



**Owuor v Brinks Security Services Limited (Cause 1829 of 2016)  
[2023] KEELRC 183 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 183 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1829 OF 2016  
J RIKA, J  
JANUARY 31, 2023**

**BETWEEN**

**ISAAC ODOYO OWUOR ..... CLAIMANT**

**AND**

**BRINKS SECURITY SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim, on 8<sup>th</sup> September 2016.
2. He states, he was employed by the Respondent on 15<sup>th</sup> October 2016, as a Branch Manager. He was confirmed in the position, on 15<sup>th</sup> May 2011.
3. He was issued a letter to show cause why he should not be disciplined, for paying an Employee, Alice Kemunto, salary for November and December 2012. She had gone on maternity leave in September and October 2012. The Respondent complained that the Claimant paid Alice salary for the months of November and December, while she had failed to return to work.
4. On 10<sup>th</sup> January 2014, the Respondent summarily dismissed the Claimant, on the ground that he had failed to respond to a letter to show cause, dated 9<sup>th</sup> January 2014 for misappropriation of funds, meant for Guards' transport allowances.
5. The letter of termination also alluded to the Alice Kemunto incident. The salary paid to this Lady, amounting to Kshs. 19,000, was recovered from the Claimant's salary by way of monthly deductions.
6. His last salary was Kshs. 50,000 monthly.
7. Termination came a day after the letter to show cause. The Claimant was not granted adequate opportunity to defend himself.



8. He paid Alice her salary, because she was entitled to it during her 3 months of maternity leave. She had sought permission from the Claimant to take another 1 month away on annual leave, covering the month of December. The Claimant authorised the added 1 month of annual leave, and paid salary for that month- December 2012.
9. The Claimant prays the Court to declare that termination was unfair and unlawful, and grant him: 1-month salary in lieu of notice at Kshs. 50,000; gratuity; refund of the amount of Kshs. 19,000 wrongfully surcharged; compensation equivalent of 12 months' salary; costs; interest; and any other suitable relief.
10. The Respondent filed its Statement of Response on 20<sup>th</sup> April 2017. It is conceded that the Claimant was employed by the Respondent.
11. He placed Alice Kemunto on labour budget, indicating that she was working at Sarit Centre and Safaricom Shop, Gallaria, in November and December 2012, while knowing well, that was not the position. He was issued a final warning letter, and surcharged.
12. He continued to engage in gross misconduct. He misappropriated funds assigned to him for payment to his colleagues. He was a perpetual offender. He was issued a letter to show cause on misappropriation of funds. He did not respond. He is not entitled to the prayers, having brought the misfortune of termination upon himself. The Respondent prays for dismissal of the Claim.
13. The Claimant gave evidence and closed the Claim, on 25<sup>th</sup> February 2022. Raymond Nzioka, Respondent's Human Resource Manager, gave evidence on 15<sup>th</sup> July 2022, closing the hearing.
14. The Claimant adopted as his evidence-in-chief, his Witness Statement and Documents on record. He restated the contents of his Statement of Claim. He did not understand why he was accused of paying Alice Kemunto her salary, while she was on maternity leave. He was told by the Respondent that the Respondent had only authorised her to take 2 months of maternity leave. He was dismissed for alleged misappropriation of money entrusted to him for payment to his colleagues. He had been issued a final warning and surcharged, after he paid Alice Kemunto salary while on maternity leave.
15. Cross-examined, he testified that he was registered with the N.S.S.F. His pay slip for April 2013, did not reflect deduction of Kshs. 19,000. Deduction was made in April and May 2013. He had not taken any loan with from the Respondent. Kshs. 19,000 surcharge was converted to a loan.
16. He responded to the letter to show cause, issued over Alice Kemunto. He accepted that he made an error, and would be more vigilant in future. He did not say in his letter, that Alice Kemunto, had applied or leave extension. It is true that he was issued final warning. He did not misappropriate any funds.
17. Nzioka told the Court that the second letter to show cause, issued at the Respondent's Nairobi premises. The Claimant was within the same premises, and was required to respond the same day. He did not ask for more time. He did not attempt to explain the allegations against him. He had various warnings over the same misconduct. He was paid his final dues and issued Certificate of Service.
18. Cross-examined, Nzioka told the Court that letter to show cause issued on 9<sup>th</sup> April 2014. Dismissal was on the following day, 10<sup>th</sup> April 2014. The ground for termination was misuse of office, by paying Guards less or no money, they were entitled to be paid as transport allowance. He was on a final warning after he paid Alice Kemunto salary irregularly. Nzioka was not aware that Alice Kemunto was on maternity leave, when the Claimant paid her salary. He was not aware that she had applied for annual



- leave of 1 month, after her maternity leave. Maternity leave was not authorized by the Respondent. The Claimant took it upon himself to authorize leave. Matters of this magnitude needed to be progressed.
19. The Claimant was surcharged Kshs. 19,000. An Employee on maternity leave, is entitled to full salary. The Claimant misappropriated allowances meant for other Guards. Nzioka was not able to say how much was misappropriated. It was a lot of money. The Claimant was dismissed for these, and previous infractions. The time given to respond to the letter to show cause, was sufficient. It was a whole day.
  20. The Claimant was nowhere, to be taken through a disciplinary hearing. He was defiant. Redirected, the Claimant told the Court that the Alice Kemunto incident, happened in 2013. The Claimant conceded wrongdoing, but continued to work, and earn his salary.
  21. The issues are whether termination was fair on procedure and substance under Sections 41, 43 and 45 of the [Employment Act](#); and whether the Claimant merits the remedies pleaded.

