



G4S Kenya Limited v Khawanga (Employment and Labour Relations Appeal E046 of 2022) [2024] KEELRC 13202 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13202 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E046 OF 2022
MA ONYANGO, J
NOVEMBER 21, 2024**

BETWEEN

G4S KENYA LIMITED APPELLANT

AND

PETER NJEBWE KHAWANGA RESPONDENT

(Being an appeal against the Judgment and Decree of the Senior Principal Magistrate at Eldoret Chief Magistrate's Court Honourable R.O. Odenyo delivered on the 6th October 2022 in Eldoret CMELRC No. 108 of 2021)

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent herein was the Claimant in Eldoret CMELRC No 108 of 2021 where the Respondent had sued the Appellant vide a Statement of Claim dated 6th August 2021 seeking compensation and terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 6th October 2022 and held that the Respondent had been terminated from employment unprocedurally by the Appellant. The Respondent was awarded one month's pay in lieu of notice, compensation for unfair termination, general damages and gratuity. The Respondent was also awarded costs and interests.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 25th October 2022 and filed in court on 4th November 2022. It raised the following grounds of appeal:
 - a. The Appellant adduced evidence to show that it dismissed the respondent after establishing that the Respondent:



- i. Was negligent in the performance of duties, failed to confirm details of fuel drawn into his work ticket, recorded false figures of fuel drawn on his motor vehicle KCF 716Z and was dishonest in the course of duty;
 - ii. Had admitted the offences; and
 - iii. Was given an opportunity to be heard.
 - b. Based on the law and the evidence before the court:
 - i. The Learned Magistrate erred in failing to hold that there were fair and valid reasons to terminate the respondent's employment; and
 - ii. The Learned Magistrate erred in failing to hold that there was procedural fairness in the termination.
 - c. The Learned Magistrate erred in making an award for compensation for unlawful termination;
 - d. Without prejudice to the foregoing, the award of 12 months' pay as compensation for unlawful termination is in any event inordinately high and excessive in the circumstances of this case.
 - e. The trial court erred in awarding the respondent one month's salary in lieu of notice in the circumstances.
 - f. The trial court erred in making the award of damages for discrimination when there was no basis for the award and no evidence was led to prove the Respondent faced discrimination.
 - g. The trial court also erred in making an award of service pay contrary to Section 35 (6) (d) of The *Employment Act*, 2007.
4. Consequently, the Appellant seeks the following orders:
- a. The appeal be allowed
 - b. That the judgment of the Chief Magistrate's Court at Eldoret (Honourable R.O. Odenyo) delivered on 6th October 2022 be set aside and substituted with an order dismissing the suit against the appellant with costs.
 - c. That the costs of this appeal be awarded to the appellant.
5. The appeal was disposed of by way of written submissions. The Appellant filed its written submissions on 23rd October 2023 while the Respondent filed his submissions on 30th October 2023.

Appellant's submissions

6. The Appellant in its submissions addressed the issues for determination from the grounds of appeal as follows:
 - i. The Appellant had valid grounds for termination of the Respondent's employment
 - ii. The proper procedure was followed in the termination
 - iii. The Respondent was not entitled to the reliefs granted by the subordinate court
7. On the first issue, the Appellant submitted that the Learned Magistrate's judgment incorrectly concluded that there were insufficient grounds for the termination when the Appellant adduced evidence to show that it dismissed the Respondent after establishing that he was negligent in the



performance of his duties. According to the Appellant, the Respondent's employment was regulated by the Appellant's Disciplinary Code of Conduct and Fuel Management Policy. It was submitted that the Respondent was provided with a checklist outlining the responsibilities of drivers regarding fuel management. The Appellant submitted that the Respondent was obligated under clause 6 of the checklist on drivers' responsibility for fuel management, a fact he acknowledged during cross-examination, to independently document the fuel readings obtained from the fuel pump in his work tickets.

