



Kati v G4S Kenya Limited (Employment and Labour Relations Appeal E219 of 2022) [2024] KEELRC 200 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 200 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E219 OF 2022**

**SC RUTTO, J
FEBRUARY 9, 2024**

BETWEEN

EDWARD OMUNAMI KATI APPELLANT

AND

G4S KENYA LIMITED RESPONDENT

(Being an appeal against the Judgment and decree of Principal Magistrate Hon. S.A Opande (PM) delivered on 14th November 2022 in Nairobi Chief Magistrates Employment Cause E965 OF 2020)

JUDGMENT

1. Through a Memorandum of Claim dated 6th October 2020, the Appellant moved the Chief Magistrate's Court at Milimani seeking a declaratory order to the effect that he was unlawfully dismissed from employment. The Appellant further sought an order to compel the Respondent to pay him terminal dues and compensatory damages in the sum of Kshs 905,853.00.
2. In his Claim, the Appellant averred that he was employed by the Respondent as a cashier vide a letter dated 9th September 2013. It was the Appellant's case that he discharged his duties diligently and in accordance with the terms of employment without any appraisals from his employer. The Appellant further averred that he was terminated from employment on 4th November 2019 on grounds of aiding and abetting commission of a robbery where the Respondent's staff were robbed of cash amounting to Kshs 74,480,000.00. The Appellant denied being on duty when the alleged offence occurred hence he was perplexed when he was arrested and subjected to aggressive questioning by the police.
3. It was the Appellant's view that the decision to dismiss him was not only unfair and unlawful, but extremely inhuman as there was no link between him and the crime and further, he was not given an opportunity to be heard. He further contended that he was terminated on flimsy grounds.



4. The Claim did not go unopposed. The Respondent through its Statement of Response dated 14th December 2020, denied the Appellant's assertions that he discharged his duties diligently and that his termination was unfair. In its defence, the Respondent further averred that on 5th September 2019, while its Cash In Transit crew were on their first stop in their replenishment duties at Standard Chartered Bank ATM at Nairobi West, they were attacked by the police officers escorting them. The said police officers stole a total of Kshs 74,480,000.00.
5. According to the Respondent, police investigations ensued and the Appellant who was a cashier within its Cash Services Department, was interrogated by police in connection with the robbery incident. The Respondent further stated that the Appellant admitted that Benson Sawanga and Bernard Mwendwa who had been arrested for their direct involvement in the robbery, had each promised him Kshs 500,000/= for collection of intelligence from the Respondent's Cash Services Department.
6. That further, the Appellant was subjected to a disciplinary process and on 29th October 2019, he was invited to a disciplinary hearing. He was accompanied by a shop steward and was given an opportunity to make his submissions as to why disciplinary action should not be taken against him. The Respondent considered the Appellant's representations against the findings of the disciplinary panel and the gravity of his misconduct and made a decision to dismiss him from employment.
7. In the Respondent's view, the dismissal of the Appellant from employment was lawful, fair and procedural. To this end, the Respondent asked the Court to dismiss the Claim with costs.
8. At the trial Court, both parties called oral evidence and after close of the hearing, they filed written submissions. Subsequently, the trial Court evaluated and analyzed the evidence on record, and found that the Appellant was fairly and lawfully terminated from employment. Accordingly, in its Judgment delivered on 14th November 2022, the trial Court dismissed the Appellant's Claim with an order that each party bears its own costs.

The Appeal

9. The Appellant being aggrieved by the findings and orders of the trial Court has sought to challenge them on the following eleven (11) grounds listed in its Memorandum of Appeal:
 1. The trial Court erred in law by failing to consider the Claimant's (sic) evidence presented for unfair termination.
 2. The trial Court erred in law in failing to make a finding that the Claimant's (sic) purported confession occasioning his dismissal was made under duress.
 3. The trial Court erred in law by dismissing the Appellant's claim despite oral evidence adduced and medical evidence indicating that the Claimant (sic) purportedly confessed after being tortured.
 4. The trial Court erred in law in failing to make a finding that the reason for termination of the Claimant (sic) was unsubstantiated.
 5. The trial Court erred in law in dismissing the Claimant's (sic) claim yet there was no proof of breach of any term of his contract of employment or job description.
 6. The trial Court erred in making a finding that the Claimant (sic) was validly dismissed on an offense that is criminal in nature and failing to consider the proper standard of taking confessions.



