



Ongwali v Savannah Three K Security Limited (Employment and Labour Relations Cause 1756 of 2016) [2023] KEELRC 151 (KLR) (27 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1756 OF 2016**

**SC RUTTO, J
JANUARY 27, 2023**

BETWEEN

SILAS EMOJONG ONGWALI CLAIMANT

AND

SAVANNAH THREE K SECURITY LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted the present suit vide a Memorandum of Claim dated August 29, 2016, through which he avers that he was employed by the respondent as a security guard on December 24, 2010. He avers that he was dismissed from employment on or about May 11, 2016. He has termed the termination as untimely, unlawful and unjustified. He attributes the genesis of his problems at the respondent's employment, to the fact that he declined to plead guilty to the malicious and unfounded allegations contained in the show cause letter dated January 14, 2016.
2. Consequently, the claimant seeks a declaration that his termination was unlawful and untimely and an order for the payment of Kshs 534,166.00 being notice pay, compensatory damages, salary for days worked in January, 2016, salary during the period of suspension and unpaid annual leave for four years.
3. Opposing the claim, the respondent filed a Statement of Defence and Counterclaim. It avers that the claimant was the author of his dismissal as he sold his employer's Alsatian dog, defrauded it by keeping at the station a payroll of non-existent workers and deserted duty. That further, the claimant refused to appear before the respondent's board on January 27, 2016 despite receiving an invitation letter. According to the respondent, the claimant's termination was justly, timely, lawful and strictly in accordance with the law. The respondent has thus asked the Court to dismiss the claim with costs.
4. In addition, the respondent has counterclaimed against the claimant, the sum of Kshs 90,000.00 being the loss of its Alsatian dog. It prays that the Court orders the claimant to pay the said sum of money and that the same be set off against any sum the Court may award him.



5. The matter proceeded for hearing on July 14, 2022 and each side presented oral evidence.

Claimant's case

6. The claimant testified in support of his case and to start with, he adopted his witness statement together with his bundle of documents, to constitute his evidence in chief.
7. It was the claimant's evidence that on December 28, 2015, he received a phone call from the respondent's operational manager in Nairobi branch, instructing him to take his off days that were pending and which were 11 in number. That on January 11, 2016, he received a text message from the same operational manager who instructed him to hand over his duties to the supervisor and report to the head office in Nairobi.
8. That he reported to the head office in Nairobi where he was informed of six allegations listed against him in the show cause letter dated January 14, 2016. That he defended himself by stating that he was a stranger to the said allegations. That he was told to write everything he knew regarding the allegations which he denied in toto. That he was suspended for seven days after which he met the Board of Directors who insisted that he accepts liability and writes an apology letter. That he refused to do so and was threatened with prosecution but he still denied liability.
9. He stated in further evidence that he appeared before the Board twice but he was not given a chance to explain his side of the story and only insisted that he accepts liability in writing. That he denied liability and the board was disappointed hence sent him on compulsory leave as they 'investigated' the allegations. That he was never called again by the directors hence he called the chairman and even texted him severally but his calls went unanswered. That he later received a dismissal letter from the secretary of the Chairman. He termed the allegations levelled against him as fabrications with no shred of evidence to back them up hence he verily believes that this was a deliberate cruel scheme to hound him out of office.
10. The claimant asked the Court to allow his claim as prayed.

Respondent's case

11. On its part, the respondent called Mr Paul Kiriba Nyokabi, who testified as RW1. He identified himself as a director in the respondent company. Similarly, he adopted his witness statement and the respondent's documents to constitute his evidence in chief. This was with the exception of the invoice dated August 22, 2012.
12. He testified that the respondent company was incorporated on October 4, 2012. That before then, he had never had any business with the other directors of the respondent. To this end, he denied the claimant's assertions that he was employed by the respondent in 2010. He told Court that the respondent had two Alsatian dogs in Kericho.
13. That the claimant was in charge of the site in Kericho and he was to give a report on and off site. That it was not his duty to release the dogs to a third party and had no authority to do so. That the claimant admits in his letter of January 15, 2016, that he irregularly exchanged the respondent's dog without authority and eventually, the dog was never seen again. That the respondent came to know in December, 2015 that the dogs had died. That this was at the end of the assignment when they received a strange dog which was of a poorer breed. That it had bought its dog for the sum of Kshs 90,000.00 and by the claimant selling it without the employer's authority, amounted to gross misconduct entitling the employer to sack him.



