the Claimant stated that his off days at the material time were to run from 1<sup>st</sup> to 4<sup>th</sup> October 2015. These days weren't sick-off days. He went to the hospital on 3<sup>rd</sup> October 2015. He wasn't treated immediately because of the problem with his NHIF card. He called his supervisor, Job Omondi and informed him of his situation. Omondi allowed him to be off duty until he got well.
10. The Claimant stated that per the contract of employment, he was supposed to work six days a week. He used to work from 6:00 am to 6:00 pm.
11. His absence from duty was with a justified reason, and he had medical documents to support it.
12. The Claimant presented Ms. Barongo Nyaboke [RW2], a nurse at Cherengani Nursing Home, to testify in support of his case. She confirmed that the Claimant was treated at the Hospital and discharged on 3<sup>rd</sup> October 2015. She produced a discharge summary as an exhibit.
13. She stated that though the Claimant was supposed to be operated on, the same was not done as his NHIF card had a problem.

#### **Respondent's case**

14. The Respondent presented one witness, Beryl Odhiambo to testify on its behalf. The witness confirmed that at all material times, the Claimant was employed as a security guard and stationed at Family Bank, Kariobangi Branch. Sometime in October 2015, it came to the attention of the



- Respondent that the Claimant had failed to report to duty from 5<sup>th</sup> October 2015 for over two weeks without any official leave or information of his whereabouts.
15. She stated that given the strict nature of work and service which the Respondent provides, security guards are required to be present whether day or night with specific reference to banks which require security guards to be on duty at all times. When the Claimant failed to report to duty, the Respondent's client, Family Bank, contacted the Respondent's office seeking to find out why the Respondent hadn't provided them with security services. That is when it dawned on the Respondent that the Claimant had absconded duty.
  16. The Respondent's efforts to contact and find out why the Claimant had not reported to work as required were futile, and thus, the Respondent proceeded to summarily dismiss the Claimant after three weeks of absence.
  17. The Claimant did not present any medical documents to support his claim that he was unwell during the time he was absent from duty. He was away from duty from 5<sup>th</sup> October 2015 to 29<sup>th</sup> October 2015, when he resurfaced.
  18. The Respondent's decision to summarily dismiss the Claimant from employment was informed by the nature of the industry within which the Respondent operates as well as the need to guard its reputation. The Respondent adhered to the provisions of the law in summarily dismissing the Claimant.
  19. The Claimant refused to collect the dismissal letter. He failed to return his work uniform as was required. The Respondent acknowledges owing the Claimant salary for four [4] days worked in October 2015. It also admits having had his certificates, which now have been released back to him.
  20. Cross-examined by Counsel for the Claimant, the witness stated that the Claimant was employed under a contract of employment dated 17<sup>th</sup> December 2012. It was for 90 days. Thereafter, there wasn't any other contract of employment executed by the parties.
  21. She further stated that the Claimant never applied for leave throughout his service. For the earned but unutilized leave days, the Claimant was not compensated.
  22. The Claimant was entitled to seven days of sick leave within the first two months and, thereafter, thirty days of sick leave.
  23. The Claimant deserted duty; as such, the Respondent didn't give him any show cause notice. He was not heard because he was absent. He was dismissed in absentia.
  24. The witness testified further that the Respondent hasn't placed before the Court any document from which the alleged effort[s] to trace the Claimant can be discerned.
  25. Throughout his tenure, the Respondent made remittances to the NHIF. However, the Respondent has no document to prove that it did from April to September 2015

### **Claimant's Submissions**

26. The Claimant identified the following issues for determination: whether the termination of the Claimant's employment was unfair and unlawful and whether the Claimant is entitled to the prayers sought in the statement of claim.
27. The Claimant submitted that he was summarily dismissed from his employment and that the dismissal was substantively and procedurally unfair. The dismissal wasn't effected in accordance with the provisions of Sections 41, 43, and 45 of the [Employment Act](#).



