



**Elijah v Xfor Security Solutions (K) Limited (Cause 1779 of 2017)
[2023] KEELRC 345 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 345 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1779 OF 2017
K OCHARO, J
FEBRUARY 9, 2023**

BETWEEN

ALEX KIMWELI ELIJAH CLAIMANT

AND

XFOR SECURITY SOLUTIONS (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim Dated 1st September 2017 alleging unfair/unlawful dismissal from employment.
2. The Claimant avers that he was employed by the Respondent as a Guard on the 5th July 2013 where he served continuously and diligently and was earning a salary of Kshs 13,400.
3. The claimant averred that on the 5th July 2016 when he reported to work he found new guards from another security firm had taken over guarding of the station where he was assigned to work. His supervisor instructed him to go home, with a promise that he will be called back.
4. The claimant avers that he never received any communication from the Respondent despite his relentless efforts to follow up with their office.
5. The claimant avers that the respondents Actions of terminating his employment was unfair/unlawful and against the constitution of Kenya, the *Employment Act* and against the principles of natural justice as the claimant had not done anything wrong to warrant the dismissal, no notice was issued to him before the decision to dismiss him was made and no notice was issued to him that the Respondent's contract with his client was coming to an end.
6. The claimant states that as a result of the unfair and unlawful termination he has suffered immensely and is unable to secure a befitting job that would adequately provide for his family.



7. On cross-examination, the Claimant stated while the employment contract that he has exhibited before the Court, appears not to be having an execution page, that is what the Respondent gave him.
8. The Claimant further testified that his employment was brought to an end on the 5th July 2016, without any termination letter. The Respondent's assertion that he absconded duty was untrue.

Respondent's evidence

9. RW1 Lenus Mwakio the Human Resource Manager of the Respondent testified on behalf of the Respondent.
10. In his evidence he stated that the Claimant was an employee of the Respondent as a security guard with a monthly salary of KShs. 12,000. The terms and conditions of work were under a written contract. The Claimant was assigned duties at the Respondent's emergency vehicle.
11. The witness stated that the Claimant's employment was not terminated as a result of the assignment at which he and others were working came to an end. The Claimant deserted duty on the 10th June 2016 without notice. The Respondent tried to reach him with no avail. The Claimant wouldn't pick calls from the Respondent.
12. The witness stated that the claimant has no cause of action against the Respondent in the circumstances of the matter, having wilfully deserted duty, consequently leading to the separation. The claimant is not entitled to the reliefs he has sought. The Respondent did pay him all that was due to him at the time of absconding duty.
13. On cross-examination, the witness insisted that the Claimant's salary was Kshs. 12,000, which was subsequently reviewed up to Kshs. 13,400. The Claimant and his colleague, deserted duty, the Respondent made efforts to call them but they would not be reached. There is no way the Respondent would have traced the Claimant and his colleagues Physically. In its operations, the Respondent heavily relies on phone calls.
14. The witness admitted that the Respondent has not exhibited any documents as proof of the efforts to trace the Claimant.
15. Witness alleged that he sent one Collins Otieno to try trace the Claimant. Mr. Otieno gave feedback that he was unable to find the Claimant. The Claimant didn't have a postal address.
16. The Respondent stated that the Respondent didn't issue the Claimant with any show cause letter. He was not subjected to any disciplinary hearing because he was not there in the first place.
17. The Claimant and his colleague deserted immediately after earning their salary. Their last day of work was 10th June. They were paid through the bank.

Claimant's submissions

18. The Claimant identifies two issues for determination:
 - a. Whether the claimant was dismissed or he absconded duty.
 - b. Whether the claimant is entitled to his terminal dues.
19. On the first issue the Claimant submitted that the Respondent totally failed to prove that he absconded duty. The Respondent's witness didn't place any document before court to support his assertion that they tried to reach the Claimant through phone to no avail. In cross examination the witness



testified that he instructed Mr. Otieno to trace the Claimant, yet Mr. Otieno was not call to testify in support of the Respondent’s case.

20. The Claimant further submitted that it is not enough for an employer to allege that an employee deserted duty. He or she must reasonably demonstrate to court through evidence that indeed the employee did desert. On this point reliance was placed in the holding in *Simon Mbithi Mbane vs. Inter Security Service Limited* (2018) eKLR Abuodha J. held that:

“an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”

21. The claimant submits that the claimant was summarily dismissed. The Claimant was dismissed without notice. He was not accorded an opportunity to defend himself against any accusations. This was contrary to the stipulations of Section 41 of *Employment Act*. The claimant relies in the holding in *Anthony Mkala Chitavi vs. Malindi Water & Sewerage Company Ltd* (2013) eKLR, to buttress his submissions that the procedure leading to his dismissal lacked procedural fairness.
22. It was argued that having failed to establish that the separation was as a result of the Claimant’s desertion of duty, the Respondent failed to discharge pits duty under section 45 of the *Employment Act*, that the reason for the dismissal was valid and fair.
23. On the 2nd issue the claimant submits that he was never paid his terminal dues prior to his dismissal contrary to the allegations by the Respondent.
24. The claimant submits that they are entitled to terminal dues as prayed for in the memorandum of claim.

