



Kenya National Private Security Workers Union v KK Security Limited (Cause E004 of 2022) [2024] KEELRC 2749 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2749 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E004 OF 2022
MA ONYANGO, J
NOVEMBER 7, 2024**

**BETWEEN
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT
AND
KK SECURITY LIMITED RESPONDENT**

JUDGMENT

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent employees in the private security sector.
2. The Respondent is an organization which operates a private security firm and employs security guards.
3. The Claimant therefore has jurisdiction to represent the employees of the Respondent in labour matters.
4. The claim herein was instituted by the Claimant on behalf of the Grievant Morgan Ombeva, a former employee of the Respondent and a member of the Claimant's Union.
5. The Claimant alleges that the Grievant was employed by the Respondent on 19th December 2001 as a guard and worked in several towns until 6th April 2021 when he was dismissed from employment while working at Junction Mall along Ngong Road, in Nairobi.
6. According to the Claimant, the Grievant was dismissed on flimsy allegations that he had released a lady who accessed the mall before opening hours interrupting the normal operations without informing the management contrary to the standard operation procedures.
7. The Claimant contended that although the Grievant was taken through a disciplinary hearing, he was not given a proper chance to defend his case before he was dismissed from employment.



8. It was pleaded that a dispute on the matter was reported to the Minister for Labour, a conciliator was appointed and after the parties failed to agree, a Certificate of Unresolved Dispute was issued giving the Claimant the go ahead to institute this claim on behalf of the Grievant before this court.
9. In the Memorandum of Claim dated 8th January 2022 and filed in court on 11th January 2022, the Claimant seeks the following remedies on behalf of the Grievant:
 - i. Gratuity.....Kshs 352,000
 - ii. 12 months compensation for unfair dismissal.....Kshs. 336,000
 - iii. One month pay in lieu of notice.....Kshs. 28,000
 - iv. Leave dues.....Kshs. 56,000
 - v. Certificate of service
 - vi. Costs of the suit.
10. In response, the Respondent filed a Memorandum of Defence dated 18th February 2022 in which it denied the allegations made in the Memorandum of Claim. According to the Respondent, the Grievant's dismissal was in accordance with the provisions of section 41(1), section 43(1) and section 45(1) of the Employment Act.
11. The Respondent prayed that the Claimant's suit be dismissed with costs.
12. At the hearing both parties called witnesses. At the close of the hearing, the court directed parties to file written submissions. The Claimant's submissions were filed on 2nd October 2023 while the Respondent's submissions were filed on 24th October 2023.
13. The grievant testified as CW1 and stated that he was employed by the Respondent in 2001 as a security guard. He stated that at the time he left employment, he was earning a salary of Kshs 16,288 all inclusive.
14. The grievant testified that on 19th March 2021, he was in the course of performing his duties together with two other other supervisors when they were called to the gate after an altercation involving a lady. CW1 stated that ordinarily, they were required to write a statement over the incident which he actually wrote reporting the incident.
15. The grievant testified that he was summoned to the office on 22nd March 2021 and after being cleared, he was transferred to Makini where he worked for 3 days before being again transferred to Rubis along Naivasha road as a guard. He stated that he was invited for a disciplinary hearing on 30th March and on 31st March 2021 he was taken to Lantama; on 1st April he was taken to Thomsons Apartments, on 2nd April he was taken to Broose Nolan Hall where he worked until 4th April and on 5th April 2021 he was taken back to Rubis.
16. The Grievant stated that he was told to go back to the Respondent's headquarters in Westlands on 5th April 2021 after work which he did and on arrival, he was issued with a dismissal letter. He testified that the reason advanced for his dismissal was that he failed to perform his duties professionally. The Grievant testified that he appealed against the decision to terminate his services but the appeal was not successful.
17. The grievant stated that the dismissal was unfair and prayed for payment of his terminal benefits comprising of salary for April 2021, notice pay, gratuity and compensation for the unfair termination.



18. On cross examination, the Grievant stated that he never got in contact with the lady whose case he was accused of not handling professionally. CWI stated that he recorded a statement over the incident as per the Respondent's policy. He also stated that when he was summoned to see the Operations Manager on 20th April 2021 over the incident, he recorded another statement.
19. The Grievant stated that he was taken through due process and after being summarily dismissed, he was informed of the right of appeal.
20. The Grievant maintained that he recorded a statement on 19th March 2021 after the incident and another statement when he was summoned by the Operations Manager. On the issue of leave dues, the Grievant stated that he had no outstanding leave dues apart from 2021.
21. The Respondent called Christine Mudanji, its human resource manager who testified as RW1. She adopted her witness statement recorded on 8th July 2022 as her evidence in chief. RW1 also relied on the bundle of documents filed by the Respondent as part of her evidence.
22. According to RW1, the Grievant is not entitled to the reliefs the Claimant is seeking as he was summarily dismissed. RW1 also stated that due process was followed in the dismissal of the Grievant from employment.
23. On cross examination, RW1 could not answer most of the questions put to her regarding the instant matter. She did not know how many supervisors were on duty on the material date when the Grievant was accused of failing to perform his duties professionally. She could not tell who was in charge of ladies on the material date, the name of the witness at the disciplinary hearing of the Grievant, or the assignments the Grievant was attached to after the incident. The witness answered to most questions put to her in cross-examination: "I need to check" or "I don't know".

