



REPUBLIC OF KENYA



KENYA LAW
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**Momanyi v KK Security (Cause 152 of 2017)
[2023] KEELRC 235 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 152 OF 2017
JK GAKERI, J
FEBRUARY 7, 2023**

BETWEEN

WILLIAM MOMANYI CLAIMANT

AND

KK SECURITY RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on January 30, 2017 alleging unfair termination of employment.

The Claimant's Case is Pleaded as Follows;

2. The Claimant avers that he was employed by the Respondent as a Guard on January 28, 2009 till his employment was terminated on November 10, 2016.
3. It is the Claimant's case that he served the Respondent diligently and his last posting was the Kenya Red Cross.
4. The Claimant avers that on September 19, 2016, the Red Cross Transport Officer, Emergency Plus Services, Mr Amran Jumanne informed him that one of the ambulances that had been involved in an accident was vandalized on September 18, 2016 and parts stolen. The Claimant informed the Transport Manager that he did not witness the theft and on material date and was stationed at the exit gate used by ambulances as they exited the premises.
5. That he had handed over to the night guard who had not noticed anything even after inspecting the premises as required by the Standing Operating Procedures. That further interrogation took place on September 20, 2016, by Mr Noor, Mr Kilaka and Amran as well as the police under one, Mr Sakwa.
6. The Claimant avers that crime detectives visited the scene on September 21, 2016 and the Claimant recorded a statement with the police on September 22, 2016 and the Claimant and one Mr David



Ombuni were arrested at 10.00 am on September 27, 2016 and taken to Akila Police Station, later to the Lang'ata Police Station and then to Kibera Law Courts.

7. It is the Claimant's Case that before they took the plea, the Prosecutor informed them that the evidence was insufficient, that the matter would be referred to the Lang'ata Police Station for further investigation and they were taken back to the Lang'ata Police Station where his friend, Mr Anunda paid cash bail of Kshs 20,000/= for his release to report back on October 6, 2016.
8. That he sought medical attention at the PCEA Kikuyu Hospital on September 29, 2016 due to stress and lack of food.
9. The Claimant further avers that on September 30, 2016, he reported to the Respondent's Branch Office and one, Mr Njeru, the Assistant Operations Manager gave him a suspension letter dated of even date.
10. That on October 6, 2016, Mr Sakwa informed them that he would not proceed with the case and when they reported back on October 14, 2016, the cash bail was returned.
11. The Claimant further avers that he received a Discharge letter from Lang'ata Police Station on October 21, 2016 that the charges had been dropped.
12. That on October 16, 2016, he was invited for a disciplinary hearing and attended on October 17, 2016 with two union representatives. That he was requested to accept liability of Kshs 282,300/= to secure his job but declined and sought a hearing at the Head Office for fairness but was instead given a notice to attend a disciplinary hearing on October 25, 2016 on which date the hearing was deferred to October 27, 2016, on which day he requested for permission to leave and report on another date as he felt sick and needed to take lunch time medicine and visit the hospital for check-up.
13. That the hearing was deferred to 8th November and then to November 10, 2016 when the hearing took place in the presence of the Employee Relations Manager and 3 Union representatives but no witness gave evidence.
14. That a termination letter was issued after the hearing.
15. The Claimant prays for;
 - i. A declaration that the termination was unfair and invalid.
 - ii. 12 months compensation of Kshs 266,772/=
 - iii. Outstanding annual leave February – November 2016, Kshs 12,967.50.
 - iv. Service pay (2009 – 2016), Kshs 77,808.50

Respondent's Case

16. The Respondent filed a Reply to the Memorandum of Claim on March 17, 2017 admitting that the Claimant was its employee from January 28, 2009 until November 10, 2016 and was terminated from employment for gross misconduct. That he failed to report an incident of vandalism on September 18, 2016 after being informed of the same and failed to report to work on October 27, 2016 and was arrested and charged for theft.
17. The Respondent avers that the hearing was postponed at the instigation of the Claimant ostensibly to seek medical attention but provided no documents in support of the claim.



18. That the Disciplinary Committee found that the Claimant failed to report a theft incident and was not at the work place on October 27, 2016 and November 8, 2016 and the Respondent paid Kshs 282,300/= to the client for the loss.
19. The Respondent avers that termination of the Claimant's employment was effected in accordance with the law and he was given the right to appeal.
20. The Respondent prays for dismissal of the suit with costs.

