



**Luseno v Kilima Camp Maasai Mara (Cause 1357 of 2018)
[2024] KEELRC 2 (KLR) (22 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1357 OF 2018
JK GAKERI, J
JANUARY 22, 2024**

BETWEEN

TOM MABYA LUSENO CLAIMANT

AND

KILIMA CAMP MAASAI MARA RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 5th September, 2018 alleging wrongful and unlawful summary dismissal.
2. The Claimant avers that he was employed by the Respondent as Camp Manager from 16th January, 2011 to 15th December, 2017 at Kshs.218,215/= per month.
3. It is the Claimant's case that on 15th December, 2017, the security guard, one Masai Mbirika informed him that a group of armed Maasai youths had broken into the camp and were heading to his office. That one youth by the name Dennis Kirapash wanted to strike him but the Respondent's Bar-man, Mr. Paul Maina came to his rescue and had to be whisked out of his office and could only grab the safe keys.
4. That he was beaten and frog-matched for several kilometers down the escarpment.
5. The Claimant avers that he was taken to Lolgorian District Hospital and later to Kilgoris Level 4 Hospital for X-ray and on discharge on 16th December, 2017 reported the attack at the Lolgorian Police Station under OB No. 22/15/12/2917.
6. The Claimant further avers that he spent the night at the camp under tight security and left on 17th December, 2017 for Nairobi, and was treated at Mariakani Cottage Hospital which suggested a Shoulder Operation at Kshs.148,000/= but the employer asked for a second opinion at Kikuyu PCEA Hospital which report he presented later.



7. That he attended a meeting on 29th March, 2017 where his absence from work and insubordination were discussed.
8. It is the Claimant's case that a meeting with the community scheduled by the Respondent's Assistant Manager, one Mohammed could not take place as he feared for his life and his employment was terminated on 4th May, 2017.
9. That the Director of Occupational Safety and Health Services (DOSHS) assessed his injuries at Kshs.881,000/= but he was not paid.
10. The Claimant prays for;
 - i. Reinstatement to his previous position.
 - ii. Salary arrears for the entire period the Claimant has been out of employment.
 - iii. Damages for injuries sustained while on duty.
 - iv. Damages for wrongful and/or unfair termination.
 - v. 12 months compensation.
 - vi. Costs of this suit with interest.

Respondent's case

11. In its response filed on 15th May, 2023, the Respondent avers that the Claimant's employer was Escapades Ltd, a company incorporated in Kenya and owner of the Kilima Camp, Masai Mara.
12. The Respondent denies having terminated the Claimant's employment without good reason. It also denies the alleged claim for compensation and avers that the attack took place outside the camp.
13. That the Claimant was accorded a fair hearing and the termination was fair.
14. The Respondent admits that the Claimant was paid Kshs.612,168/= being the full emoluments and benefits due to him.
15. That the Respondent met all the Claimant's medical expenses.
16. It is the Respondent's case that the Claimant was guilty of gross misconduct.
17. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

18. On cross-examination, the Claimant admitted that he received the notice to show cause and the notice of the disciplinary hearing on 15th January, 2018 and confirmed that the attack took place on 15th December, 2017, appealed the dismissal, was heard but did not receive a response and was paid Kshs.612,198/=.
19. That he was the Camp Manager which was situated within a conservancy area rented by the community.
20. That he had good interactions with the community and no allegations had been made against him.
21. That he could not tell why he was attacked as he had no issue with Maasai women.



22. That he was not paid all his dues and was claiming damages for injuries sustained in the course of his employment and unlawful termination of employment.
23. He disclosed that he knew the persons who attacked him and was aware that he was supposed to have a good working relationship with the community.
24. That although the camp had no fence, it had a gate.

