



**Okari v Cobra Securities Limited (Cause 203 of 2017)
[2024] KEELRC 261 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 261 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 203 OF 2017
NZIOKI WA MAKAU, J
FEBRUARY 13, 2024**

BETWEEN

ABEL MORANG'A OKARI CLAIMANT

AND

COBRA SECURITIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent claiming wrongful and unfair termination of his services and failure to pay him terminal benefits. He averred that the Respondent employed him as a Security Guard on or about 18th November 2013 on a monthly salary of Kshs. 7,500/- but did not give him an appointment letter. The Claimant's case was that despite serving the Respondent with loyalty and diligence, it terminated his services without notice on 15th May 2016. That at the point of exit, the Respondent issued him with a Cheque of Kshs. 15,000/- which bounced upon presentation to the bank. It was the Claimant's averment that his terminal dues amounting to Kshs. 151,750/- include pay in lieu of notice, house allowance, leave earned and not taken, service pay, uniform refund, and compensation for unfair termination equivalent to 12 months' wages. He prayed that this Court awards the said amount as particularised in the Claim and further asked for costs of this suit, interest and any other relief as the Court may deem just.

2. In response, the Respondent filed a Reply wherein it admitted to having employed the Claimant but asserted that his salary was Kshs. 7,000/- and not Kshs. 7,500/- as alleged by him. It averred that the Claimant's terms of employment were contained in the Employment Contract dated 18th November 2013, which the Claimant signed signifying his acceptance to be bound by the terms therein. According to the Respondent, the Claimant absconded duty at his work assignment on 1st May 2016 thus breaching the provisions of his Contract as well as the law. It thus denied that the Claimant is entitled to any of the amounts set out in his Memorandum of Claim or to the prayers sought therein and further denied that it issued him a cheque. The Respondent further averred that



since the Claimant deserted duty and never returned the uniform issued to him, he is not entitled to any uniform refund amount, compensation for unfair termination and notice pay. In addition, that the Claimant is not entitled to service pay since the Respondent used to pay NSSF on his behalf and that it also had evidence that the Claimant took all the leave days he was entitled to. The Respondent prayed that the Claim herein be dismissed with costs to it.

Evidence

3. The Claimant testified that he worked from 6.00pm to 6.00am and was earning Kshs. 7,500/- and that he was not paid in May 2016 upon termination of his employment. He stated that he was asked to wait three weeks for payment of his terminal dues and that he was neither notified of the reasons for the termination nor given an explanation. Further, that he was not given any documents, notice, house allowance, and never went on leave for the whole time he worked for the Respondent. It was the Claimant's testimony that he returned his uniform to the Respondent. He stated under cross-examination that he never asked the Respondent about housing allowance and denied that he skipped work for 15 days.
4. The Respondent's witness, Mr. James Ngwalla, produced the Claimant's Employment Contract together with the Respondent's Bundle. He testified that after the Claimant failed to report to work on 1st March 2016, the Claimant never told them where he was and that they wrote to him, through the post office, to his last known address. That the Respondent subsequently summarily dismissed him pursuant to para 10(i) of the Employment Contract (Exhibit 1). Mr. Ngwalla further testified that the Claimant went on leave and never returned his uniform and he challenged the Claimant to produce a copy of the purported cheque that bounced and a copy of his NSSF Statement to prove that the Respondent did not pay his NSSF. Under cross-examination, Mr. Ngwalla admitted to not having filed in court the Claimant's leave forms and in regard to NSSF payments, asserted that NSSF statements are issued to individuals.

Claimant's Submissions

5. According to the Claimant, the matter raises three issues:
 - a. Whether the termination was unfair and unprocedural;
 - b. Whether the Claimant was entitled to any notice; and
 - c. Whether the Claimant is entitled to the prayers sought.

The Claimant submitted that his termination was done wrongfully and unlawfully, hence wanting in both procedure and fairness as the Respondent failed to follow the mandatory requirements provided for in sections 41, 43 and 45 of the Employment Act, 2007. That section 41 of the Employment Act requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. That section 43 of the Employment Act throws a burden on the employer to prove the reason or reasons for the termination and where the employer fails to do so, then the termination shall be deemed unfair pursuant to the provisions of section 45 thereof. That under section 45 of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reasons and that a fair procedure was followed.

6. On procedural fairness, the Claimant relied on the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd [2013] eKLR where the Court stated that in a claim for unfair termination or wrongful dismissal on the grounds of misconduct among other things, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness as required under



section 41 of the Act. Further, in a case of summary dismissal, the employer is obliged to hear and consider any representation by the employee before making the decision to dismiss or give other sanction. The Claimant submitted that it is trite law that the procedure provided for under section 41 of the *Employment Act* is mandatory and that procedural unfairness shall occur if there is some flaw in the process leading to the decision. That in the case of *Joyce Mukolwe v Mustek East Africa Limited* [2021] eKLR, this Court held that in considering the procedural fairness of termination or summary dismissal of an employee, the period under consideration has to be one from the time the employer conceives the intention to terminate or dismiss, to the preparation and issuance of the termination letter, or conveyance of the decision to terminate or dismiss. It was the Claimant's submission that it therefore follows that since procedure was not followed in the termination of his employment, the termination was unfair.

