



**Kaberech v Xfor Security Solutions (Kenya) Limited (Cause
1776 of 2017) [2023] KEELRC 155 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 155 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1776 OF 2017
K OCHARO, J
JANUARY 31, 2023**

BETWEEN

FELIX CHEPYEGON KABERECH CLAIMANT

AND

XFOR SECURITY SOLUTIONS (KENYA) LIMITED RESPONDENT

JUDGMENT

1. This suit was initiated through a memorandum of claim dated 1st September 2017, by the Claimant against the Respondent. Alleging that the termination of his employment by the Respondent, was unlawful, and wrongful, the Claimant sought against the Respondent the following reliefs and orders:
 - a. A declaration that the Claimant's dismissal from the Respondent's service was unfair and unlawful and totally failed to follow due process.
 - b. An order that the Respondent to pay the Claimant his terminal dues and compensatory damages totalling to Kshs 577,280 with interests thereon

The claim works out as follows;

- i. 1 month's salary *in lieu* of noticeKshs 13,400
- ii. Unpaid/untaken leave for a period of 1 year being (Kshs 13,400 x 3 years)Kshs 40,200
- iii. Overtime worked being Kshs 13,400=30x1/8(56 per hour) x 4hours x 30 days x 12 months x 3 years 1.5Kshs 362,880
- iv. 12 months gross salary as compensation for wrongful termination 13,400 x 12.....Kshs 160,800



Total.....Kshs 577,280

- c. The Respondent do pay the Claimant costs of this cause plus interest
2. The Respondent entered appearance on the 24th October 2017 and subsequently filed a memorandum of reply dated 1st December 2017 and later amended it on 17th January 2020. Matter proceeded for oral evidence on the 19th May 2022.

The Claimant's Case

3. The Claimant stated that he was employed by the Respondent as a security guard on the 1st July 2013 with a salary of Kshs 13,400 and served diligently until 31st January 2017 when the Respondents manager one Mr. Collins Otieno summoned all the security guards and informed them that their contract had been terminated and directed them to return their uniforms and await further communication.
4. The Claimant avers that the termination was unfair, unlawful, against the law and the principles of justice as he had not done anything to warrant the dismissal, no notice of termination was served on him and the due process of termination was totally ignored.
5. In his testimony in court, the Claimant stated that he, did not abscond duty as alleged by the Respondent and was never subjected to a disciplinary hearing.
6. He contended that throughout the currency of his employment with the Respondent, he was not granted a chance to proceed for his annual leave. Further that though he worked daily from 6:00 am to 6:00 pm, he was not at all compensated for the overtime worked. The item "overtime" appearing on his pay slip is in respect of the time worked during off days.
7. Cross examined by counsel for the Respondent, the Claimant testified that he has no document from which it can be discerned that he was earning a sum of Kshs 13,400. The pay slip of September 2016, shows that on that month he earned Kshs 14, 698. However, the figure was inclusive of overtime pay of Kshs 2395.
8. He reiterated that he never deserted duty. He left employment at the direction of the Respondent and advice that he would be called back once the Respondent had a new assignment.

Respondent's Case

9. The Respondent presented one Linus Mwakio to testify on its behalf in defence against the Claimant's case. The witness placed reliance on his witness statement filed herein as part of his evidence in chief. He urged the Court to admit the documents filed by the Respondent as its documentary evidence. The documents were so admitted.
10. The witness affirmed that the Claimant was employed by the Respondent as a security guard with a salary of Kshs 12,000 per month. The terms and conditions of employment were set out in the employment contract executed between the Respondent and him.
11. The witness stated further that the Claimant's employment was not terminated because the assignment at which they were working had been terminated. The Claimant absconded duty.
12. The salary that the Claimant was earning at all material times was higher than that that obtained in the relevant wages Orders. His salary was inclusive of House allowance.



13. According to the witness, the Claimant was earning his overtime compensation as and when he was entitled to as reflected in the pay slips.
14. In his evidence under cross examination, the witness testified that at the material time, the Claimant was attached to an assignment at Select Kenya.
15. Asked on the efforts made by the Respondent to trace the Claimant following the alleged desertion of duty, the witness stated that he had nothing to show that the Respondent did try to trace him. Respondent didn't make any report to the Labour Officer.

