



REPUBLIC OF KENYA



KENYA LAW
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**Nyongesa v Hatari Security Guards Ltd (Cause 2523 of 2016)
[2023] KEELRC 144 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2523 OF 2016
JK GAKERI, J
JANUARY 24, 2023**

BETWEEN

DANIEL SIMIYU NYONGESA CLAIMANT

AND

HATARI SECURITY GUARDS LTD RESPONDENT

JUDGMENT

1. The claimant initiated this suit by a statement of claim filed on December 7, 2016 alleging unlawful and unfair termination of employment.
2. The claimant avers that he was employed by the respondent as a supervisor in May 2009 and was incharge of the Nairobi Central Business District.
3. That he served diligently for 7 years until his employment was terminated on October 12, 2015 allegedly for failing to notice that one, Mr Douglas Miriti was intoxicated while on duty, failing to have a checklist to show he visited the site or report to the site when informed by one, James Makini and leaving the workplace at 4.00 am.
4. The claimant prays for;
 - i. Compensation for unlawful termination Kshs 119,760/=
 - ii. One month's salary in lieu of notice Kshs 9,980/=
 - iii. Accrued leave days for 4 years Kshs 27,943/=
 - iv. General damages.
 - v. Costs of this claim and interest thereon.



Respondent's Case

5. The respondent filed a response to the memorandum of claim on March 14, 2017 denying that the claimant was employed in May 2009 or terminated on October 12, 2015. It is the respondent's case that if the claimant was indeed dismissed from employment, the same was for justifiable grounds within the claimant's knowledge.
6. The respondent denies owing the claimant any monies and prays for dismissal of the claimant's suit with costs.

Claimant's Evidence

7. The claimant testified that he was dismissed from employment on account of an accident that occurred at the City Square Postal Office on the night of September 26, 2015 at about 11.00 pm occasioned by a guard who was intoxicated.
8. That he had no checklist on that day and reported at the site at 8.00 pm and the guards were present. That he left at 4 am.
9. On cross-examination, the witness could not recall when he was employed by the respondent. He confirmed that his remit included confirmation whether the guards had reported to work, are sober and well dressed and sign a checklist. The guard(s) would also sign.
10. The witness testified that one, Mr Miriti, a guard was intoxicated while on duty when he went there at 9 pm but did not fill in the checklist.
11. That it was the duty of the employer to provide a checklist and he did not report to anyone that he had no checklist.
12. The witness made an about turn and stated that in his opinion the two guards were not intoxicated.
13. It was his testimony that he notified the controller that he left at 4 am and reported to work on September 27, 2015 in the evening and was later transferred to Westlands and suspended on a date he could not recall.
14. The witness confirmed that he was invited for a hearing and explained what had happened.
15. On the leave claimed, the witness stated that he did not proceed on leave. That he applied but had no evidence.
16. On re-examination, the witness stated that one, Mr Ndiema was to bring the checklist to him. It is unclear where the exchange was to take place.
17. Finally, the witness stated that he was notified of the accident by one, James, the other guard at the City Square site.

Respondent's Evidence

18. Mr Ben Njoora, the respondent's witness testified that the claimant had been an employee of the respondent since May 2009. That on September 26, 2015, he was not at the workplace and had not notified the office that he had a sick child and had no checklist.
19. On cross-examination, the witness confirmed that checklists were printed and supplied by the respondent and were collected by the supervisor for a specific duration and would sign for them but had no record of collection of the forms by supervisors, including the claimant.



20. That the claimant had several stations to supervise within the Central Business District and had three shifts.
21. That the respondent had an occurrence book but the same was not in court nor the damage occasioned by the intoxicated driver.
22. It was his testimony that he had no minutes of a hearing and no certificate of service was issued.
23. On re-examination, the witness testified that the claimant's services were terminated for gross misconduct by leaving a checklist, did not supervise the employees and left the work station without notice. That it was his duty to collect the checklist.

