



**Matindi v Securex Agencies (K) Ltd (Cause 2531 of 2017)
[2023] KEELRC 330 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 330 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2531 OF 2017
JK GAKERI, J
FEBRUARY 9, 2023**

BETWEEN

DANIEL NTHENGE MATINDI CLAIMANT

AND

SECUREX AGENCIES (K) LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on December 29, 2017 alleging unfair termination.

The Claimant's Case is pleaded as follows;

2. The Claimant avers that he was employed by the Respondent on March 15, 2011 as a Crew member and confirmed on December 1, 2012. That he was arrested on May 8, 2013 while at the work place and detained at the Gigiri Police Station and on 9th May, he was charged for bank breaking and committing a felony contrary to section 306(a) of the Penal Code in Criminal Case No 551 of 2013.
3. The Claimant avers that as a result of the arrest, he was orally suspended with no pay until the criminal case was completed.
4. It is the Claimant's case that the Respondent terminated his employment verbally without justifiable cause or fair hearing.
5. That the trial ended on July 7, 2015 when the Claimant was acquitted under section 210 of the Criminal Procedure Code.
6. The Claimant further avers that he was not paid the salary for May 2013 following wrongful termination, or pay in lieu of notice or severance pay.
7. The Claimant prays for;



- (i) A declaration that termination of his employment was unlawful and unfair.
- (ii) Unpaid salary for May 2013, Kshs 17,650/=.
- (iii) Three months' salary in lieu of notice, Kshs 52,950/=.
- (iv) Service pay, Kshs 44,125/=.
- (v) Compensation for unlawful termination.
- (vi) Interest on (i) and (ii) at court rates.
- (vii) Costs of this suit.
- (viii) Any other relief that the court may deem just and fit to grant.

Respondent's Case

8. In its reply filed on March 28, 2018, the Respondent admits that the Claimant was employed as a Mobile Response Crew from March 15, 2011 to May 7, 2013 when he deserted duty after the police suspected that he was involved in a theft case.
9. It denies that he was a faithful employee or that he had been arrested nor was it involved in the arrest or his acquittal on July 7, 2015.
10. It is the Respondent's case that the Claimant absconded duty for more than 14 days although he was held by the police for only one day and a disciplinary meeting was held and recommended a warning letter and a show cause letter was posted to his last known address. That attempts to contact the Claimant's kin using the contact details provided by the Claimant fell through.
11. The Respondent avers that the Claimant was arrested on account of a robbery at Giro Commercial Bank, one of its client's and he did not respond to the notice to show cause. It denies having terminated the Claimant's employment unfairly as section 44(4)(a) of the *Employment Act* enabled it to terminate his employment for absconding duty and had been arrested for a cognizable offence, a ground of summary dismissal.
12. The Respondent prays for dismissal of the Claimant's suit.

Claimant's Evidence

13. In his oral testimony, the Claimant confirmed that he was arrested on May 8, 2013 following a robbery at the Giro Commercial Bank and that was his last day of employment. That no one recalled him.
14. It was his testimony that they had responded to an alarm at the bank but the guard denied them access into the premises and that his termination of employment was related to the incident as on even date the Operations Manager told him to hand over all company property as he and three other colleagues had ceased to be employees of the Respondent on that date.
15. He admitted being charged in court but was acquitted.
16. The Claimant denied having received the notice to show cause and contested the postal address, that he had given the Respondent PO Box 70 Machakos.
17. The Claimant testified that after arrest, he returned all company property and were told that they were on longer employees of the Respondent.
18. He admitted having been paid for the month of April 2013.



19. On cross-examination, the witness confirmed that they did not access the compound of Giro Commercial Bank and Mr Ogutu, the Operations Manager told him to surrender company items. That the complainant in the Criminal case was Giro Commercial Bank and he was in custody for 2 weeks before he was released on bond.
20. The witness confirmed that he did not return to the employer's place after release from custody because he was unwell and denied having absconded duty and would have returned after the criminal case was concluded.
21. He admitted having been paid for the 8 days he worked in May 2013.
22. On re-examination, the witness maintained that since he was no longer an employee after May 8, 2013, he could not return to the work place.

Respondent's Evidence

23. RWI, Dorothy Kaane confirmed on cross-examination that on April 22, 2013, the Claimant was stationed at the Highridge Area and the crew responded to the alarm at Giro Commercial Bank and CCTV footage showed that they entered the bank as required.
24. The witness admitted that the claimant was acquitted but had been dismissed earlier and the notice to show cause was posted to his last known address and he was not summoned after the acquittal in July 2015.
25. That his terminal benefits were computed but he did not collect them.
26. On re-examination, the witness testified that the notice to show cause was issued after the Claimant absented himself from work from 7th – May 31, 2013 and did not inform the company that he had a criminal case and did not hand over to the company and was not cleared.

