



**Ali v Brinks Security Services Limited (Cause 420 of 2017)
[2023] KEELRC 481 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 481 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 420 OF 2017
AK NZEI, J
FEBRUARY 23, 2023**

BETWEEN

SAID OMAR ALI CLAIMANT

AND

BRINKS SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 19th May 2017, the Claimant sued the Respondent herein and pleaded that he was, in July 2013, employed by the Respondent as a security guard, earning a monthly salary of ksh. 10,000. It was the Claimant’s further pleading that he worked diligently and well but on 31st December 2016, he was unlawfully dismissed from employment by the Respondent.
2. The Claimant set out his claim against the Respondent as follows:-
 - a. one month salary in lieu of noticeksh. 10,000
 - b. salary for December 2016.....ksh. 10,000
 - c. unpaid leave for 3 years.....ksh. 30,000
 - d. service pay for 3 years worked @15 days salary for every year workedksh. 15,000
 - e. compensation for unfair termination.....ksh. 120,000
Total ksh. 185,000
 - f. costs of the suit and interest.
3. On 15th February 2018, the Respondent filed Response to the Claimant’s claim and counter-claim, denying the Claimant’s, claim and counter-claiming a sum of ksh. 14,442 from the Claimant, being:-



- a. One month pay in lieu of notice.....ksh10,000
 - b. Lost/unrefunded itemsksh. 4,442
 - Total ksh. 14,442
4. The Respondent further pleaded:-
- a. that the Claimant was employed by the Respondent from 1st August 2013 and his last salary was ksh. 10,000.
 - b. that the Claimant absconded from his duties without notice on 15th December 2015, to an extent that he had to be replaced to avoid a situation that there would be a breach of security at his station.
 - c. that the Claimant was not unfairly dismissed from work, but left employment wilfully, and of his own choice, and owes the Respondent one month salary in lieu of notice.
 - d. that the claim for December 2016 salary was misplaced, the Claimant having left employment a year earlier.
 - e. that the Claimant had exhausted his leave days for the two years that he had worked for the Respondent, and was not entitled to service pay as he was a member of/contributor to NSSF.
5. The Respondent further pleaded that the Claimant owed the Respondent company property supplied to him at the beginning of employment being uniform, a baton, a whistle, a torch, a cap, boots, a belt and a lanyard whose cost was ksh.4,422; which items were returnable upon termination of employment, but which the Claimant did not return, hence the counter-claim.
6. The Claimant is not shown to have filed any defence to the Respondent's counter-claim.
7. When trial opened on 10th May 2022, the Claimant adopted his filed witness statement dated 19th May 2017 as his testimony. He also produced in evidence two documents listed on his list of documents filed 22nd May 2017. The two documents are demand letters dated 16th January 2017 and 14th March 2017 respectively.
8. The Claimant further testified that his employment was terminated on allegation that his supervisor by the name Mwema, found him in an area outside his work station. It was the Claimant's testimony that he had gone to answer a call of nature when his supervisor passed by, took away his job baton (rungu) and send someone to tell the Claimant to go to the Respondent's office, and that at the office, the Claimant was told to return his uniforms, which he did.
9. It was the Claimant's further testimony that he was not called for any disciplinary hearing regarding the allegations raised against him, and was not given a termination letter. That the allegations that he lost company property were untrue, as he had returned everything. That the Respondent should pay the Claimant in lieu of notice, but not vice-versa.
10. Cross examined, the Claimant denied having absconded duty on 15th December 2016, and stated that in January 2017, he went to the Respondent's premises for purposes of getting notification to the effect that he had returned all the Respondent's properties, but was thrown out by security guards on the Respondent's instructions. He denied having been absent from duty as indicated in the Muster Roll produced in evidence by the Respondent, which he termed as not being right, and stated that he even received his salary for the month that he was alleged to have been absent.