28. In a dispute like the instant, the employer bears the burden to demonstrate the reason for the dismissal and that the same was valid and fair. Absent of the proof, the dismissal shall be deemed unfair.
29. The Claimant submitted that the Respondent's witness (RW1) made vital admissions during her evidence under cross-examination, including that the Claimant was neither served with a notice to show cause nor the summary dismissal letter and that the Respondent doesn't have any material from which the efforts it made to reach out the Claimant, can be discerned.
30. It was further submitted that the evidence by the Claimant clearly demonstrates that he was absent from duty as he was unwell. He notified his supervisor, and the supervisor allowed him to be off duty. It cannot, therefore, be right for the Respondent to assert that he was absent from duty without permission. Sick leave is an employee's right under Section 30 of the *Employment Act*. As required by the law, when he fell sick, he informed the Respondent through the supervisor about it. Further, he gave them medical documents to justify his absence.
31. The summary dismissal was without procedural fairness. The dictates of Section 41 of the *Employment Act* were not adhered to. In her evidence under cross-examination, the Respondent's witness admitted that he was not given an opportunity to defend himself. For this, the Court should find the summary dismissal against him procedurally unfair. To buttress the submission, reliance was placed on the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, where the Court held:

“But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.

Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

32. In the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR, the court opined as follows;

“37. The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must, where possible, demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels.

38. It is desirable that upon realizing that an employee is no longer reporting at work, the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues



the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.”

33. Having established that the termination of the Claimant was unfair, unjust, and unlawful, the Claimant herein is entitled to compensation as provided for under the provisions of Section 49 of the *Employment Act* and is further entitled to the other reliefs sought in the statement of claim.

### **Respondent’s submissions**

34. The Respondent identified the following issues for determination: whether the Claimant was absent from his workstation and whether the Claimant’s summary dismissal was lawful.
35. The Respondent submitted that the actions of the Claimant, particularly, absconding duty, were unwarranted and a gross violation of his employment contract as the nature of his duty required him to be present at all times. The allegation that he was unwell was unsubstantiated and should be ignored. His action could attract the sanction of summary dismissal rightly and lawfully under section 41 of the *Employment Act*.
36. To fortify the foregoing submission, reliance was placed on the case of *Consolata Kemunto Aming’a v Milimani High School* [2019] eKLR. where the Court held that,

“The above put into account, the other matter raised in defence was that from 21st to 28th March 2017, the claimant was absent from work without due cause and or permission by the respondent. When the Board of management met to discuss the claimant’s case, she could not be found. Upon payment of her wages and dues, she failed to report to work and opted to report the matter to the labour officer.

The claimant did not explain her whereabouts from 21st to 28th March 2017. Absence from work without good cause and the permission of the employer is a matter categorised as gross misconduct under section 44(4) of the *Employment Act*, 2007.”

37. Similarly, in *Ismael Otieno Omollo v Oshwal Education and Relief Board t/a Oshwal Academy Mombasa* [2021] eKLR, the court held that:

“An employee who is absent from work is under an obligation to notify the employer of the reason for absence and seek permission for extension of absence. It is not enough for an employee to assume the employer is aware of the employee’s predicament.”

38. In conclusion, the Claimant breached his duties and caused the respondent great disrepute, leading to his summary dismissal.

### **Analysis and determination**

#### **Issues**

- i. Was the summary dismissal against the Claimant wrongful and unfair?
- ii. Whether the Claimant is entitled to the remedies sought.