8. The Appellant submitted that in September 2019, it conducted an audit of its Eldoret Branch overall fleet fuel consumption when some discrepancies in the fuel reports were noted. It is further submitted that the discrepancies pointed to possible manipulation of entries in the fuel records. As a result, the Respondent was suspended on 16th September 2019 pending the conclusion of investigations led by its fleet fuel marshals' supervisor, Benard Natembeya. According to the Appellant, the investigation revealed that both the Respondent and the fuel marshal had frequently exaggerated and manipulated the fuel quantities and costs for the vehicles they oversaw and the fraudulent activity resulted in a loss of approximately Kshs 41,229.80 to the Appellant, equivalent to 398.33 litres of fuel.
9. The Appellant submitted that it had valid grounds for dismissing the Respondent from employment.
10. On the second ground on whether proper procedure was followed in termination, the Appellant submitted that the Respondent was on 24th September 2019 issued with a notice to show cause inviting him for a disciplinary hearing and the charges levelled against him were clearly indicated in the notice to show cause. The Appellant submitted that the Respondent confirmed that he attended the disciplinary hearing, was accompanied and represented by a shop steward by the name Paul Egesa and was also granted an opportunity to defend himself. According to the Appellant, RW1 who was present at the disciplinary hearing informed the court that the panel concluded that there was sufficient documentation demonstrating that the Respondent had received training on the fuel management policy and that he had failed to verify the details of fuel drawn into his work ticket, leading to the recording of false fuel figures for the motor vehicle assigned to him.
11. It was the Appellant's submission that the learned magistrate held that the decision to terminate the Respondent's employment was baseless as the Appellant's disciplinary panel did not make such a recommendation. According to the Appellant, the learned magistrate erred in reaching that conclusion, as the disciplinary panel did not absolve the Respondent of the charges against him.
12. The Appellant further submitted that the process of referring the matter to the Respondent's head office for the appropriate sanction was lawful and procedural. In support of this position, the Appellant cited the cases of *HO (Suing as Next Friend of PO (Minor) v Peter Obwogo & 3 others* [2019] eKLR and *Patrick Musyoka Mwilu v Mombasa Maize Millers Limited* [2019] eKLR
13. It is the Appellant's submission that its head office had the power to review the disciplinary panel's findings and determine the appropriate sanction in line with its disciplinary code. The Appellant submitted that its head office deliberated on the findings of the disciplinary panel and made the decision to summarily dismiss the Respondent.
14. It is therefore the Appellant's submission that the Respondent was taken through the disciplinary process in accordance with the Appellant's internal process and section 41 of the *Employment Act*.
15. On the issue whether the Respondent was entitled to the reliefs he was awarded by the trial court, it was submitted that the Respondent was summarily dismissed for lawful cause and was therefore not entitled to pay in lieu of the notice. On the award made by the trial court on compensation for the unfair termination, the Appellant submitted that the Respondent's conduct amounted to gross



misconduct and the Appellant had proved that his summary dismissal was fair in substance and on procedure hence he was not entitled to the award. Further, the Appellant while citing the case in *Olpajeta Ranching Limited v David Wanjau Muhoro* (2017) eKLR, submitted that the trial court failed to give an explanation and a justification for awarding the maximum 12 months gross salary as compensation. The Court was urged to set aside this award.

16. On the award of damages for discrimination, the Appellant submitted that the learned magistrate erred in awarding the Respondent damages for discrimination as the Respondent did not plead or particularize the provisions of the *Constitution* which were allegedly violated to validate the claim of discrimination and to justify the award of Kshs 1,000,000/= as damages. It was also submitted that the Respondent did not lead any evidence to prove the claim for discrimination. In support of this position, the Appellant cited the case of *Heritage Insurance Company Limited v Christopher Onyango & 23 others* [2018] eKLR.
17. With regard to the award made by the trial court on gratuity, the Appellant submitted that the Respondent was not entitled to the service pay awarded as he was a member of the National Social Security Fund (N.S.S.F) as evidenced by July 2018 pay slip. The Appellant further submitted that the Respondent was not entitled to gratuity pay pursuant to rule 17(2) of the Regulation of Wages (Protective Security Services) Order, 1998 as he was summarily dismissed.
18. The Appellant urged the court to allow the appeal in the terms prayed in the Memorandum of Appeal.