Claimant's Submissions

24. The claimant's counsel framed two issues for determination, namely;
 - i. Whether the claimant's employment was unlawfully and unfairly terminated.
 - ii. Whether the claimant is entitled to the reliefs sought.
25. On the 1st issue, reliance is made on the provisions of section 45(2) of the *Employment Act, 2007* as is the decision in *Richard Nyonga Aluvale v National Environment Management Authority & another* (2018) eKLR to urge that the claimant had not absented himself from work.
26. It was urged that since the claimant's area of supervision was the Central Business District and not a specific place, it was possible for an employee to get drunk while at work in addition, no occurrence book was provided on the incident and the respondent had not provided a checklist to the claimant.
27. Reliance was also made on section 43 of the *Employment Act* to underscore the burden of proof of the employer. The decision in *Dickson Otieno v University of Nairobi* (2015) eKLR is also relied upon to reinforce the submission as were the provisions of section 44(4)(c).
28. It was urged that the respondent did not prove the loss or damages suffered as a result of the alleged accident.
29. It was submitted that the claimant was neither given notice nor paid in lieu of notice.
30. Finally, it was submitted that the claimant was not given an opportunity to be heard as confirmed by RWI. The decision in *Sbankar Saklani* case (2012) eKLR was relied upon.
31. As regards the reliefs sought, it was submitted that the claimant was entitled to all the reliefs including a certificate of service.
32. By 8th November when the court retired to write this judgement, the respondent had not filed its submissions even after extension of time to do so.

Determination

33. The issues for determination are;
 - i. Whether termination of the claimant's employment was unfair.
 - ii. Whether the claimant is entitled to the reliefs sought.
34. As regards termination of employment, the provisions of the *Employment Act, 2007* set out the entire architecture which must be complied with for a termination of employment to pass muster.



35. The provisions of sections 35, 41, 43, 45, 44 and 47(5) of the Act set out the requirements from notice, attributes of a fair termination, burden of proof and summary dismissal.
36. Section 45(2) of the Act provides that;
A termination of employment by an employer is unfair if the employer fails to prove –
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason –
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.
37. Taken cooperatively, the foregoing provisions of the Employment Act are unambiguous that for a termination of employment to be deemed fair, it must have been substantively justifiable and procedurally fair.
38. This signifies that the employer must not only comply with the provisions dealing with the substantive aspects of the termination, principally the reason(s), but those dealing with procedural precepts as well.
39. The dual requirement was aptly captured by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and has been elaborated upon in countless decisions such as *Naima Khamis v Oxford University Press EA Ltd* (2017) eKLR, where the Court of Appeal held that a termination of employment was unfair if there was no substantive justification and/or procedurally unfair.
40. Similar sentiments were expressed in *CMC Aviation Ltd V Mohammed Noor* (2015) eKLR.
41. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reasons for Termination

42. The letter of termination of employment dated October 12, 2015 identified four reasons for termination of the claimant’s services;
- i. As a supervisor, the claimant failed to notice that one of the guards at the City Square Post Office was drunk.
 - ii. Had no checklist to prove that he visited the assignment area or sign the OB.
 - iii. Did not visit the assignment area when he was informed by James Makini.
 - iv. The claimant alleged to have gone home at around 04.00 am to attend to a sick child.
43. The claimant was accused of negligence in the performance of his duties.
44. The claimant’s evidence on the alleged intoxicated guard is contradictory and unreliable.
45. He confirmed on cross-examination that the guard was intoxicated but later changed the story that in his opinion, the guard was not intoxicated. If he indeed reported to work on that date, he did not satisfy himself that the guards were sober, which was part of his duty.



