



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Total Security Surveillance Limited v Karibu (Appeal E044 of 2023)
[2024] KEELRC 2331 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E044 OF 2023
M MBARÚ, J
SEPTEMBER 26, 2024**

**BETWEEN
TOTAL SECURITY SURVEILLANCE LIMITED APPELLANT
AND
MARK BAYA KARIBU RESPONDENT**

*(Being appeal from the judgment of Hon. W M Wachira
delivered on 11 May 2023 in Mombasa CMELRC E340 of 2021)*

JUDGMENT

1. The appeal herein arises from the judgment delivered on 11 May 2023 in *Mombasa E340 of 2021*. The appellant is seeking that the judgment be set aside and the claim be dismissed with costs.
2. The background to this appeal is a claim filed by the respondent on the basis that on 12 August 2019, the appellant employed him as a security guard at a monthly wage of Ksh.10, 000. On 20 July 2020, he was served with an indefinite suspension letter which required him to return all the employer's property. The suspension went on for a year without recall. He made enquiries about his employment without any response. This resulted in constructive dismissal that is wrongful, unlawful and unfair. He claimed the following terminal dues;
 - a. Notice pay Ksh.10,000;
 - b. July wage Ksh.10,000;
 - c. Unpaid leave for 2019-2020 Ksh.10,000;
 - d. Compensation for unfair termination at 12 months Ksh.120,000;
 - e. Underpayments Ksh.5,141 x 12 Ksh.61,692;



- f. Salary while under suspension Ksh.12 x 10,000 Ksh.120,000;
 - g. Payment of unremitted deductions to NSSF Ksh.4,800;
 - h. Costs of the suit.
3. In response, the appellant admitted that the respondent was employed on 12 August 2019 as a security guard. He was suspended on 20 July 2020 on account of a theft incident that occurred at Raffia Bags on the premises on 7 July 2020 where he was stationed. At the time the respondent was earning Ksh.15, 142 per month inclusive of all the necessary allowances. The respondent was paid under his job grade and allowed to take off days and annual leave. The suspension was without pay to allow for investigations by the police where he was called to explain himself. He was required to submit a police report clearing him of the theft incident which he failed to do and per a letter dated 18 June 2021 from the Kenya Police Service, the matter is still pending in court. The claims made are not justified and should be dismissed with costs.
 4. The learned magistrate heard the parties and held that there was an unfair termination of employment and the claims made justified. The decree was issued for the following awards;
 - a. Notice pay Ksh.10,000;
 - b. July wage ksh.10,000;
 - c. 12 months compensation Ksh.120,000;
 - d. 12 months' salary while on suspension Ksh.120,000;
 - e. Costs of the suit.
 5. Aggrieved, the appellant filed the appeal because the learned magistrate erred in law and fact by finding that there was no due process in the termination of employment whereas there was sufficient evidence to justify termination of employment. the appellant has also faulted the trial court for finding it liable for the claims made despite submitting sufficient evidence to justify termination of employment and seeking judgment be entered allowing the appeal with costs.
 6. Both parties attended and agreed to address the appeal by way of written submissions.
Only the appellant complied.
 7. The appellant submitted that on 20 July 2020, the respondent was suspended from work due to a theft incident at his place of work. The matter was investigated by the police and he was required to return the police clearance form as per the appellant's policy. The appellant got a report from the police that the matter was ongoing and the respondent failed to return any report that he was innocent. The respondent is in a 'self-instigated termination' having caused theft to occur at his site on 7 July 2020. He has since not been cleared by the police to justify the claims made. He was required to attend before the criminal court and the matter is pending. Continued absence from duty is a self-summary dismissal from employment.
 8. The appellant submitted that the trial court failed to establish that there were valid and justified grounds leading to termination of employment. Had the evidence been looked at in its totality, it would have been apparent that the suspensions were procedural and justified. The awards made should be dismissed with costs. The appellant relied on the following cases *Victoria De Meo v Abdullahi H Khabil & another* [1994] eKLR; *Jackson Muiruri Wathigo t/a Murton Supermarket v Lilian Mutune* [2021] eKLR.



