**G4S Kenya Limited v Arasa (Employment and Labour Relations Appeal E019 of 2022) [2024] KEELRC 2814 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2814 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2022**

**HS WASILWA, J**

**NOVEMBER 14, 2024**

**BETWEEN**

**G4S KENYA LIMITED ..... APPELLANT**

**AND**

**STANLEY MICHIRA ARASA ..... RESPONDENT**

## JUDGMENT

1. This Appeal arises from the Judgement and Decree of the Honourable J. B Kalo (CM) in the Chief Magistrate Court in Nakuru delivered on 29th July, 2022 in the CMELRC Case No. 3 of 2019, where in Stanley Michira Arasa was the claimant while G4S Kenya Limited was the Respondent.

2. The Grounds of Appeal as follows;-

    1. The learned magistrate erred in holding that the appellant violated and failed to adhere to the Disciplinary and Grievance Procedure and declaring the disciplinary process illegal, null and void.

    2. The learned magistrate erred in holding that there was insufficient evidence provided to prove that the respondent received cash from clients which he did not bank on time as required.

    3. The learned magistrate erred in holding that the respondent was unfairly dismissed.

    4. The learned magistrate erred in awarding the respondent six (6) months' salary as damages for wrongful termination of employment.

    5. The learned magistrate erred in making an award of leave not taken for nine years notwithstanding that this was not proven and without making a finding on leave in the judgment.

6. The learned magistrate erred in making an award to the respondent for salary for 15 days worked in May 2018.

3. The Appellant sought for the Following reliefs;-

    1. That the appeal be allowed.

    2. That the judgment of 29th July 2022 be set aside and be substituted thereof with an order dismissing the suit against the appellant.

    3. That the costs of this appeal be allowed to the appellant, and.

    4. Any other alternative relief this Court may deem fit to grant.

4. The summary of the Trial Court case is that the respondent was employed by the Appellant on 20th June, 2008 as the District Manager of the Appellant's Eldoret office earning a monthly salary of Kshs 34,400. That he later rose through the ranks to become the Operations manager earning a salary of Kshs 71, 250 until his termination.

5. That the Respondent was summarily dismissed from employment in disregard to the Appellant's disciplinary and Grievance procedure, in that, he was not given an opportunity to defend himself, neither was he allowed to sign form GD1 &GD2 as per the Hearing disciplinary code. Further that the disciplinary hearing issued a verdict on one offense of late banking but on termination, the charges against him were several that were not addressed in the hearing.

6. The Appellant in their defence, admitted to employing the claimant and the averments of rising through the ranks to become the Operations manager earning a salary of Kshs 71, 250.

7. The Respondent stated that it come to their knowledge that the employees of the Respondent were not banking cash received from cash paying customers. Hence investigations were done, wherein the Respondent admitted to receiving Kshs 30,470 and failing to bank the same but promised to source funds and refund the said money by 18th April, 2018.

8. It is stated further that the Respondent was unable to account for a list of items and admitted that some receipts had been forged to pass office expenses, all these on his watch as the Operations manager. That due to this negligence of duty, the Respondent suffered financial loss of Kshs 201,355.

9. The Appellant avers that following the investigations and admission therefore, the Respondent was issued with a Notice to show cause dated 9th May, 2019, which he responded by the letter off 10th May, 2019 admitted to using the Respondent's money for his personal used but promise to refund the same and also admitted to late banking of money and failing in his oversight role. That he was suspended, invited to disciplinary hearing, heard on his defence and eventually terminated for failing to bank cash in transit payments and failing to provide leadership causing loss of funds.

10. After hearing both parties, the trial Court found for the Respondent herein and stated that the Appellant violated their Disciplinary and Grievance procedures regarding Appeal by failing to communicate reason for Appeal within 2 days and thus the disciplinary procedure was unfair. The Court further held that the reason of delaying banking of money was not demonstrated before the Court as the key witnesses were not called to testify before Court. However, on the offense of negligence of duty, the trial Court found the claimant culpable because he failed to avert the fraud that was perpetuated by one of his juniors', Mr. Sigilai, who was the Operations administrator.

11. Based on the fact that proper procedure was not followed, the trial Court found in favour of the Respondent and awarded 6 months' salary as compensation, one-month salary in lieu of notice, accumulative leave days not taken for 9 years and 15 days worked in the month of May, 2018.

12. It is this decision that caused the filling of this Appeal. The parties agreed to canvas the Appeal by written submissions.

**Appellant's Submissions**

13. The Appellant submitted that this Court being a Court of First Appeal, is required to consider and review the facts and the evidence that were placed before the trial Court and come to its own independent conclusion.

