



REPUBLIC OF KENYA



KENYA LAW
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**G4S Kenya Limited v Busuru (Appeal E048 of 2024)
[2025] KEELRC 958 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 958 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E048 OF 2024
JK GAKERI, J
MARCH 27, 2025**

BETWEEN

G4S KENYA LIMITED APPELLANT

AND

RODGERS OMONDI BUSURU RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. Robert M. Oanda, at Winam SPM in ELRC No. E10 of 2023, Rodgers Omondi Busuru V G4S Security Services (K) Ltd delivered on 27th August, 2024.
2. By way of background, the respondent sued the appellant vide a Memorandum of Claim dated 4th May, 2023 alleging unfair and unlawful termination of employment, unpaid salary and terminal dues.
3. The respondent's case was that he was employed by the appellant on 28th January, 1993 as a security guard at Kshs.25,952.35 per month and served diligently until 21st September, 2021 when on reporting for duty was informed that his employment had been terminated. He admitted having been charged at the Winam Principal Magistrate's Court in Criminal Case No. E813 of 2021 for stealing by servant but was acquitted of the charges on 16th November, 2022. The respondent alleged that proper investigations were not conducted for purposes of the criminal case, no warning letter was given and was not given a chance to defend himself and was not paid.
4. The appellant's case was that on 1st September, 2024 the respondent was deployed to the AEE Power site as a night guard or officer, but on the night of 3rd September, 2021, the incoming day guard noted that some items were missing namely; two complete 50mm conductor cables and 3 crates of insulator connectors and declined to take over the sight and contacted on Jacob Olando who visited the sight and patrolled the site in the company of the two night guards and the day guard and confirmed that items were missing from the site. That Jacob Olando contacted one Raphael Nyagaya of AEE power who reported the matter to the Police at Kondele Police Station and the two night guards were



- charged and subsequently dismissed from employment for negligence after a disciplinary hearing on 15th September, 2021 and was paid his dues.
5. After considering submissions by counsel and the evidence before the court, the learned trial Magistrate vide Judgment delivered on 27th August, 2024 awarded the claimant; a declaration that refusal to pay his terminal dues was unlawful and unfair, one month's salary in lieu of notice, Kshs.25,952.35, 12 months compensation Kshs.311,428.20, gratuity for 28 years, Kshs.1,064,046.35, interest from date of filing and costs and interest.
 6. This is the Judgment appealed against. The trial court is faulted on the grounds that it erred in:
 - a. Failing to hold that there was a valid and fair reason for termination of the respondent's employment.
 - b. Disregarding the reasons cited by the appellant's letter dated 21st September, 2021.
 - c. Failing to hold that there was procedural fairness and proceedings were conducted in consonance with the appellant's Disciplinary Code and were separate from the criminal proceedings.
 - d. Holding that the disciplinary hearing was conducted alongside the criminal trial and it could not supersede the findings of the criminal trial.
 - e. Finding that the respondent was taken through multiple trials.
 - f. Finding that the respondent's dismissal after acquittal of charge was unlawful.
 - g. Making an award for damages for loss of employment.
 - h. Awarding 12 months compensation which is inordinately high.
 - i. Making an award of salary in lieu of notice.
 - j. Making an award of gratuity.
 - k. Computation of gratuity at one month's salary per year worked without a basis.
 7. In sum, the appellant is challenging all findings and awards made by the court.
 8. The appellant prays for the appeal to be allowed and the judgment of Hon. Oanda set aside with costs.

Appellant's submissions

9. Concerning the validity of dismissal, counsel for the appellant placed reliance on the Court of Appeal decision in *Bamburi Cement Ltd V William Kilonzi* [2016] eKLR to submit that the trial court did not evaluate the evidence before it and disregarded the reasons set out in the dismissal letter.
10. The decisions in *Banking Insurance and Finance Union (Kenya V Consolidated Bank of Kenya* [2014] eKLR and *Gregory Kwabi Wekule & 2 Others V Musoni Kenya Ltd* [2021] eKLR on the effect of criminal cases on internal disciplinary hearings to urge that the appellant was not bound by the decision of the criminal court and further urge that the appellant had valid reasons to dismiss the claimant as he was negligent and dishonest as he did not patrol the site when he came in for duty, and his colleague did so.
11. Reliance was also placed on the sentiments of the court in *Judicial Service Commission V Gladys Boss Shollei & Another* [2014] on dishonesty, as well as those in *Kenya Revenue Authority V Reuwel*



Waithaka Gitahi & 2 Others [2019] eKLR on the standard of proof under Section 43(2) of the [Employment Act](#).