Respondent's evidence

25. RWI, Mr. Timothy Rob confirmed that the alleged complaints sheet on record did not have the complainants name and the statements were from the community generally.
26. That the Claimant was given an opportunity to cross-examine witnesses.
27. That the meeting with the community scheduled for 17th February, 2018 took place but minutes were not filed and the Claimant did not attend though he had been invited.
28. The witness testified that the minutes on record dated 3rd February, 2018 relate to a meeting whose objective was to understand what had occasioned the attack on the Claimant.
29. That the Claimant was not given a notice to show cause for insubordination and disobedience of lawful orders, but he had been called upon to visit the Kikuyu hospital on 20th March, 2018 but did not do so until 19th April, 2018.
30. That the Claimant was attacked while at the workplace on 15th December, 2017.
31. The witness confirmed that the amount assessed by the DOSHS of Kshs.881,252.88 was paid in terms of salary.
32. That the insurer had tabulated the amount payable to the employer as Kshs.902,574.00 but its letter made no reference to the DOSHS computation.
33. The witness further confirmed that the letter dated 23rd May, 2018 to the Manager KCB, Ongata Rongai Branch makes no reference to the amount assessed by the DOSHS.
34. That the Claimant did not attend the appeal hearing but there was no letter on record to that effect.
35. On re-examination, the witness confirmed that the altercation happened outside the camp.
36. That members of the Maasai community came to the office and left with the Claimant and they may have disagreed and he was injured by members of the community.
37. That the Claimant was accorded due process when he appealed the termination.
38. According to the witness, reinstatement was not possible as the issue was never resolved.
39. RWII, Mr. Jacob Nabwala confirmed that the Claimant was picked from the office by members of the community (the witness also confirmed he was not present).
40. The witness testified that although investigations took place, the report was not filed.
41. The witness confirmed that the Claimant was not accorded an opportunity to cross-examine members of the community and had requested for security.
42. The witness testified that the Claimant was not entitled to the amount assessed by the DOSHS but was paid Kshs.612,198.00.



43. That the Respondent did not oppose payment of the sum of Kshs.881,252.88.
44. According to the witness, the Claimant was paid in the form of salaries and the Respondent did not appeal the assessment by the DOSHS.
45. On re-examination, the witness testified that although the Claimant did not work after the injuries, he was paid for the duration and hospital bills were also paid and his injuries did not incapacitate him.

Claimant's submissions

46. As to whether termination of the Claimant's employment was substantively unfair, counsel submitted that it was as the Respondent did not disclose the Claimant's conduct which occasioned dispute between the Respondent and the community and assumed that the allegations were true.
47. That the identities of the complainants were never disclosed as the report on record had no particulars.
48. Counsel submitted that the Claimant was attacked in the office and the two grounds relied upon to terminate the Claimant's employment had not been brought to his attention previously.
49. As regards procedural fairness, counsel urged that the Respondent neither conducted an investigation nor file a report and the Claimant was not invited for a disciplinary hearing to respond to the charges against him nor was he informed of his right to attend with a representative of his choice and the dismissal was thus procedurally unfair.
50. Reliance was made on the provisions of Article 41 of *the Constitution* of Kenya, 2010 and Section 4 of the *Fair Administrative Action Act*, 2015.
51. It was submitted that the appeal hearing did not take place and no decision was rendered.
52. As regards the reliefs sought, counsel submitted that the Claimant was entitled to the amount assessed by the DOSHS as the Respondent did not object to the assessment.
53. Counsel cited the decisions in *Patrick Mugallo V Crown Motors Group Ltd* and *Justus Atsieno Odhiambo V Siri Gurdwara Ramgarhia Railway* to reinforce the submission that termination of the Claimant's employment was unfair.

Respondent's submissions

54. Counsel for the Respondent submitted that the decision to dismiss the Claimant was grounded on the Claimant's handling of the local community which was inimical to the maintenance of a cordial relationship between the two. That the animosity he created culminated in the attack by members of the community and was unrelated to his employment by the Respondent.
55. Counsel urged that the Claimant was duty bound to act in the best interests of the company and being the Camp Manager in charge of day today operations, the Claimant owed the Respondent a duty to measure his interaction with the local community.
56. Counsel urged that records revealed that the Claimant was invited and attended a meeting to discuss the attack by members of the community and he suggested a meeting with the community but did not attend.
57. Counsel submitted that the Claimant had indicated that he would have the attackers prosecuted thus underscoring that the attack was on him not the Respondent and in any case it happened outside the camp and was on account of a personal dispute between the Claimant and the community and the Respondent was not liable but gratuitously met his hospital bills.



58. Counsel further submitted that the termination letter clearly articulated the reasons for termination of the Claimant's employment including his disrespectfulness and being insubordinate in relation to consulting a Doctor at the Kikuyu PCEA Hospital in particular.
59. That the letter underscored the Claimant's right to appeal the termination of employment and RWI and RWII testified that the Claimant did not attend the appeal hearing.
60. As regards compensation for the injuries sustained during the attack, counsel urged that they were sustained outside the Respondent's property and did not relate to his work as an employee of the Respondent.
61. Counsel relied on Section 2 of *Work Injury Benefits Act* (WIBA) for the definition of an accident to urge that the accident in question was a consequence of personal differences between the Claimant and members of the local community.
62. On service pay, counsel cited the decisions in *Kennedy Nyangucha Omanga V Bob Morgan Services Ltd* (2013) eKLR and *Martin Ileri Ndwiga V Olerai Management Company* (2017) eKLR to urge that the Claimant was not entitled to service pay and was paid all his dues.
63. Finally, counsel submitted that the Respondent had demonstrated that the Claimant had no action against it and urged the court to dismiss the suit.

