



Nalwali v Securex Agencies (K) Limited (Employment and Labour Relations Cause 1598 of 2018) [2024] KEELRC 2281 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2281 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1598 OF 2018
BOM MANANI, J
SEPTEMBER 26, 2024**

BETWEEN

PETER NATEMBEYA NALWALI CLAIMANT

AND

SECUREX AGENCIES (K) LIMITED RESPONDENT

JUDGMENT

Background

1. This case challenges the decision by the Respondent to terminate the Claimant’s contract of service. The action was commenced through a Memorandum of Claim which was filed on 10th December 2018.
2. The Claimant avers that he was employed by the Respondent on 14th September 2009. He avers that he worked for the Respondent until 17th December 2015 when his contract was terminated, a period of approximately six years and three months.
3. The Claimant contends that on 11th June 2015, the Respondent’s management made an unfounded report to the police accusing him together with other employees of having stolen its transformer. As a result, he was arrested and arraigned in court for an offense of stealing. He faced an alternate charge of failing to prevent a felony.
4. The Claimant contends that after several court appearances, he was discharged of the offense. As such, he perceives the Respondent’s decision to accuse him of the offense as having been actuated by malice.
5. The Claimant avers that after he was admitted to bail by the court which was handling the criminal case, he sought to resume duty but the Respondent asked him to stay away until he was advised to report back. He contends that despite this, the Respondent did not subsequently ask him to resume duty.



6. The Claimant further contends that when he sought to report back to work after he was acquitted of the criminal charge, the Respondent informed him that his employment had been terminated for alleged desertion of duty.
7. He contends that the Respondent's decision to terminate his contract was without valid reason. Further he avers that he was not accorded the usual procedural safeguards that apply to closure of employment contracts.
8. The record shows that the Respondent filed a statement of defence, a witness statement and a list and bundle of documents. However, it did not call any witness during trial.
9. The Claimant testified on 11th March 2024. In his testimony, he largely reiterated what is contained in his pleadings.

Issues of Determination

10. Having regard to the evidence on record, the following are the issues for determination: -
 - a. Whether the Claimant's contract was terminated unfairly.
 - b. Whether the Claimant is entitled to the reliefs that he seeks through his Statement of Claim.

Analysis

11. Although the defence filed a statement of defence, a statement from its proposed witness and a bundle of documents, it did not call its witness to testify. As such, the statement of defence, witness statement and bundle of documents were not admitted in evidence.
12. The implication of the foregoing is that the Respondent did not tender evidence in the cause. Therefore, the documents filed by it remain mere statements which have not been tested on oath.
13. The court is not entitled to consider such pleadings and documents when deciding a dispute before it. Their presence on the court's record does not convert them into evidence.
14. This point has been made in a number of decisions. In *Netab Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR, the defendant filed a defence but failed to call witnesses during trial. Despite this, the trial court went ahead to consider the defence pleadings in its decision. On appeal, the learned Judge observed as follows on the subject: -

“The trial court erred to have considered the respondent's defence when it indeed remained unproved. The respondent's defence was not available for consideration having not been proved by evidence.”
15. Having regard to the foregoing, I am not entitled to refer to the aforesaid documents by the defence. In effect, the Claimant's case is deemed uncontroverted.
16. The Claimant's case is that after he was arraigned in court, the Respondent asked him not to report to work until he was asked to do so. However, he did not receive communication asking him to resume duty.
17. He contends that after he was acquitted of the criminal offense that was brought against him, he sought to resume duty. However, he was informed that his services had been terminated.



18. The Claimant avers that after he was granted bail in June 2015, he received a notice to show cause from the Respondent. He says that the Respondent also asked him to attend a disciplinary hearing that was scheduled for 2nd July 2015.
19. However, on this date, he was informed that the Disciplinary Panel was not sitting. As such, the case was not heard. He contends that he was not invited for another disciplinary hearing after the aborted one for 2nd July 2015.
20. The Respondent did not call evidence to controvert the Claimant's evidence in this respect. As such, the evidence remains unchallenged.
21. The law requires that before an employer terminates an employee's contract of service, he should inform the employee of the infraction that he is accused of. The employee is entitled to offer his rebuttal to the accusation. This contemplates a hearing at which the employee will be accorded the opportunity to offer his defence.
22. In the instant case, the Respondent accused the Claimant of failure to secure its property leading to one of its transformers being vandalized. The evidence produced by the Claimant shows that indeed he was charged with the offense of failing to prevent a felony at the Respondent's premises where he had been assigned the duties of a guard.
23. The proceedings in the criminal trial demonstrate that indeed there was an incident of vandalism at the Respondent's premises in which the Respondent's transformer was damaged. The Respondent believes that the incident happened because the Claimant and his colleagues who had been assigned to guard the premises failed to execute their duties diligently.
24. Section 43 of the *Employment Act* obligates the employer to prove the reason for his decision to terminate an employee's contract of service. This requirement is considered as met if the employer is able to demonstrate that he had a genuine belief that there was a valid reason to discharge the employee from employment (*Kenya Revenue Authority v Rewel Waitbaka Gitahi & 2 others* [2019] eKLR).
25. The evidence on record points to destruction of the Respondent's property which the Claimant and other guards had been tasked to secure. The fact that the property was vandalized whilst under the guard of the Claimant and his colleagues gave the Respondent legitimate grounds to entertain a genuine belief that the Claimant failed to secure it. As such, I find that the Respondent had valid grounds to consider relieving the Claimant of his duties.
26. That said, the law also requires the employer to allow the affected employee the opportunity to rebut the accusations against him. The Claimant contends that he was denied this opportunity. He avers that after the disciplinary hearing scheduled for 2nd July 2015 aborted, he was not invited to another session. As such, he was relieved of his contract without having been heard.
27. The Respondent did not call evidence to rebut this contention by the Claimant. As such, it remains unrebutted. In the premises and having regard to the Claimant's testimony, I find that the Respondent failed to uphold the procedural safeguards under section 41 of the *Employment Act* whilst terminating the Claimant's contract. As such, I declare the decision to terminate the contract as irregular and unlawful.
28. The next question for consideration relates to the reliefs sought by the Claimant. He has sought: salary in lieu of notice; service pay; reinstatement; damages; interest; and costs of the suit.



