



**Kabusia v KK Security (Employment and Labour Relations Cause  
709 of 2017) [2025] KEELRC 420 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 420 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 709 OF 2017**

**JW KELI, J**

**FEBRUARY 14, 2025**

**BETWEEN**

**HUMPHREY MASIBO KABUSIA ..... CLAIMANT**

**AND**

**KK SECURITY ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim dated 13<sup>th</sup> April 2017 and received in court on even date seeking the following reliefs:-
  - i. A declaration that the dismissal was wrongful, unlawful and malicious.
  - ii. An order that the respondent do pay the claimant terminal dues amounting to Kenya Shillings 328,615.50.
  - iii. Award of service pay for each completed year of service from the date of employment.
  - iv. General damages for wrongful termination.
  - v. Interest and costs of the suit.
  - vi. Any other or further relief that the Honourable Court may deem fit and just to grant.
2. The claimant, in support of the claim, filed verifying affidavit of even date, claimant's list of documents of even date (C-Exh 1-7) and his witness statement of even date as his evidence.
3. The respondent entered appearance and filed reply dated 2<sup>nd</sup> October 2017 to the claim. In support of the response it filed witness statement of Wilberforce Munoko dated 12<sup>th</sup> September 2019 and another witness statement of Norine Silwe dated 11<sup>th</sup> August 2021.



## Hearing and Evidence

4. The claimant's case was heard on the 13<sup>th</sup> March 2023 before My Brother Justice Ocharo Kebira where Humbrey Masibo, the Claimant, testified on oath as CW1, he adopted as his evidence in chief his witness statement dated 13<sup>th</sup> April 2017 and produced his documents as C-Exh 1-7 and was cross-examined by counsel for the respondent. The proceedings were typed and the court took over hearing of the defence.
5. The defence case was heard on the 30<sup>th</sup> of October 2024 with Norine Silwe testifying on oath as RW1. She adopted as the Respondent's evidence in chief her witness statement dated 11<sup>th</sup> August 2024 and was cross-examined by counsel for the Claimant. She produced Respondent's documents under list dated 20<sup>th</sup> May 2019 R-Exh 1-13.

## Claimant's case in summary

6. In witness statement of the claimant dated 15<sup>th</sup> April 2017 adopted as evidence in chief, the claimant stated that on or about 24<sup>th</sup> June 2014 he was employed by the respondent as a security officer at a monthly salary of Kshs. 21,201.00 and was issued with appointment letter(not produced). That he served with loyalty and diligence until 8<sup>th</sup> April 2016 when the respondent wrongfully and unlawfully terminated his services. He was given a letter of dismissal on grounds of desertion of duty which was untrue because during the period that he was out of work he had suffered a right tear on his right knee which needed surgery . That he was placed on light duties to facilitate his healing as per the recommendation of the doctor. He was not paid his dues.

## Respondent's case

7. The Respondent opposed the Claimant's Claim vide Reply to Memorandum of Claim dated 2<sup>nd</sup> October 2017. The respondent admitted that the claimant was their employee. He was employed on 24<sup>th</sup> June 2014. He was issued with dismissal letter dated 8<sup>th</sup> April 2016 on account of desertion of duties and given opportunity to appeal the verdict arrived at during the disciplinary hearing. (paragraph 3 (d) of the reply)within 7 days.
8. The witness statement of Norine Silwe (RW1) dated 11<sup>th</sup> august 2021 was adopted as evidence in chief. RW1 stated she was the Human Resources Officer of the respondent. The claimant was employed by the respondent as security guard on the 1<sup>st</sup> October 2014 on a temporary service contract subject to renewal at the sole discretion of the parties. The claimant absconded duty on the 22<sup>nd</sup> December 2015 without authority. The respondent wrote to the claimant on the 8<sup>th</sup> April 2019 informing him of summary dismissal on account of desertion of duty from 22<sup>nd</sup> December 2015 in accordance with the [Employment Act](#). The summary dismissal was effective 22<sup>nd</sup> December 2015 however he was paid salary upto February 2016. The claimant was issued with certificate of service on the 11<sup>th</sup> April 2016. The claimant was lawfully terminated and given opportunity to be heard through appeal. The respondent relied documents produced under list of documents dated 20<sup>th</sup> May 2019.