Findings and determination

64. The issues for determination are;
 - i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
65. As regards the 1st issue, the provisions of the *Employment Act*, 2007 and case law are consistent that for a termination of employment to pass muster, it must be demonstrated that the employer had a valid and fair reason to terminate the employment and did so in accordance with a fair procedure.
66. The foregoing has been reinforced by legions of decisions such as *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR where Ndolo J. underscored the need to establish a substantive justification for the termination and procedural fairness for a termination to pass the fairness test and emphasized by the Court of Appeal in *Naima Khamis V Oxford University Press EA Ltd* (2017) eKLR.
67. In this case, it is common ground that the Claimant was an employee of the Respondent effective 16th January, 2011 till 15th December, 2017 when he was attacked by youths from the local community and did not report to the workplace thereafter ostensibly for fear of his life and his employment was terminated on 7th May, 2018.

Reason(s) for termination

68. It is common ground that the Claimant was attacked by youths of the local community on 15th December, 2017 who came to his office and left with him.
69. The Claimant's evidence on what transpired in his office is interesting but unequivocal that the attackers left with him and he could only grab the safe keys.
70. It is clear that the Claimant was not beaten while in the office but was frog-matched away from the office alone. No other employee was attached or whisked away.



71. The court is left wondering why, if the events were as dramatic as described, why Mr. Masai Mbirika, the security guard and Mr. Paul Maina made no effort to report the matter to the police or call for help from the Rangers.
72. The attack on the Claimant must have shocked the Respondent which reportedly conducted an investigation and an undated list of complaints against the Claimant is on record.
73. Email communication reveals that a meeting took place on 22nd December, 2017 between the members of staff of the Respondent and members of the Maasai Community and a list of complaints were written down. Other than the email communication, none of the Respondent's witnesses attended the meeting. Whereas some of the complaints were old and institutional such as failure to take a person to hospital most of them were directed at the Claimant and personal to him and the list is long.
74. From the diversity and number of complaints voiced by members of the local community, it is decipherable that the Claimant was not projecting a positive image of the Respondent to the local community and as exemplified by attack on 15th December, 2015, the local community attacked him alone and did not damage the Respondent's property.
75. Notwithstanding the general nature of the allegations, it is clear that the local community had genuine complaints against the Claimant as the Manager of the Respondent's Camp.
76. During the meeting held on 3rd February, 2018, whose minutes are uncontested, the Claimant stated that he had other reasons for the attack but did not disclose them which would suggest that he was aware of the reasons for the attack on his person.
77. From the minutes, it is clear that the Claimant knew those who attacked him and could identify them and must have known the reason(s) for the attack and they appear to have been personal.
78. In its notification of disciplinary inquiry dated 15th January, 2018, the Respondent attached the list of the complaints and the Claimant was expected to respond within 2 days.
79. The Claimant adduced no evidence of a response.
80. It is common ground that the Respondent did not issue a notice to show cause with detailed accusations or charges.
81. This means that the Claimant was not accorded the opportunity to interact with the specific allegations against him.
82. Unlike the notification for disciplinary inquiry dated 15th January, 2018, which was exclusively on the incident of 15th December, 2017, the termination letter identified four reasons for termination namely; incident on 15th December, 2017 and complaints by the local community, disrespect and refusal to obey instructions to visit the Kikuyu PCEA hospital which he eventually did on 19th April, 2018.
83. The Claimant contested the last two grounds of termination on the ground that they had not been brought to his attention either by way of a notice to show cause or other method and was seeing them for the first time.
84. The court is of the view that since the two grounds had not been brought to the Claimant's attention for his response prior to the letter of termination, they cannot be relied upon as the reasons for termination for want of fairness and have no effect on this judgement.
85. From the foregoing, it is clear that the Local Community had unresolved grievances with the Claimant who appears to acknowledge the same and had suggested the holding of a meeting with the community.