Respondent’s submissions

25. The Respondent identifies one issue for determination, whether the Claimants claim of unfair termination falls within the realm of unfair termination provided for in the *Employment Act*.
26. The Respondent submitted that the Claimant’s assertion that he lost the job as a result of the assignment whereat he was stationed being taken over by another security firm, make little sense. It is the Respondent that would lose the job in the circumstances not the Claimant[s]. It was further argued that the Respondent managed to establish in this matter that the Claimant absconded duty.
27. It was submitted that Clause 6 of the contract of employment prohibited absence of employees from duty without authority and consequences attendant to being absent without permission. The Respondent rightfully replaced the Claimant as he was in breach of this term of the contract. Reliance was placed on the judicial decision in *Banking Insurance & Finance Union [Kenya] v. Barclays Bank of Kenya* [2014] eKLR.
28. It was further submitted that Section 44[4] of the *Employment Act* puts forth actions and or inactions on the part of an employee that can amount to gross misconduct, attracting a sanction of summary dismissal. The Claimant’s act of deserting duty, fell squarely on that ground identified under section 44[4][a].
29. The Respondent submit that in an email dated 8th July 2016 it was reported that two crews deserted work after they requested for 8 days annual leave which was approved by the person in charge of the crew. The respondent states that it did not know the whereabouts of the employees and had to get more personnel to replace the personnel who had absconded duty.



30. The Respondent submits that the termination was fair and lawful and relies in the holding in *Manuel Anidos v. Kinangop Wind Park Limited (In Receivership)* [2019] eKLR stated as follows:

“Considering the clear evidence that the termination of the employment contract herein was pursuant to an express and binding term, I find and hold that the claimant has not discharged his burden of proving that the termination of his contract of service was unfair as he alleged. Consequently, I return that the burden of proof has not shifted to the respondent so as to call her to make a rebuttal by evidence by justifying the reason for the termination.”

31. The respondent submits that the court cannot rewrite a contract between parties but will only give meaning to such contract in determining any issue that may arise.

32. The respondent urges the court to dismiss the suit with costs as the claimant has not demonstrated that their dismissal was unfair.

Determination

33. After careful consideration of the pleadings, evidence on record and submissions by counsel, the issues for determination are;

- i. How did the employment of the Claimant come to termination?
- ii. If the answer to [i] above is “by the Respondent”, was the termination procedurally and substantively fair.
- iii. Whether the Claimant is entitled to the prayers sought.

How did the employment of the Claimant come to termination.

34. The parties herein have taken a fiercely uncompromising contrasting position as regards how the Claimant’s employment got determined. In its amended response to the Claimant’s statement of claim, and through its witness’s evidence, the Respondent contended that the Claimant deserted duty never to be traced. Keenly looking at the response, one cannot fail to note an in-text crucial contradiction. Under the sub-heading “Prayer” the Respondent confirms that the Claimant was dismissed from employment, when it stated;

- a. That in line with the facts surrounding the case, it is proposed that since the Respondent has complied fully over and above with the provisions provided for in the *Employment Act* this Honourable Court should therefore declare that the Claimant’s summary dismissal was fair and legal and should therefore stand.”

35. It is either the Claimant deserted duty and disappeared without trace for any sanction, or that he somehow got available for a process leading to his summary dismissal. It cannot be both.

36. The Respondent’s witness testified that after the Claimant deserted from duty, the Respondent’s officers made frantic efforts to reach out to the Claimant on phone without success. The evidence was silent as regards when specifically, the calls were made, through and to which number. There was no document from the mobile service provider to demonstrate that calls were made as alleged. Further, the witness asserted that he assigned one Mr. Otieno with the task of tracing the Claimant physically, Mr Otieno was not called to testify and elaborate to court as regards his effort if at all. In sum, I find that the Respondent has not placed any reasonable evidence before this court to demonstrate that after the alleged desertion, it made efforts to trace the Claimant.



37. By reason of the premises foregoing, I am persuaded that the Claimant's employment was terminated in the manner he has explained in his pleadings and evidence. I decline to accept the Respondent's version. Consequently, I hold that the Claimant's employment was terminated by the Respondent.

If the answer to [i] above is by the Respondent, was the termination procedurally and substantively fair.

38. Having found that the termination of the Claimant's employment was by the Respondent, I now turn to consider whether the same was procedurally and substantively fair. It is now trite law that when interrogating fairness in the termination of an employee's employment or dismissal of an employee from employment, one has to consider two components. The substantive fairness and procedural fairness. Substantive fairness relates to the decision itself, whilst procedural fairness relates to the process leading to the decision. Absence of any or both of these two components renders a termination or dismissal unfair, entitling the affected employee to the galaxy of reliefs established under the *Employment Act*.