46. On the checklist, his contention was that the employer had not provided the same yet he confirmed that he did not report the same to anyone. In addition, he testified that it was his tool of trade as a supervisor.
47. As regards the failure to visit the assignment area even after notification of the accident by one, James Makini, a fact he admitted, the claimant led no evidence on why he did not.
48. Interestingly, the claimant alleged that he was at the assignment area at 9.00 pm and the accident happened at 11.00 pm and he was informed about it by James. Puzzlingly, it was his testimony that he left the work place at 4.00 am in the morning and City Square Post office is within the Central Business District.
49. Finally, the claimant did not explain why he did not report the accident in the occurrence book.
50. Similarly, RWI testified that it was the claimant's duty to collect the checklist forms for purposes of his work and would sign for them.
51. The claimant's evidence that Mr Ndiema was to supply the checklists that night sounded unconvincing as the venue of the exchange of the forms or time was not disclosed.
52. Contrary to claimant's submission that he was not assigned a specific station, and a guard could get drunk, he had a specific assignment location, the Central Business District from 6 pm to 6.00 am and was obligated to do three shifts.
53. A review of the claimant's evidence on record reveals that if the claimant reported to the assignment area on September 26, 2015, he had no checklist, his tool of trade and did not bother about it and must have taken his duties rather casually. In the alternative, he did not report to the work on that day which may perhaps explain the gaps in his evidence.
54. The claimant led no evidence that he called or notified the supervisor or the respondent's Human Resource that he had a sick child. The controller was not the Human Resource Officer but an Operation Officer.
55. For the above stated reasons, the court is satisfied and finds that the respondent has on a balance of probability demonstrated that it had a valid reason to terminate the claimant's employment.
56. Contrary to the submission that the respondent did not prove the damage occasioned by the accident, that aspect of the reason for termination was peripheral to the performance of the claimant's duties, the salient issue.
57. Relatedly, it is common ground that a guard employed by the respondent drove a client's vehicle and caused an accident.
58. The foregoing finds support in section 43(2) of the *Employment Act* which provides that;

"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."

Procedure

59. In *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal stated that the procedural precepts provided by section 41 of the *Employment Act* were mandatory.



60. The specific procedural requirements have been tabulated in many decisions of this and the Court of Appeal such as *Loice Otiemo v Kenya Commercial Bank Ltd* (2013) eKLR and *Postal Corporation of Kenya v Andrew K Tanui* (2019) eKLR.
61. These requirements include; explanation of the grounds of termination in a language the employee understands, reasons for which the employer was considering termination of employment, right of the employee to have a representative when the explanation of the grounds is made and a hearing and consideration of any representations made.
62. The essence of section 41 of the *Employment Act* is that the employee must be accorded a fair hearing.
63. In the instant case, RWI admitted on cross-examination that he had no evidence that claimant was taken through a disciplinary hearing.
64. Although the claimant testified that he explained what had happened, he was categorical that he was not invited for a disciplinary hearing.
65. In the absence of an invitation to attend a disciplinary hearing coupled with minutes of the proceedings, it is the finding of the court that the respondent has on a balance of probabilities failed to show that termination of the claimant's employment was procedurally fair.
66. The inescapable conclusion is that termination of the claimant's employment by the respondent was unfair for want of procedural propriety.

Reliefs

(i) One month's salary in lieu of notice

67. As submitted by the claimant, the provisions of section 35 of the *Employment Act* were not complied with.

The claimant is awarded one month's salary in lieu of notice.

(ii) Accrued leave days

68. The claimant led no evidence on this prayer. The written statement dated December 2, 2016 makes no reference to accrued leave days or the number and the year of accrual. The claimant was an employee of the respondent for a duration of 6 years, 4 months.

In the absence of particulars on the prayer, the same is disallowed.

iii. Compensation for unlawful termination

69. The claimant is entitled to the relief provided by section 49(1)(c) of the *Employment Act*.
70. In determining the quantum of compensation, the court has taken into consideration the fact that; The claimant was an employee of the respondent for about 6 years and 4 months. The claimant substantially contributed to the termination of employment. The claimant had a clean record for the duration served.
71. In light of the foregoing, the court is satisfied that the equivalent of three (3) months salary is fair.

(iv) General damages

72. This prayer was not unpackaged. The claimant adduced no evidence to demonstrate his entitlement to general damages and for what.

The prayer is dismissed.



73. In conclusion, judgment is entered for the claimant against the respondent in the following terms;
- a. One month's salary in lieu of notice.
 - b. Equivalent of three (3) months salary.
 - c. Certificate of service.
 - d. Costs of this suit.
 - e. Interest at court rates from the date of judgement till payment in full.

74. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY 2023

DR. JACOB GAKERI

JUDGE

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 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.

DR. JACOB GAKERI

JUDGE

