



Kenya National Private Security Workers Union v Wells Fargo Limited (Cause 955 of 2016) [2023] KEELRC 644 (KLR) (14 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 644 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 955 OF 2016
JK GAKERI, J
MARCH 14, 2023**

**BETWEEN
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT
AND
WELLS FARGO LIMITED RESPONDENT**

JUDGMENT

1. The Claimant initiated this claim by a Statement of Claim filed on 24th May, 2016 alleging unfair dismissal. That the grievant was employed by the Respondent on 27th January, 1989 as a Security guard and was later promoted to Supervisor and eventually to Crew Commander at ksh 31,354/= . It is averred that the grievant performed his duties honestly and diligently until his employment was terminated on 30th April, 2015 when it was alleged that vehicle C51 was found stationary outside Fargo House without a Chase Car.
2. The Claimant further avers that the grievant was issued with a summary dismissal letter on 30th April, 2015 and a disciplinary hearing was held on 18th March, 2015. That the panel was biased and the grievant was not properly heard or represented.
3. The Claimant further avers that the grievant appealed on 7th May, 2015 and reported the dispute to the Labour Office on 11th May, 2015 and a Conciliator was appointed on 18th June, 2015.
4. That on 24th September, 2016, the Conciliator recommended that the grievant's dismissal be reduced to normal termination.
5. The Claimant prays for;
 - i. A declaration that the grievant's dismissal was wrongful and unfair.
 - ii. One month's salary in lieu of notice.



- iii. Service/gratuity ksh 322,000/=
- iv. 12 months compensation.
- v. Costs of the suit and interest.

Respondent's case

6. The Respondent admits that it employed the grievant and earned the salary pleaded as at the date of termination, but deny that the grievant was a diligent employee.
7. The Respondent avers that the Claimant's employment was terminated because he declined to follow instructions issued by the Supervisor and was rude.
8. That on 14th March, 2015, the Respondent VIT Manager mr Henry Mwangi found a motor vehicle under the grievant's command parked at the Red Cross parking and on inquiry was informed that they were waiting for a Chase car. That he instructed the grievant to drive back to the Respondent's premises for pairing up with Chase car before leaving the premises but the grievant took his time to comply with the directive even after another driver had been asked to request the grievant to return to the Respondent's premises.
9. That when the grievant was asked about the breach of VIT Procedures, he stated that he had done nothing wrong and if the Manager thought he had done something wrong, he was free to dismiss him. The VIT Manager assigned the grievant's vehicle to a different crew and requested the grievant to meet him and the General Manager, VIT mr Njogu Gachagua in the office.
10. That when asked about the unauthorised stopover, which was unprocedural, the grievant arrogantly stated that it was neither the first nor was there anything special on that day stating as follows; "Nyinyi watu kama mnataka kunifuta fanyeni haraka, hii kazi sio yenu hata nyinyi ni wafanyi kazi na mtafutwa siku moja."
11. The Respondent further avers that the matter was reported to the Human Resource Manager who interviewed witnesses and collected written statements on the incident and a notice to show cause was issued to the grievant whose contents the grievant denied and was invited to a disciplinary hearing and was informed of the right to be accompanied by a representative of his choice and the Claimant attended the hearing in the company of one mr Jairus Shamalla of the Claimant union.
12. That witnesses who had heard the grievant on that day corroborated the account of the VIT Manager, mr Henry Mwangi on the conduct of the grievant.
13. That the Respondent's top management reviewed the disciplinary hearing and resolved that the Claimant's employment be terminated and the letter of summary dismissal was issued informing the grievant that he had the right to appeal which he did and was invited for the appellate hearing at which the grievant was accompanied by mr Chrispinus Okhupe.
14. The Respondent avers that the evidence against the grievant notwithstanding, the grievant showed no remorse and insisted on his innocence and the many years of service which according to the appeals committee was not an excuse for the insubordination.
15. That the conciliator did not fault the process of termination other than the recommendation that the dismissal be converted to a normal termination which the Respondent rejected as the conciliator had not found unfairness in the disciplinary process.
16. The Respondent prays for dismissal of the suit with costs.