14. That upon enquiry from the dog handlers, the respondent came to learn that one of the dogs had died around September, 2015. That further, in his response to the show cause letter issued to him, the claimant explained that the dog had died.
15. RW1 further told Court that they were not aware that the dog had disappeared or died hence they suspected a cover up. That they were not shown how and where the carcasses were buried.
16. He further testified that the claimant used to receive money for purposes of buying food for the security dogs and to this end, he was required to provide receipts for the purchase of the food. That the claimant never produced any receipts. That the claimant further admitted in his letter of January 15, 2016 that he employed a guard by the name Maxwell yet he had no authority to do so.
17. That the claimant was given an opportunity to respond to the allegations against him and never appeared for a disciplinary hearing despite being invited. Concluding his testimony, RW1 maintained that the claimant was guilty of gross misconduct and that he was rightfully terminated.

Submissions

18. It was submitted on behalf of the claimant that the respondent had admitted that he was in its employment as at December 24, 2010. It was the claimant's further submission that he did not abscond work but was on unpaid compulsory leave between January 29, 2016 and May 11, 2016. That during this period, the respondent did not communicate to the claimant concerning the status of his employment.
19. That if indeed, he absconded duty, the respondent has not shown the steps it took to notify the claimant that his employment could be terminated for absconding work. To buttress these arguments the claimant placed reliance on the cases of *Javan Kisoi Mulwa vs SAA Interstate Traders (K) Ltd (2018) eKLR*, *Philomena Kiprotich Kirui vs Lessos Veterinary Suppliers Ltd (2016) eKLR* and *Milano Electronics Limited vs Dickson Nyasi Muhaso (2021) eKLR*.
20. In further submission, it was stated that the reasons for dismissing the claimant from employment were not valid as he had not absconded duty. That the respondent calculatedly hounded the claimant from employment without following due process. That his termination was therefore unfair and unlawful. To this end, the Court was referred to the cases of *Felix Mbolonzi Kioko vs Director of Public Prosecution (2020) eKLR* and *Nicholus Muasya Kyula vs FarmChem Limited (2012) eKLR*.
21. The respondent did not file written submissions as the same were not on the Court's physical record and were not traceable on the online portal at the time of writing this Judgement.

Analysis and determination

22. I have carefully considered the pleadings, the evidentiary material placed before me and the submissions on record and find the issues falling for the Court's determination to be:
 - a. Whether the claimant's employment relationship commenced on December 24, 2010.
 - b. Whether the claimant's termination was unfair and unlawful.
 - c. Is the counterclaim justified?
 - d. Is the claimant entitled to the reliefs sought?



Commencement of the employment relationship

23. It was the claimant's case that he was employed by the respondent with effect from December 24, 2010. On his part, RW1 testified that the respondent company was incorporated on October 4, 2012 hence it is not possible that the claimant was its employee at the time.
24. In support of its position, the respondent exhibited a certificate of its incorporation which indicates that it was incorporated on October 4, 2012. The claimant testified under cross examination that in as much as the respondent may have been incorporated on October 4, 2012, he was already on the ground working for the respondent before then.
25. Despite the claimant's assertions, the evidence on record states otherwise as it is not logical that he was employed by the respondent prior to its incorporation. Being a juristic person, its date of incorporation was the date it came into being, hence became entitled to specific legal rights and duties including the right to sue and be sued, as well as enter into contracts including employment.
26. This leads me to conclude that the claimant could only have been employed by the respondent after October 4, 2012 and not December 24, 2010.