7. The trial Court erred in dismissing the Claimant (sic) on a purported confession which was irregularly procured.
 8. The trial Court erred in law in failing to consider the purported offense occasioning the dismissal of the Claimant (sic) was criminal in nature and no charges have ever been brought against the Claimant (sic).
 9. The trial Court erred in law in dismissing the Claimant (sic) on an incident that occurred while the Claimant (sic) was off duty.
 10. The trial Court erred in law in making a finding that the Claimant (sic) was accorded a fair hearing before dismissal.
 11. The trial Court erred in law in failing to make a finding that the Claimant's (sic) contract of employment was arbitrarily terminated without notice.
10. To this end, the Appellant seeks the following orders from this Court:
- i. That judgment dismissing the Appellant's Claim and all subsequent orders in the Milimani Chief Magistrate ELRC Cause E965 of 2020 dated 14th November, 2022 of Hon. S. A Opande be set aside.
 - ii. That this Court be pleased to allow this Appeal and set aside the judgment dated 14th November 2022.
 - iii. That the Court to make a finding that the Claimant (sic) was unfairly dismissed and award the compensation as prayed for in the Claimant's (sic) Memorandum of Claim filed in the trial court.
 - iv. That the Respondent be ordered to pay costs for this appeal.

The Submissions

11. The Appeal was canvassed by way of written submissions. On his part, the Appellant submitted that his termination was unlawful and/or unjust, as there was never conclusive proof of his involvement in the alleged offense. The Appellant further argued that he was denied a fair opportunity to present his case prior to the termination, which was executed without reasonable cause. He further contended that he was not provided with any terminal benefits as required by law.
12. It was the Appellant's position that summary dismissal is only warranted when gross misconduct or fundamental breaches of employment obligations have been established. He submitted that in this case, he did not commit any gross misconduct and neither is there any proof that he breached his terms of contract.
13. The Appellant further submitted that the fact that the purported confession was not taken in accordance with the prescribed procedures, suggests that it was obtained under duress, indicating its potential invalidity. While recognizing that this court's proceedings differ from criminal trials, the Appellant posited that this observation underscores the flawed nature of the confession, raising doubts about its admissibility in the context of the employment dispute.
14. The Appellant maintained that the dismissal, which hinged on an alleged confession obtained under duress, cannot be deemed as a fair reason for termination.



15. In support of the Appellant's arguments, the case of *Engineering Workers Union v Telkom Kenya Limited & another* [2017] eKLR was cited.
16. Placing reliance on the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* (2015) eKLR, the Respondent submitted that in considering whether an employer had valid grounds for termination, a Court must not substitute its own views with those of the employer. The Respondent further submitted that this is a matter it genuinely believed that there were reasonable and sufficient grounds for terminating the Appellant's employment.
17. With respect to the Appellant's claim that the confession was not obtained in accordance with the *Evidence Act*, the Respondent argued that the said issue was not raised in the Appellant's pleadings and termed the said argument as an afterthought.
18. The Respondent further contended that the disciplinary proceedings initiated by an employer should not be likened to criminal proceedings in a court of law. In support of this position, the Respondent placed reliance on the case of *Francis Barngetuny & another v Teachers Service Commission* (2015) eKLR.
19. It was the Respondent's further submission that the Appellant's misconduct led to a breakdown in the trust relationship between the employer and employee and that it was not reasonable for him to be retained in its employment considering his role in the cash department.
20. The Respondent further submitted that there was procedural fairness in the termination of the Appellant's employment.

