



**SGA Security Solutions Limited v Mwale (Appeal E127 of 2023)
[2024] KEELRC 1480 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1480 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E127 OF 2023
M MBARŪ, J
MARCH 14, 2024**

BETWEEN

SGA SECURITY SOLUTIONS LIMITED APPELLANT

AND

MAXWELL OMULANDO MWALE RESPONDENT

*(Being an appeal from the judgment of D.M. Ndungu in Mombasa
CMELRC No. E768 of 2021 delivered on 31 October 2023)*

JUDGMENT

1. The background of this appeal is a claim filed by the respondent in Mombasa CMELR No. E768 of 2021 on the grounds that on 2 October 2011, he was employed by the respondent as a night security guard and assigned duties at a residential home in Kizingo within Mombasa County. The compound was too large for him to man alone and despite requests to be provided with another guard, this was ignored by the respondent. On the night of 21st August 2021, his supervisor visited him at 2.17 am and left. While manning the site, he found some chairs missing from the compound and reported to his supervisor Mr Mupe. He got back up and recorded a statement. On 23 August 2021, the respondent was summoned to the office and then sent home for 5 days. On 1st September 2021, he was called to a disciplinary meeting in the presence of 3 others and informed that his employment had been terminated. He claimed that there was unfair termination of employment and claimed the following dues;
 - a) One-month notice pays Kshs. 18,000;
 - b) House allowance for 18 months Kshs. 318,600;
 - c) Unpaid leave for 9 years Kshs. 216,000;
 - d) Unpaid overtime for 118 months Kshs. 559,320;

- e) Unpaid NHIF for 118 months Kshs. 59,000;
 - f) Service pay for 9 years Kshs. 81,000; and
 - g) Costs.
2. In response, the appellant's case was that the respondent was not diligent in his duties and had many disciplinary cases which made the management issue him with several warning letters. Most of the disciplinary cases are related to sleeping while at work and absconding on duty without lawful authority. on 21st August 2021, while the respondent was on duty at a client's residence in Kizingo, 5 steel chairs were stolen from the residence without the knowledge of the respondent and he admitted that he had fallen asleep while on duty. He was suspended for 5 days to allow for investigations. He was invited to a disciplinary hearing and allowed to have the shop steward as his representative. A decision was taken for summary dismissal due to gross misconduct for allowing theft while at work and sleeping on the job. Such sanction was justified and the claims made were without merit. Notice pay is not due in summary dismissal. The wage paid was inclusive of the house allowance. No overtime work and the respondent has been a member of NSSF, no service pay is due.
 3. The learned magistrate delivered judgment on 31 October 2021 and held that there was an unfair termination of employment and awarded compensation, notice pay, house allowance, and untaken leave days and costs.
 4. Aggrieved by the judgment, the appellant filed this appeal because the finding that there was unfair termination of employment was in error since the respondent was of gross misconduct. The award of notice pay at Kshs. 18,000 was not justified in a case of summary dismissal, the award of house allowance was in error as the wage paid was consolidated and compensation awarded at Kshs. 180,000 was without any reason. The assessment for payment of untaken leave days ignored the evidence and the fact that the respondent would take all his annual leave days. The appeal should be allowed, and the judgment set aside with costs.

Both parties attended and filed written submissions.

5. The appellant submitted that termination of employment was procedural and under Sections 41, 43, and 44 of the [Employment Act](#), 2007 (the Act). The notice terminating employment gave reasons and the fact that the respondent was found to be of gross misconduct and incapable of performing his duties. He admitted to falling asleep while at work when the property of the client he was guarding got stolen. The appellant conducted a disciplinary hearing as required under Section 44(1) of the Act as held in *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR.
6. The appellant submitted that a full and proper consideration of the evidence would have revealed that the respondent was of gross misconduct and the compensation award, notice pay ought not to have been awarded. The respondent took all his annual leave days and the allocated payment was double payment. The house allowance was part of the consolidated wage and the appeal should be allowed and the judgment of the trial court set aside.
7. In response, the respondent submitted that the learned magistrate properly analyzed the facts, and the evidence and arrived at a sound judgment, which should be confirmed and the appeal dismissed with costs. Through a letter dated 25 July 2021, he was suspended to allow for investigations. He was not invited to a disciplinary hearing or allowed to call a witness of his choice. The invitation for deliberations is not similar to the invitation for a disciplinary hearing held in *Walter Ogal Anuro v Teachers Service Commission* [2011] eKLR.

8. The respondent submitted that where the appellant found him required to attend and answer to any alleged gross misconduct, he was entitled to call another employee of his choice as held in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited* [2013] eKLR. The appeal is without merit and should be dismissed with costs.