Unfair and unlawful termination?

27. The determination of this issue turns on the provisions of section 41,43 and 45 of the *Employment Act* (Act). The import of these provisions is that an employer must prove that there was substantive justification to warrant the termination of an employee and that the same was undertaken procedurally. Essentially these are the two tests to be applied in determining whether an employee's termination from employment was fair and lawful.
28. Substantive justification, is addressed under section 43 and section 45(2) (a) & (b) of the Act. In this regard, Section 43(1) requires an employer to prove the reasons for termination, and in absence thereof, such termination is deemed to be unfair. Under 43(2), such reasons are the matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee.
29. In addition, section 45 (2)(1) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
30. Turning to the instant case, the claimant's dismissal was effected through a letter dated May 11, 2016. The reasons for his dismissal was that he deserted duty following his suspension from employment. Prior to his dismissal, the claimant had been issued with a letter to show cause dated January 14, 2016. The allegations raised in the said letter are as follows:
 1. In early 2015 you sold/rented our dog to one Mr Ernest Ngira for use at Awasi without our authority.
 2. That dog allegedly died and was disposed off at Awasi without informing the management the circumstances of the death.
 3. On December 17, 2015, you transferred to Nairobi a dog that did not belong to S3K without informing the directors.
 4. You have not provided receipts for money sent to you for the purchase of dog food from November, 2014 to December, 2015.



5. On different dates during your work at Kericho from November, 2014 you have given irregular off days in favour of some employees e.g Evelyn Chepkwoni and Betty Akwede.
 6. You have also employed ghost workers contrary to your terms of service and given false information on the same e.g Maxwell Iroto.'
31. The claimant distanced himself from the allegations leveled against him through his responses dated 14th and January 15, 2015. Following his response, he was suspended from duty on January 20, 2016. He was advised that his explanation was not satisfactory hence the suspension which was to pave way for further investigations by the respondent's Board.
 32. The claimant denied deserting duty and even stated that he appeared before the respondent's Board for a disciplinary hearing on January 27, 2016. Oddly enough, despite the serious charges facing the claimant, the real reason for his dismissal was desertion. His letter of dismissal reads in part:

' Although you responded to this letter on January 15, 2016, you were advised on January 20, 2016 vide our S3K/1006/21/2016 that your reply was not satisfactory. You were subsequently sent on 7 days suspension and requested to report to the board on January 27, 2016. You did not do so, but instead deserted duty without explanation.

Due to the above, this is to inform you that you have been dismissed from employment.'
 33. Having discharged the claimant from employment on account of desertion, it was upto the respondent to prove that he deserted duty without any explanation.
 34. As stated herein the claimant had been suspended for seven days and was to appear for the hearing of his disciplinary case on January 27, 2016, which was after the end of the suspension period.
 35. Notably, the respondent did not inform Court what steps it took upon noting that the claimant had deserted duty following his suspension and specifically, for failing to honour the summons to the disciplinary hearing. What steps did it take to establish his whereabouts? Did it contact him? If so, where is the evidence?
 36. It was the claimant's testimony that he appeared at the respondent's offices several times including January 27, 2016 for the hearing of his disciplinary case. This position was not discounted by the respondent by way of evidence. In terms of section 43 (1) and 45(2) (a) and (b) of the [Employment Act](#), the respondent bore the burden of proving the reasons for dismissal which in this case, was desertion of duty. This, it failed to do.
 37. Evidently, the claimant was facing serious charges. One therefore wonders why the respondent would have to wait for four months to dismiss him from employment on account of desertion?
 38. Ultimately, the respondent did not prove to the requisite standard that it had a valid and fair reason to dismiss the claimant on account of desertion.
 39. In addition to the foregoing, desertion of duty is a ground for summary dismissal under section 44 (4) (a) of the [Employment Act](#). Therefore, since the claimant was still an employee of the respondent, it had all the right as an employer to require him to explain his absence from duty. If at all the claimant deserted duty, this constituted a different charge altogether and the respondent ought to have notified him that it intended to take disciplinary action against him on account of desertion.



