



**Kenya National Private Security Workers Union v Midal Group Kenya  
Limited (Employment and Labour Relations Cause E044 of 2023)  
[2024] KEELRC 2811 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2811 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E044 OF 2023  
HS WASILWA, J  
NOVEMBER 14, 2024**

**BETWEEN  
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION ..... CLAIMANT  
AND  
MIDAL GROUP KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By an Amended Memorandum of Claim dated 8<sup>th</sup> May, 2024 and filed on 13<sup>th</sup> May, 2024, the claimant instituted this suit on behalf of its member, Janet Adhiambo Otieno, claiming that the grievant had been unfairly terminated and seeking for compensation for the unfair termination and payment of terminal dues.
2. The claimant states that the grievant was employed by the Respondent verbally on 30<sup>th</sup> November, 2016 as a day security guard, earning a monthly salary of Kshs. 7,500. Upon employment she was assigned to guard Woolmatt East main entrance.
3. It is averred that the grievant used to report to work at 7:00am and clock out at 8:30pm, thereby working for 14.5 hours per day. Further that she was not granted a weekly rest day as prescribed under section 27 of the [Employment Act](#).
4. The Claimant also states that the grievant did not utilize her annual leave, neither was she allowed to rest during Public Holidays.
5. The claimant states that the grievant joined the Union herein on 6<sup>th</sup> June, 2021 but that the management was against the idea and in effect she was discriminated and harassed by the Respondent's management that her salary was reduced in the months of March to June, 2022 without any valid reason.



6. It is averred that the circumstances leading to her termination is that on 11<sup>th</sup> June, 2022, while the grievant was performing her guarding duties at Woolmatt supermarket central main entrance at around 7.00 pm, she was requested by one of the customers to assist push the trolley to offload the shopping into her car parked outside the supermarket. That she escorted the customer, offloaded the goods and on her way back, she was reprimanded by the Operations manager for being in the wrong place and later directed to leave the assignment with immediate effect and report on Monday the 13<sup>th</sup> June, 2022 with the Uniform for handover.
7. It is averred that the grievant took ill the same evening and rushed to Hospital for treatment thus unable to go to work on 13<sup>th</sup> June, 2022. When her condition improved, she reported back to work and handed over the uniform as directed.
8. It is averred that the dispute herein was reported to the labour office, but no settlement was reached.
9. It is also stated that the grievant was not housed by the Respondent, neither was she paid House allowance throughout her employment. Moreover, that she was underpaid throughout this period.
10. Based on the foregoing, the Claimant sought for the following reliefs; -
  - a. That the Honourable court does find and establish that the dismissal of the claimant in this matter was totally unlawful.
  - b. That after establishing the unfairness by the Respondent, the Honourable court be pleased to order for a remedy in terms of payment as hereunder; -
    - i. That the claimant be paid one month salary in lieu of notice based on the provisions of the legal notice No.2 of 1<sup>st</sup> May 2018 .
    - ii. That the claimant be paid for 5 years 7 months pending leave plus travelling allowance as given under the provisions of paragraph 10(1) and sub paragraph 10(2) of the protective security services order legal notices no.53 of 2003 corr.No.63 of 2003 as is read together with paragraph 13 of the same legal notice.
    - iii. That the claimant be paid for the 11 days worked in June, 2022 but was not paid at termination time.
    - iv. That the claimant be paid for overtime compensation as given under the provision of section 6 and 7(la,b) and (2) of protective security services order, as read together with section 27(2) of the *Employment Act*, 2007.
    - v. That the claimant be paid for rest days based on the provision of section 8 of protective security services order legal notices no.53 of 2003 corr.No.63 of 2003 as read together with section 27(2) of the *Employment Act*, 2007 laws of Kenya.
    - vi. That the claimant be paid public holidays worked during holidays as given under the provision of paragraphs 9 (1) and (2) of the protective security services order legal notice no. 53/2003 corr.65/2003
    - vii. That the claimant be paid for house allowance based on the provision of section 5 of the protective security order.
    - viii. That the claimant be paid gratuity based on the provisions of section 17 of the protective security order legal notice no.53/2003 corr.65/2003.