The Respondent's submissions

19. On his part, the Respondent framed the main issue for determination to be whether the learned magistrate in exercise of judicial discretion, made an award that was so grossly excessive as to be a misdirection in law, justifying the appeal court's interference.
20. In his submissions, the Respondent stated that the trial court applied the law to the facts correctly in reaching its decision. It is the Respondent's submission that the learned magistrate addressed the issues in question and was satisfied that the ingredients of lawful, fair and procedural termination were not met in his dismissal from employment.
21. As to the awards made by the trial court, the Respondent submitted that the award of one month's pay in lieu of notice was justified since the Appellant did not have a valid reason to dismiss the Respondent, and further, that the process leading to termination was flawed as before that, no notice was issued.
22. On the 12 months compensation awarded by the trial court, the Respondent submitted that the trial court having made a finding that his employment terminated unfairly and unlawfully, it exercised its discretion on the award of compensation as envisaged by section 49(c) of the *Employment Act*. The Respondent urged the court to uphold the finding by the trial court that he is entitled to maximum compensation in light of over 14 years of work and that the procedure employed to terminated his employment was a pre-determined decision.
23. On the trial court's award on general damages, gratuity and costs, the Respondent submitted that the trial court made a correct finding in granting these reliefs.
24. The Respondent urged the court to dismiss the appeal with costs.



Analysis and determination

25. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123.
26. Having considered the record of appeal and the submissions made by both the Appellant and the Respondent, the following issues fall for determination:
- a. Whether summary dismissal of the Respondent by the Appellant was lawful and fair,
 - b. Whether the compensatory damages awarded to the Respondent by the trial court should stand.
- Whether the Appellant summarily dismissed the Respondent lawfully and fairly from employment
27. The law relating to fair termination is contained in Sections 41, 43 and 45(2) of the *Employment Act*. It is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but also ensure that the laid down procedure has been followed.
28. Section 43 of *Employment Act* 2007 provides inter alia:
- “43. Proof of reason for termination
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.
29. The burden of proof in termination of employment is on the employer who is required to prove that the reasons for the termination are valid and the procedure is fair.
30. Section 45(1) of the *Employment Act* provides that:
- “No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -
- a. That the reason or reasons for the termination is valid.
 - b. That the reason for the termination is a fair reason.
 - i. Related to the employee's conduct, capacity or compatibility or
 - ii. Based on the operational requirements of the employer was that the Employment was terminated in accordance with fair procedure”.



31. The Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR observed as follows:

“The onus was really on the appellant to show that the dismissal was justifiable after the response made by the respondent both in his documentary and oral evidence. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR this Court had the following to say on the burden of proof: -

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

“...to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees...”

Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.

Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:

“(5) 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 of the termination of employment or wrongful dismissal shall rest on the employer.”

So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): “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.”

32. In the instant case, the Respondent was issued with a summary dismissal letter dated 8th October 2019 which read as follows:

08th October 2019

Peter Khawanga

P/No 39241

Courier- Eldoret



Dear Peter,

Re: Summary Dismissal

We make reference to the disciplinary hearing held in Eldoret office on the 30th September 2019. It was established as follows: -

That you were negligent with regards to performance of your duties That you failed to confirm details of fuel drawn into your vehicle and willingly recorded falsified figures onto your work ticket That you failed to uphold G4S Core value of integrity That you were dishonest in the course of duty

Your above actions amount to gross misconduct; hence you are hereby dismissed from company service with effect from the date of this letter as per the Employment Act 2007 section 44

You are required to hand in all the company property in your possession to enable s process your final dues,

Your terminal dues will be paid as follows:

- a. Days worked plus overtime if any up to 08t October 2019
- b. Leave earned but not taken to 08th October 2019
- c. House Allowance for days worked

From this payment, the company shall deduct statutory deductions, any loans owed to the company, cost of lost company property in your possession if any.

You have a right of appeal against this decision within the next 14 days as per the company policy.

Yours Sincerely,

Signed

Jacque

Line Onyango

Human Resource Officer-western Region

33. The Respondent's letter of suspension listed only two grounds for which he was to defend himself at the disciplinary hearing being:

1. Negligence with regards to performance of duties
2. Breach of G4S Kenya driver's responsibility on fuel as signed by yourself on 29th March 2019.

34. The letter of suspension gave the specific particulars as follows:

You failed to independently confirm from the fuel pump the exact litres and amount as dispensed and recording in the vehicle work ticket. Instead you only transferred the falsified fuel details on the Bon Boyage receipt handed over to you by the Fuel Admin Fredrick Okoth this led to loss of Ksh 41,229 on undispensed fuel.