14. On procedural fairness, it was submitted that the trial Court only faulted the Appellant for allegedly failing to demonstrate that it provided the Respondent with reasons for the outcome of the Appeal and that the said Appeal outcome was not communicated within 2 days.

15. On that note, it was submitted that the issue that the Appeal outcome was not communicated in accordance with the Disciplinary and Grievance procedure was not pleaded but only introduced in submissions stage, hence the trial Court erred in finding on the issue. Nonetheless, that the Respondent admitted during hearing that he was aware of the outcome of the Appeal only that the same was not communicated to him in writing and within 2 days. Thus his right to be heard in Appeal was not prejudiced in any way to warrant the award granted.

16. Conversely, that the disciplinary procedure leading to the Respondent's termination was done in accordance to the law a fact that the trial Court did not fault.

17. On validity of reasons, it was submitted that the trial Court found that there was no sufficient evidence to prove that the Respondent received cash from the client, when the minutes demonstrated otherwise. He argued that the Respondent admitted to failing to adhere to the laid done procedure in handling the cash received and recorded in the Temporary Works Order. Further that the Respondent admitted in his statement that he was aware of 4 payments which were not banked on time between January, and February, 2018 and stated that he intended to bank the said money by 18th April, 2018. Therefore, that the reason for termination was justified based on the above admissions.

18. The Appellant cited the Court of Appeal case of Attorney General and Another Vs Crispinus Ngayo Musundi [2017] eklr where the Court relied on the Canadian case of Mc Kinley Vs B.C Tel [2001] 2 SCR 161 that Court held that;-

> " the test is whether the employee dishonesty gave rise to a breakdown in the relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesy violates an essential consition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

19. The Appellant also relied on the case of Kenya Revenue Authority Vs Reuwel Waithaka Gitahi & 2 Others [2019] eklr where the Court held that;-

> " It is improper for a Court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond

reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test."

20. Accordingly, it was submitted that the Respondent conduct was directly inconsistent with his obligations and violated the trust placed upon him by the Appellant, therefore that his termination was warranted. It is argued further that the Respondent did not call for the makers of the statement to be called for cross examination, therefore that the trial Court erred in holding that the Respondent was denied an opportunity to cross examine the makers of the statements recorded during investigations.

21. On compensation awarded, the Appellant submitted that the trial Court erred in awarding the Respondent 6 months' salary as compensation when the said Court confirmed that the Appellant had proved reason for termination. That the only issue that the Court observed was wrongly done was none issuance of written reason of the outcome of Appeal within 2 days and not the disciplinary process. Which reason cannot be a ground to award the Respondent 6 months' salary in compensation. To support this, the Appellant relied on the case of Kenfreight (E.A) Limited V s Benson K.Nguti [2019] eklr where the Court held that;-

> " In an award on damages, the Act limits the award a Court of law can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under -section 4 of section 49 of the *Employment Act*."

22. He also relied on the case of Kiambaa Dairy Farmers Co-operative Society Limited Vs Rhoda Njeri & 3 Others [2018] eklr where the Court held that;-

> " The compensatory damages for unfair dismissal must always be seen as first of all not mandatory or automatic meaning that they should be awarded only in deserving cases; and, even where appropriate, there must be an assessment with the range of zero to twelve months in mind. To my mind, this means, as it must, that the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Awards of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal."

23. Similarly, that in this case the trial Court found that forgery and fraud had been proven to have happened under the Respondent's watch, that led to loss. Hence the trial Court ought to have taken the gravity of reason for termination into consideration when making the award of compensation.

24. Based on the foregoing and in line with the case of Robert Kimutai Rutto Vs Hotel Cathay Limited [2018] eklr where the Court refused to award the claimant compensation for contributing to his dismissal, the Appellant argued that the award of one month salary in lieu of Notice awarded by the trial Court was without any basis. Neither was the award of 6 months' salary in compensation.

25. On the award of leave for nine years, the Appellant submitted that the contract of employment at clause 8 provided that leave must be taken in the financial years or be considered forfeited save for when such leave is agreed upon to be carried forward by the managing Director in writing. Hence, in absence of any agreement between the Respondent and the managing Director of the Respondent of carrying

the said leave forward, the claim for leave should not have been awarded. To support this, the Appellant relied on the case of Peter Mwangi Maina V standard Group Limited [2018] KEELRC 913 (KLR) where the Court held that;-

> " Finally, the claim for 100 days accrued leave between 2006 and 3.1.2011 is partially successful because although under the contract of service the claimant was entitled to 25 leave days per year, he could not carry forward more than 5 days of the annual leave without prior written approval from the respondent. The claimant has not tendered evidence of any approval to carry forward more than 5 leave days per year. Consequently, I will only award to him 25 leave days for the year ending on 3.1.2011 plus 5 days carried forward from the year that ended on 3.1.2010 totaling to 30 days outstanding leave. Consequently, the claimant will be paid cash equivalent of the outstanding leave being Kshs. 21,500."

