



**Ngagaya v Securitas Kenya Limited (Cause 1459 of 2017)  
[2025] KEELRC 1714 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1714 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1459 OF 2017**

**JW KELI, J  
MAY 9, 2025**

**BETWEEN**

**CHARLES ODHIAMBO NGAGAYA ..... CLAIMANT**

**AND**

**SECURITAS KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted a suit by filing a Statement of Claim dated 25th July 2017 against the Respondent alleging unfair termination and seeking the following Orders:
  - a. This Honourable Court to find that the Claimant's termination was wrongful and unlawful and consequent to such finding and in exercise of its Jurisdiction do award Judgment as prayed herein under;
  - b. An order that the Respondent release all monies meant for the Claimant.
  - c. An order directing payment to the Claimant of all the following terminal dues arising out of the period of service with the Respondent
    - i. 1 months' pay in lieu of notice- Kshs.8,000
    - ii. Gratuity entitlements (1 month x 1 year worked)-Kshs.8,000
    - iii. 12 months' pay at the rate of his salary for the unlawful termination for 12 months Kshs.96,000
    - iv. NSSF Ksh 720/= Ksh. 8,640
    - v. NHIF Ksh 300/= for 12 months Ksh. 3600
    - vi. Compensation for being paid below the minimum wage Ksh. 89,616



Total Kshs. 213,856

- vii. Interest on the above at court's rate
  - viii. Damages for wrongful dismissal
  - ix. Issuance of certificate of service
  - x. Costs of this suit
  - xi. Punitive damages to crb employers from extorting employees.
  - xii. Any other relief the this Honorable Court shall deem fit to grant or order.
2. In support of the claim the claimant relied on his witness statement dated 25<sup>th</sup> July 2017, list of documents of even date and the bundle all filed with the claim.
  3. The claim was opposed by the Respondent who filed response dated 4<sup>th</sup> September 2017 to the memorandum of claim filed on even date, witness statement of Judah Mulinge dated 26<sup>th</sup> September 2022, respondent's list of documents and bundle dated 27<sup>th</sup> September 2022.

### **Hearing and evidence**

4. The claimant's case was heard before Justice Ocharo Kebira on the 17<sup>th</sup> October 2023 when the claimant testified on oath and produced his filed bundle of documents and adopted prayers as stated in the statement of claim. He was cross-examined by counsel for the respondent Ms. Abuga and re-examined by his counsel.
5. The respondent's case was heard on the 17<sup>th</sup> October 2024 before me where the respondent called Judah Mulinge as RW. RW testified on oath and adopted his witness statement dated 26<sup>th</sup> September 2024 as defence evidence in chief. He had list of documents dated 27<sup>th</sup> September 2022 Nos. 1,3,4,5,6 and 7 produced as exhibits for response. Document No. 2, being police clearance certificate dated 4<sup>th</sup> August 2025 was expunged from the record. He was cross-examined by counsel for the claimant Mr. Muhoro and re-examined by his counsel.
6. The parties filed written submissions after close of the respondent's case.

### **Determination**

#### **Issues for determination**

7. Issues raised by the Claimant
  - i) Whether the Claimant was wrongly and unfairly terminated?
  - ii) Whether the Claimant is entitled to the orders sought for?
  - iii) Who should bear the costs of this suit.
8. Issues raised by the Respondent
  - a. Who carries the burden of proof
  - b. Whether the claimant was unlawfully terminated.
  - c. Whether the claimant is entitled to the reliefs sought.



9. The court having perused the submissions finds the issues placed before the court for determination of the dispute by the parties are :-
- a. Whether the Claimant's employment was wrongly and unfairly terminated?
  - b. Whether the Claimant is entitled to the Orders sought for?

**Whether the Claimant's employment was wrongly and unfairly terminated?**

10. The relevant legal threshold for determination of fairness of termination of employment in claims 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 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.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR.)
11. The burden of proving employment claims is as stated in section 47 (5) of the Employment Act to wit :- '5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.’
12. The claimant stated that on or about 3<sup>rd</sup> May 2017 the respondent without justification summarily terminated his employment without notice. that prior to the summary dismissal he had taken 21 days leave which he asserted had been approved by management and he was told to get a replacement and train him for 3 days and thereafter he commenced his leave. upon return he was dismissed for no reason.
13. Conversely, the respondent stated that the claimant after receipt of his salary absconded duty contrary to his contract where he had agreed to report on duty on agreed time. That it was the client where he had been deployed who complained and they had to deploy another guard. That on calling the claimant he responded that he had terminated his employment and was no longer interested in working hence absconded duty without giving notice.