- ix. That the Respondent pays the claimant compensation based on the provision of section 49(1)(c) of the Employment Act 2007.
  - x. That the Respondent to issue the claimant with a certificate of service in the meaning of section 51 of the Employment Act.2007
11. The Respondent entered appearance and filed a response to the Memorandum of Claim on 22<sup>nd</sup> February, 2024 admitting to employing the grievant as indicated in the claim but denying unfairly terminating her.
  12. The Respondent states that the grievant was paid salary as per the location of business and in accordance with the Basic minimum wage at the time of her employment which by her consent agreed to and she should therefore be estopped from claiming any other sum over and above her agreed salary.
  13. The Respondent stated that day guard shift begins at 7am till 7 pm and was always remunerated for holidays worked. Further that she was entitled to one rest day in a week.
  14. Contrary to the allegation that the grievant was discipline throughout her employment with the Respondent, the Respondent states that she was delinquent and wrote apology letters as an act of atonement.
  15. The Respondent denied allegations that it was against any Union activities and instead stated that the grievant absconded duty from time to time without communicating to her supervisor and all attempt to reach her were futile.
  16. It is stated that the Respondent was forced to terminate the service of the grievant after she failed to report to work for more than a week without any communication or any lawful excuse.
  17. On that note, the Respondent stated that the grievant does not deserve any of the reliefs sought in the claimant and instead that the suit herein should be dismissed with costs to the Respondent.

### **Evidence**

18. The claimant called the grievant, Janet Adhiambo Otieno, as its witness who testified as CW-1 and adopted her witness statement of 20<sup>th</sup> September, 2023, she also produced the claimant's documents that were marked as Exhibit 1-7 respectively.
19. She testified that she was employed by the Respondent and assigned to guard Woolmatt Supermarket, where she used to report at 7 am till 8 pm when the supermarket was closed. She told this Court that she was terminated on 11<sup>th</sup> June, 2022 because on that day, she helped a customer carry their shopping to their car. She explained that she helped the said customer because it was raining and the customer did not have any umbrella. That on her way back to her guarding station, she met with her Mr. Opondo, her supervisor who reprimanded her and called her a crook, then took out his phone and talked to someone only to inform her that the supervisor had directed her to leave the assignment immediately and go home until she is contacted by the Respondent, but that she was never contacted to date.
20. Upon cross examination, the grievant testified that she did not apply for the job rather that she was asked by the director of Midal to go work for them upon attending training which she did. She testified that she agreed to the salary offered by Respondent and that the said salary was paid in cash initially until 6<sup>th</sup> June, 2018 when they were paid through the bank.
21. She testified that among her duties was to frisk customers going inside the supermarket, arrange for parking for customer among others. That escorting customer who were carrying heavy shopping was



- allowed. She stated that there were many guards working at a time. She testified that in the evening of the same day she fell ill and the next day she was taken to London medical Clinic where she was referred to PGH for further examination and treatment and then discharged. She testified that after feeling better she went back to work but could not remember when she reported back to work.
22. On re-examination, she testified that the operations manager told her after the incident to go home until further notice and within that period she fell ill. She added that she was not called back to work as indicated.
  23. The Respondent called one witness Elvis Omondi Otieno as its RW-1. The witness testified that he is the manager of the Respondent's Nakuru branch. He adopted his witness statement of 28/3/2024 and produced the Respondent's documents dated 21/2/2024 which were marked as Exhibit 1-3 respectively. He told this Court that the grievant used to be aggressive when corrected.
  24. Upon cross examination, he testified that the grievant absconded duty from 12<sup>th</sup> June, 2022 without any excuse. That they tried contacting her to no avail and even wrote to her the letter of 23<sup>rd</sup> June, 2022 when she refused to answer to the several emails send to her. He testified that the grievant had committed several offenses and disciplinary hearing done but that she was pardoned.
  25. Upon re-examination, he reiterated that the claimant on several occasions wrote apology letters causing the Respondent to pardon her.