12. As regards procedural fairness, reliance was placed on *Abdi Mohamed Daib V Kenya Ports Authority* [2016] eKLR on the prerogative of an employer to discipline its employees for misconduct.
13. Counsel urged that the respondent's dismissal was procedurally fair as by law required.
14. Finally, on reliefs, counsel submitted that the respondent was not entitled to salary in lieu of notice, 12 months salary was excessive and cited *Moi Teaching and Referral Hospital V James Kipkonga Kendagor* [2019] eKLR, *Kiambu Dairy Farmers Co-operative Society Ltd V Rhoda Njeri & 3 Other* [2018] eKLR and *Oi Pejeta Ranching Ltd V David Wanjau Muhoro* [2017] eKLR among others.
15. Counsel submitted that the claimant was not entitled to gratuity on account of Regulation 17(2) of the Regulation of Wages (Protective Security Services Order 1998 as the dismissal was summarily.

Respondent's submissions

16. Reliance was made on the provisions of Section 12 and 18(4) and (5)(b) of the [Employment Act](#) on the disciplinary rules applicable and payment of dues to an employee after dismissal, to submit that the appellant breached the law.
17. Also relied on were the provisions of Sections 43(1), 45 of the Act to submit that in determining whether the respondent's dismissal was unfair the court should be guided by these provisions.
18. Finally, counsel for the respondent cited the provisions of Section 49 and 50 of the [Employment Act](#) to submit that since the respondent's dismissal was unfair, he was entitled to the reliefs sought in the Memorandum of Claim.
19. Counsel defended the judgment of the trial court and urged the court to dismiss the appeal with costs for want of merit.

Analysis and determination

20. Being a first appeal, the obligation of the court is to re-consider and re-evaluate the evidence before the court as well as the judgment and make its own conclusions being alive to the fact that it neither saw nor heard the witness and make due allowance as held in *Selle and Another V Motor Boat Co. Ltd & Others* [1968] EA 123.
21. See also *Gitobu Imanyara & 2 Others V Attorney General* [2016] Eklr, *Abok James Odera t/a A. J. Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Mwana Sokoni V Kenya Bus Services Ltd* [1985] KLR 931.
22. It is not in dispute that the respondent joined the appellant as a Security Guard in January 1993 and was summarily dismissed from employment on 21st September, 2021 for negligent, for having failed to account for the appellant client's property he was assigned to protect and dishonesty in the course of his duties by indicating that all was well on site while it was not as some items were found missing.
23. On cross-examination, the respondent testified that nothing was lost from his place of work but also confirmed that a report was made, was suspended and signed the letter of suspension, attended a hearing with one Solomon Shikinga but was not given time to defend himself.
24. He admitted that the dismissal letter had reasons for the dismissal and he signed it and was not paid salary for September 2021.



25. RWI, Mr. Stephen Ochieng confirmed that he had no documents on what was lost and that the claimant was acquitted by the criminal court and termination took place before the criminal case was concluded and the OB was not filed.
26. The witness further admitted that he compiled the minutes of the hearing but they were not signed, and did not show who the members of the panel were and he could not recall the names.
27. As regards termination of employment, the provisions of Section 41, 43, 44, 45 and 47(5) of the [Employment Act](#) set out the architecture of a fair termination.
28. Under Section 45 of the [Employment Act](#) and as correctly submitted by the parties, for a termination of employment to pass muster, it must be shown that the employer had a valid and fair reason to terminate the employment relating to conduct, capacity or compatibility of the employee or operational requirements of the employer and conducted the termination in accordance with a fair procedure, which entails compliance with the mandatory requirements of Section 41 of the [Employment Act](#).
29. The provisions of Section 43(1) and (2) of the Act relate to the reason for termination while Section 47(5) of the Act relates to the burden of proof.
30. Put in the alternative, the termination of employment passes the fairness test, if, and only if it is demonstrated that the employer had a substantive justification for the termination of the employee's employment and conducted the termination in accordance with a fair procedure as held in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR.
See also *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR.
31. While the appellant submitted that it had reasons to terminate the claimant's employment, the respondent urged the court to uphold the judgment of the trial court.
32. As regards the reason(s) for dismissal, the respondent's memorandum of claim and witness statement dated 4th May, 2023 are loudly silent on what transpired, though the respondent admits having been charged at the Winam Principal Magistrate's Court and later acquitted of all charges.
33. Evidence adduced in the criminal trial reveals that the respondent was on duty on the night of 3rd/4th September, 2021 at African Equipment Engineering Ltd (AEE) at Mamboleo, having been posted by Mr. Hongo (PW4). That the supervisor was called by the day guard (PW2) to the site on the ground that it had been tampered with and on inspection of the site in the company of the respondent and PW2 and PW3, confirmed that some conductor wires had been stolen.
34. PWI, Mr. Raphael Nyagaya testified that he was called to the site by the day guard (Peter) and found the respondent on site and PW4 and inspected the site and confirmed that an AV conductor, LV insulator and other items missing.
35. However, the missing items were not recorded in the occurrence book. PW5, PC Moses Wambua testified that he visited the site on 4th September, 2021 and ascertained that two drums of conductor wire and three crates of HVK insulators had been stolen.
36. RW5 provided the OB to show that the accused were on duty and a delivery note to show that the stolen items had been delivered at the site. The witness confirmed that there was no evidence to show that the day guards handed over to the night guards.
37. The respondent's hand written and signed witness statement on record dated 4th September, 2021, reveal that he reported to the site at 1824hrs and took over from the day guard who stated that it was okay. The respondent did not inspect the site as he alleged it was raining heavily.