29. Section 35 of the *Employment Act* obligates either party who wishes to terminate a contract of service to issue the other with the requisite notice to terminate. In the premises, the Respondent was obligated to issue the Claimant with such notice. There is no evidence that this was done.
30. Section 36 of the Act permits the party who is required to issue notice under section 35 thereof to pay the other an amount that is equivalent to the notice period in lieu of such notice. As such, the Respondent having failed to issue the Claimant with notice to terminate his contract, is obligated to pay him salary in lieu of the notice period. In the premises, I find that the Claimant is entitled to claim salary for one month in lieu of notice.
31. The Claimant pleaded that at the point his contract was terminated, he was earning Ksh. 22,000.00 per month. As stated earlier, although the Respondent placed various documents on the court file, it did not introduce them in evidence. As such, the court cannot resort to them to determine the Claimant's salary. It can only rely on the Claimant's pleadings and evidence to determine this issue. As such, I accept the Claimant's contention that his exit monthly salary was Ksh. 22,000.00. In the premises, I enter judgment for him for Ksh. 22,000.00 in lieu of notice to terminate his contract.
32. The Claimant has claimed for service pay of Ksh. 68,751.00. Under section 35(5) of the *Employment Act*, an employee whose services are terminated is entitled to service pay for every year worked. Although the law does not provide the mechanism for assessing the quantum of this benefit, case law suggests that it is the equivalent of an employee's salary for fifteen (15) days for every year worked (*George M. Kirungaru v Next Generation Communications Limited* [2014] eKLR).
33. The Claimant avers that at the point that his contract was terminated, he had worked for the Respondent for six years and three months. Therefore, in terms of the foregoing provision of statute, he is entitled to service pay for six years.
34. Having regard to the formula developed by precedent, the Claimant is entitled to claim salary for fifteen days for every of the six years. This works out to Ksh. 11,000 x 6 = Ksh. 66,000.00. The amount is awarded.
35. The Claimant has prayed for reinstatement to his previous position with the Respondent. It is noted that this judgment has been rendered more than three years since the contract between the parties was terminated. Therefore and in terms of section 12(3) (vii) of the *Employment and Labour Relations Court Act*, this remedy is unavailable to the Claimant. As such, it is declined.
36. The Claimant has prayed for compensation that is equivalent to his salary for twelve months, that is to say Ksh. 264,000.00. Section 49 of the *Employment Act* permits the court to make such an award. However, it (the court) should consider various matters such as the length of service by the employee; whether the employee's conduct contributed to the decision to terminate his employment; and the opportunity for the employee to secure alternate employment.
37. Having regard to the foregoing, I award the Claimant compensation that is equivalent to his salary for four months that is to say, Ksh. 22,000.00 x 4 = Ksh. 88,000.00.
38. The amounts awarded are subject to the applicable statutory deductions.
39. I award the Claimant interest on the amounts awarded at court rates. Such interest to run from the date of this decision.
40. I award the Claimant costs of the case.



Summary of Award

41. The court declares the Respondent's decision to terminate the Claimant's employment as unfair.
42. The court awards the Claimant salary in lieu of notice to terminate his contract of service in the sum of Ksh. 22,000.00.
43. The court awards the Claimant service pay of Ksh. 66,000.00.
44. The court awards the Claimant compensation for unfair termination of his employment in the sum of Ksh. 88,000.00.
45. The court declines to order reinstatement of the Claimant to his previous position.
46. The amounts awarded to the Claimant are subject to the applicable statutory deductions.
47. The Claimant is awarded interest on the amount awarded to him at court rates from the date of this decision.
48. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF SEPTEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

