



**Onyapidi v Market Masters Limited (Cause 489 of 2016)  
[2023] KEELRC 181 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 181 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 489 OF 2016  
J RIKA, J  
JANUARY 31, 2023**

**BETWEEN**

**DAVID WILBERFORCE ONYAPIDI ..... CLAIMANT**

**AND**

**MARKET MASTERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim on March 30, 2016. He states that he was employed by the Respondent as a Security Officer, in August 1999. He was dismissed on January 12, 2016, for alleged negligence and carelessness. He had been promoted to the position of Deputy Chief Security Officer by the time of dismissal, earning a monthly gross salary of Kshs 117,899.
2. He states that he was not given a valid or fair reason to justify dismissal. The Respondent alleged that the Claimant had given instructions for return of a tenant's items to Respondent's premises, after the tenant had been removed from the premises on instructions of the Respondent. The Respondent alleged that the Claimant failed to consult the Directors, in giving those instructions. The Claimant explained that the tenant had a Court order barring removal from the premises. The Claimant could not harass the tenant, as it would be in contempt of court.
3. He prays for Judgment against the Respondent for: -
  - a. 12 months' salary in compensation for unfair termination at Kshs 1,414,788.
  - b. Notice of 1 month, at Kshs 117,899.  
Total... Kshs 1,532,687.
  - c. Costs, interest and any other suitable relief.



4. The Respondent did not file any Response, until the year 2021. This was after Parties filed a consent dated May 28, 2021, allowing the Respondent to file its Statement out of time, subject to payment to the Claimant, of throw away costs of Kshs 20,000.
5. The Respondent placed on record what is described as a Response to the Claim and Counterclaim. The document ends abruptly at page 2, and does not contain a Counterclaim, a date, or signature. It is stated in this document that dismissal of the Claimant was carried out fairly. The Claimant facilitated the return to the Respondent's premises, an unruly and undesirable tenant who was a security threat to the mall, customers and occupants of the mall. He acted contrary to the code of conduct governing the mall, by issuing orders that compromised the security of the mall. There was never a Court order, which permitted re-entry of the said tenant. The security team and management only discussed an order issued by the Court, for eviction of the unruly tenant. The Respondent did not instruct the Claimant to harass the tenant. It was not his role to interpret Court orders. He was to consult management if in doubt, but not act unilaterally. The Claimant acted negligently, in discharging his security role, and failed to appreciate that, the Respondent's premises hosted diplomats and foreigners, who were prone to being targeted by terrorists.
6. The Claimant was given adequate opportunity to explain himself. He did not give a satisfactory account, and was dismissed for insubordination and negligence.
7. The Claimant testified, as did Respondent's Chief Finance Officer John Mwangi, on February 14, 2022. Respondent's Human Resource Manager, Peris Oloo, closed the hearing on June 28, 2022. The Cause was last mentioned on September 22, 2022, when Parties confirmed filing and exchange of their Closing Submissions.
8. The Claimant told the Court that there were 2 Court orders- one evicting the tenant and the other barring eviction. He stopped eviction, because there was an order, already barring eviction. The tenant was not a security threat. It was only that the Respondent had issues with the tenant. The Claimant was not given any notice or hearing, before dismissal. He was reporting to the Chief Security Officer Jared Obonyo. John Mwangi was the Chief Finance Officer, and not involved in security issues. Peris Oloo was the Human Resource Manager, and not involved in security issues. The order stopping eviction was served on Management and pasted on the door to the premises.
9. Cross-examined, the Claimant told the Court that he was assigned duty by the Chief Security Officer. He would also receive instructions from the management. The tenant was running a food and alcohol business. Her operating hours went up to midnight. The mall where the business was housed, shut down at 11.00 pm. Security would ask her to close. She adhered to instructions. The Claimant was not involved in receiving the Court orders. His position was that the instructions from the Respondent amounted to harassment of the tenant. The Claimant met Sanjay Shah and Obonyo, and said nothing would stop him. It was before the Court order came. He received instructions from his Supervisor. The suit where the orders issued was struck out. The orders would not be effective. There was a terrorist attack at westgate mall. Security was on high alert. Sanjay asked the Claimant to explain himself. The Claimant understood why he was being suspended. The Claimant felt he was ambushed.
10. The Claimant had a huge loan from the bank, which he was redressing through salary check-off. The Respondent guaranteed the loan. Redirected, the Claimant told the Court that once he had the order, it was his duty to implement the order. It was not his role to interrogate its authenticity. He was only told that he had been suspended. It was not a disciplinary hearing.
11. John Mwangi told the Court that the Respondent gave the Claimant an opportunity to explain himself. There was a meeting with the management where the Claimant explained himself. He did not



