



**Otipi v Inter Security Services Limited (Cause 609 of 2014)
[2023] KEELRC 522 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 522 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 609 OF 2014
HS WASILWA, J
FEBRUARY 28, 2023**

BETWEEN

DIXON MBARIE OTIPI CLAIMANT

AND

INTER SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant instituted this suit *vide* a memorandum of claim dated November 19, 2014 and filed on the November 20, 2020 through the firm of Kamau Lagat and Company Advocates contending unlawful and unfair termination of his employment and failure by the respondent to pay his terminal dues.

Claimant's Case

2. The claimant's case is that he was employed by the respondent in the year 2009 and worked in various capacities including serving as a branch manager and also as the controller of operations in the respondent's head office in Nairobi. That he he performed his duties diligently and skillfully until August 2012 when the respondent dismissed him without any justification or an opportunity to be heard.
3. The claimant states that at the time of his termination he was earning a gross salary of Kshs 18,946.67 and annexed a copy of his pay slip for the month of March 2012.
4. The claimant therefore sought for the following reliefs;
 - a. A declaration that the respondent termination was unfair and unlawful.
 - b. General damages for unfair and unlawful termination.



- c. 3 month's salary in lieu of notice.
 - d. An order directing the respondent to issue the claimant with a certificate of service.
 - e. Costs of this suit.
 - f. Such other relief that the court shall find just and fair in the circumstance.
5. During hearing the claimant testified as CW-1 and adopted his witness statement dated October 7, 2022 which in summary stated that he was employed as the respondent's branch manager in 2009 and from October, 2011 till August, 2012, he was stationed in the South Rift office managing the respondent's operations in Molo, Bomet and Kericho. He testified that on May 15, 2012, he received instruction from control room in Nairobi to escort Wycliffe Ambale of Linksoft Communication system from Nyakacho Motibo to Site number 3419 Kabartegan double ticket number 735. The person who was driving, the company's vehicle was one Geoffrey Okal. That they left Ketepa were the car had been parked headed to Kericho and on reaching Brooke area, the Driver, while branching to head to his residence to pick a spotlight and escort requisition form, he lost control of the vehicle causing an accident. That they reported the accident at Kericho police station and they were treated at Kericho District Hospital then discharged.
 6. He testified that he continued working for the respondent till August, 2012 when he was summoned by Isaac Okwiri to go to the respondent's offices in Nairobi only to be dismissed from employment without any notice or disciplinary hearing.
 7. Upon cross examination, he stated that he never absconded work rather that he was summoned by one of the respondent's directors, Isaac Okwiri to go to Nairobi in August, 2012. He added that he was not issued with any documents.
 8. On further cross examination he testified that he worked for the respondent from September 1, 2009 till August, 2012. He stated that he was the branch manager who worked in various branches including; Nairobi, Webuye, Naivasha, Nakuru and Kericho. He stated that he was not the driver of the vehicle neither was he the one that caused the accident. He stated further that he was summoned by the respondent's director to go to Nairobi.
 9. On re-examination he testified that he was with Okal, the respondent's driver, at the time of the accident and that the said driver recorded statement of the accident. He reiterated that he was called to Nairobi by his Boss Mr Isaac Okwiri.

Respondent's Case.

10. The respondent entered appearance and filed a defence on October 21, 2015 through the firm of Anthony Burugu and company advocates. The respondent basically denied all the contents of the memorandum of claim and alleged that the claimant is not entitled to the reliefs sought.
11. During hearing, the respondent summoned one Isaac Okwiri, the director of the respondent, to testify as RW-1. He adopted his witness statement dated September 27, 2022 which in summary stated that the claimant joined the respondent's employ on November 7, 2009 and left on August 21, 2012. That before his departure he was assigned duties at Ketepa in Kericho and while on duty he drove the company vehicle to his home in Bungoma without authorization. Also that on August 21, 2012, he drove motor vehicle registration number KBJ 957 J to Ketepa where he lost control and hit Ketepa gate together with motor vehicle registration number KAE 813 C. That he was questioned on the accident caused and recorded a statement at the police station, thereafter he left employment without



any notice. He added that after this accident, its contract with Ketepa was rescinded causing it financial loss.

12. Upon cross examination, he testified that the accident was reported to the police by the claimant together with a driver. He maintained that the claimant never visited its offices in Nairobi.

Claimant's Submissions.