35. The letter of dismissal therefore contains grounds that the Respondent was never required to defend himself against being ground 3 and 4 thereof that: That you failed to uphold G4S Core value of integrity That you were dishonest in the course of duty
36. Ground 2 in the letter of dismissal is also materially different in the letter of suspension and in the letter of dismissal. The charge as per letter of suspension reads “Breach of G4S Kenya driver’s responsibility on fuel as signed by yourself on 29th March 2019”.
37. In the letter of termination the same reads: That you failed to confirm details of fuel drawn into your vehicle and willingly recorded falsified figures onto your work ticket
38. The element of “willingly” and “falsified figures” were not in the original charge as per letter of suspension nor were these proved at the disciplinary hearing. There was no evidence or admission by the Respondent that he was aware the figures he entered in the work ticket were falsified or that he was aware when recording the figures that the figures he was entering were falsified. The element of dishonesty was neither in the charges against the Respondent nor proved at the disciplinary hearing.
39. The fueling Procedure that the Respondent was accused of not complying with is at page 73 to 75 of the Record of Appeal. The relevant provisions are at paragraphs 4 and 6 of the Fuel Management Procedure which are reproduced below:

Arrival The vehicle or motorcycle shall arrive at the designated service station and report to the duty Fuel Marshal who shall carry out a positive identification of the driver.

Vehicle identification. After positive driver identification, the registration number and odometer reading of the vehicle or motorcycle shall be recorded by the duty Fuel Marshal. The driver shall confirm that the details recorded are accurate.

Driver identification. The duty Fuel Marshal shall carry out positive identification of the driver by confirming his/her name, photo and employee number which are visible on all staff identity cards. Where the vehicle is hired and the driver is not a company employee authorization will be sought by a phone call in the Fuel Marshal supervisor or his Manager or a nominated person from Risk and Security general before fueling. Once authorized to fuel by the supervisor then the following details must be recorded accurately: Driver’s full names and national identity number, which must match those given by the Service Line Fleet Coordinator on mail to the Fuel supervisor.

The confirmation of Product Required. The duty Fuel Marshal, together with the driver, shall establish the product requirement of the vehicle. The product can either be Excellium Petro or Excellium Diesel.

Volume Required. The duty Marshal shall make sure that he/she has authorized the customer attendant to fuel the vehicle as per the advised volume per route vehicle and local delivery vehicles to be fueled full tank all the time.

Product Dispensation & Recording. The duty Fuel Marshal shall instruct the pump attendant to dispense the established product. Both the Fuel Marshal and the driver shall independently record the volume and cost of the dispensed fuel. The driver shall then sign a fuel marshal issue record book to confirm quantity of fuel drawn as reflected on the fuel pump screen.

Payment. Payment for drawn fuel must be settled immediately through the vehicle specific Bon Voyage Post Paid Card before the vehicle exits the service station.



Departure. After fueling the recording litres and amount drawn then the Fuel Marshal on duty makes payment for the fuel drawn immediately via bon voyage fuel card in the presence of the driver before starting to serve another vehicle.

All branch vehicle fueling are under the control of the branch Manager Inclusive of route vehicles and only authorized person on behalf of the branch Manager is allowed to fuel and keep record and also update the online branch fuel monitoring tool.