Claimant's Evidence

21. On cross-examination, the witness confirmed that the last day at work was September 27, 2016 and duties included preventing unauthorised person from accessing the assignment site and loss of property. That the Respondent's Operating Procedures required him to make a physical check of the entire location whenever he reported for duty.
22. That on September 18, 2016, he took over from the night guard and handed over in the evening and there was nothing unusual.
23. It was his testimony that he was arrested for an offence committed on September 18, 2016 which he was unaware of.
24. That he did not respond to the warning letter dated September 26, 2016 for having abandoned the workplace and admitted that Red Cross property was lost and he was invited for a disciplinary hearing on October 17, 2017 and no decision was made to terminate his service.
25. That he was invited for another disciplinary hearing on October 25, 2016 but was not heard as he sought medical assistance in hospital as evidenced by the letter dated on even date and the hearing was deferred to October 27, 2016 but availed no evidence to that effect and in any case he did not attend the hearing on October 27, 2016.
26. That he attended a hearing on November 8, 2016 and November 10, 2016.
27. The Claimant denied having been notified of the theft.
28. That although he cleared with the Respondent, he was not paid terminal dues.
29. On re-examination, the Claimant testified that a total of 8 vehicles were vandalized and he was not at work from 25th October to November 8, 2016 as he was unwell.

Respondent's Evidence

30. On cross-examination, RWI, Norine Silwe testified that the incident took place on September 18, 2016 and the Claimant had reported on duty at 6.00 am stationed at the exit gate and was guarding the entire premises.
31. That Mr Joseph Omemo had handed over to the Claimant that morning.
32. It was her testimony that the Standard Operating Procedures empowered a security guard to refuse to take over duties if there was something unusual and was required to alert the In-charge immediately and another guard had taken over from the Claimant.
33. RWI testified that the suspension letter did not state that the Claimant had failed to report a theft. That the Respondent lost Kshs 282,300/= and the Red Cross terminated the contract with the Respondent.



34. The witness testified that the Claimant did not provide evidence of his sickness. It was her testimony that evidence of sick-offs was required by the Company.
35. That a hearing took place at the Branch level on October 11, 2016 and was postponed to November 10, 2016.
36. Finally, the witness confirmed that assignment at the gate included patrolling the compound.

Claimant's Submissions

37. The Claimant's counsel identified four issues for determination, ranging from failure to report the vandalism on October 18, 2016, absconding of duty from 27th October to 8th November, termination of services and entitlement to reliefs.
38. As to whether the Claimant failed to report the incident, it was submitted that since he was stationed at the gate, his duty was to man the gate and there were distinct security guards at the entry gate.
39. It was submitted that there was no CCTV footage to confirm the incident, or independent witness, or letter from Red Cross or photographs of the vehicles, repairs or payment.
40. That the Respondent fabricated the reasons for termination of the Claimant's services and was aware of his ill-health after the arrest and subsequent release.
41. That his acquittal was evidence of his innocence.
42. Reliance was made on the decision in *Robi Stephen Nyamohanga V Judicial Service Commission* to buttress the submission.
43. On the procedure of termination, it is urged that the Respondent did not comply with the prescribed procedure.
44. The Court of Appeal decision in *National Bank of Kenya V Samuel Nguru Mutonya* (2019) eKLR was relied upon to reinforce the submission that the Respondent failed to demonstrate the test established by the *Employment Act, 2007*.
45. Reliance was also made on the provisions of Section 43(1) of the Act and the Court of Appeal decision in *Kenfreight (EA) Ltd V Benson K Nguti* (2017) eKLR on the burden of proof.
46. It was urged that the Respondent had not discharged the burden as it had not proved the allegations.
47. The Claimant's counsel submitted that the Claimant was entitled to the reliefs claimed including costs which were not prayed for.

Respondent's Submissions

48. According to the Respondent, the singular issue for determination was whether termination of the Claimant's employment was unlawful.
49. Reliance was made on the provisions of Section 47(5) of the *Employment Act* and the decision in *Joseph Ouko Lwambe V Royal Garment Industries EPZ Ltd* (2018) eKLR to urge that the burden of proof lay on the Claimant to demonstrate that termination of services was unfair.
50. It was further submitted that the Claimant's conduct led to his termination from employment by failing to report a theft after he received information from Mr George Otieno and Joseph Omema.