38. That he patrolled at 1832 hours and it was okey. The respondent indicated that it was the day guard who after inspecting the site discovered that theft had taken place.
39. The respondent stated that he could not patrol the site alone as he had no gumboots/safety boots and the day guard had informed them that there were snakes.
40. In a nut shell the respondent admitted that they did not patrol the site that night but confirmed to the supervisor and the alarm team that all was okey.
41. Puzzlingly, neither the Report on the theft at AEE dated 9th September, 2021, prepared by Jacob Orlando nor the minutes of the disciplinary hearing held on 16th September, 2021 compiled by Mr. Stephen Owuor, Human Resource dated 20th September, 2021, are signed, a fact Mr. Stephen Owuor confirmed on cross-examination.
42. It trite that an unsigned document lacks ownership and authenticity and has no probative value in a court of law.
43. The trial court found that based on the criminal trial no loss of property had taken place and, in any case the disciplinary hearing was conducted alongside the criminal trial thus multiple trials which prejudiced the respondent.
44. From the evidence adduced before the criminal court to the evidence placed before the learned trial Magistrate, there is sufficient evidence to show that some items were stolen at the site the respondent and his colleague were guarding on the night of 3rd/4th September, 2021.
45. The respondent admitted in his witness statement that he relied on the assurance of the day guard when he took over at 1824 hours and did not patrol the site at night as he had no safety boots and feared snakes and confirmed to at least two supervisory teams that all was well that night yet he had not confirmed. That is evidence of laxity, lack of care and out rightly negligence on his part.
46. Section 44(4)(c) of the [Employment Act](#) allows an employer to summarily dismiss an employee where: -

An employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.
47. The respondent admitted that he was unaware of the theft until the day guard, one Peter patrolled to site and noticed the same and declined to take over the site.
48. Similarly, on the evening of 3rd September, 2021, the respondent took over the site without patrolling and did bother to write down the status of the site until his colleague did so later.
49. Was the respondent dishonest? The respondent admitted in his signed witness statement that he confirmed to the night supervisor and the Alarm team, that night, at 2330hrs and 0330hrs respectively, that all was okey without confirming the actual state of affairs.
50. Based on the foregoing, it is the finding of the court the respondent was not only careless in the manner in which he discharged his duties, but dishonest too as he misled the night supervisor and the alarm team.
51. The appellant, in the court's view had a substantive justification to dismiss the respondent summarily as it did.
52. The foregoing analysis disposes off grounds (a) and (b) of the Memorandum of Appeal.