Determination

9. This is a first appeal. The court is required to consider the entire record, re-evaluate and re-assess the evidence, and make its conclusion but taken into account, the trial court needed to hear and see the witnesses testify in court.
10. Through a letter dated 24 August 2021, the appellant suspended the respondent to allow for investigations following an incident on 21st August 2021. Chairs were stolen at the site the respondent was guarding. The appellant informed the respondent that you are to report back for a disciplinary hearing on Wednesday 25th August 2021.
11. On 25 August 2021, the appellant extended the suspension period and directed the respondent to report back to the SGA Mombasa Office for further deliberations on 1st September 2021.
12. The respondent asserts that the termination of his employment following a disciplinary hearing on 1st September 2021 was unprocedural since he had been invited to attend further deliberations on 1st September 2021 and not to attend the disciplinary hearing. That he was not allowed to attend a hearing with another employee of his choice.
13. The appellant has made a case that the respondent committed gross misconduct and was suspended to allow for investigations. He was invited to attend a disciplinary hearing conducted in the presence of a shop steward. That the respondent did not call or invite the shop stewards to represent him.
14. The learned magistrate analyzed the pleadings and evidence and held that under the provisions of Section 41(2) of the Act, the respondent was entitled to another employee of his choice at the disciplinary hearing which the appellant failed to secure and hence the due process of the law was not adhered to leading to unfair termination of employment.
15. The motions of Section 41 of the Act are three-fold. First, an employee who is of misconduct should be issued with notice to attend the disciplinary hearing. Secondly, present at the disciplinary hearing is a union representative available on the shop floor or a person identified by the subject employee. A shop steward is hence a workers' representative and unless the subject employee seeks to have a specific employee present at the hearing, the shop steward lawfully undertakes such a role under Section 41(1) of the Act.
16. Thirdly, in a case of gross misconduct, the employer is allowed to apply short timelines to require the subject employee to attend and address the misconduct in terms of Section 41(2) of the Act. The similarity with Section 41(1) of the Act is that the shop steward or another employee chosen by the employee should be present.
17. In this case, the appellant suspended the respondent on allegations of gross misconduct. Notice dated 24 August 2021 required him to proceed on suspension and to attend a disciplinary hearing on 25 August 2021. This was extended to 1st September 2021.
18. As of 24 August 2021, the respondent was aware that he was required to attend a disciplinary hearing concerning the incident at his site on the night of 21st August 2021 where chairs were stolen.

19. The respondent attended a hearing on 1st September 2021 in the presence of the shop stewards, Geoffrey Nyamweya and Bernard Ondieki. Legally, the shop stewards were properly present at the disciplinary hearing as required under Section 41(1) of the Act.
20. The respondent did not protest the presence of the shop stewards or that he needed more time to call another person of his choice. The record of the disciplinary proceedings is not challenged at all. The respondent admitted to the following matters;

... the accused (respondent) admitted that at some point and time of the night, he dozed off and it's highly suspected that at that time that's [that is] when the thieves broke in and stole the chairs.

He requested to be pardoned and never to repeat the same mistake.

He also added that in case the client needs a refund for the chairs, he is ready to be surcharged. ...

On his own accord, he admitted to the allegations made.
21. A security guard found sleeping on his job during which time there is theft is in breach of a fundamental provisions of his employment contract. Such breach goes to the heart of his employment and is contrary to Section 44(3) of the Act and attracts summary dismissal. The disciplinary proceedings undertaken by the employer are not akin to criminal proceedings where evidence is called and proved beyond a reasonable doubt. On a balance of probabilities, the respondent having admitted that he dozed off and the property of the client he was securing got stolen, cannot urge a case that termination of his employment was not justified. The due process and disciplinary hearing was conducted under Section 41 of the Act and summary dismissal was properly applied under Section 44 of the Act.
22. To this extent, the findings by the trial court that there was unfair termination are set aside.

The award of compensation and notice pay are hereby set aside.
23. On the claim for house allowance, the appellant was a night guard in Mombasa County. As of 1st September 2021, the due wage was Kshs. 15,141.95. A house allowance of 15% thereof was due at Kshs. 2,271.15. The total due wage was Kshs. 17,412.15. On a wage of Kshs. 18,000 per month, the respondent was well compensated for his time.
24. On the award of untaken leave days, the appellant filed leave request forms approved on 4 January 2021, 27 June 2020, and 15 May 2020. The employer is the custodian of work records. On the submitted leave sheets, to allocate payment instead of leave thereof is double payment.
25. The award of costs in employment claims is discretionary. However, such must be issued in a case where the matter is well addressed and found deserving as the contest of employment claims is not to enrich any party but to resolve the terminal dues payable to the employee at the earliest possible time and to address any other malpractice expeditiously. The objectives of Section 3 of the [Employment and Labour Relations Court Act, 2011](#) will not be achieved where costs are awarded as a matter of course. For these reasons, the appeal is successful and each party will bear its costs.
26. Accordingly, appeal is hereby allowed; judgment in Mombasa CMELCR No. E768 of 2021 is hereby set aside in its entirety. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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