40. At both the disciplinary hearing and in his testimony in court the Respondent stated that he was not inducted into the fueling procedure. That he was issued with the form and advised to sign.
41. No evidence was adduced by the Appellant to counter this averment by the Respondent. It was also not clarified whether the Respondent retained a copy of the G4S Kenya Driver's Responsibility procedure or he signed and handed it over to the Appellant such that he would have no opportunity to go through it at a later stage and absorb the contents thereof.
42. It is further evident from the Record of Appeal that the Disciplinary Committee of the Appellant did not recommend the dismissal of the Respondent and neither did the investigation report assign any loss of funds to the Respondent.
43. The Appellant's head office did not call the Respondent for a further hearing before deciding to dismiss the Respondent based on the report of the disciplinary hearing which did not recommend dismissal. No copy of the Appellant's document providing for the role of the disciplinary committee was filed in court for the court to determine if the policy authorized the management to give a penalty more severe than that recommended by the disciplinary committee.
44. Further, during the hearing the Respondent stated that he was the only driver dismissed out of all the drivers whose vehicles were found to have discrepancies in fuel paid for as against the fuel card records. This evidence was not controverted by the Appellant. The investigation report at pages 98, 99 and 100 of the Record of Appeal has 12 names of persons who were under investigation. Out of the 12 only the Respondent and one Metrine Wechuli did not have any loss assigned to them. RW1 stated that Metrine was not dismissed while the Respondent was. The Respondent testified that Simon Chege, John Chakaya, Steve Ndeche, Moses Daniel, Benjamin Baraza, Martin Wemuli who had fuel shortages were still at work. He testified that the investigation report attributed the loss on his vehicle to his boss Fredrick Okoth.
45. In the judgment of the Trial Court, the court found that the Respondent had proved that no blame was found on him as conceded by RW1. The court further found that the Disciplinary Committee did not reach a conclusion whether or not to dismiss the Respondent and yet the management dismissed him based on the minutes of the Disciplinary Committee. The court also found that Fredrick Okoth was found responsible for the fuel that the Respondent was blamed for.
46. It is my finding that on the evidence on record, the Appellant did not act in accordance with justice and equity in terminating the employment of the Respondent, contrary to section 45(4)(b) of the *Employment Act*.
47. Having made my observations from the pleadings and evidence on record, I am inclined to agree with the Trial Court on the determination that the termination was unfair on the grounds outlined herein above, some of which are over and above the grounds identified by the Trial Court.
48. Specifically, I find that the management of the Appellant acted unfairly by reaching a decision to dismiss the Respondent without hearing the case independently after 3 out of 4 managers decided that



the Respondent should be given a warning. The benefit of doubt should have been exercised in favour of the Respondent.

49. I am guided by the test in the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R. 91 where Lord Denning observed;

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.” It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

50. It is my view that a reasonable employer would not have dismissed the employee in the present circumstances.

Whether the compensatory damages awarded to the Respondent by the trial court should stand

51. Its trite law that an appellate court can only disturb the discretionary award of the trial court where it proceeded on wrong principles, or misapprehended the evidence in some material respect, or where the finding was based on no evidence.

52. The Respondent was awarded the following reliefs which I will address in the separate heads as hereunder:

- a. One months' pay in lieu of notice

Having found that the Respondent's employment was unfairly terminated he is entitled to 1 month's salary in lieu of notice as awarded by the trial court. It is however noted that the Respondent's gross salary as per pay slip was not Kshs 46,101.80 awarded but Kshs 22,583 plus house allowance of Kshs 3,387.45, soap allowance of Kshs 50 and site allowance of Kshs 1,000 which he received every month and therefore constituted his gross pay in terms of section 49 of the *Employment Act*. I thus award him Kshs 27,020.45.

- b. Compensation for unfair termination

The trial court awarded the Respondent 12 months' salary as compensation for unfair termination. From the evidence on record, and particularly the minutes of 30th September 2019, the Respondent had worked for the Appellant for over 9 years. Being guided by section 49 of the *Employment Act* and considering the duration of employment as well as all the circumstances of the case including the factors under section 49(4) of the Act, I see no reason to disturb the award by the trial court. The award of 12 months' compensation for the unfair termination is upheld.

- c. General damages

It is trite law that general damages are not payable for wrongful termination. Courts have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice and compensation. General damages are only



payable where the employee proves violation of some other rights under the *Employment Act* such as discrimination or for proven violation of constitutional rights.

The award of general damages is set aside as the Respondent did not prove his entitlement to the same.

d. Service pay/Gratuity

The Regulation of Wages (Protective Security Services) Order, Legal Notice No 53 of 2003 provides for gratuity at the rate of 18 days per year worked for employees who have completed 5 years of service. The Appellant in its submissions averred that the Respondent is not entitled to the award of gratuity as he was summarily dismissed. However, since the court has established that the Respondent was unfairly dismissed, he is entitled to gratuity. I award him the same at Kshs 168,358.20.

53. The upshot is that the Appeal partially succeeds as follows:

- a. The award of one months' pay in lieu of notice is upheld but reviewed to Kshs 27,020.45
- b. The award of 12 months' salary compensation for unfair termination is upheld but reviewed to Kshs 324,245.40
- c. The award for gratuity is upheld but reviewed to Kshs 168,358.20
- d. The award of General damages is set aside

54. Each party to bear its own costs of the Appeal. The orders of costs at the lower court are not disturbed. Interest shall accrue on decretal sum from date of award in the lower court.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2024.

M. ONYANGO

JUDGE