Analysis and Determination

21. Being a first appeal, this Court has a duty to reconsider the evidence, evaluate it and draw its own conclusion but making allowance for the fact that it has not seen or heard the witnesses. Such was the determination by the Court of Appeal in *J. S. M. v E. N. B.* [2015] eKLR, thus: -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”
22. Bearing in mind the above duty, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion noting that I did not see or hear the witnesses as they testified.
23. Having reviewed the record before me, the opposing submissions, as well as the law applicable, the following issues stand out for determination by the Court: -
 - a. Whether the Respondent proved that it had a valid and fair reason to terminate the Appellant's employment;
 - b. Whether the termination of the Appellant's employment was in line with fair procedure;
 - c. Whether the remedies sought by the Appellant lie in law.



Valid and fair reason?

24. The starting point in determining this issue is Section 43(1) of the [Employment Act](#) (Act) which places the burden of proving the reasons for termination on the employer and in default, such termination is rendered unfair. Additionally, Section 45 (2) (a) and (b) of the Act, renders a termination of employment unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
25. Turning to the instant case, it is ascertainable from the record that the Appellant was summarily dismissed on 4th November 2019 on grounds that he allegedly aided and abetted commission of a robbery. For context purposes, I will reproduce the letter of summary dismissal in part, thus:

“Re: Summary Dismissal

The disciplinary hearing held at G4S Head Office on 29th October 2019 established that while assigned duties as a cashier you aided and abetted commission of a robbery where G4S staff were robbed of cash amounting to Kes 74,483,000, 38 cassettes, 13 purge bins and 13 canvas bags totaling to kes 75,947,350.

You're (sic) above actions amount to gross misconduct. This letter therefore serves to advise that you have been dismissed from the service of the company with effect from the date of this letter as per section 44(g) of the [Employment Act](#), 2007...”

26. Revisiting the record, it is apparent that the Appellant distanced himself from the robbery incident and contended that there was no evidence to support the allegation against him. As per the record of the disciplinary proceedings, the Appellant stated that he only confessed to aiding and abetting the robbery incident out of torture by the police. He stated as much during cross-examination at the trial Court. Cross-examined further, the Appellant stated that he had no evidence that he was tortured by the police. Upon being cross-examined further, he stated that he had a medical report to confirm his torture injuries. Nonetheless, the same is not on record. It is notable that the Appellant exhibited copies of sick sheets at the trial court which do not disclose the nature of his illness. As such, the same do not support the Appellant's allegations that he was tortured hence his confession to the police regarding his participation in the robbery incident.
27. As a matter of fact, the trial Court observed in its Judgment that the Appellant should have presented some medical record to corroborate the issue of torture. It is on the foregoing basis that the trial Court found that the Appellant's dismissal from employment was fair and lawful.
28. Further to the foregoing, it is evident from the record that the Respondent's decision to summarily dismiss the Appellant from its employment was largely based on his confession regarding his involvement in the robbery incident. In its findings, the Respondent's disciplinary panel found that the Appellant had admitted to the police on video that he had been promised Kshs 500,000.00 from Benson Sawanga and Bernard Mwendwa for collection of intelligence.
29. In light of the above, I am led to revisit the applicable standard of proof in cases of termination of employment. On this core, I will follow the determination by the Court of Appeal in the case of [Kenya Revenue Authority v Reuel Waithaka Gitabi & 2 others](#) [2019] eKLR, in which the learned Judges held that the standard of proof required is on a balance of probability and 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 employee's services.



