



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lorogoi v Sasini Limited (Cause 334 of 2017)  
[2024] KEELRC 136 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 136 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 334 OF 2017  
JK GAKERI, J  
FEBRUARY 6, 2024**

**BETWEEN**

**SIMON LABACHO LOROGOI ..... CLAIMANT**

**AND**

**SASINI LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit on 20<sup>th</sup> February, 2017 alleging unfair termination and non-payment of terminal dues.
2. It is the Claimant's case that he was employed by the Respondent from 11<sup>th</sup> November, 2011 and served continuously as a Night Guard until he was dismissed. That he worked 2 extra hours per day and was not paid, did not proceed on leave and worked during public holidays.
3. That his last salary was assessed at Kshs.12,221/= per month and was underpaid.
4. The Claimant prays for:
  - i. A declaration that termination of employment by the Respondent was unfair and unlawful.
  - ii. A declaration of entitlement to terminal dues and compensatory damages.
  - iii. Terminal dues amounting to Kshs.617,906.51.
  - iv. Interest on (iii) above.
  - v. Cost of this suit plus interest.



### **Respondent's case**

5. By a Statement of Response dated 7<sup>th</sup> November, 2017, the Respondent avers that the Claimant was its employee as alleged but denies that he was diligent.
6. It is the Respondent's case that on 17<sup>th</sup> September, 2015 while the Claimant was on duty at around 7.30 pm, 2 bags of patchment were spotted in Coffee Block 19 and was noted as missing from one of the coffee tables in the pulping factory and when called upon to explain, the Claimant had no explanation.
7. Finally, the Respondent denies that termination of the Claimant was unfair or he was entitled to terminal dues.

### **Claimant's evidence**

8. On cross-examination, the Claimant admitted and denied that he was employed as a casual Night Guard.
9. The witness confirmed that the payslips on record were his and showed that he was paid overtime.
10. That he received the sum of Kshs.10,243/= and the contract dates were correct.
11. Strangely, the Claimant denied having been called by the supervisor at around 8 pm and informed of a theft, yet his written statement states so.
12. It was his testimony that the day guard came in at 6.00 am carrying the coffee bags.
13. The witness admitted that the theft took place at the place they were guarding and he was taken to Kamundu Police Station but had no evidence to prove the same.
14. The Claimant denied knowledge of any Collective Bargaining Agreement between the Union and the Respondent.
15. The witness admitted that he was invited for a meeting on 18<sup>th</sup> September, 2015 to explain the theft and his employment was terminated without a hearing.
16. On re-examination, the Claimant testified that he had no warning letter or misconduct and was not given a termination letter.

### **Respondent's evidence**

17. RWI, Mr. Boniface Nyongesa confirmed that the Claimant was a night guard and had taken over from another guard and was unaware of the coffee theft and was alone as the other guard had left.
18. That another guard named Simon discovered the coffee bags.
19. RWII, Mr. Stephen Gitunga confirmed that the Claimant's employment was terminated by the Respondent after coffee was stolen under his watch and he could not explain and was considered a suspect.
20. According to the witness, the coffee bags were found outside at 7.30 pm and the Claimant took over from a Mr. Wandera.
21. The witness confirmed that the Claimant was not charged for any offence and he was not arrested.



### **Claimant's submissions**

22. Counsel submitted that the Respondent's witness had no evidence that the Claimant was a thief and no hearing was conducted. That the Respondent did not conduct an investigation.
23. Counsel urged that the reason for the Claimant's dismissal was false and contrary to the requirements of Section 43 of the [Employment Act, 2007](#) and the decision in [Pius Machafu Isindu V Lavington Security Guards](#) (2017).
24. Counsel urged that the prescribed procedure was not followed as the Claimant was not accorded an opportunity to prepare his defence before the meeting rendering the termination unfair.

### **Respondent's submissions**

25. Counsel for the Respondent submitted that termination of the Claimant's employment was valid and due procedure was followed.
26. Reliance was made on the decisions in [Joshua Rodney Marimba V Kenya Revenue Authority](#) (2019) eKLR, [Postal Corporation of Kenya V Andrew K. Tanui](#) (2019) eKLR among others to buttress the submission that the Claimant was aware of the attempted theft or was negligent in discharging his mandate as a guard.
27. Counsel submitted that the Claimant was bound by the seasonal contracts and cited the decisions in [Pius Kimaiyo Langat V Co-operative Bank of Kenya](#) (2017) eKLR and [National Bank of Kenya Ltd V Pipe Plastic Samkolit Ltd](#) (2002) eLKR.

### **Findings and determination**

28. The issues for determination are;
  - i. Whether termination of the Claimant's employment was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
29. Before delving into the issues identified above, it is elemental to dispose of the peripheral issue as to whether the Claimant was a casual employee or not.
30. Although the Claimant contradicted himself on this issue and copies of the Claimant's contracts of employment reveal that he had a daily rate, copies of the pay slips he provided show that salary was paid on a monthly basis depending on the number of days worked and statutory deductions were made.
31. Copies of the employment contract on record reveal that the Claimant was an employee of the Respondent from 3<sup>rd</sup> October, 2011 to September 2015 and the Respondent adduced no evidence to demonstrate that the Claimant's service was interrupted at any point.
32. Clearly, although the Claimant may have been employed as a casual employee initially, his employment converted to term by virtue of the Provisions of Section 37 of the [Employment Act, 2007](#).
33. As regards termination of employment, the law is well settled that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason to do so and conducted the termination in accordance with a fair procedure.
34. Put in alternative, the employer must prove that it had a substantive justification for the termination and conducted it in accordance with a fair procedure.