7. On substantive fairness, the Claimant submitted that considerable judicial attention has been given regarding the test to be applied by courts in determining that a termination of employment was valid and fair. He cited the case of *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR in which the Court expressed that the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of the employee. It was the Claimant's submission that therefore, the onus of proof that he absconded duty is on the Respondent as the employer. That in the case of *Simon Mbithi Mbane v Inter Security Services Limited* [2018] eKLR, the Court found that the employer had not proved its case of absconding, which included the employer demonstrating that it tried to reach out to the employee before terminating his employment. That while citing the foregoing case, the Court in the case of *Boniface Francis Mwangi v B.O.M. Iyego Secondary School* [2019] eKLR opined that it is good practice for an employer to take the initiative of contacting the employee who absconds work and find out the reason for the failure to present themselves for work. The Claimant argued that in this case, the Employer did not share any show cause letter and any correspondence, including phone call logs, indicating that it attempted to get hold of him prior to termination of his employment. That in the upshot, there is no proof of service of the alleged termination notice explaining the reason for termination and as such, the whole process was a sham, flawed and wanting in procedure.
8. The Claimant submitted that a quick look at the said Employment Contract, which he denounced during the trial, indicates that the signature of the alleged employee and the one of the Claimant herein as in his documents do differ. That without any other corroboration, there is a high likelihood that he never signed the said document. As regards the prayers sought, the Claimant submitted that for house allowance, section 31(2) of the *Employment Act* provides an employer with three options, that is, to provide housing, pay house allowance or pay a consolidated salary. That in this case, whereas the Employment Contract only states that the salary is inclusive of all the allowances paid at the end of the month, the same does not state that the allowances include housing allowance. He argued that a further look at Regulation of Wages (General) (Amendment) Order, 2013 indicates that the minimum wage for a security guard, which is exclusive of house allowance, was Kshs. 9,780.95. That as such, the Kshs. 7,500/- he used to receive was an underpayment and did not even cover the payment as per the Minimum Wage during the said year. He concluded that the Respondent evidently never paid or even intended to pay the statutory house allowance to its employees. That without prejudice to the foregoing, the Court in the case of *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR opined that the failure of the Employer to use the term "other benefits as required by law" in the contract to award house allowance led the Court to believe that the pay issued to the Employee was not inclusive of House Allowance, thus the award of house allowance granted to the employee. It was the Claimant's submission that having demonstrated that the termination was unfair, he is therefore entitled to the prayers sought in his Memorandum of Claim together with costs.



Respondent's Submissions

9. The Respondent submitted that since the Claimant was summarily dismissed for absconding duty, he had not come before Court with clean hands and his claim should thus fail. That under section 44(3) of the *Employment Act*, an employer may summarily dismiss an employee from his employment where the employee fundamentally breaches the terms of the contract of service. That section 44(4) (a) further provides that absence from work or from a place appointed for the performance of work constitutes a fundamental breach of contract that is liable to summary dismissal. It argued that faced with the testimony by Mr. Ngwalla, the Claimant was obliged to show by evidence that he did not in fact abscond and was at his place of work. That the Claimant had the opportunity to call the owner of the area he was guarding or any other witness to demonstrate that he did not desert duty but failed to do so. It was the Respondent's submission that it thus acted within the law by summarily dismissing the Claimant for his failure to report for work or being absent from his duty station. Moreover, that since the Claimant absconded duty, he was not available for disciplinary hearing. That the testimony by Mr. Ngwalla was to effect that the Claimant was not reachable after he deserted duty on 1st May 2016 and could thus not be subjected to any disciplinary action by the Respondent.
10. Regarding the reliefs sought by the Claimant, the Respondent submitted that considering Mr. Ngwalla adduced concrete evidence before Court that the Claimant absconded duty without any notice to his employer, he cannot expect to be paid notice pay. For unpaid/untaken leave, the Respondent noted that the Claimant failed to produce in Court any evidence of complaint or claim for monetary compensation for the same and that the claim was thus not well founded. It further submitted that the Claimant did not also produce any evidence of complaint that the Respondent was not paying his NSSF and that Mr. Ngwalla was insistent that the Respondent paid all the Claimant's NSSF remittances. Regarding the claim for uniform refund, the Respondent submitted that the Claimant is not entitled to the same as he did not return his uniform upon his dismissal and he also had no evidence to prove that he returned the uniform. It further submitted that on house allowance, where a contract of employment signed between an employer and employee states that the monthly salary is gross salary, then the employee is not entitled to additional house allowance. It relied on the case of Pius Toboso Matendechere v Jaswant Singh & Brothers Ltd [2015] eKLR in which the Court while citing the case of Thomas Ndiege Oyugi v Riley Falcon Security Services [2013] eKLR, stated thus:

“The claimant was paid a gross salary for the entire period he was in employment. There is no evidence that he ever asked for payment of house allowance during the tenure of his employment. This means he was aware that his salary was consolidated. This fortified by the fact that the claimant did not demand payment of house allowance in his labour complaints.