**Validity of the reasons for termination**

14. Under section 43 of the Employment Act, the burden is on the employer to prove the validity of the reason for termination based on grounds of misconduct like absconding, 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.”
15. The claimant during cross-examination told the court he was employed as a security guard with tasks assigned by either the supervisor or operations manager. He told the court his leave was authorized by the secretary to the operations manager. That the secretary told him to get someone to step in for him and it was his brother who was working in hardware, who stepped in for him while on leave, after the claimant trained him for three days. That on resumption of duty he met the supervisor at the gate who denied him access. The claimant admitted he left employment to his brother who the client told the employer was a stranger. The claimant did not provide any evidence to demonstrate that he gave his brother's name to the Respondent, even to the alleged secretary, as the person to substitute him, when he was on leave, at the post he was assigned. The court agreed that the brother was a stranger and compromised the work of the respondent. This caused the client to cancel the contract/work, justifiably. The court finds that there was a valid reason to terminate the services of the claimant which reason met the reasonableness test by Lord Denning in *British Leyland UK Limited v Swift*(1981)I.R.L.R 91 who held that:- “The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...”

### **Procedural fairness**

16. The Court found the claimant absconded duty and that amounts to gross misconduct for summary dismissal under section 44 of the *Employment Act* to wit:- ‘(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;’ Section 41(2) provides for the process of separation of employee with employer on basis of gross- misconduct as follows;- ‘41. Notification and hearing before termination on grounds of misconduct (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (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.’ (Emphasis given).
17. The claimant during cross-examination told the court he was employed as a security guard with tasks assigned by either the supervisor or operations manager. He told the court his leave was authorized by the secretary to the operations manager. That the secretary told her to get someone to step in for him and it was his brother who was working in hardware, who stepped in for him. That on resumption of duty he met the supervisor at the gate who denied him access. That the Respondent did not have any leave form to be filled. That he was not issued with notice of termination.
18. Conversely, the respondent's witness told the court the claimant deserted work. That the client where he was attached called and stated there was a stranger at its work place and consequently cancelled the work. RW stated that they looked for the claimant on phone. That they called the claimant later and he said he had left work. They did not issue the claimant the notice as he was not around. That they



called and he said he did not want work. That they did not terminate the employment of the claimant as he left and said he did not want to work. During cross-examination RW told the court he relied on records and had no evidence of the call to the claimant. RW told the court the claimant was called by the supervisor but he had not obtained his statement. That the Respondent did not issue the claimant the notice as the claimant was not around.

## **Decision**

19. The court finds that it was not in dispute that the claim was not subjected to any procedural fairness before the termination. The Respondent stated that the claimant absconded duty but no evidence was filed of service on the claimant's notice of intention to terminate the employment relationship as per section 41 of the *Employment Act*. Absconding is gross- misconduct and a valid ground to terminate employment. The court agreed the claimant left work unauthorised. The termination ought to be done following the procedural process under section 41 of the *Employment Act*. In *Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR* the Court stated, 'an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.' The employer failed to prove even the alleged calls to the claimant and it was at fault for non-compliance with procedural fairness.
20. The court finds that the termination was only unfair for lack of procedural fairness.

## **Whether the claimant was entitled to reliefs sought**

21. The claimant sought the following reliefs:-
  - a. This Honourable Court to find that the Claimant's termination was wrongful and unlawful and consequent to such finding and in exercise of its Jurisdiction do award Judgement as prayed herein under;
  - b. An order that the Respondent releases all monies meant for the Claimant.
  - c. An order directing payment to the Claimant of all the following termina dues arising out of the period of service with the Respondent
    - i. 1 months' pay in lieu of notice-Kshs.8,000
    - ii. Gratuity entitlements (1 month x 1 year worked)-Kshs.8,0000
    - iii. 12 months' pay at the rate of his salary for the unlawful termination for 12 months Kshs.96,000
    - iv. NSSF Ksh 720/= Ksh. 8,640
    - v. NHIF Ksh 300/= for 12 months Ksh. 3600
    - vi. Compensation for being paid below the minimum wage- Ksh. 89,616
    - vii. Total Kshs. 213,856
    - viii. Interest on the above at court's rate
    - ix. Damages for wrongful dismissal
    - x. Issuance of certificate of service
    - xi. Costs of this suit