## Determination

9. The court found that there was no dispute that the claimant was a former employee of the respondent.



### Issues for determination

10. The court having perused the pleadings, read the proceedings of the claimant's case, heard the Respondent's case and considered written submissions was of the considered opinion the issues placed before the court for determination in the suit were as follows:-
  - a. Whether the dismissal of the claimant from employment by the respondent was lawful and fair.
  - b. Whether the claimant was entitled to remedies sought.

### Whether the dismissal of the claimant from employment by the respondent was lawful and fair

11. The threshold for termination of employment to be held as fair is according to the provisions of section 45(2) of the *Employment Act* to wit:- "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—
    - (i) related to the employee's 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."

### Substantial fairness

12. Substantial fairness is related to the validity and fairness of the reason(s) for termination and whether the reason is related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer (section 45(2) of the *Employment Act*). The burden of proof of the validity of the reason lies with the employer according to the provisions of section 43 of the *Employment Act* to wit:- "43. Proof of reason for termination
  - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
  - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."
13. The claimant stated he was given a letter of dismissal dated 8<sup>th</sup> April 2016 on account of desertion. RW1 confirmed this. The letter dated 8<sup>th</sup> April 2016 was produced at the hearing by RW1. It stated:-

‘ 08 April 2016

P/NO 19403

Humphrey Masibo Kabusia

Operations Department

Kenya Kazi Services Ltd

Nairobi

Dear Humphrey ,



Re: Desertion

Our records indicate that you have not reported on duty since 22 December 2015 and no information has been received to explain your unauthorised absence. It is clearly known to you that desertion of duty is a gross misconduct and a violation against the company policies.

In view of the above, the company has summary dismissed your services for desertion in accordance with the [Employment Act](#) 2007 with effect from 22 December 2015

You are required to hand in all company equipment and uniform to enable us process your final dues.

Any grounds for appeal against this decision should be submitted within (7) seven days effective date of this letter.

Yours faithfully,

Kenya Kazi Services Ltd

Anthony Odera

D/hr Manager

CC County Labour Officer

Chief Shop Stewards.”

14. The employer gave the reason for summary dismissal as desertion on account of absence from duty from 22<sup>nd</sup> December 2016 to 8<sup>th</sup> April 2016 as per the above letter of dismissal dated 8<sup>th</sup> April 2016. In support of the assertion desertion, RW1 stated the claimant was on leave from 16<sup>th</sup> December 2015 ending 21<sup>st</sup> December 2015 (page 19 of the Respondent’s bundle of documents was the signed leave form). RW1 told the court the claimant never returned to work on 22<sup>nd</sup> December 2015 after the leave. During cross-examination RW1 told the court the claimant had been injured on 9<sup>th</sup> September 2015 at Hurlingham while cycling a bicycle. His place of work was Nairobi Hospital as per the investigation (page 30 of the investigation report). The claimant after the accident was on the 19<sup>th</sup> of November 2015 recommended for light duties (page 21 of the Respondent’s documents) RW1 told the court the claimant never reported to work for assignment of the light duties. RW told the court they had not produced evidence of signing attendance sheets to demonstrate the claimant had not reported to work.
15. The claimant stated that he had been reporting to work but he was not given any where to sign.

### **Decision**

16. The court having evaluated the positions of the parties as above took time to peruse the documents. The claimant in own witness statement dated 13<sup>th</sup> April 2017 which he adopted as his evidence in chief stated:-“ that I was given a letter of dismissal on grounds of desertion of duty which was untrue , because during the period that I was out of work I had suffered a right tear on my right knee which needed surgery. I was even placed on light duties to facilitate my healing as per the recommendation of the doctor.” During cross-examination the claimant told the court the light duties involved opening gate for visitors and even transferring files from one office to the other.
17. The Court found that the claimant testimony that he was not given anywhere to sign on reporting to duty was not controverted by RW1 who admitted they had not produced the signing sheets. The respondent stated they paid the claimant salary upto end of February.