I agree with the decision of Wasilwa J that an employee paid a consolidated wage is not entitled to house allowance in addition as the salary is inclusive of house allowance. A gross pay means the salary is inclusive of all allowances including house allowance. I find that the claimant has not proved and is therefore not entitled to house allowance as his salary was inclusive of the same.”
11. The Respondent argued that in the present case, clause 5 of the Employment Contract agreed upon between the Claimant and Respondent clearly spelt out that the Claimant's salary of Kshs. 7,000/- per month was gross, inclusive of all allowances payable at the end of every month. According to the Respondent, this connoted that the house allowance and all other allowances were included. It submitted that the Claimant had also neither asked for house allowance at the point of employment nor complained about house allowance during the course of his employment. That the claim for house



- allowance before Court was thus belated and an afterthought and the Claimant had no basis to claim the same.
12. The Respondent further submitted that a reading of section 49 of the *Employment Act* reveals that where in the opinion of the labour officer, the termination of the Claimant's employment was unfair, he may recommend to the employer to pay the employee wages not exceeding 12 months' salary. The Respondent argued that with the operative words being 'may' and 'recommend', the foregoing section is not worded in mandatory terms and the employer may accept the labour officer's recommendation or reject it. In addition, the Respondent submitted that under section 50 of the *Employment Act*, the Court is guided by the labour officer's recommendations under section 49, in determining a complaint or suit involving dismissal or unfair termination of the Claimant's employment. It fronted that the Claimant had not demonstrated that he instituted any complaint before the labour officer for any subsequent recommendation and had therefore not put anything on the table to enable this Court make any determination based on section 49 of the Act.
 13. Additionally, the Respondent argued that compensation or damages payable after a finding of wrongful termination is dependent on the employee's length of service with the employer. That in the case of *Kenya Hotels and Allied Workers Union v Desert Rose Resort* [2022] eKLR, the Court awarded the claimant compensation equivalent of 2 months' salary for having worked for the respondent for 2 years and 5 months. The Respondent submitted that given the Claimant in the present case worked for the Respondent similarly for 2 years and 5 months, if this Court finds that he was unfairly dismissed, he would be entitled to compensation of not more than 2 months' salary. It however reiterated that the Claimant's employment was not unlawfully terminated to warrant payment of any compensation.
 14. It is asserted by the Respondent that the Claimant was terminated upon absconding work. The Claimant asserts the termination was without basis. The letter of termination was dated 10th October 2015 yet it indicated the Claimant had allegedly absconded work from 1st May 2016. Assuming the Respondent had basis for termination for this reason, it needed to show it had attempted to contact the employee without success. No letter was tendered in evidence or evidence led as to the efforts of the Respondent in tracing the employee. Whereas the Respondent asserts desertion, this was not proved to the required standard which is on a balance of probabilities. In addition, the Respondent admitted to underpaying the Claimant. He however will only recover the monies for underpayment in respect of the last year of service alone. The Regulation of Wages (General) (Amendment) Order, 2013 indicates that the minimum wage for a security guard exclusive of house allowance was Kshs. 9,780.95. To this would be added a sum of Kshs. 1,467.15 being house allowance at 15% of the basic pay in terms of section 31 of the *Employment Act*. The amount which was due as salary each month was Kshs. 11,248.10 and the Claimant only received Kshs. 7,000/- meaning he was underpaid by a sum of Kshs. 4,248.10 each month. He would only recover the underpayment for a period of one year meaning he would get Kshs. 50,977.20 for the last year of service as a wage underpayment. In respect to the compensation for termination, he had worked for 2 years and some months as a result of which in my considered view, the full compensation may not be ideal. He has secured a portion of his unpaid salary and as such a compensation for 4 months for his unfair termination would suffice. It is uncontroverted that the Respondent did not afford the Claimant an opportunity to give an explanation in terms of section 41 of the *Employment Act*. The Claimant is thus entitled to recover the compensation for 4 months which is Kshs. 44,992.40.
 15. In the final analysis I enter judgment for the Claimant against the Respondent for:-
 - a. Kshs. 50,977.20 being underpayment of wages
 - b. Kshs. 44,992.40 as compensation



c. Costs of the suit

d. Certificate of service in terms of section 51 of the *Employment Act*.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