ask for additional opportunity to explain further or call witnesses. The tenant was a security threat, who hosted parties well beyond midnight. The Respondent did not know who were the participants in these parties. She had overstayed her tenancy by 2 years and was not paying rent. She went to Court demanding renewal of her tenancy.

12. Cross-examined, Mwangi told the Court that he sat on the Board of Management. Head of Security, Obonyo, was directly responsible for security. The Claimant was dismissed on account of the tenant hosting parties beyond the hours. Mwangi did not sit in the disciplinary meeting. He did not exhibit the letter to show cause. There was no letter, inviting the Claimant for a disciplinary hearing. There was no document to show that the tenant was unruly. The tenancy agreement was not brought before the Court. There were strict controls at the gate, in village market mall. The tenant brought an order stopping eviction. It was served in the evening of December 15, 2015, when eviction was 75% complete. Redirected, Mwangi told the Court that the Claimant was advised why he was being suspended. It was a disciplinary process. He was told when to appear before the Human Resource Office. He was fully notified. The restaurant hosted rogue parties. The mall did not allow patrons to visit the mall after 11.00 p.m. It was possible they could extend their stay until morning, if already inside the mall. The Claimant did not appeal against the decision to dismiss him or express any discomfort with the process. The Respondent had a legal department, dealing with legal issues such as interpretation of Court orders. It was not in his place, for the Claimant to interpret Court orders.
13. Peris Oloo relied on her Witness Statement and documents filed by the Respondent, in her evidence-in-chief. On cross-examination, she testified that she was an Employee of the Respondent, in 2015. She was partly involved in the process leading to Claimant's dismissal. She did not formally invite the Claimant to the disciplinary hearing. There was a hearing, where minutes were recorded. She thought that the minutes were with her Advocate. There was a fair and valid reason to justify termination. There was a Court order in place, which the Claimant was to implement. The tenant was not to enter the premises. He allowed the tenant entry. The tenant, German Point, was being evicted. Oloo was not aware of any order barring eviction. 3 Officers including Obonyo were sacked. The Claimant was not to interpret Court orders. Eviction took place eventually. Oloo did not know that the Respondent was found in contempt, and fined for proceeding with eviction. Oloo concluded her evidence on cross-examination with the statement that the Respondent does not claim anything from the Claimant. [Which would suggest that there was no Counterclaim after all, although the Respondent's Pleadings allude to the presence of such a Counterclaim].
14. Redirected, Oloo told the Court that the Claimant was invited to attend hearing through the suspension letter. He was to report to the Human Resource Office on January 12, 2016. Legal Department interpreted Court orders. The Claimant was not a party to the Court case where relevant orders issued. The Claim was struck out, and there were no other directions. The Claimant was not given any orders to execute. He was not a Director of the Respondent, and could not make decisions for the Respondent. He was to follow instructions. The tenant was not paying rent for 2 years. The matter was sensitive and handled by the Directors. The terrorist attack at westgate mall had just taken place. The village market mall in the next door, could not be lax with its own security. Summary dismissal was justified.
15. The Claimant submits he was served with a Court order, stopping the ongoing eviction of Respondent's tenant, German Point. His obedience of the Court order was deemed to be an act of insubordination by the Respondent. The order specifically restrained the Respondent from evicting or interfering with the tenant's quiet and peaceful possession and occupation of the premises. Eviction was not complete by the time the Respondent was served the restraining order. The Claimant submits that it is the plain and unqualified obligation of every person against, or in respect of whom an order is