18. The court in search of the truth perused the investigation report produced by the Respondent. At page 7 of the report it was stated:- “ -Email Communication : on 23<sup>rd</sup> December 2015 Dishon Wamulwa in charge of Karen office wrote to the headquarters requesting that the claimant be maintained in the payroll as he was unwell and was waiting to go for a surgery at Kijabe Hospital”(page 35 of the Respondent’s bundle).The Court from the foregoing concluded that the reason of having deserted duty from 22<sup>nd</sup> December 2015 was not true taking into account the respondent’s own report citing email of the incharge of Karen Office of the Respondent dated 23<sup>rd</sup> December 2015 where the claimant stated he was working at the material time. The email by the in charge stated the claimant was unwell and requested he be retained in the payroll on account of sickness. This position is supported by the fact that the respondent continued to pay the claimant salary after the alleged desertion of 22<sup>nd</sup> December 2015. The court then held the reasons for termination of desertion of duty on 22<sup>nd</sup> December 2015 was not true and did not exist at that time as per provision of section 43(2) of the *Employment Act* to wit:- .” (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
19. The employer could not have genuinely believed that the claimant deserted duty on 22<sup>nd</sup> December 2015 when its incharge Karen Office where the Claimant stated he was working had written an email on 23<sup>rd</sup> December 2015 stating the claimant was unwell and that he be retained in the payroll. The defence of desertion / absconding places a burden on employer to demonstrate efforts made to notify the employee of intention to terminate their services on account of that reason. Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on this ground is being considered (see Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR and Dickson Matingi v Db Schenker Limited [2016] e KLR all cited in New World Stainless Steel Limited v Cosmas Mbaulu Munyasya (2021) e KLR. No such effort was demonstrated. The reason for termination on account of desertion of duty on the 22<sup>nd</sup> December 2015 is held as invalid hence unlawful termination.

### **Procedural fairness.**

20. It is true absconding work is a ground for summary dismissal under section 44(4)(a) of the *Employment Act* to wit:- “44(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:—
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;”
21. The law still requires before the said summary dismissal the employee be accorded procedural fairness as stated in section 41 (2) of the *Employment Act* to wit:- “41(2) Notwithstanding any other provision



of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear

and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

22. The claimant told the court he was not heard before the issuance of the summary dismissal letter. RW1 on being asked whether the claimant was invited for disciplinary hearing answered : “ No. From the desertion letter he was given a chance to appeal.” The claimant did not appeal. The court held that the disciplinary hearing contemplated under section 41(2) of the *Employment Act* is happen before the dismissal and not thereafter. The court held there was no procedueral fairness before the summary dismissal.

### **Whether the claimant was entitled to remedies sought.**

23. The claimant sought the following reliefs:-
- i. A declaration that the dismissal was wrongful, unlawful and malicious.
  - ii. An order that the respondent do pay the claimant terminal dues amounting to Kenya Shillings 328,615.50.
  - iii. Award of service pay for each completed year of service from the date of employment.
  - iv. General damages for wrongful termination.
  - v. Interest and costs of the suit.
  - vi. Any other or further relief that the Honourable Court may deem fit and just to grant.

### **On A declaration that the dismissal was wrongful, unlawful and malicious.**

24. The court found no proof of malice in the summary dismissal. The court issued a declaration that the summary dismissal was unlawful and unfair.

### **An order that the respondent do pay the claimant terminal dues amounting to Kenya Shillings 328,615.50.**

25. The claimant did not plead details of this prayer in the memorandum of claim or his statement. The claim for the said terminal dues needed to be pleaded with precision and itemization. What were the terminal dues? Was it leave? Unpaid salary? The respondent denied any due terminal dues and in submissions relied on provisions of section 107 and 109 of the *Evidence Act* to wit :-

“107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.” The Respondent further relied on the decision in *Christine Kalama v Jane Wanja Njeru & another* (2021 e KLR which in elaboration of the meaning of section 107 and



109 of the *Evidence Act* cited the cases of Re H (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the Home Department v Rehman {2003} 1 AC 153. The House of Lords laid down a series of guiding principles on standard of proof as follows:-

- (1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.
- (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred.
- (3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others.”