The Claimant's Submissions

16. The Claimant distilled three issues for determination thus;
 - i. Whether the Claimant was dismissed or absconded from work?
 - ii. Whether the Claimant was subjected through fair disciplinary process prior to the dismissal?
 - iii. Whether the Claimant is entitled to prayers sought?
17. On the first and second issues, Counsel submitted the Claimant was unfairly dismissed without being given a reason for dismissal and that he never absconded duty as alleged by the Respondent.
18. It was further submitted that Section 43 of the *Employment Act, 2007* places a legal burden on the employer in a dispute relating to termination of an employee's employment, to prove the reason[s] for the termination. If the employer defaults to prove, the termination shall be deemed unfair by dint of the provisions of section 45 of the *Employment Act*.
19. Under Section 45 of the *Employment Act* 2007, the employer is duty bound to go beyond showing the reason[s] for the termination, he or she must establish that the termination was on a valid and fair reason. The Respondent didn't discharge the legal burdens obtaining in the two sections of the law.
20. The Respondent's allegation that the Claimant deserted duty was ill intentioned, only intended to cover up the unfair dismissal of the Claimant from employment.
21. It was argued that assuming the Claimant deserted employment as alleged by the Respondent, he would still be entitled to the fair procedure postulated under Section 41 of the *Employment Act* 2007. Reliance was placed on the holding in *Donald Odeke v Fidelity Security Ltd* Cause no. 1998 of 2011.
22. Section 44 [4][a] makes absenteeism by an employee from his place of work, without leave or other lawful cause a justifiable ground for dismissal of that employee from employment by the employer. However, in a dispute like is the instant one, the employer must show that he reported the desertion to the Labour Officer, demonstrate efforts that he or she made to trace the employee and require him to get back to work, show he notified the employee that he intended to take action against him or her on account of the desertion. The Respondent did none of these. The evidence of the Respondent's witness under cross examination is testament of this.
23. Counsel submitted that the Claimant's termination was unfair as the Respondents failed to prove that the Claimant deserted duty and further the termination was substantively and procedurally unfair and in contravention of Section 41 and 45 of the *employment Act*. He relies in the holding in *Walter Ogal Anuro v Teachers Service commission* (2013) eKLR



24. It was further asserted that having established that the termination of his employment was procedurally and substantively unfair, this court should grant the Claimant the reliefs sought.

Respondent's Submissions.

25. The Respondents did not file submissions.

Analysis and Determination.

26. Considering the material placed before this Court, the following issues emerge for determination, thus;

- i. How did the employment of the Claimant come to termination?
- ii. If the answer to [i] is by the Respondent, was the termination procedurally and substantively fair?
- iii. Is the Claimant entitled to the reliefs sought or any of them?
- iv. Who should bear the costs of this suit?

How did the employment of the Claimant come to termination?

27. The combatants have taken fiercely uncompromising contrasting positions as regards how the Claimant's employment came to an end. In, its pleadings and the evidence of its witness, the Respondent asserts that the Claimant "wilfully defaulted going back to work". I must say that this is all that one sees on the Respondent's material placed before this court as regards the reason for the separation or how the separation occurred.

28. The Respondent explains not; when the alleged wilful failure to go back to work occurred; the circumstances leading to the failure and; when was the Claimant last at work. Respectfully, I find the pleadings and evidence by the Respondent very sketchy.

29. In fact, looking at the amended statement of response filed by the Respondent herein, one cannot fail to detect an in-text crucial contradiction on the manner of separation. Under, the sub-heading "submissions" therein, the Respondent confirms that there was a dismissal, however, the same was fair not unfair as claimed by the Claimant. On the other hand, the general tone of the statement of response, under the sections "preamble and background" is that the Claimant disappeared from work never to come back. There was no process of dismissal. It had to be one account not two as brought out in the pleadings.

30. It is by reason of the premises foregoing that I am persuaded that the Claimant's employment was terminated in the manner as pleaded and stated by him in evidence, I decline to accept the Respondent's version. Consequently, I hold that the Claimant's employment was terminated by the Respondent.

If the answer to [i] above is by the Respondent, was the termination procedurally and substantively fair.

31. Having found that the termination of the Claimant's employment was by the Respondent, I now turn to consider whether the same was procedurally and substantively fair. It is now trite law that when interrogating fairness in the termination of an employee's employment or dismissal of an employee from employment, one has to consider two components. The substantive fairness and procedural fairness. Substantive fairness relates to the decision itself, whilst procedural fairness relates to the



