



**Livingstone v Hatari Security Guards Limited (Cause 2282 of 2017)
[2024] KEELRC 207 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 207 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2282 OF 2017
AN MWAURE, J
FEBRUARY 9, 2024**

BETWEEN
STEPHEN EMONGOR LIVINGSTONE CLAIMANT
AND
HATARI SECURITY GUARDS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 15th November 2017.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent in August 2015 on permanent and pensionable terms as a security guard earning a salary of Kshs 9,500 and he carried out his duties diligently and faithfully.
3. The Claimant avers that on 26th September 2017, the Respondent summoned him to its offices; notified him of his termination and directed him to return the company's property.
4. The Claimant avers that while working for the Respondent, he never received any house allowance nor was he provided with any form of accommodation.
5. The Claimant avers that he was never allowed to proceed to his annual leave and he used to work overtime and was never compensated for overtime.
6. The Claimant avers that despite having made its intention to sue, the Respondent has failed to settle his claim but instead claimed that the Claimant had abetted theft of its client's tyre by opening the gate for the suspected thief. The Claimant denies the allegations made by the Respondent.



Respondent's Case

7. In opposition to the Claim, the Respondent filed its response dated 10th May 2019.
8. The Respondent denied the Claimant's claim in its entirety and put the Claimant to strict proof.
9. The Respondent avers that if the Claimant was ever his employee which is denied, the Respondent is not aware of any termination and/or dismissal.
10. The Respondent avers that the Claimant was paid all his dues and the Respondent does not owe the Claimant any dues as claimed in the memorandum of claim.

Evidence in Court

11. The Claimant filed an affidavit dated 13th February 2023 as his evidence in chief and produced his exhibit marked SEL 1-5.
12. The Respondent did not adduce any evidence to controvert the Claimant's testimony and neither did they file any submissions.

Claimant's Submissions

13. The Claimant submitted that the Respondent's allegations remains unproved and he was never informed of the reason of his summary dismissal or invited to show cause why he should be dismissed.
14. The Claimant submitted that the Respondent did not follow fair procedure and the manner, timing and reason for termination was unlawful and unfair.
15. The Claimant submitted that having denied him a fair hearing, the Respondent violated his right to a fair hearing before termination thus his termination was illegal, unlawful and unfair.
16. The Claimant submitted that the Respondent has committed an offence in grossly underpaying him in violation of the various Minimum Wages Orders applicable during his employment tenure and Section 48 of the [Labour Institutions Act](#).
17. The Claimant submitted that the Respondent neither provided him with accommodation nor any house allowance during his employment. Section 10 and 74 of the [Employment Act](#) stipulates an employer has a duty to prove the Claimant was paid house allowance and the Respondent has failed to do so.
18. The Claimant submitted that he worked from 6pm to 6 am which was in excess of the required 52 hours of work per week spread over six months as provided under the Regulations of Wages and Conditions of [Employment Act](#) (General Order), Regulation 5.
19. The Claimant submitted that the Respondent did not provide any records to demonstrate the Claimant did not work over public and national holidays or he had been paid for days worked or that he proceeded for annual leave.

Analysis and Determination

20. The main issue for determination is whether the Claimant's termination was fair and lawful.



21. The court in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR held that: -

“.....First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the Act are: poor performance; physical incapacity; and gross misconduct.

But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.

Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

22. In *Walter Ogal Anuro vs Teachers Service Commission* [2013]eKLR the court held thus;

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

23. Substantive justification is clearly provided under Section 41 (1) of the *Employment Act* which provides as follows:

“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.”

24. Further, Section 43 provides as follows:

“(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.”

25. In respect to procedural fairness, Section 45 of the Act provides in part as follows: -

“(1) No employer shall terminate the employment of an employee unfairly.



- (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:
 - Related to the employees conduct, capacity or compatibility; or
 - Based on the operational requirements of the employer; and
 - That the employment was terminated in accordance with fair procedure.”

26. Lastly, Section 47(5) of the Act deals with the burden of proving unfair termination as follows:

“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.”

27. In view of the foregoing, Claimant has proved to this court that he was unfairly terminated as the Respondent did so without any valid reason as provided in section 43(1) of *employment act* and section 47(5) of the said act as well as section 45 and he did not accord him an opportunity to defend himself vide a fair hearing as provided in section 41 of the Act. Therefore, the Claimant’s termination was wrongful and unlawful and judgment is entered in his favour.

28. The second issue for determination is whether the Claimant is entitled to the reliefs sought and the court finds that the response to that is in the affirmative on some of the reliefs sought.

a. Underpayment

29. In *Irungu Githae v Mutheka Farmers Co-operative Society Limited* [2019] eKLR, the Court held:

“Section 48 of the *Labour Institutions Act* 2007 provides that the minimum rates of remuneration established in a Wages Order constitute a term of employment of any employee to whom the Wages Order applies. If the contract of employment provides for payments lower than the minimum rates as in this case, the minimum rates under the Wages Order substitute the inferior terms. Under the law, any employer paying below the minimum wage commits an offence.”

30. The Claimant submitted that his working hours were from 6pm to 6 am, meaning he worked as night guard. The Regulation of Wages (General) (Amendment) Order, 2015 and Regulation of Wages (General) (Amendment) Order, 2017 set the minimum monthly wage of a night guard at Kshs. 12,221 and Kshs 14,420.90 respectively.

31. Therefore, the Claimant was clearly underpaid and is entitled to Kshs $(2,721 \times 17) + (4,920 \times 5) = 70,857/-$



b. House Allowance

32. Section 31 of the Employment Act provides:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

33. The Respondent failed to produce any evidence before this court to prove that the Claimant’s salary was inclusive housing allowance or that he was accorded suitable accommodation. Therefore, the Claimant is entitled to housing allowance as prayed in the amount of Kshs 42,723/2

c. Overtime, Holiday Pay and Leave

34. The Claimant submitted that he used to work overtime; was forced to work during national and public holidays and was never allowed to take leave days.

35. The Respondent did not produce any evidence and/or records before this court to controvert the Claimant’s claim. Nevertheless the court cannot grant awards in abstract and since there is no clarity on the overtime and holiday days worked those two prayers are declined.

d. September 2017 salary and Notice pay

36. Having established that the Claimant was wrongfully and unlawfully terminated without notice, the Claimant is entitled to the reliefs sought herein being leave pay and salary for septmiber4 2017, 12,597/90x2=25,195/08

e. Damages for unfair termination

37. The claimant is awarded 3 months equivalent salary for wrongful and unlawful termination, amounting to kshs 37,793/70. Total awarded is Kshs 176,569/70.

38. Costs are also awarded to the claimant.

39. Interest is awarded at court rates from date of judgment till full payment.

Orders accordingly.

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

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ANNA NGIBUINI MWAURE

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 **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.

A signed copy will be availed to each party upon payment of Court fees.

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ANNA NGIBUINI MWAURE

JUDGE