51. The decision on *Barrack Musumba V Nyanza Sugar & Produce* (2017) eKLR was cited to urge that failure of the Claimant to report the incident rendered him eligible for dismissal from employment as he had a duty to prevent the theft.
52. The Respondent's counsel submitted that the Claimant absconded duty on the pretext of being unwell.
53. On procedural fairness, reliance was made on the decision in *Patrick Abuya V Institute of Certified Public Accountants of Kenya (ICPAK) & another* (2015) eKLR as well as the provisions of Section 41 of the *Employment Act* to urge that the Claimant was granted a fair opportunity to present his case before the Disciplinary Committee. The decisions in *National Bank of Kenya V Samuel Nguru Mutonya* (2019) eKLR and *Janet Nyandiko V Kenya Commercial Bank Ltd* (2017) eKLR were relied upon to exemplify the operations of Section 45 and 41 of the *Employment Act*.
54. Counsel submitted that the first warning was issued on September 26, 2016 and the Claimant did not challenge it and was notified of the hearing on October 17, 2016.
55. That the hearings on 11th and October 17, 2016 accorded the Claimant sufficient opportunity to defend himself.
56. The decisions in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and *George Okello Munyolo V Unilever Kenya Ltd* (2019) eKLR were relied upon to buttress the submission.
57. It was urged that the Claimant's action was devoid of merit.

Determination

58. The issues for determination are;
 - i. Whether the Claimant absconded duty or absented himself from duty without authority on October 27, 2016.
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
59. As to whether the Claimant absconded duty or absented himself from duty on October 27, 2016, the starting point is an explanation of the concept of desertion or absconding duty.
60. According to *Black's Law Dictionary*, 10th Edition, desertion means;

“The wilful and unjustified abandonment of a person's duties or obligations.”
61. The concept was also explained in the often cited South African court in *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA),

“... 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.
62. Needless to emphasize, desertion or absconding duty does not deny an employee the right to procedural fairness in termination of employment. (See *Felistas Acheba Ikatwa V Charles Peter Otieno* (2013) eKLR).
63. The Claimant testified that he was not at work place from September 27, 2016 to October 8, 2016.



64. It was his testimony that the hearing scheduled for October 25, 2016 was postponed to October 27, 2016 allegedly because of congestion. Although the Claimant adduced evidence of the invitation to the hearing on 25th October, he adduced no evidence on the postponement and did not attend the hearing on October 27, 2016.
65. Letters on record reveal that the Claimant had the Respondent's authority to visit PCEA Kikuyu Hospital on October 13, 2016 and October 25, 2016 at the Respondent's cost.
66. The Claimant further supplied credit slips from the hospital dated 24th and October 26, 2016 and none for October 25, 2016.
67. On October 26, 2016, the Radiologist at the hospital confirmed that the Claimant had a bone infection in the knee.
68. From the documents on record, the Claimant did not furnish the Respondent with any documentary of evidence of having been attended to at any hospital from October 27, 2016 to November 8, 2016.
69. RWI testified that all sick-offs had to be supported by evidence as matter of course and the Claimant furnished none.
70. Although the Respondent was aware of the Claimant's indisposition, it was the Claimant's duty to avail evidence of hospital visitations and treatment to the employer. He did not in this instance and had to be contacted by SMS on November 7, 2016 as his whereabouts was unknown and he was not on sick off or leave.
71. It is unclear to the court when, if at all, the Claimant had the intention of reporting back to his post.
72. From the foregoing, it is the finding of the court that the Claimant absented himself from the place of work while not on leave and without authority of the employer or evidence to demonstrate that he was attended to at any medical facility.
73. As regards termination of the Claimant's employment, the provisions of the *Employment Act* are explicit that for a termination of employment to pass muster, it must be proved that there was a substantive justification as provided by Sections 43, 45 and 47(5) of the Act and procedural fairness as provided by Section 41 and 45(2)(c) of the Act.
74. These requirements were aptly captured by Ndolo J in *Walter Ogal Anuro V Teachers Service Commission* (supra) 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 in effecting the termination.”
75. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR and *Kenafri Industries Ltd V Joseph Gitongo Njeru* (2016) eKLR among others.
76. One of the essential provisions of the *Employment Act* on termination of employment is Section 43(1) which imposes a duty on the employer to prove the reason(s) for termination. Section 47(5) on the other hand imposes a duty on the employee to justify the grounds for the termination of employment or wrongful dismissal.



