



**G4S Kenya Ltd v Odowa (Appeal E029 of 2022)  
[2023] KEELRC 467 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 467 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E029 OF 2022  
S RADIDO, J  
FEBRUARY 22, 2023**

**BETWEEN**

**G4S KENYA LTD ..... APPELLANT**

**AND**

**DAVID AYIEKO ODOWA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Principal  
Magistrate at Bondo Principal Magistrates Court (Hon J.P. Nandi)  
delivered on the 28th July 2022 in Bondo PMEL No. E001 of 2021)*

**JUDGMENT**

1. The Honourable Principal Magistrate (Bondo) delivered a judgment on 28 July 2022 in favour of David Ayieko Odowa (the Respondent). The Principal Magistrate found that G4S Kenya Ltd (the appellant) had unfairly terminated the respondent's employment.
2. The Principal Magistrate awarded the Respondent gratuity of Kshs 245,157/-, compensation of Kshs 173,052/- and salary in lieu of notice Kshs 14,421/-.
3. The appellant was aggrieved, and it filed a Memorandum of Appeal with the court on 25 August 2022 contending:
  - (a) The appellant adduced evidence to show that it dismissed the Respondent after establishing that the Respondent:
    - (i) had committed gross and negligent misconduct with respect to the handling of the cash book, by failing to fill out the pages of the cash receipt book in sequential order when raising cash waybills for the May 11, 2020 and May 12, 2020 contrary to courier procedures.



- (ii) had committed gross misconduct by failing to account for courier sales he made on May 14, 2020, which was contrary to the Appellant’s Courier Operations Procedures Manual.
  - (iii) had admitted the offences; and
  - (iv) was given an opportunity to be heard.
- (b) Based on the law and the evidence before the Court:
- (i) The Learned Magistrate erred in failing to hold that there was fair and valid reasons to terminate the Respondent’s employment.
  - (ii) The Learned Magistrate erred in failing to hold that there was procedural fairness in the termination.
  - (iii) The Learned Magistrate erred in holding that the disciplinary procedure was unfair on the basis that the respondent had not been accompanied by a Union representative, when section 41 of the *Employment Act* did not make such prescription.
  - (iv) The Learned Magistrate erred in failing to find that the notice for disciplinary hearing had informed the Respondent of his right to be accompanied by a representative from within the company; and
  - (v) The Learned Magistrate erred in failing to hold that the Respondent was in fact accompanied by a representative to the disciplinary hearing.
- (c) The Learned Magistrate erred in making an award for compensation for unlawful termination.
  - (d) Without prejudice to the foregoing, the award of 12 months’ pay as compensation for unlawful termination is in any event inordinately high and excessive in the circumstances of this case.
  - (e) The trial court erred in awarding the Respondent one month’s salary in lieu of notice in the circumstances.
  - (f) The trial court also erred in making an award of gratuity pay.
4. On 26 August 2022, the court stayed execution of the judgment pending the hearing and determination of this Appeal. The appellant was ordered and deposited the decretal sum in court.
  5. The appellant filed the Record of Appeal on 29 August 2022, and a Supplementary Record of Appeal on 21 November 2022.
  6. The court gave directions on 8 December 2022 as a result of which the appellant filed its submissions on 20 January 2023, and the respondent on 6 February 2023.
  7. The court has considered the Record of Appeal and the submissions.

**Role of the Court on first appeal**

8. This being a first appeal, the court is enjoined to re-evaluate the evidence before the trial court and make its own findings on the evidence and facts, but conscious that it did not see the witnesses.