30. Applying the above determination to the case herein as well as the provisions of Section 43(2) of the Act, the Respondent only needed to prove that the reasons for which the Appellant was terminated from employment were matters that it genuinely believed to exist at the time of the termination. In this case, the said matters touched on the Appellant's level of honesty.
31. In the Canadian case of *McKinley v BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38, the Court in assessing whether an employee's dishonesty would justify a dismissal, found that the test applicable is whether the employee's dishonesty led to a breakdown in the employment relationship. The court in that case further found that just cause for dismissal would exist where the dishonesty violates an essential condition of the employment or breaches the faith inherent to the work relationship, or is fundamentally inconsistent with the employee's obligations to his employer.
32. It is common ground that the Appellant was serving the Respondent as a cashier within the Cash Services Department hence it goes without saying that trust and honesty were key ingredients in the sustenance of the employment relationship.
33. In the circumstances, it was expected that following the Appellant's confession regarding his participation in the robbery incident, the Respondent could no longer retain him in its employment owing to trust issues. Applying the test set in the *McKinley* case, the trust issues seemingly went to the root of the employment relationship, moreso noting that the Appellant was entrusted with handling cash hence honesty and trust on his part, were paramount.
34. The foregoing leads me to conclude that it is more than probable that the Respondent had reasons to genuinely believe that it could no longer trust the Appellant as its Cashier thus its decision to terminate him from its employment.
35. The total sum of the foregoing is that I am satisfied that the Respondent demonstrated that it had reasonable grounds to terminate the services of the Appellant hence it discharged its burden as by law required at the trial Court.
36. To this end, this Court is unable to fault the finding by the learned trial Magistrate.

Procedural fairness?

37. Section 45 (2) (c) of the *Act* places the burden on the employer to prove that termination of employment was in line with fair procedure. Additionally, Section 41 (1) of the Act makes specific requirements with respect to the process to be complied with by an employer. This process entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
38. In this case, the Appellant pleaded at the trial Court that he was never given an opportunity to be heard. This is in sharp contrast with the record. Here is why. As per the record, the Appellant was suspended from duty on 24th October 2019 and on the same date, he was issued with a Notice of Disciplinary Enquiry. Through the Notice of Disciplinary Enquiry, he was notified of the allegations that had been leveled against him and advised of his rights which included inter alia, the right to be allowed a representative from within the company, the right to state his case and to call and question witnesses and to challenge all evidence presented.
39. This was followed by a disciplinary hearing which was conducted on 29th October 2019, in which the Appellant was present in person and was accompanied by his representative. According to the record,



the Appellant was afforded an opportunity to state his case and to mitigate accordingly. Further, his representative was also allowed an opportunity to give her representations in support of his case.

40. It is notable that at the trial Court, the Appellant did not deny the minutes exhibited by the Respondent as being a record of what transpired during the disciplinary hearing.
41. In light of the foregoing, I cannot help but find that the procedure for termination as applied by the Respondent met the legal threshold under Section 41 of the Act.
42. To that extent, this Court is unable to fault the finding by the learned Trial Magistrate.

Reliefs

43. As there has been no finding of unfair termination, the claim for compensatory damages and notice pay does not lie.
44. With regards to payment of gratuity, it is apparent that the Appellant based his claim on Regulation 17 of the Regulation of Wages (Protective Security Services) Order, Legal Notice No. 24 of 1998. A perusal of the said legislative instrument reveals that the same is only applicable to employees carrying out any of the following activities:
 - a. private investigations or security consultancy;
 - b. guarding of industrial plants banks, warehouses, shops, private home or any other property or establishment against theft, illegal entry or fire; and
 - c. escort of money or other valuable property.
45. As stated herein, the Appellant was employed as a Cashier hence it is clear that he falls outside the above categories of employees. Besides Regulation 17(2) of the said Order, expressly provides that an employee who is summarily dismissed for lawful cause or whose services are terminated for any other reason other than certified ill health or retirement shall not be entitled to gratuity.
46. In the premises, the Appellant's claim of gratuity does not lie.

Orders

47. Ultimately, I find no reason to cause me to overturn the decision by the learned Trial Magistrate. Accordingly, the instant Appeal fails and is dismissed in its entirety.
48. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

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STELLA RUTTO

JUDGE

Appearance:

For the Appellant Mr. Maliambo instructed by Mr. Makaka

For the Respondent Mr. Mwendwa instructed by Ms. Kirimi

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