53. As regards procedure, while the appellant submitted that it complied with the procedural requirements, the respondent maintained that he was not heard before dismissal from employment.
54. The respondent stated so in paragraph four (4) of the written witness statement on record and the court noted it in its judgment at pages 6 and 9.
55. Needless to emphasize, the procedural precepts contained in Section 41 of the Employment Act are mandatory. (See Pius Machafu Isindu V Lavington Security Guards Co. Ltd [2017] eKLR and the sentiments of Mbaru J. in Jane Samba Mukula V Ol Tukai Lodge Ltd [2013] eKLR that:

“Where this procedure as set out under Section 41 of the Employment Act is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular...”
56. The employer shoulders the burden to demonstrate that the termination of employment or summary dismissal was fair, that the employee was aware of the reasons the employer was considering termination of employment, the charges were read out to the employee in a language the employee understood and in the presence of a colleague of the employee’s choice or a shop floor representative, right to be accompanied by a fellow employee of his/her choice and make representations and/or adduce evidence and finally the representation made by the employee and/or his/her representative be heard and considered in the determination of the matter. See Postal Corporation of Kenya Ltd V Andrew K. Tanui [2019] eKLR.
57. The appellants uncontroverted evidence was that the respondent was suspended and invited for a hearing vide letter dated 11th September, 2021 scheduled for 15th September, 2021.
58. The invitation letter set out the charges the respondent was to confront contained a summary of the facts as well as time and place of the meeting and attendant rights.
59. The appellant did not issue a notice to show cause for a preliminary response from the respondent before determining whether or not a hearing was necessary.
60. Intriguingly, the unauthenticated minutes on record indicate that the disciplinary hearing took place on 16th September, 2021.
61. According to the appellant, the provisions of the Employment Act and the relevant clauses of the appellant’s Disciplinary Code were complied with.
62. As already adverted to elsewhere in this judgment since the minutes on record are unauthenticated they cannot be relied upon as evidence or record of what transpired at the hearing.
63. It therefore, follows in the court’s view, that the appellant lacks verifiable evidence to establish that it accorded the respondent an opportunity to defend himself a fact he contested.

Put differently, how were the proceedings conducted?
64. Surprisingly, Mr. Stephen Owour, could not remember who the attendees of the meeting were yet he took and compiled the unsigned minutes.
65. Did the respondent respond to questions only or he was given an opportunity to explain his case and rebut the charges against him?
67. Was the colleague who accompanied the respondent accorded an opportunity to make representations and were the representations by the claimant and/or the representative considered in decision making?



68. Finally, was a copy of the unsigned investigation report prepared by Mr. Jacob Olando, the appellants Operations Manager, Kisumu availed to the respondent to enable him prepare for his defence bearing in mind that he was suspended vide letter dated 11th September, 2021 pending further investigations?
69. Availment of documents or evidence to be relied upon by the employer in a disciplinary hearing, to the employee is an integral part of the right to fair hearing as held in *Postal Corporation of Kenya v Andrew K. Tanui (Supra), Ol Pejeta Ranching Co. Ltd V David Wanjau Muhoro (Supra) and Regent Management Ltd V Wilberforce Ojiambo Oundo [2018] eKLR.*

Under Section 45 of the *Employment Act*: -

- (4) A termination of employment shall be unfair for purposes of this part where
- (a) ...
- (b) It is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
70. Section 45(5) of the Act catalogues the factors the court takes into consideration in making the decision whether it was just and equitable to terminate, the employee's employment, including procedure adopted by the employer, communication of the decision and, handling any appeal among others.
71. The termination letter dated 21st September, 2021 makes no reference to the right of appeal, conduct of the employee, compliance with the provisions of the Act, including issue of certificate of service and Section 41 and previous warning letters.
72. The totality of the evidence in this case reveals that the procedure adopted by the appellant in dismissing the respondent from employment fell below the threshold of a fair one.
73. The foregoing analysis disposes off ground (c) of the Memorandum of Appeal.
74. Before addressing the contested reliefs, it is necessary to re-state the law on the effect of criminal proceedings on an employee undergoing internal disciplinary proceedings.
75. In *Attorney General & Another V Andrew Maina Githinji & Another [2016] eKLR Waki JA* stated:
- “In other cases where a plea was made that there was an intervening criminal process, it was held that the institution of criminal proceedings is not a bar to civil proceedings based in similar facts”.
76. Similarly, in *James Mugeru Igati V Public Service Commission [2014] eKLR Rika J.* held as follows
- “The Claim rests on the question whether the Respondent was bound by the outcome of the criminal proceedings in the Nairobi Chief Magistrate's Criminal Case Number 1602 of 2005 R V James Igati Mugeru. There is nothing in the repealed *Employment Act* Cap 226 the Laws of Kenya, and the Public Service Commission Regulations 2005 which applied to the dismissal of the Claimant from service, that suggest the disciplinary process, is tied to the criminal process that may arise from the same facts. Section 17 of the repealed *Employment Act* did not make disciplinary proceedings at the workplace subject to any criminal investigations, trial or convictions. The Claimant appears to confuse the disciplinary process, which is properly a private process between an employer and its employee, whose aim is to ensure the employer's business is not harmed by delinquent employee behaviour, with a criminal trial which is a public process where prosecution is carried out by the state and is purposed on securing the safety of the general population,



and on maintenance of a stable social order. This Court has expressed the view in the past that the two processes are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process. There is no provision in the old or the new *Employment Act*, or the Public Service Commission Regulations, which make it necessary for employers to follow police investigations, or findings, or indeed Criminal Court decisions, in resolving employment disputes based on cross-cutting facts.