13. The claimant submitted on two issues; whether the claimant was terminated from employment unlawfully and whether the claimant is entitled to the reliefs sought.
14. On the first issue, it was submitted that the claimant was unfairly terminated from the respondent's employ when the respondent summarily dismissed him without according him hearing as mandated under section 41(2) of the *Employment Act* thus the termination was unfair as provided for under section 45 of the *Employment Act*.
15. It was submitted that the allegation by the respondent that the claimant deserted employment after causing an accident is not plausible because the accident occurred on May 15, 2012, which vehicle was being driven by Geoffrey Okal and not the claimant as is depicted by the police abstract dated May 17, 2012. It was further argued that the claimant continued working for the respondent till August, 2012 when he was summoned by the respondent's director Isaac Okwiri, who dismissed him. He added that the claimant worked for the respondent and in fact banked a cheque on the June 25, 2012 also that he collected the vehicle that was involved in the accident from Jeet motors after repair on June 8, 2012, confirming that indeed the claimant continued working for the respondent after the accident, disbanding the allegation by the respondent of deserting work after the accident.
16. He submitted that the burden of justifying the grounds for termination of employment rest with the employer as expressly stated under section 47(5) of the *Employment Act* and cited the case of *Jared Aimba v Fina Bank Limited* [2016] eklr, where the court held that;

“...under sections 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to the termination.”
17. The claimant further relied on the case of *Walter Ogal Anure v Teacher Service Commission* [2013] eklr where the court held that;

“ ... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
18. Accordingly, the claimant submitted that since due procedure of according him hearing was not followed the dismissal becomes unfair and unlawful as contemplated under section 45 of the *Employment Act* and urged this court to find the dismissal unlawful and grant him the reliefs sought in the claim. In this the claimant relied on the case of *D.K Njagi Marete v Teachers Service Commission* [2020] eklr and the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eklr.
19. In conclusion, the claimant submitted that he has discharged its burden of proving his case as required under section 107-109 of the *Evidence Act* and therefore he is deserving of the reliefs sought. He then urged this court to allow the claim as prayed with costs and interest.



Respondent's Submissions

20. The respondent submitted on two issues; whether the claimant was unfairly terminated and if so what is the quantum of compensation he is entitled to.
21. On the first issue, it was submitted that the claimant left the respondent employ on August 21, 2012 after giving his statement of the events that led to the accident in Kericho. He argued that the claimant alleged to have been fired by the respondent without indication of the date when such an act occurred, therefore making his explanation unreliable.
22. On that basis, the respondent submitted that the fact that a specific date of dismissal was not indicated in his claim lends credence to the respondent's evidence that the claimant disappeared after writing a statement on the accident. The respondent then urged this court to dismiss the claimant on the basis that the claimant deserted employment and was not fired as pleaded.
23. I have examined all evidence and submissions of the parties herein. The claimant has stated that he was unfairly terminated from work without any valid reasons or hearing.
24. The respondent on the other hand contend that the claimant absconded duty after causing an accident and driving the respondent's vehicle without any authority.
25. In response to this allegation, the claimant stated that the police abstract was clear that the motor vehicle was being driven by the respondents driver one Geoffrey Okal. The claimant also confirmed working for respondent after the said accident.
26. The contention that the claimant absconded duty after the accident is therefore not true.
27. In any case there is no notice to show cause served upon the claimant to explain why he should not be dismissed for absconding duty. The claimant was also never summoned to any disciplinary hearing for absconding duty or even for causing an accident and driving a motor vehicle without authority.
28. Section 41 of the Employment Act 2007 envisage that a man should not be condemned unheard. Indeed the claimant was never heard before being dismissed. Section 45 (2) of the Employment Act also states as follows;-
 - “ 45. (1).....
 - (2) A termination of employment 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”.
29. The claimant having been condemned unheard and there being no evidence that there were valid reasons to warrant his dismissal, I find his dismissal unfair and unjustified and I order so.



30. In terms of remedies, I find for the claimant and I award him as follows;-

1. I order issuance of a certificate of service as prayed.

2. 10 months salary as compensation for the unlawful termination

= 18,946.67

Less 3,750/= overtime = 15,196.67 x 10

= 151,967/=

3. 1 month's salary *in lieu* of notice = 15,197/=

Total awarded = 167,164/=

Less statutory deductions

4. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN

JUDGE

In the presence of:

Burugu for Respondent – present

Kailedi for Claimant – present

Court Assistant – Fred