Claimant's evidence

17. The Claimant's written statement dated 24th May, 2016 rehashes the contents of the Statement of Claim.
18. In his oral evidence, the grievant testified that on 14th March, 2015, he had two drivers and they were proceeding to Equity bank and the Chase car was blocked at the gate and he stopped on the side of the road to await it.
19. The written statement had no such detail. That the VIT Manager had blocked the Chase car and calling them to stop but he did not respond to the Manager's call.
20. On cross-examination, the witness confirmed that he had no proper representation at the disciplinary hearing but the invitation letter had informed of the right to have a representative and had one mr Shamalla, a Union Dispute Officer.
21. That he signed the Minutes on 27th March, 2015 and did not raise the issue of any inadequacy in the representation at the meeting.
22. The Claimant testified that he did not disobey the Manager's instructions and returned the motor vehicle. He confirmed that the committee was informed that he took long to turn back to the office. He denied having been rude. That he was on the road and his witness mr Shamala appeared to support the Respondent's case at the hearing.

Respondent's evidence

23. RWI, mr Ayieko Onyango's written statement rehashes the contents of the Memorandum of Response.
24. On cross-examination, the witness testified that he joined the Respondent in 2015 and relied on the Respondent's records as most of the witnesses had left the Respondent company.
25. It was his testimony that the Respondent did not issue a warning letter to the grievant. He confirmed that mr Irungu was a senior driver and witnessed the occurrences on the material date.
26. On re-examination, the witness testified that the grievant admitted the mistake but did not apologise or show any remorse at any point.

Claimant's submissions

27. According to the Claimant union, the issues for determination were whether;
 - i. The grievant's dismissal was wrongful, illegal and unfair.
 - ii. The Claimant was entitled to the reliefs sought and
 - iii. Who should bear the costs.
28. On the first issue, the Claimant submitted that the Respondent gave the specific reason for the dismissal.
29. Reliance was made on the provisions of Section 43 and 47(5) of the *Employment Act*, 2007 to urge that the employer was required to prove the reason for termination and justify the ground for termination.
30. The Claimant further submitted that prior to termination, the grievant had not been warned.



31. The provisions of Section 41 of the *Employment Act* were relied upon to underscore the essence of procedural fairness in termination of employment.
32. That the alleged misconduct was beyond the grievant's control and it was not the first time it had occurred.
33. That as the Crew Commander, he stopped when he realized that the Chase car was not behind and that was when he was instructed to go back to the office.
34. That the Respondent relied on hearsay evidence in alleging that the grievant was disrespectful.
35. The Claimant further submitted that if the Respondent was genuine, the occupants of the said car would have faced a similar consequence which was not the case.
36. Reliance was made on the sentiments of Ndolo J. (incorrectly cited as Maureen Onyango J.) in *Walter Ogal Anuro v Teachers Service Commission* to underline the essence of substantive justification and procedural fairness in termination of employment and urge that the grievant's dismissal from employment did not pass the fairness test.
37. As regards reliefs sought, reliance was made on the provisions of Section 49(1) of the *Employment Act* to urge that compensation was discretionary not mandatory and the parameters to be taken into consideration in determining the quantum of compensation.
38. Finally, the decision in *Swaleh David v Premier Cookies Ltd* (2021) eKLR was relied upon to urge that for a termination of employment to pass muster, it must be grounded on a valid and fair reason and the procedure relied upon must have been fair.

Respondent's submissions

39. The Respondent's counsel identified three issues for determination, namely;
 - i. Whether there were valid grounds for termination of the greivant's employment.
 - ii. Whether proper procedure was followed before terminating the grievant.
 - iii. Whether the grievant is entitled to the prayers sought.
40. As to whether there were valid grounds for the grievant's dismissal from employment, it was submitted that the Claimant union had conceded that there was a valid reason for the grievant's dismissal but pleaded that it ought to be converted to a normal termination for purposes of gratuity and was therefore estopped from pleading otherwise.
41. The Court of Appeal decision in *Daniel Njuguna Muchiri v Sugar Bakery Ltd* (2019) eKLR was relied upon to reinforce the submission.
42. It was further submitted that from the minutes of the disciplinary hearing, it was evident that;
 - i. The evidence of the VIT Manager (mr Henry Mwangi) was corroborated by mr Michael Irungu and mr Njogu Gachagua.
 - ii. The Grievant testified but did not adduce corroborative evidence and
 - iii. The grievant's witness admitted that the grievant had been insubordinate.