### **Was the summary dismissal against the Claimant wrongful and unfair?**

39. It was common cause that at all material times, the Claimant was in the employment of the Respondent and stationed to guard at Family Bank Kariobangi, Branch. Further, his employment was terminated at the initiation of the Respondent.
40. Section 43 of the *Employment Act* places a duty on the employer in a dispute regarding termination employment to prove the reason[s] for the termination. It is pertinent to state that where the employer alleges, as the Respondent has, in the instant matter, that the termination was in the form of a summary dismissal, then the infraction the basis for the dismissal must be shown to be a gross misconduct in terms of section 44[4] of the Act, and one that equates a fundamental breach of the employment contract. See section 44[3] of the Act. Undeniably, an employee's absence from duty without the permission of the employer or lawful cause can be one of those infractions under section 44 [4] that can be a basis for summary dismissal against the employee involved.
41. The Respondent asserted that it dismissed the Claimant for being absent from duty for approximately three weeks without permission. It bears repeating that it isn't enough for the employer to plead desertion from duty without providing sufficient evidence to demonstrate that the reason [desertion] indeed existed. Only then can the reason be held to be valid as contemplated by the provisions of section 45[2] of the Act.
42. I have carefully analysed the material before this Court and conclude that the reason did not exist. The Claimant didn't abscond duty. This view is the for the following reasons:
- i. Consistently, the Claimant held that he was off duty for 7 days, due to illness, with the permission of his supervisor, whom, during the hearing, he stated, was Job Omido. In essence, the Claimant was asserting two things: first, he was off duty with permission, and second, he was off duty for a lawful cause. If indeed the Respondent was not in agreement with his assertion regarding the permission granted, nothing could have been easier than to call the Claimant's supervisor during the material time to testify and discount the assertion. This Court notes the Respondent's contention that the Claimant didn't name the supervisor in his pleadings, hence, a reinforcement of their assertion that he didn't have permission. With great respect, this contention isn't reasonable. Pleadings traditionally aren't supposed to embody evidence.
  - ii. The Respondent's witness and I hold deliberately so, didn't deny in her evidence that Job Omondi was the Claimant's supervisor at the material time and or that he had authority to grant permission to the Claimant to be off duty. This, plus the foregoing premise [sub-Para. I], leads this Court to draw an adverse inference that had the supervisor been called to testify as the Respondent's witness, his evidence could have been prejudicial to its case.
  - iii. Under Section 30 of the *Employment Act*, absence from duty is absence with a lawful cause. The Claimant testified that his absence from duty was justified, as it was occasioned by illness, and called RW1, a nurse from the Hospital where he was treated, to fortify this evidence. I am of the view that the Respondent looked at this evidence with inexplicable casualness. They just asserted that the Claimant didn't substantiate his claim that he was unwell. With the medical notice he tendered in evidence, his unshaken evidence during cross-examination, and the evidence of the nurse, I am not persuaded that sufficient substantiation was lacking.
  - iv. The Respondent's witness asserted that it dawned on them that the Claimant had absconded duty for almost three weeks after their Client raised an issue. This evidence isn't that which



can easily be believed. Did the client write to them or call them? When did it raise the issue? These are important questions that the witness didn't answer but remained too general about. The witness alleged that the client by virtue of the industry in which it operates, is a sensitive client who requires security around the clock, twenty-four seven. Is it possible then that they could be without a guard from the Respondent for all that long without noticing or raising an issue? I doubt they could.

- v. In the totality of the of the circumstances of this matter, I am persuaded that the Claimant was out of duty with the permission of his supervisor following the need for him to proceed for medical attention.
43. In the case of *Too v University of Eastern Africa, Baraton* (Cause E023 of 2021) [2024] KEELRC 42 (KLR) (25 January 2024) (Judgment), the Court held, and I agree;

“The section is specific that absence from work per se does not constitute a ground for dismissal unless it is without leave or other lawful cause. In this case, it is not contested that the absence was without permission. The Claimant, however, states that the absence was for a lawful cause. That he was unwell and had been admitted to hospital. He produced documents to support his averments.

For an employer to determine if the absence is for a lawful cause or otherwise, it has to give the employee an opportunity to explain the reason for the absence. Section 43 of the *Employment Act* demands that the employer proves the grounds for dismissal. Further, Section 30(2) is specific that “For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable the employer of his absence and the reasons for it.”

44. It is trite now that where the employer alleges that an employee absconded duty, hence his dismissal from employment, it behoves that employer so asserting to demonstrate that before it reached the decision to terminate the employee's employment, it made efforts to reach out to the employee for an explanation regarding his absenteeism, and notifying him of its intention to take adverse action against him on account of the absenteeism and or continued absenteeism.
45. The Respondent just made a bald claim that they tried to reach out to the Claimant without success. They didn't show when and how. Consequently, I am not persuaded they did.
46. The Court in *Haji v Syed Hassan Zaidi t/a Imamia Electrical & Hardware* (Employment and Labour Relations Appeal E022 of 2022) [2023] KEELRC 1200 (KLR) (4 May 2023) (Judgment) held on this that,

“In this case, there is no notice which the respondent issued to the appellant to resume duty after his alleged abandonment of duty, there is no letter sent to his last known address, and there is no notice issued to the Labour Officer. The response that there was abandonment or abandonment of duty leading to termination of employment lacked any justification and the finding of the trial court in this regard was in error.”

47. Without much ado, I find that the Respondent didn't adhere to the procedural dictates set out in section 41 of the Act, notifying the Claimant that they were contemplating taking action against him, and the reason[s] the basis thereof, according him an opportunity to defend himself against the accusations rendered against him, and considering the representations made by him on the reason[s]. The Respondent's witness admitted to this in her evidence. However, she misguidedly attempted to justify the failure by stating that since he was summarily dismissed, the Respondent rightfully



proceeded the way it did. It is high time employers took full heed that there isn't a disciplinary process exempt from the mandatory requirements of section 41 of the *Employment Act*.