### **Claimant's Submissions**

26. The claimant submitted on two issues; whether the grievant was unlawfully and unfairly terminated and whether the claimant is entitled to the reliefs sought.
27. On the first issue, it was submitted that the grievant was employed by the Respondent on 30 November, 2016 as a security officer wherein he was tasked to man various stations in Nakuru until 13<sup>th</sup> June, 2022, when her services were verbally terminated by the Respondent's Operations Manager.
28. On procedural fairness, the claimant relied on the case of Anthony Mkala Chivati Vs Malindi Water & Sewage Company Limited [2013] eKLR, where Radido J stated as follows;

‘And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employee ‘s contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.’”

29. The Claimant submitted that they have demonstrated that the grievant was not served with warning letters during the course of her employment. Further that the Respondent has failed to produce any evidence to rebut the same. It is argued that the grievant was not issued with a show cause letter by the Respondent during her cause of employment and that the apology letters written by the grievant



did not bar the Respondents from taking further actions against her. That no hearing was conducted before the termination. Therefore, that the termination was not done in accordance with the dictates of section 41 of the *Employment Act*, hence was unfair.

30. On substantive fairness, the claimant submitted that section 43 of the *Employment Act* 2007 requires the employer to demonstrate a valid reason for terminating the employment of an employee. That in instances where the Employer alleges that the employee has absconded duty, the employer ought to demonstrate the steps taken to recall the employee to attend work or risk being terminated.
31. He argued that in the present case, despite the Respondent alleging that the grievant absconded duty, they have not produced any document indicating any attempts or efforts made to reach out to the Grievant, when they are mandated under sections 10 (6) and (7) of the *Employment Act* to produce records it is required to keep under the Act. To support this, the claimant relied on the case of *Simon Mbithi Mbane v Intersecurity Ltd Cause No 805 of 2018* where the learned Justice Abuodha held that;-

“an allegation that an employee has absconded duty calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
32. They also relied on the case of *Joseph Nzioka v Smart Coatings Ltd [2017] eKLR* the court held that;-

“dismissal on account of absconding must be preceded by evidence showing that reasonable attempts was made to contact an employee concerned and that show cause fetter was issued to such an employee to show cause why services should not be interrupted on account of absconding duties” .
33. Accordingly, that the Respondent has not demonstrated any steps taken to contact the grievant after the alleged desertion of duty hence did not have a valid reason to terminate her services.
34. On that basis, the claimant urged this court to declare that the termination of the grievant’s services was unfair in line with section 45(4) of the *Employment Act* 2007.
35. On the reliefs sought it, was submitted that the case against the Respondent has been demonstrated to the required standard and urged the Court to allow the claim as prayed.

### **Respondent’s Submissions**

36. The Respondent submitted on three issues; whether the Claimant has made out a case for unlawful and/or unfair termination, whether the Claimant is entitled to any payments from the Respondent, if so, to what extent and who should bear the costs of the cause.
37. On the first issue, the Respondent stated that section 107 of the *Evidence Act*, Cap. 80 Laws of Kenya clearly states that;

“Whoever desires my Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.(2 when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
38. Based on the above provision, it is argued that, it is the duty of the grievant to prove her case having alleged that her termination was unfair and unlawful. However, that they failed to prove their case for the reasons that the grievant after being summoned to appear at the Respondent’s office on 12<sup>th</sup> June 2022 for abandoning her workstation without permission failed to show up and failed to communicate