26. In addition, it was submitted that the trial Court erred in failing to consider that any claim for over 3 years was statute barred under section 90 of the *Employment Act*.

27. On the award of 15 days worked in May, 2018, the Appellant submitted that the Respondent did not make a prayer for the award of the said amount as such the trial Court should not have awarded what was not prayed for as was stated by the Court in Express Connections Limited Vs Ezekiel Kiaries Kamande [2016] eklr.

28. In conclusion, the Appellant submitted that the Appeal herein is meritted and urged this Court to allow it as prayed.

**Respondent's Submissions**

29. The Respondent submitted on each ground of Appeal and with regard to the first grounds, it was argued that prior to the hearing, neither the Respondent nor his representative were given any statements or documents from the Appellant to enable him to prepare his defence, in violation of the company's disciplinary and grievance procedure, which provides that the employee must be supplied with copies of the documents intended to be relied on at the hearing and that he be given an opportunity to cross-examine the company's witnesses.

30. That the failure to call witnesses who record statements for cross examination and the failure to supply the Respondent with the documents relied on at the hearing was contrary to the provision in the Appellant's Disciplinary and Grievance policy, which state as follows:-

> " Witnesses shall be persons called to give evidence at the disciplinary hearing by either the company's representative or the employee or his/her representative."
>
> "Copies of the relevant documents which the company representative intends to use in support of his case at the hearing will be given to the employee upon commencement of the disciplinary hearing."
>
> "The company's representative will outline the complaint against the employee and call relevant witnesses to give evidence to prove the alleged misconduct. The employee or his representative may cross-examine the company's witnesses."

31. It is argued that the contention by the Appellant that the Respondent did not request copies of the said documents cannot stand because the provision of documents as well as the right to cross examine witnesses is explicitly stated in the Appellant's policy. In addition that provision of forms GDI and

GD2 are provided for in the Respondent's Disciplinary and Grievance policy and the policy makes it mandatory for the said forms to be provided.

32. In addition, the Respondent argued that the Disciplinary and Grievance policy states that the Appeal Officer shall decide on the outcome of the appeal within 2 days of the conclusion of the Appeal hearing and provide written reasons for his/her decision. However, that in this case no reason for the Appeal were not communicated as required under the said policy but the same was communicated to the Respondent 17 days after the hearing, and he was not furnished with the reason for the decision.

33. Accordingly, that it is clear that the Appellant failed to adhere to its own Disciplinary and Grievance Procedure and thus the trial Court was justified in finding against them.

34. On the second ground of Appeal, it was argued that the Respondent's services were terminated on the basis of two allegations, one being that he failed to bank company funds received from G4S cash clients against company policy on daily banking and instead used the monies collected from clients for his personal use. However, no evidence was adduced by the Appellant to prove this alleged claim. Moreover, that the diverse dates when the Respondent supposedly received and failed to bank the said payments, fell on a sunday when the Respondent was not at work, that is, 28/01/2018, 4/2/2018, 11/02/2018, and 18/02/2018.

35. It was argued that at the disciplinary hearing, no witnesses were called to testify to the allegations against him. The crew commanders in charge on the days the Respondent was alleged to have received the monies were never called to give evidence. The employee working in the control room was also never called to testify that the Respondent failed to bank the money received from customers.

36. The Respondent submitted with regard to allegations that the Respondent admitted to some of the charges that the Appellant relied on the unsigned letter dated 10th May, 2018, which the Respondent denied authoring, thus the letter is without any probative value. To support this, he relied on the case of Kenya Electrical and Allied Workers Union v Wartsila Eastern Africa Limited [2020] eKLR where this Court, at page 4, noted in her ruling that:

> " There are also letters showing withdrawal of some members from the union though some of the letters are not signed by its authors and therefore cannot be relied upon."

37. On the third ground, whether the learned magistrate erred in holding that the respondent was unfairly dismissed. The Respondent stated that section 45(2) of the *Employment Act* provides that, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

38. Similarly, that in this case the Respondent was summarily dismissed on the basis of allegations that were not conclusively proved. On the allegation of failing to bank monies he received from clients, the Respondent argued that at the disciplinary hearing, the crew commander and the person in charge of the control room were never called as witnesses to testify to the allegations against him, and he was further never given a chance to question them, yet their statements constituted part of the investigation report that was relied on to terminate his services.

39. On the second charge, it was argued that the Appellant Victor Singilai, the branch administrator at the time who was in charge of petty cash, was found guilty of misappropriating company funds, as is evident from the disciplinary hearing minutes. Therefore, that he was exonerated from the said charge.