Reason for termination

77. The letter of termination dated November 10, 2016 identifies the reasons for termination as;
- i. Failure to report a theft incident.
 - ii. Absenteeism from work from 27th October to November 8, 2016 and failure to produce medical documents signed by a duly authorised medical practitioner.
78. Relatedly, the letter made reference to the disciplinary hearing scheduled for October 27, 2016 which the Claimant testified about and which he admitted that he did not attend.
79. The letter also made reference to the amount the Respondent was liable to pay for the loss suffered by the client (The Red Cross).
80. The Claimant testified that he was not at the workplace from October 27, 2016 to November 7, 2016.
81. Having found that the Claimant indeed absented himself from the workplace without the employer's authority and did not notify anyone his whereabouts until contacted on November 7, 2016, coupled with the fact that he did not provide evidence of the treatment he received during the duration, the court is satisfied that the second ground of termination of the Claimant's employment was sustainable and had been established by the Respondent.
82. As regards failure to report a theft, although the Claimant admitted that the incident occurred on September 18, 2016 and was arrested thereafter and taken to Akila Police Station, and witness statements on record attest to the date of the occurrence.
83. The conflicting dates notwithstanding, evidence on record reveals that 8 motor vehicles parked within the Red Cross compound which the Claimant and others were guarding, were vandalised on September 18, 2016.
84. The Claimant was stationed at the gate on that day and according to his testimony, nothing unusual happened and he signed off at 6 pm after handing over to one Mr George Otieno whose uncontested statement states that on patrol, he noticed the vandalism and noted it in the OB, a copy of which was not provided by the Respondent and allegedly informed the Claimant. Mr Joseph Omemo who took over from the Claimant stated that he noticed the same and allegedly notified the Claimant. Although these statements were never subjected to cross-examination, they are part of the story of what may have transpired on that day. According to the Claimant, on the material day, he left his colleague one Mr Ombuna, when he proceeded for lunch. Mr Ombuna did not testify.
85. According to Sammy Ondigi, who was stationed at the main entrance from 6.00 am, everything was normal, that those at the entrance or exit did not patrol. This evidence was contradicted by the statements of George Otieno and Joseph Omemo. That he could not see what happened because he was alone at the gate.
86. Similarly, in his statement dated September 23, 2016, the Claimant stated that after lunch break, he saw Mr Wanje and Rama entering the tent erected close to the car wash and approached them and found them chewing miraa with soda and he left. It was the Claimant's evidence that he was stationed at the gate exclusively.
87. Instructively, the Respondent's Operating Procedures which the Claimant relied upon provide as follows;
3. Make a physical check of the entire location when you arrive on duty with the outgoing guard.



7. Check the entire post at least once in every 30 minutes.
88. These procedures among others leave no doubt in the court's mind that being stationed at the gate meant more than standing or sitting next to the gate and in this case there were motor vehicles parked in the compound.
89. In the court's view, the vandalism does not appear to have been a one-off affair but a deliberate activity carried out by an insider or outsider with connivance of the guards on duty at the time.
90. The fact that the Claimant was arrested and later discharged by the police is not conclusive evidence that he was not culpable. After all, criminal and civil matters have disparate standards of proof.
91. Strangely, the Claimant did not contest or rebut the contents of the warning letter dated September 26, 2016.
92. From the foregoing, the court is satisfied that the Respondent has on a balance of probabilities established that the Claimant failed to report an incident involving vandalism of motor vehicles in the compound he was guarding on September 23, 2016.
93. In sum, the court is satisfied and finds that the Respondent had valid reasons to terminate the Claimant's employment.