made by a Court of competent jurisdiction, to obey the order, unless and until that order is discharged. He invokes Civil Appeal No 51 of 2018, *Abdi Satarbaji & Asba Mohammed v Omar Ahmed & Ali Ahmed Mohammed*; and *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] e-KLR, where the duty to obey Court orders was underscored. The order did not need interpretation; it needed to be obeyed. 3 Employees of the Respondent were cited for contempt for disobeying the orders, where 1 was found guilty and fined Kshs 10,000 or serve 2 months' imprisonment, in event of default. Dismissal of the Claimant's contract was based on his obedience to a valid Court order, and cannot therefore have been valid and fair reason. The Claimant was suspended and thereafter dismissed without a hearing. Dismissal did not adhere to Section 41 of the *Employment Act*. The Claimant urges the Court to grant him equivalent of 12 months' salary in compensation for unfair termination.

16. The Respondent submits that it manages shopping malls and premises. The Respondent was at the material times, managing security at the village market mall. There was increased threat of terrorist attacks, westgate mall having been attacked in the recent past. A tenant, German Point, had a lease of 5 years, which expired in 2013. It continued to hold the premises, without paying rent arguing that its lease was to expire in 2014. It operated on the strength of a Court order, without paying rent. It operated outside the rules, running the bar beyond the hour, posing a real security threat. On December 11, 2015, the Court, in Milimani Magistrates Court Civil Case No 6021 of 2013, gave orders permitting the Respondent to repossess the premises. There was no fresh suit filed. The tenant applied for stay of execution and obtained an order irregularly staying eviction which was 75% complete. Legal department handled Court orders, and it was not for the Claimant to interpret orders. The Respondent, citing Court of Appeal and this Court's decisions respectively, in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union [K]* [2017] e-KLR; and *Samuel Daniel Wafula v Kenyatta University* [2016] e-KLR, submits that there is a wide spectrum of actions that would qualify as reasonable. The conduct of the Claimant, seen against his role as a Security Officer, at a time of high security concerns, justified dismissal. Citing Court of Appeal in *Postal Corporation of Kenya v Andrew K Tanui* [2019] e-KLR, the Respondent submits that disciplinary hearing may assume the mode of oral hearing or hearing through correspondence. The Claimant offered his explanation through a written statement. He was also heard in the Respondent's Boardroom, where he admitted liability and offered an apology.
17. The issues are whether the Claimant was dismissed following a fair procedure, and for valid reason, or reasons, in accordance with Sections 41, 43 and 45 of the *Employment Act*; and whether he merits the remedies claimed.

#### **The Court Finds: -**

18. The Claimant was employed by the Respondent in August 1999 as a Security Officer. He rose to the position of Deputy Chief Security Officer, a position he held until January 12, 2016, when the Respondent summarily dismissed him, for gross misconduct. The letter of dismissal states that the Claimant admitted he instructed that the tenant is granted re-entry to the premises, without consulting the Directors. The Respondent invoked Section 44[4] [c] of the *Employment Act*, in finding the Claimant to have acted negligently and carelessly.
19. Chief Magistrate's Court at Milimani Civil Case Number 6021 of 2013 was a tenancy dispute, involving German Point Limited and Market Masters Limited.
20. It did not involve the Claimant, David Wilberforce Onyapidi. His role was to follow the instructions of his Employer. The Employer believed rightly or wrongly, that there was an order, permitting the unruly and high security-risk tenant, German Point Limited, to be evicted from the mall. The dispute