- xii. Punitive damages to curb employers from extorting employees.
  - xiii. Any other relief the this Honorable Court shall deem fit to grant or order.
- d. This Honourable Court to find that the Claimant's termination was wrongful and unlawful and consequent to such finding and in exercise of its Jurisdiction do award Judgement as prayed herein under;
22. The court held there was justified and valid reasons to terminate the employment of the claimant for leaving work under a stranger without knowledge of the respondent. The termination was unfair for lack for procedural fairness. The claimant was only entitled to notice pay which is granted for one month. The court cannot reward an employee where it finds valid reason of termination as that would amount to compensating misconduct. The court awards notice pay for one month salary at Kshs. 11,330 for lack procedural fairness.

### **Service pay**

23. There was no evidence of payment of NSSF. Service pay is payable under section 35 (5 and 6) of the *Employment Act* where there is no NSSF or other social security like in the instant case. The claimant worked for one year. Service pay is tabulated at 15 days for each of complete year thus ½ of the minimum wage of 11,330 thus Kshs. 5,665.
24. Gratuity claim –gratuity is not provided for as a statutorily benefit and is only payable under contract of employment or Collective Bargaining Agreement. This was not the case here and the same is denied.

### **Claim for NSSF and NHIF unremitted monies**

25. The claimant said his salary was deducted dues for NSSF and NHIF and the same was not remitted. The court had held severally that the claims for statutory dues can only be claimed by the regulators. In any event the claimant has already been awarded Service Pay for lack of NSSF hence the issue is moot.

### **Underpayment claim -Compensation for being paid below the minimum wage- Ksh. 89,616**

26. The claimant claimed that he was paid monthly wages of Kshs. 7,400 which he asserted was below the minimum wage and sought backpay for the underpayment amounting to Kshs. 89,616.
27. The claimant submitted that:- During cross examination, RW1 confirmed that he was conversant with the *Labour Institutions Act* and the provisions therein. He further confirmed knowledge of the Regulation of Wages (General ) (Amendment) Order 2015 which regulated the minimum amount payable to various categories of workers. He also confirmed that the Claimant was employed as a night guard and could be engaged as a day guard. Upon further cross-examination, RW1 confirmed that the salary of Kshs 8,000/= which the claimant was being paid was below the minimum requirement of Kshs 11,330/= as per Regulation of Wages (General ) (Amendment) Order 2015. He also confirmed that the Claimant was never paid any salary as a day guard and was only paid a monthly salary of Kshs 8,000/= despite alternating between a night guard and day guard. He sought compensation as follows ;•
- Under payment as a day guard
- Min wage Kshs 10,107 x 12 months = Kshs 121,284
- Under payment as a night guard
- Min wage Kshs (11,330 – Monthly pay 8,000/=) = Kshs 3,330 x 12months =39,960
- Total due to claimant on under payment (Kshs 121,284 + 39,960) = Kshs 161,244.



28. The respondent did not submit on the underpayment.
29. The claim as pleaded was not disputed. The underpayment related to minimum wages. The claimant in submissions sought for full salary for day time and night guard. Submissions are not pleadings. There was no evidence before the court that the claimant worked day and night. The only evidence was of work sheets for night guard produced by the claimant. RW stated sometimes they alternated day and night. The claimant did not lead evidence of having worked day time and night time. He only produced work sheets for night shifts.
30. The court then taking into consideration the tabulation for all days as worked at night by the claimant awards the same as follows:- Minimum wage Kshs 11,330 – Monthly pay 8,000 equalled to underpayment monthly of Kshs 3,330 x 12months = Kshs. 39,960 which is awarded as backpay for underpaid minimum wage.

### **Conclusion**

31. The court held that the termination was lawful but unfair for lack of procedural fairness. Judgment is entered for the claimant against the respondent as follows:
  - a. Notice pay of Kshs. 11,330.
  - b. Service pay of Kshs. 5,665.
  - c. Underpayment of salary 39,960.
  - d. Total sum(a, b and c above) awarded for Kshs. 56955/- payable with interest at court rates from date of judgment until payment in full.
  - e. Costs of the suit.
32. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY , 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Claimant : -Muhoro

Respondent: Mukathe

Further Court Order

Stay of execution granted for 30 days

Coram

Before Lady Justice J.W. Keli

C/A Otieno

**09/05/2025**