## Unfair termination of employment

### Procedural fairness

9. Grounds (a)(i),(ii)(iii) and (b)(i) spoke to the question of procedural fairness.
10. In concluding that the dismissal of the Respondent was procedurally unfair, the Principal Magistrate considered the Respondent's testimony that he was not informed of the right to be accompanied by a union representative during the disciplinary hearing despite being a union member.
11. During the trial, the appellant's witness testified that the respondent was issued with a Notice of Disciplinary Enquiry/Hearing which clearly informed him of the right to be accompanied by a representative from within the company, and that during the hearing, the Respondent attended with a colleague of his choice.
12. The court has reviewed the record.
13. A copy of the respondent's pay slip produced before the trial court indicated that he was a subscription paying member of the Kenya National Private Security Workers Union.
14. Before the respondent moved to court, the Union of which he was a member reported a trade dispute to the Cabinet Secretary, Labour and both parties made submissions before the Conciliator.
15. The Conciliator issued a report dated 18 March 2021.
16. Since the appellant was aware that the respondent was a subscription paying member of the Kenya National Private Security Workers Union, it should have involved the Union in the disciplinary process, even if there was no recognition agreement in place at the material time.
17. This court, therefore, agrees with the conclusion by the Principal Magistrate that the hearing was tainted by failure to involve the Union.

### Substantive fairness

18. By dint of sections 43 and 45 of the *Employment Act*, 2007, the burden of proving the reasons for terminating an employment contract is placed upon the shoulders of the employer.
19. The Principal Magistrate discounted the evidence placed before him by the Appellant primarily on the ground that the investigations report which was relied on heavily during the disciplinary hearing was not signed by the author, one Collins Alego.
20. It is correct that the report was not signed by the author, and that it was relied on by the Disciplinary Committee.
21. The court, however, observes that the respondent did not oppose the reliance on the report during the disciplinary hearing nor did he argue that the Disciplinary Committee was bound by the rules of evidence which guide Courts of law.
22. Nevertheless, the author of the report was present during the disciplinary hearing and it was open to the Respondent to question him.
23. Be that as it may, the appellant gave three reasons for dismissing the respondent, and these were in brief, consolidating three different letters into one envelope and raising one waybill instead of three; skipping cash receipt books while raising waybills and withholding of cash from customers.



24. The infractions, the appellant contended, breached the Courier Operations Manual.
25. The court has again reviewed the Record and more so the minutes of the disciplinary proceedings. Copies of the waybills in question were placed before the Principal Magistrate. The respondent admitted skipping cash receipt sheets but attributed it to error and pressure of work. The Respondent also admitted that he could not account for all the monies received from customers. He explained that he had given the money to a rider whom he did not name.
26. This court is satisfied that the respondent was in breach of the appellant's Courier Operations Manual and that the breach was a manifestation of dishonesty warranting dismissal.
27. The appellant proved the reasons for dismissing the respondent.

### **Compensation**

28. The appellant contended that the award of maximum compensation was inordinately high. The Principal Magistrate considered the circumstances of the dismissal to award the maximum compensation.
29. Section 49(4) of the *Employment Act*, 2007 has set out several factors the court should consider in awarding compensation.
30. The respondent had served the appellant from 2003 to 2020, about 17 years.
31. The court has concluded the appellant proved the reasons for the dismissal but got the process wrong.
32. Considering these factors, this court is of the view that the equivalent of 8 months' gross salary compensation would have been appropriate.

### **Salary in lieu of notice**

33. The appellant got the procedural process wrong and the court therefore finds no error in the award of salary in lieu of notice.

### **Gratuity**

34. The Principal Magistrate awarded gratuity on the strength of the Regulation of Wages (Protective Security Services) Order. The court set out the formula for arriving at the sum.
35. This court has found that the dismissal of the respondent was unfair. The exemption in the Order does, therefore, not apply.
36. The court, consequently would not interfere with this head of the relief.

### **Conclusion and Orders**

37. The Appeal fails save that the award of compensation is vacated and substituted with an order awarding compensation of Kshs 115,368/-.
38. The other awards by the Principal Magistrate are sustained.
39. The appellant has only succeeded on the question of compensation. Each party to bear own costs of appeal. respondent to have costs before the trial court.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2023.**



**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Appellant Hamilton Harrison & Mathews Advocates

For Respondent P.D. Onyango & Co. Advocates

Court Assistant Chrispo Aura