43. That the allegation of insubordination and refusal to obey instructions were proved as he took over 20 minutes to turn around the vehicle after he was instructed to proceed back to the office yet he was a few metres away and blamed the driver yet he was the Crew Commander.
44. It was urged that the Respondent had verifiable grounds for dismissing the grievant summarily. That the offence committed by the grievant warranted summary dismissal under Section 44 (4)(d) and (e) of the *Employment Act*, 2007.
45. Reliance was made on the decisions in *Dede Esi Annie Amanor Wilks v Action Aid International* (2014) eKLR and *Boniface Simiyu Makoe v Kongoni River Farm (Star Division)* (2020) eKLR to urge that Respondent had a justification for the grievant's summary dismissal.
46. As regards the procedure employed by the Respondent, the Respondent submitted that it issued a notice to show cause, invited the grievant to a disciplinary hearing and he was accompanied by a union representative, defended himself and signed the minutes.
47. To the allegation that the minutes were not a true reflection of the proceedings, it was submitted that the grievant and the witness signed the minutes and the witness did not raise the issue during the hearing of the appeal and had another witness and did not raise the issue during reconciliation or in his pleadings. Similarly, the witness Mr Shamalla did not testify in court.
48. On the reliefs sought, the Respondent submitted that the notice pay was untenable since the grievant was summarily dismissed.
49. That the claim for gratuity was also untenable by reason of the *Regulation of Wages Order*, 1998.
50. That the grievant was not entitled to the compensation as the dismissal was fair in substance and form.

Analysis and determination

51. The issues for determination;
 - i. Whether termination of the grievant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
52. As regards termination of the grievant's employment, parties adopted opposing positions. While the Claimant submits that the termination was unwarranted for want of a valid reason and fair procedure, the Respondent submitted that it had a reason to terminate the grievant's employment and afforded him sufficient opportunity to be heard.
53. Needless to emphasize, the provisions of the *Employment Act* address various aspects germane to termination of employment such as notice, reason(s), justification of termination, burden of proof and procedure. The essence of these provisions was summarised by the Court of Appeal in its decision in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR.
54. Section 45 of the *Employment Act* provides the basic infrastructure on fair termination of employment as follows;
 1. No employer shall terminate the employment of an employee unfairly.
 2. A termination of employment by an employer is unfair if the employer fails to prove: –
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason –



- i. related to the employee's conduct, capacity or compatibility or
- ii. based on the operational requirements of the employer; and
- c. that the employment was terminated in accordance with fair procedure.

55. In their construction of the relevant provisions of the *Employment Act*, this court and the Court of Appeal have been categorical that for a termination of employment to pass the fairness test, it must not only be substantively justifiable but also procedurally fair.

56. The foregoing was skilfully captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

“For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

57. The learned judge proceeded to explain the essentials of each of the above requirements.

58. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (E.A) Ltd* (2017) eKLR.

59. In totality, the provisions of the *Employment Act* impose a heavy burden on the employer in matters germane to termination of employment and summary dismissal.

Reason for termination

60. It is common ground that on 14th March, 2015, the grievant who was a Crew Commander had parked the lead car C51 on the road outside Fargo House ostensibly awaiting the Chase car as there was congestion in the yard. According to mr Michael Irungu, the jam at the exit consisted of about 4 vehicles and that was when he was found by mr Henry Mwangi.

61. From the evidence on record, it is unclear for how long the grievant had been on the road before mr Henry Mwangi found him at about 8.00 am.

62. It is also not in contest that the grievant and his crew were directed to return to the office for pairing but did not do so immediately and another person had to be sent to communicate the message but the grievant took time to return to the yard.

63. Surprisingly, the grievant led no evidence that the Chase Car eventually arrived or returned to the yard with C51. The allegation in oral testimony that the Chase Car was blocked at the gate was unsubstantiated.

64. Similarly, the grievant testified that mr Mwangi was calling them to stop but he did not pick the call.

65. Evidence adduced also reveals that the grievant had indicated that the delay in returning to the yard was occasioned by the driver yet he was the Crew Commander.

66. Statements on record reveal that after the grievant returned to the yard around 8.30 am and according to mr Michael Kimenju, the grievant had a short meeting with mr Henry Mwangi in the presence of mr Michael Kimenju whose statement indicated that on being questioned about the parking on the road side without a chase car, the grievant exhibited anger and told mr Mwangi that it was not his first time to do so and could dismiss him if he so wished and left in a rude manner. This would appear to corroborate mr Mwangi's statement that the grievant shouted at him at the yard and a new crew commander named Joshua Kinama was requested to take the grievant's place.