Determination

9. This is a first appeal. The court is required to re-evaluate the entire record of the trial court, analyze it and arrive at its conclusions. However, the account must be the fact that the trial court had the chance to hear the witnesses.
10. The appellant has admitted that on 20 July 2020, the respondent was suspended from duty following theft at his place of work at Raffia Bags (East Africa) Ltd. The suspension was without pay to allow for time to conclude investigations.
11. Whereas an employer has the prerogative to suspend an employee from his employment to allow for investigations, such suspension is just but an interim measure. Upon conclusion of investigations, the employee must be recalled back to work if not found culpable or invited to show cause why his employment would not be terminated where there is evidence that there is misconduct or gross misconduct. A suspension cannot be indefinite. To do so is to engage in unfair Labour practices.
12. In the case of *Sava v Kitui Cottages and Guest House (Cause 1280 of 2017)* [2022] KEELRC the court held that a suspension is not a strange phenomenon in employment, hence it is usual for an employer to suspend an employee from work, pending further disciplinary action.
13. This position is reiterated in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR that;

A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the workplace to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work at any time to undertake disciplinary proceedings or upon terms and given by an employer.

Should such a suspension be indefinite?

14. In the case of *Benjamin Menza Kirimo v Kilifi County Public Service Board & another* [2021] eKLR and the Court of Appeal in the case of *Mutwol v Moi University (Civil Appeal 118 of 2019)* [2022] KECA 537 (KLR) in addressing such a case and held that a prolonged or indefinite suspension could amount to constructive dismissal of an employee.
15. In this case, the appellant does not state what it did upon the suspension of the respondent upon suspicions that there was theft at his place of work save to urge the court that the police were conducting investigations and hence the matter is still pending in court.
16. An employee cannot be kept on suspension indefinitely. To do so amounts to constructive dismissal amounting to unfair termination of employment. See *Joseph Ndungu v Mastermind Tobacco (K) Ltd* [2014] eKLR and *Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another* [2019] eKLR. The employee must be recalled back within a reasonable time to answer any charges made against him within the protections of Section 41 of the *Employment Act*. This was not the case here and the findings by the trial court that there was unlawful and unfair termination of employment cannot be faulted.



17. On the claims made and the awards, on the findings that there was unfair termination of employment, the award of notice pay is justified. The wage due is Ksh.15, 142 per month based on the last payment statement issued.
18. The award of compensation should have been justified and reasons for the maximum award of 12 months stated. This is a requirement as outlined in the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR that;

This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
19. The 12 months being the maximum, to take the highest available award must be with exceptional reasons. In this case, the respondent worked for the appellant from 12 August 2019 to 20 July 2020 for a year. Compensation at one (1) month is hereby found appropriate award in compensation. Compensation is Ksh.15, 142.
20. On the unpaid July wage, for the 20 days the respondent was at work, on a wage of Ksh.15, 142 he is entitled to ksh.10, 100.
21. The claim for payment for 12 months, while the respondent remained on suspension, is on the justification that there was constructive dismissal. Indeed, the continued suspension of the respondent without any action led to these proceedings. This issue is not denied by the appellant and nothing was done to bring the respondent to account. Their inaction by the appellant resulted in both unlawful, unfair and constructive dismissal of the respondent. The non-payment of his wages during his suspension is not justified at all. These proceedings are necessitated out of the constructive dismissal. The award of Ksh.120, 000 is hereby found justified.
22. On costs, the appeal is partially successful, and for the reasons above outlined, for this appeal, each party is to bear its costs. For the trial court, costs shall be as awarded.
23. Accordingly, the appeal considered, judgment in *Mombasa CMELRCE340 of 2021* is hereby reviewed in the following terms;
 - a. Notice pay Ksh.15,142;
 - b. July wage ksh.10,100;
 - c. months compensation Ksh.14,142;
 - d. 12 months' salary while on suspension Ksh.120,000;
 - e. For the appeal, each party bears its costs. For the lower court proceedings, costs as awarded.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