48. The foregoing position finds fortification in the Court of Appeal's holding in the case of Standard Group Limited vs. Jenny Luesby [2018] eKLR that: -

“There are no exceptional circumstances that have been established by the Respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing before the summary dismissal. That hearing is as important as the law made it mandatory, even in the worst case scenario where an employee grossly misconducts oneself. The right to a hearing is what amounts to meeting the tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice, as this is the meaning of a fair hearing. However, senior an employee is, where the case is that of misconduct, the seniority is not a justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employer to uphold. This was denied of the claimant, and I find this to be an unfair labour practice.”

49. The Respondent's witness testified that the Claimant turned up at the Respondent's on 29<sup>th</sup> October 2015 but refused to take the summary dismissal letter. If indeed he had been missing for the Respondent to take the steps contemplated under section 41 of the Act, why didn't the Respondent seize the moment and initiate the process?
50. I come to the inescapable conclusion that summary dismissal against the Claimant was unlawful and unfair.

#### **Whether the Claimant is entitled to the remedies sought**

#### **Return of Original academic and professional certificates.**

51. The Respondent's witness admitted in her witness statement turned evidence in chief that the Respondent was in possession of the documents and stated that during the currency of this suit, it released the same to him.

#### **Salary for October Kshs. 14,300.00**

52. According to the summary dismissal letter, the Claimant's employment was terminated on 29<sup>th</sup> October 2015. I see no good reason why this Court can hold, therefore, that he is only entitled to four days' salary in that month as the Respondent urges the Court to. I award him the amount sought under this head.

Two months' salary in lieu of notice Kshs 28,600.00 @Kshs 14,300/= per month

53. The Claimant's employment was terminable by a twenty eight days' notice, under section 35 of the *Employment Act*. No doubt, the notice was not issued. Having found that the summary dismissal was unfair and unlawful, I hold that he is entitled to notice pay, one month's salary in lieu of notice. The Claimant didn't justify the craving for two months' salary instead of the statutory one month's salary in lieu of notice.

#### **Severance pay for 2 years Kshs 14,300.00**

54. Severance pay is a benefit granted under section 40 of the *Employment Act*, where the termination of an employee's employment follows a declaration of redundancy. Many, like the Claimant, will always



confuse it with service pay under section 35 of the Employment Act. In this case, the Claimant could be service pay, but it cannot be availed to him as there is no doubt that he was a member of the NSSF.

**Leave for the period Kshs 42,900.00**

55. I have carefully considered the Respondent's witness's evidence on this relief claimed. In my view, it was an admission that the Claimant never proceeded on leave throughout his tenure of service. Under section 28 of the Act, enjoyment of annual leave is a statutory right. As such, there is a reciprocal obligation of the employer to allow or facilitate the enjoyment. He is entitled to the relief sought.

**Damages for unfair termination salary 12 months' gross salary.**

56. Section 49 [1][c] of the Employment Act bestows upon this Court the authority to grant a compensatory relief to an employee who has successfully challenged his employer's decision on account that it was wrongful, unlawful and or unfair. However, it is pertinent to point out that the relief is discretionarily granted depending on the circumstances of each case.

57. I have carefully considered that the Respondent summarily dismissed the Claimant from employment, notwithstanding that he had permission from his supervisor to be off duty to seek medical attention, the Respondent's inexplicable rush to summarily dismiss the Claimant, the length of his service with the Respondent, and the Respondent's failure to comply with the statutory dictates of procedural and substantive fairness in a manner that appears blatant, and find that the Claimant is entitled to the compensatory relief, eight [8] month's gross salary, KShs. 114, 400.

58. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

- i. A declaration that the summary dismissal against the Claimant was unlawful and unfair.
- ii. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, KShs. 114, 400.
- iii. One month's salary in lieu of notice, KShs. 14,300.
- iv. Service pay KShs. 14,300
- v. Compensation for earned but untaken leave days  $-21/30 \times 14,300 \times 2 =$  KShs. 20,020.
- vi. Salary for October 2015, KShs. 14,300.
- vii. The Respondent is to release the Academic certificates, if it is still holding them, to the Claimant, within 30 days of this Judgment.
- viii. Interest on the awarded sums above, at court rates from the date of this Judgment till full payment.

**READ SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**OCHARO KEBIRA**

**JUDGE.**