40. I reiterate the finding in the case of *Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme [2015] eKLR*, where the Court found as follows: -

' In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.'

41. The burden was on the respondent to prove that it complied with the provisions of section 41 of the Act following the claimant's alleged desertion. In absence of proof, it is therefore evident that the claimant was not subjected to the process contemplated under section 41 of the *Employment Act*. It is instructive to note that the provisions of section 41 of the *Employment Act*, are couched in a mandatory form.

42. Essentially, the respondent was required to notify the claimant of the reasons it was considering terminating his employment in a language he understands and in the presence of a fellow employee of his choice or a union representative, as the case maybe.

43. To this end, the respondent is at fault and is liable for not complying with the stipulated procedure in dismissing the claimant.

44. In light of the foregoing, the Court finds that the claimant's dismissal was unfair and unlawful.

Is the counterclaim justified?

45. The respondent has counterclaimed against the claimant the sum of Kshs 90,000.00 being the loss of its dogs. First, it is notable that as per the claimant's letter of suspension dated January 20, 2016, the respondent was to undertake more investigations. No evidence was placed before the Court to prove that the respondent undertook the said investigations and indeed ascertained that the claimant was to blame for the loss of its dogs. Secondly, the invoice indicating the purchase price of the Alsatian dog, was not produced in evidence.

46. On the foregoing account, it is evident that the respondent did not prove the counterclaim to the requisite standard.

47. Is the claimant therefore entitled to any of the reliefs sought?

Reliefs

48. As I have found that the claimant's dismissal was unlawful, the Court awards him one month's salary in lieu of notice.

49. The Court further awards the claimant compensatory damages equivalent to five (5) months of his gross salary. This award has taken into account several factors including the fact that the respondent did not prove the reason for the claimant's dismissal as well as the length of the employment relationship.

50. The claimant is also awarded salary for the month of January, 2016 as he was still an employee of the respondent at the time, and there is no evidence that he was paid the said salary.

51. The claimant is also entitled to salary during the period of suspension. Here is why. He was sent on suspension with effect from January 20, 2016 and was to appear before a disciplinary panel on



January 27, 2016. He was eventually dismissed on May 11, 2016 in that he failed to appear for the disciplinary hearing hence was cited for desertion. First, there is no evidence that the disciplinary panel was convened on the said day and second, if indeed, the claimant failed to show up, there is no evidence that the respondent ascertained his whereabouts and asked him to show cause why disciplinary action should not be taken against him for failing to attend the disciplinary hearing.

52. It is illogical that the respondent was still waiting for the claimant to show up for the disciplinary hearing, five months down the line. I am therefore led to conclude that the claimant was still on suspension upto May 11, 2016, when his employment was terminated. In addition, the letter of suspension did not state that the suspension was to be without pay whereas there is no evidence that the claimant was paid salary during that period.
53. The claim for unpaid annual leave is declined as the claimant stated in his testimony that on December 28, 2015, he was instructed by the respondent's operational manager to take his pending leave days which were 11 in number. It is therefore odd that he would be asking for leave days for four years.

Orders

54. In conclusion, I enter judgment in favour of the claimant against the respondent as follows:
- a. An award of one (1) month's salary in lieu of notice, being the sum of Kshs 25,000.00.
 - b. An award of compensatory damages equivalent to five (5) months of his gross salary being Kshs 125,000.
 - c. Salary for days worked in January, 2016 being Kshs 9,166.00
 - d. Salary during the period of suspension being Kshs 100,000.00.
 - e. The total award is Kshs 259,166.00
 - f. Interest on the amount in (e) at Court rates from the date of Judgment until payment in full.
55. The counterclaim is dismissed.
56. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Mideva

For the Respondent Ms. Njeri Kiagayu

Court Assistant Abdimalik Hussein

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 had 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 Civil 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.