Determination

24. I have considered the pleadings, the evidence and submissions of the parties, and I find that the issues that arise for my determination are: -
 - i. Whether the Respondent had a valid and fair reason for dismissing the Grievant summarily
 - ii. Whether due process was followed in dismissing the Grievant summarily from employment
 - iii. Whether the Claimant is entitled to the remedies sought.
25. The Grievant in his testimony stated that he was summarily dismissed from employment for the reason that he failed to perform his duties professionally.
26. The Claimant was issued with a summary dismissal letter dated 6th April, 2021 which I which to reproduce hereunder:

6th April, 2021

Morgan Ombeva

P/No; SE0197

Dear Morgan,

Re: Summary Dismissal.

Reference is made to the incident that happened on 19th March 2021 While assigned duties as a Site Supervisor at the Junction Mall along Ngong Road. It is on record that an unknown



lady accessed the Mall before opening hours and interrupted the normal operations of the mall. You were informed by the controller onsite. You apprehended the unknown lady and later released her without informing the management nor the Contract Manager which is contrary to the standard operating procedures. You were later summoned to see the Branch Operations Manager who instructed you to record a statement regarding the incident that had happened at the Mall on 19th March 2021. You adamantly declined to record the statement as instructed for reasons well known to you.

During the disciplinary hearing held on 1st April 2021 you confirmed to have not written the statement as instructed. You however did not give a justifiable reason for your actions.

Please note that these amounts to insubordination and failure to obey and follow lawful command which are both gross misconduct liable to summary dismissal as per the [Employment Act](#) 2007-44-4 (e). You are therefore summarily dismissed from employment with effect from the date of this letter. Please arrange to complete clearance to enable us process and pay your dues.

Any ground for appeal against this decision should be submitted in writing within seven (7) days effective the date of this letter through the office of the Head of Human Resources.

Yours faithfully,

Signed

Norine Silwe

Human Resources Officer

Acknowledgement

Employee Sign: Signed Date:06/04/2021

27. From the above letter, the reason given for the dismissal of the Grievant was gross misconduct. On the hearing form attached to the Respondent's bundle of documents, the Respondent particularized the misconduct as: one, allowing customers to enter the mall before opening hours, and two, insubordination by declining to write a statement as instructed. The question then is whether the aforementioned reasons were valid and fair to warrant the dismissal of the Grievant.
28. The Grievant in his testimony before court denied engaging in misconduct. On the first allegation of allowing customers to the mall before opening hours, the grievant told the court that on the 19th April 2021 while he was at work together with two of his colleagues, a lady entered the mall and started making noise and that by the time the Grievant got to the entrance of the mall, he found that the guard in charge of ladies had already handled the lady. From this line of evidence, I am not convinced that the Grievant was to blame for the incident regarding the entrance of the lady who it was stated had a mental challenge, into the mall. This in my view was beyond the control of the grievant who stated that the lady was handled by his colleague before he got to the entrance where the incident happened. The grievant was not to blame for the unfortunate incident.
29. The other reason given for the dismissal as can be deciphered from the dismissal letter reproduced above is that the Grievant was insubordinate to the Operations Manager by refusing to write a statement. The Grievant stated in his evidence that he wrote the statement as required, that he wrote 2 statements over the incident. I have looked at the bundle of documents filed by the Respondent and particularly documents 8, 9 and 12 of the Respondents Bundle respectively titled: Witness Statement Form; Brief Summary of Employee's Response to Allegations; and Incident Details. All of them show that the



Claimant actually wrote the incident report and that when called by the Supervisor he asked for more time to prepare the report that the supervisor wanted him to write.

30. The court notes that at the disciplinary hearing the charges against the Grievant were:

- Allowed customers to enter the Mall before opening hours
- Instructed to write statement but declined – insubordination

These are also the charges in the Show Cause Letter dated 25th March 2021 at Document 5 of the Respondent’s Bundle.

31. The facts in the Investigation Report do not support the first charge as the Grievant did not allow any customers into the Mall before opening time. He was called in after the customer was already inside the Mall.