86. The fact that the Claimant wanted to meet the community after the attack would appear to suggest that he knew what was happening.
87. In sum, the manner in which the Claimant was attacked on 15th December, 2017 leave little doubt the youths involved had a bone to pick with him as opposed to his employer or any other employee.
88. This is reinforced by the Claimant's own written statement that neither one Masai Mbirika, the security guard on duty nor Mr. Paul Maina, the barman, who was in the Claimant's office were attacked or frog marched by the youths and the gate of the camp was not broken or any property damaged.
89. A grudge against the Respondent would have been apparent from the manner and execution of the attack. The attack in question was very specific.
90. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is guided by the provisions of Section 43(2) of the *Employment Act*, 2007 and judicial pronouncements.
91. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
92. In *Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR*, B.O. Manani J. states as follows;
- “In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.
93. Similarly, in *Kenya Revenue Authority V Reuwel Waitthaka Gitahi & 2 others (2019) eKLR*, the Court of Appeal laid it bare that;
- “The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant's services. That is a partly subjective test.”
94. The foregoing sentiments resonate with the sentiments of Lord Denning in *British Leyland (UK) Ltd V Swift (1981) I.R.L. R 91* on the band of reasonableness test that;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view . . .”
95. As adverted to elsewhere in this judgement, the number and diversity of the issues raised by the Local Community against the Claimant as the Manager of the Respondent's Camp coupled with the manner in which he was isolated and attacked show that he had not nurtured a sustainable co-existence between the Respondent and the local community for several months before the attack.



96. Having worked at the camp since 2011, the Local Community knew him well and the complaints against him cannot be dismissed as general.
97. Although the Claimant challenged the authenticity of the allegations during the meeting held on 3rd February, 2018, Alexander Lohwasser who had attended the meeting on 22nd December, 2017 and was Chair of the meeting on 3rd February 2018 discounted the same as were the Claimant's suggestion on erection of a perimeter fence around the camp and hiring of armed police on a full-time basis.
98. Most telling however, was the Claimant's admission that the reasons for attack were much deeper than what was tabled and he had other reasons that he declined to divulge.
99. From the foregoing reasons, it is the finding of the court that the Respondent has demonstrated on a preponderance of probabilities that it had a valid and fair reason to terminate the Claimant's employment on 7th May, 2018.

Procedure

100. As emphasized by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, Section 41 of the *Employment Act*, 2007 prescribes an elaborate and mandatory process to be complied by the employer in effecting a termination of employment.
101. The specific elements of procedural fairness have been elaborated upon in legions of decisions such as *Loice Otieno V Kenya Commercial Bank* (2013) eKLR by Radido J. and the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR among others
102. The tenets include reason(s) for which termination of employment was being considered, explanation of the grounds of termination in a language understood by the employee, entitlement of the employee to the presence of another employee of his choice as well as hearing and considering the representations made by the employee and/or the person chosen by the employee.
103. Case law is consistent that a termination conducted otherwise than in accordance with the provisions of Section 41 of the *Employment Act*, 2007 is irregular.
104. In the instant case, it is common ground that the Respondent did not issue a notice to show cause to the Claimant.
105. However, the notification of disciplinary inquiry dated 15th January, 2018 informed the Claimant that the Respondent had conducted an investigation and complaints had been raised against him and his explanation was required by 17th January, 2018.
106. Neither the Claimant nor the Respondent availed a copy of the response or evidence of an invitation to a hearing or minutes of the proceedings.
107. From the evidence on record, it is clear that the Claimant was not accorded an opportunity to confront the allegations made against him and defend himself.
108. Although RWI testified that as many as four meetings were held at the Respondent's Head Office, he was unambiguous that no minutes were filed.
109. Equally, RWII, Jacob Nabwala, was emphatic that the Claimant was not given an opportunity to question members of the community.



110. As regards the appeal, parties adduced conflicting evidence. While the Claimant testified that he attended the appeal hearing but did not receive a response, the Respondent's evidence is that he was invited for a hearing and did not attend.
111. In the absence of minutes or record by the Respondent to show that the appeal hearing took place on 19th May, 2018 at 11.00 am, the Claimant did not attend, the Claimant's version of the events is more persuasive though unverifiable.
112. For the foregoing reasons, it is the finding of the court that the termination of the Claimant's employment by the Respondent was not conducted in consonance with the provisions of Section 41 of the *Employment Act*, 2007 and was thus unfair within the meaning of Section 45 of the *Employment Act*, 2007.

Appropriate reliefs

Reinstatement

113. As the Claimant's employment was terminated on 7th May, 2018, and it is thus more than 3 years since the termination, the remedy of reinstatement is not sustainable by virtue of the provisions of Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011.
114. As regards practicality, RWI testified that reinstatement was not possible as the issues the Claimant had with the local community were never resolved.
115. The remedy is unsustainable and is declined.