- the reasons thereof. It is argued that the grievant alleged to have been sick but admitted on hearing that she was not admitted in hospital as such her failure to report to work or communicate her absence indicated that she was no longer interested in her employment and as such deserted her employment.
39. It is argued that pursuant to section 43 of the [Employment Act](#), the Respondent had genuine reason to believe that the Claimant had absconded work hence terminating her from employment.
40. The Respondent submitted that the Grievant's willful failure to communicate her absence to the Respondent when she was in a position to do so points to the manner in which she casually took her job. On that note, the Respondent urged this Court to find that the claimant has failed to prove that the grievant's termination was wrongful whilst the reason for termination advanced by the Respondent is valid.
41. On the reliefs sought, it was submitted that the Claimant has proved that they are undeserving of the reliefs sought as the grievant has demonstrated that she is a deserter whose actions of desertion resulted in disruption of the Respondent's business occasioning it losses.
42. On the claim for one-month pay in lieu of notice, it was argued that the grievant is not entitled to be paid under this head for the reason that she left work voluntarily without notifying the Respondent. To support this, the Respondent relied on the case of *Evans Kamadi Misango Vs Barclays Bank of Kenya Limited*, where the court held that:
- “... an employee is only entitled to payment in lieu of notice if his dismissal was due to redundancy, however the [Employment Act](#) does not provide for payment in lieu of notice in case of desertion.”
43. On overtime, it was submitted that the grievant's working hours were between 6:00 AM to 6:00 PM giving way for the night security guards and her claim for overtime is therefore unsubstantiated. Further, that they have failed to provide any proof to this Court that she worked overtime during the course of her employment and the same cannot be awarded by her mere allegations.
44. The Respondent submitted also that the claimant failed to provide any evidence to this Court that the grievant worked on public holidays to warrant any payments sought. Moreover, that these claims are special damages which need to be pleaded and strictly proved. To support this, they relied on the Court of Appeal case of *Equity Bank Ltd V Gerald Wang'ombe Thuni* [20151 Eklr , where the court cite the case of *MARITIM & ANOTHER -V-ANJERE* (1990-1994) EA 312 at 316, where it was emphasized:-
- “It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”
45. In addition, it was argued that the Claimant did not plead on which public holidays the grievant worked neither did they prove that she worked on any public holiday.
46. On the claim for annual leave, it was submitted that the grievant took all her leave days including her annual leaves and she did not provide proof of otherwise hence her prayer under this head should rightfully fail.
47. On compensation for unlawful termination, the Respondent submitted that the grievant authored her own misfortunes by deserting her place of work and cannot claim for compensation for



unlawful termination. Moreover, that she was an indisciplined employee throughout the course of her employment as evidenced by the various apology letters she wrote.

48. On costs, the Respondent argued that costs should be awarded to Respondents as the Claimant has failed to prove his cause.
49. I have examined all the evidence and submissions of the parties herein. The claimant's case is that he was unfairly terminated from employment by the respondent. The respondents on their part aver that the claimant absconded duty for seven days without communication to them and was then issued with a letter of summary dismissal.
50. There is however no evidence that the claimant having absconded duty, the respondent sought after her and issued her with a notice to show cause to explain why her services should not be terminated on account of absconding duty.
51. The respondents however admit dismissing the claimant from duty under section 44 (4) (a) of the Employment Act 2007. Section 41 of the Employment Act 2007 states as follows.

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

52. Under the law, an employer cannot unilaterally dismiss an employee from duty without according the employee an opportunity to be heard. In the case of the grievant, she was never given an opportunity to explain herself and therefore her dismissal was unfair and unjustified as per 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.

53. As for the remedies sought, having found the dismissal of the claimant was unfair, I find for her and award her as follows:

1. 1-month salary in lieu of notice Kshs 17,481.85/- as per legal notice no 125 of 2022.
2. Compensation for unfair termination at 6 months' salary considering the unfairness meted against her being dismissed without due process =  $6 \times 17,481.85 =$  Kshs 104,891/-
3. 11 days salary for days worked for and not paid in June 2022 =  $11/30 \times 17,481.85 =$  Kshs 6,410/-.
4. Underpayment of salary as tabulated by the claimant in the memorandum of claim totalling Kshs 404,788.05/-
5. Leave not taken for 1 year 2022 = Kshs 17,481.85/-



6. Payment for overtime not proved as the muster roll was not submitted to show the time and hours worked.
7. The claim for gratuity cannot stand as the grievant was a member of NSSF.
8. Total awarded = Kshs 551,052.75/- less statutory deductions plus costs and interest at Court rates with effect from the date of this judgment

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 14<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