- had been going on for 2 years, and the Respondent argued it had obtained orders to evict the tenant. While eviction was 75% complete, the tenant appears to have obtained an order for stay of execution.
21. The Respondent wished to have the tenant completely evicted, while the Claimant, acting without the concurrence of the Chief Security Officer and the Directors, took it upon himself, to grant the tenant re-entry to the premises.
  22. The Court does not think that the Claimant acted reasonably. He was not a party to the tenancy dispute. He was not directed by any Court to enforce any order. He did not consult the Directors, Obonyo or the Legal Department, encountered with 2 Court orders, one evicting the tenant, the other barring eviction. He seems to have allied himself with the tenant, disregarding the view of the Directors.
  23. As the Deputy Chief Security Officer, he appears to have misread the security situation, and failed to appreciate the well-founded concerns of the Respondent, on security of its tenants, patrons and visitors of the village mall. Westgate mall, in close proximity to village market, had just suffered a horrendous terrorist attack. Diplomats, foreigners and Kenyans died in that attack. German Point, in addition to not respecting its tenancy agreement, acted irresponsibly, hosting parties beyond the allowed hours. The participants in these parties were not known persons. The Claimant had an obligation to consult the Respondent, its Management and Directors, and not trivialize the concerns of the Respondent, relying on his own reading of Court orders.
  24. 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, as stated Section 43 [2] of the *Employment Act*.
  25. The security concerns expressed by the Respondent, and the Claimant's conduct in facilitating German Point's re-entry to the Respondent's premises, considering the Respondent's view that German Point was a security risk, are sufficient proof of reason justifying termination.
  26. There was fair and valid reason to justify termination.
  27. Was procedure fair? The Claimant was suspended on December 22, 2015 for 21 days. He was advised to report to the Human Resource Office, through the letter of suspension, on January 12, 2016.
  28. He was not told that January 12, 2016, would be day he would be taken through a disciplinary hearing. He was not specifically advised, what the charges against him were. There is no record of a disciplinary hearing. There is no record of the Respondent inviting the Claimant to a disciplinary hearing, reading any specific charges out to the Claimant, or a letter explaining to the Claimant his procedural rights, under Section 41 of the *Employment Act*. Suspension is ordinarily made, to allow for investigations, with the disciplinary hearing to follow. Between the date the Claimant was suspended, and the date he was dismissed on January 12, 2016, there is no record of a disciplinary hearing. The letter of dismissal does not refer to any date when the Claimant was heard by a disciplinary committee. It refers obliquely, to a meeting of the Board, where the Claimant, 'admitted' that he authorised the unruly tenant to re-enter the premises. There is no record of the Board meeting, or evidence showing that such a meeting, was meant to be a disciplinary hearing. There is no record that the Claimant was presented any charges, to which he conceded.
  29. The evidence before the Court is that the Claimant was suspended on December 22, 2015, instructed to report on January 12, 2016 without being told what he was reporting to do, and handed the letter of summary dismissal on return, on January 12, 2016.
  30. Disciplinary hearing must conform to Section 41 of the *Employment Act*. This includes oral hearing of the Employee, in the company of a colleague of his choice, or a trade union representative, where



the Employee is Unionisable. It is not practicable to conduct hearings through correspondence, and honour the right of an Employee to be accompanied by his colleague or a trade union representative. Physical hearing is necessary, if Section 41 is to be complied with.

31. Termination was therefore fair with regard to validity of reason, but flawed on procedure.
32. The Claimant worked for about 15 years and 5 months. This by any measure is long service. His record, save for the events leading to summary dismissal, was without blemish. He had worked his way up to the position of Deputy Chief Officer. He definitely contributed in no small measure, to the circumstances leading to his departure. The Respondent, in its evidence confirmed that it does not claim anything from the Claimant. There is no evidence that the Claimant was paid anything by way of terminal benefits.
33. He does not merit notice pay, having been correctly dismissed for an act of gross misconduct, under Section 44 [4] of the Employment Act. He merits compensation for unfair termination, procedure having been flawed.
34. He is granted equivalent of 6½ months' salary in compensation for unfair termination at Kshs 766,343.
35. No order on the costs.
36. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

**In Sum, It Is Ordered:-**

- a. It is declared that termination was fair in substance, but flawed on procedure, and therefore unfair.
- b. The Respondent shall pay to the Claimant equivalent of 6½ months' salary in compensation for unfair termination at Kshs 766,343.
- c. No order on the costs.
- d. Interest allowed at court rate from the date of Judgment till payment in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31<sup>ST</sup> DAY OF JANUARY 2023.**

**JAMES RIKA**

**JUDGE**