Claimant's submissions

27. The Claimant's counsel identified two issues for determination, namely; whether termination of employment was wrongful and unfair and entitlement to reliefs.
28. As regards termination, it was contended that the Claimant was suspended after the arrest for no just cause and was acquitted on July 7, 2015.
29. Counsel urged that the Claimant did not abscond duty but was arrested and charged and the Respondent was aware as its letter on record attested and was orally suspended on an unspecified date or by who.
30. Reliance was made on the provisions of section 44(1) and (2) of the *Employment Act* as well as the decisions in *Nicholas Otinyu Muruka v Equity Bank Ltd* (2013) eKLR and the essence of the provisions of section 41 in summary dismissals.
31. Other decisions cited in support of the submission that the Claimant's dismissal was unfair include *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR, *Anthony Mkala Chitavi v Malindi Water & Sewerage Co Ltd* (2013) eKLR, *Pheoby Aloo Inyanga v Stockwell Homes Management Ltd & another* (2022) eKLR.
32. It was urged that the Claimant was arrested at the behest of the Respondent on May 8, 2013 and charged on May 9, 2013 and acquitted on July 7, 2015 and was terminated from employment without notice of the charges or hearing.



33. It was contended that he was suspended without being recalled for a disciplinary hearing and the Respondent had no evidence of the alleged desertion.
34. Finally, counsel submitted that the Claimant was summarily dismissed for desertion yet he had been arrested and detained by the police and the Respondent was aware of the fact and he was not accorded an opportunity to be heard before dismissal.
35. As regards the reliefs sought, counsel submitted that since the Claimant's employment was wrongfully terminated and thus unfair, he was entitled to pay in lieu of notice, unpaid leave allowance, overtime and severance pay as prayed for in the Memorandum of Claim.

Respondent's submissions

36. By December 21, 2022 when the court retired to prepare this judgement, the Respondent had not filed its submissions.

Determination

37. The issues for determination are;
 - i. Whether the Claimant was suspended from employment by the Respondent.
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant's suit is statute barred.
 - iv. Depending on the answer to (iii), whether the Claimant is entitled to the reliefs sought.
38. As regards the 1st issue, the Claimant testified that as a result of the arrest and charge, he was orally suspended with no pay.
39. In his oral evidence in court, he testified that on May 8, 2013, he was told by the Operations Manager to hand over all company property as he was no longer an employee.
40. He also testified that his termination from employment was related to the theft at Giro Commercial Bank. The oral testimony in court made no reference to any suspension or handover of the Respondent's property.
41. Similarly, the written statement made no reference to the date of the alleged suspension nor by who.
42. Assuming it was on May 8, 2013, was it before or after the arrest of the Claimant by the police and for how long was it supposed to last?
43. Puzzlingly, why would the respondent suspend the claimant and prepare a show cause letter in the same month alleging desertion by the claimant. The court finds it inconceivable and improbable.
44. According to *Black's Law Dictionary* (10th Edition at page 1676), suspension means;

“The act of temporarily delaying, interrupting, or terminating something. The temporary deprivation of a person's privileges, especially of office or profession.”
45. From the evidence on record, it is unclear as to when, by whom and for how long the Claimant was suspended as there was no interruption of the sequences of events from arrest on May 8, 2013 to charging on May 9, 2013 to release after 14 days of being in remand.



46. The Claimant was emphatic that he did not return to the Respondent's offices at all even after acquittal on July 7, 2015 and according to the Respondent, he neither returned the Respondent's items nor collect his dues.
47. Guided by the mantra that he who alleges must prove and based on the evidence before the court, it is the finding of the court that the Claimant has on a preponderance of probabilities failed to establish that he was indeed suspended by the Respondent at any point.
48. As to whether termination of the Claimant's employment was unfair or he absconded duty, the starting point are the relevant provisions of the *Employment Act* on termination of employment and case law.
49. The *Employment Act* prescribes the gamut of the law on termination of employment and summary dismissal. The attributes of fair termination and summary dismissal are clearly articulated and have been applied and elaborated by courts of law consistently. The statute provides for notice, reason(s) for termination, burden of proof, summary dismissal, procedure and justification among others.
50. In a nutshell, for any form of termination of employment or dismissal to pass muster, it must be substantively justifiable and procedurally fair.
51. In *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, Ndolo, J stated as follows;
- “... 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 to effect the termination.”
52. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR.
53. Did the Respondent terminate the Claimant's employment or he deserted the work place?
54. *Black's Law Dictionary* (10th Edition) defines desertion as;
- “The wilful and unjustified abandonment of a person's duties or obligations.”
55. In *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), a South African court had this to say about desertion;
- “... desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or having left his or her post, subsequently formulates the intention not to return.”
56. Relatedly, the law is now settled that an employer who alleges that an employee has deserted the work place must prove the actions it took to ascertain his/her whereabouts and issue a notice to show cause to the deserting employee to make it clear that termination of employment was being contemplated. See *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR.
57. In the instant case, while the Claimant alleges that his employment was terminated by the Respondent on an unidentified date, the Respondent maintains that he absconded duty from May 8, 2016 and did not return to the work place at all and its attempts to contact him fell through and had to issue a notice to show cause letter dated May 31, 2016.