Damages for injuries sustained while on duty when attacked by unknown persons

116. It is common ground that on 15th December, 2017, a group of youths belonging to the local community came to the Respondent's camp and went straight to the Claimant's office and whisked him out of the office in the presence of one Mr. John Maina, the Respondent's Bar man and according to his written statement he "was beaten and/or mobbed and frog matched for several kilometres down the nearby escarpment towards the pool of crocodiles."
117. According to RWI, the youths came to the office and went out with the Claimant and may have disagreed and the incident occurred outside the camp.
118. Similarly, RWII confirmed that the Claimant was picked from the office by the youths from the local community, but also confirmed that he was not present.
119. From the Claimant's written statement, it is decipherable that the youths did not beat up the Claimant in his office or within the camp as they only frog matched him for several kilometers down the escarpment.
120. The Claimant left out crucial details as to when and how the incident ended including who rescued him.
121. The undated police statement recorded at the Lolgorian Police Station is indecipherable.
122. As adverted to elsewhere in this judgement, it is unambiguous that the youths wanted an explanation from the Claimant for his acts or omissions.
123. Strangely, the Claimant is suing for injuries sustained when he was attacked by "unknown persons" yet there is overwhelming evidence that he knew his attackers as follows;



124. First, the written statement dated 10th August, 2018 identifies one of them as Mr. Dennis Kirapash who allegedly had a sword.
125. Second, the minutes of the meeting held on 3rd February, 2018, which the Claimant did not contest are explicit that the Claimant personally knew the persons who attacked him and could identify them.
126. Third, the Kenya Police Medical Examination Report (P3) dated 15th December, 2017 (dated wrongly as 15/22/2017) clearly states that he was assaulted by known persons.
127. Finally, the doctor's letter from the PCEA Kikuyu Hospital provided by the Claimant is explicit that "He was attacked by people known to him at Mara."
128. In sum, the Claimant had an action against the persons who assaulted him as they were known to him and the attack was not accidental. It was planned and executed.
129. As regards compensation under the *Work Injury Benefits Act*, 2017, the Claimant testified that the Director of Occupational Safety and Health Services (DOSHS) computed the amount payable to him for the injuries as Kshs.881,252.88 which the Respondent did not pay.
130. Counsel submitted the Claimant was entitled to the sum though it was neither pleaded nor prayed for in this suit as special damages.
131. As regards the damages prayed for, it is clear that the Claimant's attackers were well known to him and it was one of the options he had as evidenced by the minutes of the meeting held on 3rd February, 2018 as he had a cause of action against the attackers for assault and battery and could still do so unless the action is statute barred under the provisions of the *Limitation of Actions Act*.
132. In the upshot, the court is unpersuaded that the Claimant has established a case for damages for injuries sustained when he was attacked by "unknown persons".
133. The prayer is declined.

Salary arrears for the entire period the Claimant has been out of employment

134. Neither the Claimant's written statement nor the oral testimony adduced in court make reference to the particulars of the salary arrears prayed for.
135. It is unclear as to when the arrears accrued and how much it is.
136. This prayer lacks the requisite particulars and was not proved. It is dismissed.

Damages for wrongful and/or unlawful termination

137. The provisions of the *Employment Act*, 2007 are reticent on the remedy of general damages for unfair or unlawful termination of employment.
138. In Kenya Post Authority V Edward Otieno, the Court of Appeal stated that the remedy of general damages was unavailable in cases of termination of employment.
139. More significantly, the Claimant tendered no evidence of entitlement to general damages.
The prayer is dismissed.



In the alternative to (d), terminal dues in paragraph 7 of the statement of claim, namely notice pay, annual leave, salary for 7 days in May 2018 and service pay

140. The Claimant admitted that he was paid the sum of Kshs.612,198/= by cheque dated 31st May, 2018 and did not question what the amount covered.
141. As evidenced by the Respondent's counsel's letter dated 23rd May, 2018, the amount paid included the four claims tabulated in paragraph 7.
142. The prayer is unsustainable and is dismissed.

Maximum compensation

143. Having found that termination of the Claimant's employment was procedurally flawed, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
144. In arriving at the quantum of compensation, the court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent for about 7 years and 3 months.
 - ii. The Claimant expressed his wish to remain in the Respondent's employment as exemplified by his appeal.
 - iii. The Claimant had no other recorded warning or misconduct.
 - iv. The Claimant substantially contributed to the termination of employment by engaging in conduct or activities which infuriated the local community and led to the attack.

Although in re-examination the Claimant testified that he had no idea why he was attacked, minutes of the meeting held on 3rd February, 2018 are clear that he was aware but did not want to divulge the same.

145. In the circumstances, the court is satisfied that equivalent of 3 months gross salary is fair.
146. In the upshot, judgment is entered for the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unfair.
 - b. Equivalent of 3 months gross salary.
 - c. Costs of this suit with interest at court rates from date of judgment till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF JANUARY 2024

DR. JACOB GAKERI

JUDGE