35. (See *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, *Naima Khamis V Oxford University Press EA Ltd* (2017) eKLR and *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR among others).

### **Reason for termination**

36. According to the Claimant, on 17<sup>th</sup> September, 2015, he reported to work at 7.00 pm and was notified of a theft by the supervisor at 8.00 pm and the coffee bags were brought in at 6.00 am by the Day Guards but had no corroborative evidence.
37. The witness confirmed that the theft took place at the place he was guarding as he was alone that night.
38. From the evidence on record, it is unclear to the court as to when the theft took place as the patchment coffee was on the beds and neither witness alleged that it happened during the day.
39. Being a Thursday, and a working day, it is unlikely that the attempted theft took place during the day.
40. Most likely, the attempted theft took place during the change over from the day to the night guard.
41. RWI testified that the Day Guard, one Mr. Wandera did not sign the OB when he left and the Claimant adduced no evidence to show that he satisfied himself that everything was in order when he took over.
42. In the absence of cogent evidence to prove that the handover occurred and both guards were satisfied with the status quo, it may be inferred that the Claimant and Mr. Wandera were either aware of the attempted theft or were negligent in the performance of their duties.
43. The Claimant adduced no exculpatory evidence and is not free from blame for the occurrence on the night of 17<sup>th</sup> September, 2015.
44. For the foregoing reasons, it is the finding of the court that the Respondent has on a preponderance of probabilities proved that the Claimant failed in his duties and thus had a valid and fair reason to terminate his employment.
45. Contrary to the submission that the Claimant was neither arrested nor charged for a criminal offence, all that the Respondent was obligated to do was to report the attempted theft to the police for the next course of action and bore no blame if the police did not conduct further investigation or charge the Claimant.
46. More significantly, the Respondent did not accuse the Claimant of theft as a copy of the termination letter on record reveals.

### **Procedure**

47. Although the Respondent called the Claimant for a meeting on 18<sup>th</sup> September, 2015 to explain what he knew about the attempted theft, a fact the Claimant admitted on cross-examination, the meeting was not a disciplinary hearing and the Respondent tendered no documentary record of the meeting and what its recommendations were.
48. Equally, RWI confirmed that he had no evidence of a notice to show cause.
49. Without a notice to show cause or notice of invitation to a disciplinary hearing, or minutes of a disciplinary hearing, it is evident that the Claimant was not accorded a fair hearing and the provisions of Section 41 of the *Employment Act*, 2007 were not complied with rendering the termination of employment procedurally flawed and unfair.



50. In sum, it is the finding of the court that termination of the Claimant's employment was unfair for want of procedural propriety.

### **Reliefs**

51. Having found as above, the Claimant is entitled to reliefs as prescribed by law as follows;

#### **a. Declaration**

52. Having found that termination of the Claimant's employment was unfair, a declaration to that effect is merited.

### **Terminal dues**

#### **i. One month's salary in lieu of notice**

53. Documentary evidence on record reveal that the Respondent paid the Claimant's salary for September 2015 and pay *in lieu* of notice, which the Claimant signed in the presence of a witness.

The prayer is dismissed.

#### **ii. Overtime for 2 extra hours**

54. Although the Claimant testified that he worked for 2 extra hours every day and was not paid, he also confirmed on cross-examination that the copies of payslips he furnished as evidence show that he was paid for overtime every month, which implies that the Respondent paid overtime as it fell due.

The prayer lacks evidential support and is dismissed.

#### **iii. Untaken/unpaid leave**

55. Although the Claimant testified that he did not proceed on leave for the entire duration of employment, he provided no supportive particulars.

56. Similarly, the pay in lieu of notice shows that the Claimant was paid for the pro rata leave and executed the document voluntarily as he testified, which would imply that no leave days were pending.

The prayer lacks merit and is declined.

#### **iv. Unpaid public holidays**

57. This prayer lacks the necessary particulars and/or supportive evidence, is unmerited and it is accordingly dismissed.

#### **v. Underpayment**

58. Copies of the payslip provided by the Claimant reveal that the Claimant's workplace was Kakindu Estate, Kakindu in Kiambu County.

59. It is unclear to the court as to the basis of the prayer for underpayment since 2012 for the simple reason that under the Regulation of Wages (General) (Amendment) Order, 2015, the minimum salary of a night guard outside Nairobi, Mombasa, Kisumu, Mavoko, Ruiru and Limuru town councils was Kshs.8,015.96 inclusive of 15% housing allowance.



60. The Claimant's average salary for 2012 was Kshs.10,418.60. In 2013, the average salary was Kshs.9,410.70. In 2014, the average pay was Kshs.9,895.79 and in 2015, the average pay was Kshs.10,632.07 beyond the prescribed minimum wage.
61. In the sum, the prayer for underpayment is unsustainable and it is accordingly dismissed.

**vi. 12 months compensation**

62. Having found that termination of the Claimant's employment was unfair for want of procedural fairness, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
63. The court has taken into consideration the fact that the Claimant was an employee of the Respondent for about 3 years and 10 months which is fairly short. The Claimant had no recorded warning or misconduct. The Claimant did not express his wish to continue in the employment of the Respondent or appeal the Respondent's decision.
64. In the circumstances, the court is satisfied that the equivalent of three months' salary is fair.
65. In the upshot, judgement is entered in favour of the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment was unfair.
  - b. Equivalent of 3 months' gross salary.
  - c. Costs of this suit.
  - d. Interest at court rates from date of judgement till payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF FEBRUARY 2024**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

**DR. JACOB GAKERI**

**JUDGE**