26. The Court upheld foregoing on standard of proof in civil case to hold that the claimant failed to plead the basis of the prayer for the alleged terminal dues amounting to Kenya Shillings 328,615.50 in the memorandum of claim to elicit a response from the respondent. The only established terminal dues is salary for month of March 2016 and 8 days of April 2016 when the services were terminated. RW1 told the court they paid salary for January and February 2016. The court awarded salary as per the February 2016 payslip as the pleaded salary was based on January 2016 payslip which had an item of salary arrears. The February 2016 payslip produced by the claimant had no arrears and the gross salary was Kshs. 14,134/-. Under this item the court awarded salary arrears of Ksh 14134(March salary ) and Kshs 14134x 8/30 (3769) (8 days in April)salary. The unpaid salary arrears was awarded for the total sum of Kshs. 17,903/-

#### **Award of service pay for each completed year of service from the date of employment.**

27. Service pay is payable according to sections 35 (5 and 6) of the *Employment Act* to wit:-

“35(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

- (6) This section shall not apply where an employee is a member of—
  - (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
  - (b) a gratuity or service pay scheme established under a collective agreement;
  - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
  - (d) the National Social Security Fund.”

28. The claimant produced his last payslip of February 2016(page 11 of the claimant’s bundle of documents). There is a component of NSSF. Applying the provisions of section 35(6)(d) of the *Employment Act*, the Court held that the Claimant having been under NSSF was not entitled to service pay. It is so held.

#### **General damages for wrongful termination.**

29. The court held the dismissal was unlawful and unfair. Section 50 of the *Employment Act* requires the court to be guided by the provisions of section 49. Section 50 states:-“ In determining a complaint



or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Employment and Labour Relations Court shall be guided by the provisions of section 49.”

30. Section 49 provides for remedies on finding unlawful and unfair termination as follows:- “Remedies for wrongful dismissal and unfair termination
- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
    - (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
    - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
    - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
  - (2) Any payments made by the employer under this section shall be subject to statutory deductions.”
31. The court in exercise of its judicial discretion is to be guided by section 49(4) of the [Employment Act](#) to take into account several factors in deciding on the applicable remedy as follows:-
- “(a) the wishes of the employee;
  - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
  - (c) the practicability of recommending reinstatement or re-engagement;
  - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
  - (e) the employee's length of service with the employer;
  - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
  - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
  - (h) the value of any severance payable by law;
  - (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
  - (j) any expenses reasonable incurred by the employee as a consequence of the termination;
  - (k) any conduct of the employee which to any extent caused or contributed to the termination;



- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”
32. The claimant was injured while away from his place of duty and the employer took care of his medical treatment and gave him generous time away from work including light duties. The employee was employed on 24<sup>th</sup> June 2014 and his employment terminated on 8<sup>th</sup> April 2016 approximately 2 years of service. There was evidence of previous warning on account of misconduct(warning letter dated 15<sup>th</sup> June 2015). The claimant was a security guard. There was no evidence before the court of difficult in securing a comparable or suitable employment with another employer, he was born in 1986 hence relatively young. He did not mitigate his losses. The court applying the foregoing criteria holds that the claimant was entitled to a notice pay of one month salary and that compensation for the unlawful termination of 5 months gross salary as per payslip(February 2016).
33. In conclusion the court held the termination of employment of the claimant was unlawful and unfair. Judgment is entered for the claimant against the respondent as follows:-
- a. Unpaid salary arrears awarded for the total sum of Kshs. 17,903/-
  - b. Notice pay of Kshs. 14,134
  - c. Compensation for unlawful and unfair termination equivalent of 5 months of last gross salary total sum of Kshs. 70,670/-
  - d. Costs and interest at court rates from the date of Judgment.
34. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Claimant:- Njenga

Respondent:- Muthama h/b Kamau