- process leading to the decision. Absence of any or both of these two components renders a termination or dismissal unfair, entitling the affected employee to the galaxy of reliefs established under the *Employment Act*.
32. Section 41 of the *Employment Act* provides for the procedure that an employer contemplating terminating an employee's employment or summarily dismissing an employee must follow. There is now firm jurisprudence that the procedure is mandatory. Any default in adhering to the procedure shall no doubt render the termination or dismissal unfair. Procedural fairness encompasses three components, first, notification, the employer contemplating the dismissal or termination must inform the employee of the intention and the grounds prompting the same, second, the hearing, the employee must be accorded a sufficient opportunity to make a representation on the grounds, and third, the consideration component, the employer shall consider the representation[s] made by the employee before making the decision.
 33. It is worth stating that the legal burden to prove that the termination was procedurally fair lies on the employer, by dint of the provisions of section 45[2][c] of the *Employment Act*. Though the Respondent alleged that the dismissal was fair, I state without any fear of contradiction that it didn't lead any evidence to demonstrate that. Legal burdens are discharged by adduction of evidence. Where no evidence is placed before the trier, it is not possible for one to claim that the burden was discharged.
 34. By reason of the foregoing premises, I conclude that the termination was procedurally unfair.
 35. Section 43(1) of the *Employment Act* requires the employer to prove the reason or reasons for the termination of employment. The employer is further burdened under section 45 of *the Act*, to go further, after demonstrating the reason[s] for the termination to the requisite standard, and prove that the termination was anchored on a valid and fair reason.
 36. I have herein above stated that the evidence regarding the alleged desertion of duty was too sketchy and insufficient to convince me that the Claimant's employment came to an end as a result of his desertion of duty. It was a kind of evidence that cannot reasonably be relied upon for a conclusion that the person fronting the evidence managed to prove the reason to the requisite standard.
 37. By reason of this and the premises that this court brought out hereinabove under the 1st issue for determination as basis for disbelieving the Respondent's account, I find that the Respondent failed to prove the reason[s] for the termination of the Claimant's employment. Consequently, it too did not prove that the termination was on a valid and fair reason[s].
 38. The termination was substantively unfair.

Whether the Claimant is entitled to the reliefs sought or any of them.

39. Before I delve into each and every one of the reliefs sought by the Claimant, I find it imperative to state that the Respondent boldly asserted that after the dismissal of the Claimant, it paid him all his terminal dues. This was that bald assertion. How much, how and when, it mentions not. It laid no evidence to establish the same.
40. The Claimant claimed for a one month's salary *in lieu* of notice. In my view, the nature of the Claimant's employment was one that was terminable by a 28 days' notice pursuant to the provisions of section 35 of the *Employment Act*. There is no doubt that the employment of the Claimant was terminated without the notice contemplated in the section. I have no reason to decline to award the Claimant a one month's salary *in lieu* of notice under the section as read with section 36. However, I should point out that the month's gross pay is the Kshs 13,400 provided for under the contract of employment tendered as evidence by the Respondent.



41. The Claimant further contended that during the entire period of his employment with the Respondent, he was not allowed to proceed for leave. He consequently sought for unpaid leave compensation. The relief was sought under the terminal dues. The Respondent just asserted that the terminal dues were paid without placing before this court any evidence to establish the same.
42. Further, the Respondent did not place before me any, document or form of evidence from which one can discern that the Claimant ever proceeded for leave or that he was compensated for any untaken leave days. Under the *Employment Act*, annual leave is a statutory right for an employee. Considering these, and the provisions of section 90 of *the Act*, I award the Claimant, compensation for untaken leave days for three years immediately before the termination date, Kshs 28,140.
43. He further sought for a compensatory relief for unfair termination of his employment, to an extent of twelve months' gross salary. Under the provisions of section 49[1][c], the relief as sought by the Claimant is one of those contemplated thereunder. However, it is worth stating that an award of the relief is discretionary, dependent on the circumstances of each case. This court has carefully considered the manner in which the Claimant was terminated, which in my view easily passes for an unfair practice, the extent to which the Respondent deviated from both the expected substantive and procedural fairness, the fact that there is nothing to show that the Claimant contributed in any manner in the termination, and the length of time he was in the employment of the Respondent, and come to a conclusion that he is entitled to the award and to an extent of 7 months gross salary, Kshs 93,800.
44. The Claimant asserted that throughout his employment, he worked from 6:00 am to 6:00 pm, therefore working four extra hours to the legally recognized daily working hours for employees. He claims for a total sum of Kshs 362,800 under this head, alleging that he was never compensated for the extra time worked. I have carefully considered the pay slips that were tendered in Court by the Claimant as evidence, they have an item for extra time compensation. The Claimant in his testimony attempted to mislead the Court that what appears on the pay slips is compensation for the worked off days. The pay slips have an item too for holidays and extra days worked. By reason of this premise, I find the Claimant not entitled to the sum sought under the head or any sum at all.
45. In the upshot, judgment is hereby entered for the Claimant in the following terms;
 - a. That the termination of his employment was both procedurally and substantively unfair.
 - b. One month's salary *in lieu* of notices, Kshs 13,400.
 - c. Compensation for untaken leave days, Kshs 28,140.
 - d. Compensation pursuant to the provisions of section 49 [1][c], 7 months' gross salary, Kshs 93,800.
 - e. Costs of this suit.
 - f. Interest at court rates on the sums awarded from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED, THIS 31ST DAY OF JANUARY 2023.

OCHARO KEBIRA

JUDGE

In presence of

Ms Omamo for the Claimant

Mr. Munyoka for the Respondent



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.

OCHARO KEBIRA

JUDGE