11. The Claimant told the Court that the date of his termination was 31st December 2016, and that he was, and remained a member of NSSF until the date of his termination; though the Respondent did not make all the remittances.
12. The Respondent called one witness, Bernard Kyengo Kawea (RW-1), who told the Court that he was the Respondent's Manager, Mombasa/Coast Region. He adopted his witness statement dated 15th February 2018 as his testimony. He also produced in evidence some five documents listed on the Respondent's list of documents dated the same date (15th February 2015). The listed documents are a contract of employment between the Claimant and the Respondent shown to be dated 1st August 2013, the Claimant's payslips for August 2013 and December 2015, the Respondent's Muster Roll for December 2015 and an unsigned tabulated list of employee's details for December 2015. The witness (RW-1) further testified:-
 - a. that the Claimant worked for the Respondent between 1st August 2013 and 15th December 2015, and that on the night of 15th December 2015, the Claimant was not found at his assigned place of work, though his baton was there and did not go to the Respondent's office as instructed by his supervisor. That the Claimant deserted duty instead. That the Claimant was declared a deserter after seven days and was replaced.
 - b. that the Claimant went to the Respondent's office in January 2017 to ask for his dues, but was told to return the Respondent company's property first, except the baton (rungu) which had been taken by his supervisor, but he never returned the properties and was never cleared; hence the counter-claim for ksh. 4,442.
 - c. that the Claimant worked for the Respondent for about two years and four months, and took leave in March 2015 for a whole month.
 - d. that the Claimant never worked for the Respondent in 2016, and that the payslip for December 2015 is written "hold" meaning that the bank was being instructed to hold the salary as the clamant had issues with the company.
13. Cross-examined, RW-1 testified:-
 - a. that he had not exhibited the Muster Roll for the year 2016, and that he had also not exhibited any leave forms on leave taken by the Claimant.
 - b. that the Respondent did not give any written show cause (letter) to the Claimant, though he was on 15th December 2015 invited on phone by his supervisor for a hearing but failed to turn up.
14. Having considered the pleadings filed and evidence presented by both parties, issues that present for determination, in my view, are as follows:-
 - a. whether the Claimant's employment was terminated by the Respondent on 31st December 2016.
 - b. whether termination of the Claimant's employment was unfair.
 - c. whether the Claimant is entitled to the reliefs sought by him.
 - d. Whether the Respondent is entitled to the reliefs sought in the counter-claim.
15. On the first issue, it was a common ground that the Claimant was employed by the Respondent as a security guard on 1st August 2013, earning a monthly salary of ksh. 10,000. The Claimant alleged that



his employment was terminated by the Respondent on 31st December 2016, whereas the Respondent alleged that the Claimant absented himself from his assigned place of work on 15th December 2015 and thereupon deserted duty, and was declared a deserter seven days later; and thereupon replaced. In the absence of records on termination of the Claimant's employment, the process leading up to such termination, and the actual date of such termination, the situation becomes that of the Claimant's word against the Respondent's word.

16. The Respondent alleged that the Claimant deserted duty. Under Section 44(4) (a) of the [Employment Act](#), an employee's absence from the appointed place for the performance of his work without leave or other lawful cause amounts to gross misconduct, for which the employee can be summarily dismissed. The Respondent did not tell the Court what disciplinary action it took against the Claimant if it is true that he absconded or deserted duty on 15th December 2015. Did the Respondent have to wait until a suit was filed against it in 2017 alleging unfair termination in December 2016 before it could either take disciplinary action against the Claimant or formally demand for the return of the alleged company property?
17. Where a dispute arises as to whether an employee absconded duty or his employment was terminated by the employer, the employer who alleges that an employee absconded duty must demonstrate what steps he took after the employee committed a gross misconduct by absconding duty. Such steps may be by issuance of a written notice/letter requiring the employee to show cause why disciplinary action cannot be taken against him, warning letters, emails or even contacting the employee's referees for information on the employee's possible whereabouts. It is not in vain that Section 10(2) (a) of the [Employment Act](#) provides that one of the particulars that must be captured in a written employment contract is an employee's permanent address.
18. It was held as follows in the case of [Stanley Omwoyo Onchweri -vs- Bom Nakuru Ymca Secondary School](#) [2015] eKLR:-

“the employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues or family members) issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances.”
19. The Claimant pleaded and testified that his employment was terminated by the Respondent on 31st December 2016, and that when the Claimant went to the Respondent's office in January 2017, he was instructed to return his uniforms. The Respondent (RW-1) testified that the Claimant went to the Respondent's office in January 2017.
20. Further, the Respondent did not produce in Court its employment records; including its Muster Roll, for the year 2016 to show that the Claimant was not one of its employees during that year. It is my finding that the Claimant established, on a balance of probability, that his employment was terminated by the Respondent on 31st December 2016.
21. On the second issue, Section 41 of the [Employment Act](#) sets out a mandatory procedure that must be adhered to by any employer contemplating termination of an employee's employment for misconduct, poor performance or physical incapacity. The section provides as follows:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering



termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

22. The Respondent did not demonstrate compliance with the foregoing mandatory procedure, which an employer must comply with before terminating an employee’s employment, regardless of the seriousness or otherwise of the allegation’s levelled against an employee. The Court of Appeal stated as follows in the case of *CMC Aviation Limited -vs- Mohammed Noor* [2015] eKLR:-