39. Section 41 of the *Employment Act* provides for the procedure that an employer contemplating terminating an employee's employment or summarily dismissing an employee must follow. There is now firm jurisprudence that the procedure is mandatory. Any default in adhering to the procedure shall no doubt render the termination or dismissal unfair. Procedural fairness encompasses three components, first, notification, the employer contemplating the dismissal or termination must inform the employee of the intention and the grounds prompting the same, second, the hearing, the employee must be accorded a sufficient opportunity to make a representation on the grounds, and third, the consideration component, the employer shall consider the representation[s] made by the employee before making the decision.

40. It is worth stating that the legal burden to prove that the termination was procedurally fair lies on the employer, by dint of the provisions of section 45[2][c] of the *Employment Act*. Though the Respondent alleged that the dismissal was fair, I state without any fear of contradiction that it didn't lead any evidence to demonstrate that. Legal burdens are discharged by adduction of evidence. Where no evidence is placed before the trier, it is not possible for one to claim that the burden was discharged.

41. By reason of the foregoing premises, I conclude that the termination was procedurally unfair.

42. Section 43(1) of the *Employment Act* requires the employer to prove the reason or reasons for the termination of employment. The employer is further burdened under section 45 of the Act, to go further, after demonstrating the reason[s] for the termination to the requisite standard, and prove that the termination was anchored on a valid and fair reason.

43. I have herein above stated that the evidence regarding the alleged desertion of duty was too sketchy and insufficient to convince me that the Claimant's employment came to an end as a result of his desertion of duty. It was a kind of evidence that cannot reasonably be relied upon for a conclusion that the person fronting the evidence managed to prove the reason to the requisite standard.

44. By reason of this and the premises that this court brought out hereinabove under the 1st issue for determination as basis for disbelieving the Respondent's account, I find that the Respondent failed to prove the reason[s] for the termination of the Claimant's employment. Consequently, it too did not prove that the termination was on a valid and fair reason[s].

45. The termination was substantively unfair.



Whether the Claimant is entitled to the reliefs sought or any of them.

46. Before I delve into each and every one of the reliefs sought by the Claimant, I find it imperative to state that the Respondent boldly asserted that after the dismissal of the Claimant, it paid him all his terminal dues. This was that bald assertion. How much, how and when, it mentions not. It laid no evidence to establish the same.
47. The Claimant claimed for a one month's salary in lieu of notice. In my view, the nature of the Claimant's employment was one that was terminable by a 28 days' notice pursuant to the provisions of section 35 of the *Employment Act*. There is no doubt that the employment of the Claimant was terminated without the notice contemplated in the section. I have no reason to decline to award the Claimant a one month's salary in lieu of notice under the section as read with section 36. However, I should point out that the month's gross pay is the Kshs. 13,400 provided for under the contract of employment tendered as evidence by the Respondent.
48. The Claimant further contended that during the entire period of his employment with the Respondent, he was not allowed to proceed for leave. He consequently sought for unpaid leave compensation. The relief was sought under the terminal dues. The Respondent just asserted that the terminal dues were paid without placing before this court any evidence to establish the same.
49. Further, the Respondent did not place before me any, document or form of evidence from which one can discern that the Claimant ever proceeded for leave or that he was compensated for any untaken leave days. Under the *Employment Act*, annual leave is a statutory right for an employee. Considering these, and the provisions of section 90 of the Act, I award the Claimant, compensation for untaken leave days for three years immediately before the termination date, Kshs. 28,140.
50. He further sought for a compensatory relief for unfair termination of his employment, to an extent of twelve months' gross salary. Under the provisions of section 49[1][c], the relief as sought by the Claimant is one of those contemplated thereunder. However, it is worth stating that an award of the relief is discretionary, dependent on the circumstances of each case. This court has carefully considered the manner in which the Claimant was terminated, which in my view easily passes for an unfair practice, the extent to which the Respondent deviated from both the expected substantive and procedural fairness, the fact that there is nothing to show that the Claimant contributed in any manner in the termination, and the length of time he was in the employment of the Respondent, and come to a conclusion that he is entitled to the award and to an extent of 7 months gross salary, Kshs. 93,800.
51. The Claimant prayed for a grant of Kshs. 29,480 under the head unpaid/ untaken public holidays for the entire period of service. I have carefully considered the pay slips that were tendered in Court by the Claimant as evidence, they have an item for extra days compensation. Further, the Claimant did not lead any evidence geared towards establishing his entitlement to the relief. I as a result decline to grant the relief.
52. In the upshot, judgment is hereby entered for the Claimant in the following terms;
 - a. That the termination of his employment was both procedurally and substantively unfair.
 - b. One month's salary in lieu of notices, Kshs. 13,400.
 - c. Compensation for untaken leave days, Kshs. 28,140.
 - d. Compensation pursuant to the provisions of section 49 [1][c], 7 months' gross salary, Kshs. 93,800.



e. Costs of this suit.

f. Interest at court rates on the sums awarded from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

Ocharo Kebira

Judge

In the presence of

Mr. Alividza holding brief for Namada for the Claimants.

No appearance for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

Ocharo Kebira

Judge