58. The Claimant admitted on cross-examination that after his arrest on May 8, 2016, that was his last day at the Respondent's place offices and was in remand at the Industrial Area, Nairobi for 2 weeks and was thus not at work.
59. Puzzlingly, the Claimant did not return to work place after he was released on bond to inform the Respondent that he was ready to continue working and did not do so at any other point.
60. The Claimant is inviting the court to believe that he was on an indefinite suspension from May 8, 2013 until he filed the instant suit. The court is not amenable to such invitation in light of the evidence on record.
61. Although the Claimant denied the postal address No 30397, Nairobi, RWI testified that the Respondent obtained the number from his documents on file. Could the Respondent have concocted the Claimant's postal address?
62. It is not in dispute that the Claimant did not report to the work place from the date of arrest and had not reported by May 31, 2013 when the notice to show cause was issued. It was immaterial that the Respondent was aware of the arrest. The Claimant adduced no evidence that the Respondent was the complainant. He confirmed on cross-examination Giro Commercial Bank was indeed the complainant.
63. Similarly, he was emphatic he could not return to the work place having been told that he was jobless.
64. Since the Claimant's arrest did not of itself terminate the employment relationship with the Respondent, he was still bound to honour his obligations under the contract of employment.
65. For the foregoing reasons, it is the finding of the court that the Respondent has established on a balance of probabilities that it made efforts to contact the Claimant to explain why he was not reporting to work and why disciplinary action could not be taken against him.
66. In sum, the Claimant deserted the work place from May 8, 2013 and the Respondent was entitled to dismiss him summarily having failed to respond to the notice to show cause.
67. As to whether the Claimant's suit is statute barred, the home port are the provisions of Section 90 of the *Employment Act* which provides as follows;
- Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (cap 22), no civil action or proceedings shall be based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury, or damage within twelve months next after the cessation thereof.
68. In this case, it is not in dispute that the alleged termination of employment took place either in May or June 2013 and the suit herein was filed on December 29, 2017 almost 4 years later ostensibly because the Claimant was awaiting conclusion of the criminal case.
69. What is a cause of action and when did the Claimant's cause of action arise?
70. A cause of action has been defined as an act on the part of the defendant, which gives the plaintiff his cause to complaint."



71. According to Lord Diplock in *Letang v Cooper* [1964] 2 ALL ER 929 AT 934,
- “A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”
72. When did the Claimant cause of action accrue?
73. In *Regent Management Ltd v Wilberforce Ojiambo Oundo* [2018] eKLR, the Court of Appeal held as follows;
- “To begin with, there is a clear distinction between internal disciplinary proceedings of an employer and criminal proceedings for the reason that, the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required . . . It is also settled that the institution of criminal proceedings is not a bar to civil proceedings on similar facts. See this court’s decision in *Geoffrey Kiragu Njogu v Public Service Commission & 2 others* [2015] eKLR. With the foregoing in mind, we concur with the majority decision of this court in *Attorney General & another v Andrew Maina Gitinji & another* [2016] eKLR that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal.”
74. The court is guided by these sentiments.
75. According to the Claimant, on May 8, 2013, the Operations Manager told them to hand over all company property as they were no longer employees of the company. The Claimant did not confirm having handed over and did not return to the work place thereafter even after conclusion of the criminal cause. At the conclusion of the cross-examination, the Claimant denied having absconded duty stating that the Operations Manager had informed them that they were jobless from May 8, 2013 and was paid for all the days worked till May 8, 2013 his last day at work.
76. On re-examination, the Claimant maintained that they had been told that they were no longer employees of the Respondent and insisted he could not go back to the work place.
77. According to the Respondent, the Claimant absconded duty and was summarily dismissed in June 2013.
78. The Claimant on the other had deemed himself jobless from May 8, 2013 and has not alleged that his cause of action arose on July 7, 2015 when he was acquitted and was equally claiming the unpaid salary for May 2013 and 3 months’ salary in lieu of notice.
79. Similarly, the suit herein is not one of malicious presentation for which he would have had to await conclusion of the criminal case.
80. From the evidence on record, it is clear that the Claimant’s cause of action arose in May 2013 but filed the instant suit in December 2017 after effluxion of the limitation period.
81. In sum, it is the finding of the court that the Claimant’s cause of action did not arise after the conclusion of the criminal case against him. He had a cause of action from the date he was informed that he was no longer an employee of the company in 2013.
82. As emphasized by the Court of Appeal in *Attorney General v Andrew Mwangi Gitinji & another* (*supra*), Section 90 of the *Employment Act, 2007* uses the term shall to limit actions after the limitation



period to protect both employer and employee from claims made long after “memories have faded, documents lost, witnesses dead or untraceable.”

83. In a nutshell, the claimant’s suit herein is statute barred and unsustainable and is accordingly dismissed.

84. Having so held, The claimant is not entitled to any of the reliefs sought.

85. Parties to bear own costs.

86. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF FEBRUARY, 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 March 15, 2020 and subsequent directions of April 21, 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