“In view of the foregoing, we find that the appellant’s act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the *Employment Act*. In *Kenya Union Of Commercial Food And Allied Workers -vs- Meru North Farmers Ssacco Limited* [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also *Mary Chemweno Kiptui -vs -kenya Pipeline Company Limited* [2014] eKLR”

23. In the case of *Kenfreight [EA] Limited -vs- Benson K. Nguti* [2016] eKLR, the Court of Appeal stated as follows:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.... We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent’s contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”

24. Failure by an employer to comply with Section 41 of the *Employment Act* renders termination of an employee’s employment unfair pursuant to Section 45 of the Act. In my view, the provisions of Sections 43, 45(1) and (2) (a) of the *Employment Act* are to be read together with Section 41 of the Act, as matters stated in those provisions are to be established during the hearing contemplated in Section 41. Those matters must be proved before termination, otherwise termination of an employee’s employment will be unfair. There cannot be fairness without a hearing.

25. In the present case, the Claimant was not given an opportunity to be heard before his employment was terminated. I find and hold that termination of the Claimant’s employment was unfair.

26. On the third issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant eight months’ salary being compensation for unfair termination of employment. That is ksh. 10,000x8 = ksh. 80,000.



I also award the Claimant ksh. 10,000 being one month salary in lieu of notice as the claimant was not issued with a termination notice pursuant to Section 35(1) (c) of the Employment Act.

27. The claim for three years' leave days is allowed. The Respondent did not produce in evidence any record on any leave days taken by the Claimant during the period of employment. It is to be noted that Section 74(f) of the Employment Act obligates an employer to keep records on his employees' annual leave entitlement, days taken and days due as specified in Section 28 of the Act.
28. Under Section 28(1) of the Employment Act, the Claimant was entitled to a minimum of 21 leave days for each completed year of service. I award the Claimant ksh. 20,900 for unpaid leave days.
29. The claim for severance pay is declined. The Claimant admitted in evidence that he was a member of NSSF. Section 35(6) (d) of the Employment Act disqualifies him from claiming service pay.
30. The claim for the Claimant's December 2016 salary is allowed. I award the Claimant the pleaded sum of ksh. 10,000 in that regard. The Respondent, being the employer and the custodian of all employment records regarding the Claimant, did not demonstrate that the Claimant's salary for December 2016 was paid. Indeed, RW-1 admitted in evidence that the Claimant's dues had not been paid.
31. On the fourth issue, the Respondent did not prove its counter-claim on a balance of probability, though no defence to the counter-claim was shown to have been filed by the Claimant. The Respondent pleaded and testified that the Claimant's uniforms and other items given to him upon employment were returnable upon termination of employment, and had not been returned. The Claimant testified that he had returned the uniforms and other items in his possession to the Respondent in January 2017. The Respondent's witness (RW-1) testified that the Claimant went to the Respondent's offices in January 2017 asking for his dues, but denied that the items were returned.
32. The Respondent did not tell the Court that it wrote to the Claimant asking him to return the alleged items in issue, if they had not been returned. It is not clear why the Respondent chose to handle all the issue on the Claimant's termination orally, and yet the parties are shown to have signed a written contract on 1st August 2013 at the commencement of their employment relationship. The Claimant produced in evidence two letters of demand dated 16th January 2017 and 14th March 2017 respectively. The Respondent did not deny having received the two demand letters, but is not shown to have called for return of the items the subject of the counter-claim. Further, the Respondent did not show how the counter-claimed value of the alleged items (ksh. 4,442) was arrived at.
33. Likewise, the counter-claimed sum of ksh. 10,000 being one month salary in lieu of notice cannot be allowed, in view of the Court's finding that the Claimant's employment was unfairly terminated by the Respondent. The Respondent's counter-claim is hereby dismissed with no order as to costs.
34. Finally, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-
 - a. compensation for unfair termination of employment ksh. 80,000
 - b. one month salary in lieu of notice ksh. 10,000
 - c. unpaid leave for three years ksh. 20,999
 - d. salary for December 2016 ksh. 10,000Total ksh. 120,999



35. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).

36. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

.....for Respondent