32. In the hearing notes it is stated: When requested to write a statement he (the Grievant) stated that he had written to the Commander and he needed more time to write it.

33. The Witness Statement Form at document 12 of the Respondent’s bundle is a statement on the incident written by the Grievant.

34. It is thus clear that the two charges against the Grievant were not proved as required in section 43 of the *Employment Act*.

35. The manner in which the Grievant was handled after the incident, being demoted to work as a guard and transferred to work in many different areas over a short period, further raise a lot of questions whether the termination of the Grievant’s employment met the reasonableness test.

36. Lord Denning in the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R91 described the test of reasonableness in the following words: -

“The correct test is; was it reasonable for the employers 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.”

37. I find that the reasons advanced by the Respondent for the summary dismissal of the Grievant were not fair nor valid as required by Section 45(2) of the *Employment Act*.

38. On procedural fairness, section 41 of the *Employment Act* provides 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.”

39. The import of the above provision is that the employer before terminating an employee from employment should:



- a. provide the employee with details of the accusations against the employee;
 - b. allow the employee an opportunity to respond to the charges;
 - c. allow the employee to be accompanied by a shop steward or co-employee of his choice during the process;
 - d. Provide the employee with a decision either terminating or saving the contract of service.
40. RW1 in her testimony maintained that due process was followed before the Grievant was dismissed summarily from employment. The Grievant on his part stated that he was not accorded a fair hearing as he was not given a proper chance to defend his case.
41. I have had the advantage of looking at the disciplinary hearing form attached to the Respondent's documents. From that form, it is indicated that the hearing took place on 1st April 2021 in the presence of the Grievant, a shop steward by the name Mathias Ngala and the Operations Manager, Oguna John. In that form, it is indicated that the Grievant gave his response to the allegations levelled against him. The mandatory procedure set up under section 41 of the Employment Act, requires notification, a hearing and consideration of the employee's representations and his co-worker's or union representative's before termination. From the above, it is evident that the Grievant was accorded a fair hearing as provided by section 41 of the Employment Act.
42. Although the court has found that due process was followed in the dismissal of the Grievant from employment, the fact that the reasons for dismissal were not valid makes the dismissal unfair.

What reliefs should then issue?

43. Having found that the dismissal of the Grievant was unfair, I now consider if he is entitled to the remedies sought. In the Memorandum of Claim, the Claimant sought for the following reliefs on behalf of the Grievant: -
- a. Gratuity

The Regulation of Wages (Protective Security Services) Order Legal Notice 53 of 2003 (as amended from time to time) provides for gratuity at the rate of 18 days per year worked for employees who have completed 5 years of service. The Grievant having worked from 1st May 2002 for the Respondent, he had completed 21 years at the time of termination of his employment. His salary excluding overtime was Kshs. 20,194 at the time of termination as per payslip for March, 2023. 18 days salary for 21 years is therefore $20194/26 \times 21 \times 18 =$ Kshs. 293,590 which I award the Grievant under this head.
 - b. 12 months' compensation for unfair dismissal

Having found that the dismissal of the Grievant was unfair, and noting the Grievant's long service and all other factors under section 49(4) of the Act, it is my view that the Grievant is entitled to maximum compensation, which I award at $(20194 \times 12 =)$ Kshs. 242,328 as compensation for unfair termination.
 - c. One month pay in lieu of notice

Having found the summary dismissal of the Grievant unfair, he is entitled to pay in lieu of notice pay which I award him at one month's salary in the sum of Kshs. 20,194.
 - d. Leave dues



RW1 in her evidence denied that the Grievant is entitled to leave dues. However, the Respondent did not file any documentary evidence with regards to the employment records as stipulated by Section 74(1)(l) of the Employment Act. I award the Grievant leave dues as prayed being leave for one year at 24 days as provided in the Protective Security Order being Kshs. 18,640.60.

e. Unpaid salary for April 2021

The Respondent did not rebut the Grievant's claim that he was not paid salary for the month of April 2021. From the court record, I have only seen the Grievant's pay slip for the month of February and March 2021. I award the Grievant the prayer for unpaid salary for April 2021 at Kshs. 28,000.

f. Certificate of service

The Grievant is entitled to a certificate of service and the Respondent is therefore directed to issue the Grievant with the same.

44. In conclusion judgment is entered in favour of the Claimants as against the Respondent in the following terms:

- i. Gratuity293,590
 - ii. 12 months' compensation for unfair termination...242,328
 - iii. One month notice..... 20,194
 - iv. Leave dues..... 18,640.60
 - v. Unpaid salary for April 2021..... 28,000.
- Total.....602,275.60
- Certificate of Service

45. The Claimant is awarded costs of Kshs. 50,000 in view of the fact that the Claimant was represented by a union official and is not subject to the Advocates Remuneration Order.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