77. The foregoing sentiments were upheld by the Court of Appeal in *Geoffrey Kiragu Njogu V Public Service Commission & 2 Others* [2015] KECA 161 (KLR).
78. These sentiments apply on all fours to the circumstances of this case.
79. The independent nature of criminal proceedings and internal disciplinary process being undertaken against an employee simultaneously or one after the other was highlighted by the Court of Appeal in *Kibe V Attorney General (Civil Appeal No. 164 of 2000)*.
80. See also *Judicial Service Commission V Gladys Boss Shollei & Others (Supra)*, *David O. Owino V Kenya Institute of Special Education* [2013] KEELLC 409 (KLR) as well as *Gregory Kwabi Wekulo & 2 Others V Musoni Kenya Ltd (Supra)*, cited by the appellant's counsel among others.
81. The foregoing jurisprudence leaves no doubt that the learned trial Magistrate erred by failing to appreciate that the criminal trial and the appellant's internal disciplinary process are distinct processes independent of each other and in holding that the two processes were conducted alongside each other, internal disciplinary proceedings do not supersede the findings of the court and the finding that the respondent was taken through multiple trials which prejudiced him.
82. The cases also show that the trial court erred in its finding that the summary dismissal after acquittal of the charges by a court of competent jurisdiction was unlawful, wrong and unfair.
83. On the reliefs decreed, the learned trial Magistrate is faulted for making an award in damages for loss of employment.
84. Having found that the summary dismissal by the appellant was unlawful, wrong and unfair, the trial court was obligated to award compensation, not damages and awarded 12 months as damages for loss of employment which was an error as the trial court ought to have styled it as compensation in accordance with the provisions of Section 49(1)(c) of the *Employment Act* (See *Ken Freight (EA) Ltd V Benson K. Nguti* [2019] eKLR).
85. However, the trial court did not justify the award, which the appellant characterises as inordinately high and excessive.
86. See the sentiments of the Court of Appeal in *Ol Pejeta Ranching Co. Ltd V David Wanjau Muhoro (Supra)* on why the court intervened in the case and reduced the award of 12 months compensation to 6 months.
87. Those circumstances apply to the instant case and justifies the courts interference with the decision of the trial court.
88. Considering that the appellant had a reason(s) to summarily dismiss the respondent, as found earlier in this Judgment, he did not appeal the decision or express his wish to remain in the appellant's employment and substantially contributed to the summary dismissal and taking into account that the respondent had served for over 28 years and had no recorded cases of misconduct, the court is satisfied that the equivalent of three (3) months gross salary is fair, Kshs.77,857.05.



89. On one month's salary in lieu of notice, the court is persuaded that having found that the summary dismissal was justified, the award is unjustifiable by dint of Section 44(1) of the *Employment Act* which allows an employer to dismiss an employee without notice or by a shorter notice than prescribed by law.
90. This justifies the court's interference with the decision of the trial court.
The award ought not to have been made.
See *Ephantus Mwangi & Another V Duncan Mwangi* [1981 – 1988] IKAR 278.
91. The respondent did not render any service to the appellant in October, 2021 and the claim was properly declined.
92. As regards gratuity, the respondent provided no evidence to prove his entitlement to the award in that he did not establish its factual basis by way of a contractual term or a clause in a collective bargaining agreement.
93. The award lacks a factual and legal basis and ought not to have been awarded.
94. The absence of a basis for the award justifies the courts interference with the decision. See *Bell and another V Matterelo Ltd* [2022] KECA 168 (KLR).

In conclusion, the appeal is partially successful as follows:

- a. Award of one month's salary in lieu of notice is set aside.
- b. Compensation for unlawful dismissal is reduced to the equivalent of 3 months gross salary, Kshs.77,857.05
- c. Gratuity award of Kshs.1,064,046.35 is set aside.
- d. Other awards are upheld.
- e. Parties shall bear own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