40. On whether the learned magistrate erred in awarding the Respondent six (6) months' salary as damages for wrongful termination of employment , it was submitted that the reason and procedure for

termination was found to be flawed therefore that the award of compensation was justified. Moreover, that the Respondent had been working for the Appellant without any warnings until 10 May, 2018, when his services were unfairly terminated. Therefore the award was justified.

41. On the award of 9 years untaken leave, the Respondent submitted the Appellant, being the custodian of the employee records, had the opportunity to produce any copies of the approved leave application forms filled out by the Respondent. That due to the lack of copies of the leave Application forms and no records that the accrued leave days had been paid for, there was no conclusive evidence that indeed the Respondent was granted leave during the 9 years that he worked for the Appellant. Therefore, that he was entitled to the leave days for the 9 years, it being a continuing injury. To support this, he relied on the case of *Obatta v Radar Limited (Appeal E001 of 2023*) [2024] KEELRC 64 (KLR)where Judge Agnes Kitiku Nzei stated as follows at paragraphs 24 and 26 of the judgment:

> " Regarding the claims for unpaid earned leave days and unpaid house allowance, shown to have accrued during the entire period of employment, it is my finding that these were in the nature of a continuing injury as contemplated in Section 90 of the *Employment Act*. The continuing injury ceased upon termination of the Appellant's employment...the cessation date of the continuing injury against the Appellant in the present case was the date of the Appellant's termination. The termination was shown to have taken effect on 1/11/2018. The claim thereon ought to have been filed in Court within twelve months from the said date of termination."

42. Accordingly, it was submitted that the Respondent was terminated on 17 May, 2018 and filed the claim against the Appellant on 23rd January, 2019 well within the 12 months' period from the date of termination for him to be entitled to the 9 years' worth of accumulated leave.

43. In conclusion, the Respondent urged this Court to dismiss the Appeal with costs to the Respondent.

44. I have examined the evidence and submissions of the parties herein. This being the 1st appeal to this Court, this Court has an obligation to re-evaluate the evidence afresh which this Court has done in this judgment.

45. From the evidence of the respondents herein before the lower Court he indicated that he was never given sufficient opportunity to ventilate himself in line of the allegations that led to his summary dismissal and that the respondents failed to follow the requisite disciplinary and grievance procedure.

46. I have looked at claimant's evidence in lower Court. He indicated that he never received any money in CIT payment. He indicated that the money in issue was not banked until 18/4/2018 by the branch administrator.

47. I also indicated that during the disciplinary hearing no witness was called as per the respondent's disciplinary and grievance policy. He also avers that he was not supplied with any documents contrary to the policy i.e the investigation report which was used at the hearing and which had not been supplied to him at the commencement of the hearing.

48. He also avers that after the hearing, he was supposed to receive the verdict within two working days but he received the verdict after 3 days on 19/5/2018. He also appealed the decision and an appeal was conducted on 14/6/2018 and the appeal decision was communicated on 2/7/2018 meaning that the respondent also flouted their policy which indicates that this should be done within 2 working days.

49. In cross examination the claimant indicated that the fraud was done by one Sigilai who worked under him in Eldoret. He also admitted that the investigation was tabled at the hearing.

50. On issue of petty cash he indicated that it was found there was some forgery of receipts which was done when he was not around.

51. Having considered this evidence, it is clear that the trial Court found that the respondent/ appellant herein failed to adhere to their own disciplinary manual as hereby submitted by the respondent. It is on this basis that the trial Court found this dismissal unfair. This is indeed true in line with section 45(2) of the *Employment Act* 2007 which states as follows:

    (2) A termination of employment by an employer is unfair if the employer fails to prove——

    a. that the reason for the termination is valid;

    b. that the reason for the termination is a fair reason——

        i. related to the employees conduct, capacity or compatibility; or

        ii. (ii) based on the operational requirements of the employer; and

    (c) that the employment was terminated in accordance with fair procedure.

52. In the Court's view, failure to adhere to disciplinary process as provided in the manual would render the disciplinary hearing flawed and therefore it was proper for the trial magistrate to make a finding as this.

53. The issue of leave not taken by the claimant /respondent was also addressed in the hearing and the respondent indicated that leave was channeled in the online platform but he never proceeded on leave. The hon magistrate then made a proper finding that the respondent was indeed entitled to payment in lieu of leave.

54. I am convinced that the trial magistrate applied his mind correctly to the evidence and made a proper finding in this case. I find no reason why I should disturb the findings therein. I find no merit in his appeal and I dismiss it accordingly.

55. The appellant to pay costs of this appeal and of the lower Court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF NOVEMBER, 2024.**

**HELLEN WASILWA**

**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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**HELLEN WASILWA**

**JUDGE**