**The Court Finds: -**

22. The Claimant was employed by the Respondent as a Branch Manager on 15<sup>th</sup> October 2010, and confirmed on 15<sup>th</sup> May 2011.
23. He was summarily dismissed on 10<sup>th</sup> January 2014. The reasons for this decision are stated in the letter dated 10<sup>th</sup> January 2014. They are twofold: The Claimant misappropriated funds meant for the Guards in transport allowances; and he was on final warning, having paid Alice Kemunto salary irregularly. His last gross monthly salary was Kshs. 50,000.

**Procedure**

24. The letter of summary dismissal was not preceded by a disciplinary hearing. There is no record of a disciplinary hearing, alluded to in the letter of summary dismissal. The letter states that on the previous date, on 9<sup>th</sup> January 2014, the Claimant was issued a letter to show cause. After this letter, there was no hearing in any form.
25. The Claimant was not only denied a disciplinary hearing; he was denied sufficient time to respond to the letter to show cause. He was told to respond within the same date the letter issued.
26. When he did not meet the stringent timelines, the failure to respond formed part of the accusations in the letter of summary dismissal issued on 10<sup>th</sup> January 2014.
27. The main accusation was about misappropriation of funds. No financial report is exhibited by the Respondent, showing the sums involved. No report was placed in the hands of the Claimant by the time he was required to respond to the letter to show cause.
28. The incident involving Alice Kemunto was dealt with through the letter referenced 'Final Warning' dated 13<sup>th</sup> April 2013. The Claimant paid the amount he was accused of irregularly paying to Alice Kemunto. That incident should therefore not have been cited, in justifying termination in 2014. Revisiting of the incident to justify termination, placed the Claimant in double jeopardy.
29. The first and second warnings were not disclosed by the Respondent, in the final warning. Without a record of the first and the second warning, what justified the final warning? The final warning could not stand on its own, as a disciplinary sanction. It must have been preceded by other warnings, and shown to be within the validity period. Warning system in the private security services industry, is prescribed by Regulation 23 of the [Regulation of Wages \[Protective Security Services\] Order](#), 1998. The Respondent did not adhere to this system.



30. The Respondent did not take the Claimant through a fair procedure, in accordance with Sections 41, 43 and 45 of the [Employment Act](#).

### **Reasons.**

31. The reasons as stated above were twofold. The first related to Alice Kemunto, who was a Guard serving the Respondent. In the security industry, a female Guard is called a Guardette.
32. She worked under the Claimant. She went on maternity leave in September 2012. She was entitled to 3 months of maternity leave, with full pay, under Section 29[1] of the [Employment Act](#). This would mean that she was entitled to be away in September, October and November 2012.
33. The Respondent did not explain to the Court what was irregular about the Claimant paying to the Guardette, salary for months she was on maternity leave. It was wrong to accuse the Claimant of irregular payment of salary, while the [Employment Act](#) allowed the Guardette 3 months' maternity leave with full pay.
34. Payment of December 2012 salary was explained by the Claimant. The Guardette applied for, and was granted annual leave of 1 month, in addition to her maternity leave.
35. The Respondent had allowed the Claimant as Branch Manager, to pay salaries and allowances to the Guards under him, and also it appears, allowed him to administer leave to the Guards. It was never alleged by the Respondent that the Claimant acted without mandate. Payment of salary to the Guardette, while she was on maternity and annual leave, was within the confines of the [Employment Act](#).
36. The accusation on misappropriation of funds, as suggested above in examining the procedure, was not established. The amounts are not indicated. There are no financial records, showing how much was entrusted the Claimant, and what he misappropriated, in what period. This was a generalized accusation with no details at all.
37. The allegation that he failed to respond to a letter to show cause, was likewise not a valid reason to justify termination. The Respondent was unreasonable, in expecting the Claimant to respond to allegations levelled against him, on the same date he received the letter to show cause.
38. The Claimant has satisfied the Court under Section 47[5] of the [Employment Act](#), that his contract was terminated unfairly. The Respondent has not established reason or reasons, to justify termination.

### **Remedies.**

39. It is declared that termination was unfair and unlawful. Notice is granted at Kshs. 50,000. The Claimant was actively subscribed to the N.S.S.F, and not eligible for service pay, under Section 35 [6][d] of the [Employment Act](#). Surcharge of the Claimant for paying the Guardette her salary while she was on maternity leave and annual leave, was illegal. The Claimant was simply performing his duty and fulfilling a statutory obligation. He merits and is granted refund of the surcharged amount of Kshs. 19,000. He worked for 2 years 2 months, from 15<sup>th</sup> October 2010 to 10<sup>th</sup> January 2014. His contract states that he would work on probation for 6 months. Upon completion, he would be placed on contract of 1 year, which was renewable. On 16<sup>th</sup> May 2011, the Respondent wrote to the Claimant, advising that it had decided to confirm the Claimant to permanent status. He was therefore on permanent employment, at the time of termination, with the expectation of service until retired. He was not at fault leading to termination. He is granted equivalent of 2 ½ months' salary in compensation for unfair termination at Kshs. 125,000.



**It is ordered: -**

- a. it is declared that termination was unfair.
- b. The Respondent shall pay to the Claimant: notice at Kshs. 50,000; refunds of Kshs. 19,000 wrongfully surcharged on the Claimant; and 2 ½ months' salary in compensation for unfair termination at Kshs. 125,000 – total Kshs. 194,000.
- c. Costs to the Claimant.
- d. Interest allowed at court rates, from the date of Judgment, till payment is made 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**