Procedure

94. In *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal was unambiguous that;

“A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination . . .”
95. Similar sentiments were expressed in *National Bank of Kenya V Samuel Nguru Mutonya* (2019) eKLR.
96. The specific tenets of procedural fairness have been elaborated upon in several decisions of this court such as *Loice Otiemo V Kenya Commercial Bank Ltd* (2013) and the Court of Appeal in *Postal Corporation of Kenya V Andrew K Tanui* (2019) eKLR among others.
97. Documentary evidence on record reveal that the Claimant participated in a disciplinary hearing on October 11, 2016 but no conclusion or recommendation was made by the Committee. Another hearing took place on October 17, 2016 where the charges had reduced to one. From the record, it is unclear as to what the Claimant actually stated and the hearing was inconclusive.
98. Evidence suggested that a further hearing was to take place on November 8, 2016 but did not and took place on November 10, 2016.
99. It was unclear what the charges were, what the Claimant stated and the findings of the Committee.
100. In the absence of minutes of the hearing conducted on November 10, 2016, the court is at a loss as to what transpired and how the decision to terminate the Claimant was arrived at.
101. The “Hearing Form” dated October 11, 2016 has two charges against the Claimant and states that the Claimant

“Confirmed that the client's vehicles parts were missing and was stolen on Sunday September 18, 2016.



He denied that he was ever told by the fellow security officers that the lights had been removed . . .”

102. Paragraph 6 on the summary of evidence, main points stated as follows;

“Witness statements indicate that he was informed of the items missing but never took an action.”

103. The “Hearing Form” dated October 17, 2016 stated as follows;

“The SO confirmed that indeed the incident happened whereby the incident happened and 8 vehicles were vandalized. The incident was reported to the Red Cross Management on September 27, 2016. The incident was reported to the police for further investigation.”

104. The foregoing could not have been a summary of the employee’s response to the allegations as the opening line of the paragraph states.

105. From the documents on record, it would appear that the Respondent did not give the Claimant a notice to show cause why disciplinary action should not be taken against him for the allegations made and demand a response. This omission denied the Claimant an opportunity to respond to the allegations in writing and urge his defence in a verifiable manner.

106. Relatedly, the notice of invitation to the disciplinary hearing dated September 25, 2016 made no reference to the Claimant’s right to be accompanied by an employee of his choice.

107. More significantly, from the evidence on record, it is clear that the Respondent relied on the statements made by other security officers to find the Claimant culpable. The makers of the statements did not adduce evidence at the disciplinary and were unavailable for questioning by the Claimant. Similarly, copies of the statements were not availed to the Claimant.

108. Finally, the Respondent did not avail evidence on how the disciplinary process was concluded and a decision to terminate the Claimant’s employment arrived at.

109. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probabilities failed to prove that it accorded the Claimant a fair opportunity to defend himself against the allegations, as contemplated by the provisions of Section 41 of the *Employment Act, 2007*.

110. On reliefs, the court proceeds as follows;

- i. Having found that termination of the Claimant’s employment was unfair for want of procedural fairness, a declaration to that effect is hereby issued.
- ii. Outstanding annual leave February to November 2016, 10 months

111. Although the Respondent provided copies of the Claimant’s leave application forms for 2010, 2012, 2013 and 2014, it did not provide evidence of the Claimant having proceeded on leave in 2015 and 2016. The Claimant is awarded leave pay for 10 months.

- iii. Service pay

112. The Claimant did not avail evidence of his entitlement to service pay at 15 days for each completed year of service.

113. Moreover, the copy of his payslip for September 2016 show that he was making NSSF contributions and is thus not entitled to service pay by virtue of Section 35(6)(d) of the *Employment Act*.



- iv. 12 months compensation for unfair termination
114. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to the discretionary relief prescribed by Section 49(1)(c) of the *Employment Act*.
115. In arriving at the level of compensation, the court has taken into consideration the following;
- i. The Claimant was an employee of the Respondent for about 7 years 9 months which is neither too long nor too short and had no warning letter until September 2016. He was arguably a diligent employee.
 - ii. There is no evidence on record that the Claimant wished to continue in the Respondent's employment.
 - iii. The Claimant substantially contributed to termination of his services by his conduct.
 - iv. The termination letter gave the Claimant 7 days to appeal the Committee's decision but he did not exercise. He did not exercise the right of appeal.
116. In the circumstances, the court is satisfied that the equivalent of two (2) month's salary is fair.
117. In conclusion, judgement is entered in favour of the Claimant as against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unfair.
 - b. Equivalent of two (2) month's salary.
 - c. Outstanding annual leave from February to November 10, 2016.
118. There shall be no Order as to costs or interest as none was prayed for.
119. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH 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 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 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