67. Evidence shows that later on while in the office and in the presence of Mr Mwangi, Njogu Gachagua, Mr Fred Otieno, the Commercial Manager and Michael Karanja, the Planning Officer, the grievant when questioned about being aware that he had contravened CIT procedure by having a CIT vehicle parked on a road without a Chase Car, he responded that it was not the first time and repeated that if they wanted to dismiss him from employment, the duties they were discharging as employees were neither his nor those before him and all would be dismissed one day.
68. During the hearing on 18th March, 2015, the grievant admitted the charges and blamed the driver for the delay in returning to the yard where Mr Irungu witnessed the discussion between him and Mr Mwangi who confirmed having heard the grievant daring Mr Mwangi to dismiss him from employment.
69. According to the grievant's evidence at the hearing, the grievant understood that he was supposed to pair up with a Chase car but there was congestion in the yard. The witness beseeched the management to take into consideration the fact that the grievant had been an employee of the Respondent for 27 years.
70. The Committee found that the grievant was unrepentant, the evidence adduced notwithstanding.
71. From the evidence on record, it is unclear as to how long the Claimant took to return to the yard from the time he was directed to do so.
72. It is the finding of the court the allegation of failure to obey instructions was not substantiated.
73. What, however, is disconcerting is how the grievant reacted when questioned about the CIT vehicle being parked on the road without a Chase car. The uncalled for reference to having done it before and the statements on dismissal both at the yard and in the office which was witnessed by others was rude and intended to spite the Operations Manager and Management generally.
74. The grievant's response to the questioning depicted an employee who was convinced that he had done nothing wrong and the questioning was unnecessarily bothersome to him, a show of unbridled arrogance, disrespect and rudeness to the employer.
75. Although the grievant termed the evidence adduced at the hearing as false, he did not controvert it as the statements allegedly made by him were verbal and had been heard by others days earlier.
76. Similarly, the allegation by the grievant that the management was in a conspiracy to dismiss him from employment was unsupported by evidence as no other incident was cited to demonstrate the management's inclination to dismiss him.
77. More significantly, even if the management or the disciplinary committee had conspired to terminate his employment, its decision was reviewed by Mr Ashley Diyera, the Operations Director and Mr Gullen Gray the Group Operations Manager and the grievant had the right of appeal which he exercised, was heard on 15th May, 2015 and had witnesses.
78. Puzzlingly, the grievant did not raise the issue of conspiracy on appeal.
79. Finally, the conciliator did not fault the ground(s) of the grievant's dismissal from employment but was concerned about the Respondent's failure to take into consideration the grievant's long service and recommended that the dismissal be reduced to a normal termination for purposes of service gratuity.
80. Should an employee who dares the employer to dismiss him from employment also rely on the length of service as a mitigating factor?



81. It is intriguing that the grievant was found without a Chase Car outside the Respondent's compound and found nothing wrong with it and instead of being remorseful and let the matter pass actuated its evolution to a disciplinary matter owing to his intransigence on 14th March, 2015, a factor that was determinative of the appeal.
82. Section 44(4)(d) of the *Employment Act* provides that an employer may justifiably or lawfully dismiss an employee if "an employee uses abusive or insulting language or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer."
83. The evidence adduced in court leave no doubt that the grievant's behaviour on 14th March, 2015 was uncalled for, insulting and reprehensible and the Respondent acted accordingly.
84. The Claimant's submission that the termination letter was reticent on the reason(s) for termination of the grievant's employment though correct does not necessary mean that there was no reason. The letter makes specific reference to the grievant's conduct on 14th March, 2015 and the disciplinary hearing on 18th March, 2015 contents which the grievant did not contest on appeal. The first ground of appeal was that he did not commit any offence and should not have been dismissed. The notice to show cause had two charges namely; failure to follow instructions of the VIT Manager and being rude to the VIT Manager in the presence of other officers. The grievant was at all material times aware of the charges facing him and responded to them in writing and at the hearing and on appeal and was thus aware of the reason(s) for the summary dismissal.
85. For the foregoing reasons, the court is satisfied and finds that the Claimant has on a balance of probabilities failed to demonstrate that the Respondent had no valid and fair reason to terminate the grievant's employment.
86. This finding finds support in the provisions of Section 43(2) of the *Employment Act* and the holding of the Court of Appeal in *Naima Khamis v Oxford University Press (E.A) Ltd (Supra)* as follows;

"It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract."

Procedure

87. As held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd (Supra)*, Section 41 of the *Employment Act* provides a mandatory and elaborate procedure to be complied with by the employer in the termination or dismissal of an employee from employment.
88. The specific requirements of the provision have been elaborated in legions of decisions of this court and the Court of Appeal.
89. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Court of Appeal held as follows;

"Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;



- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

90. The court is guided by these sentiments.
91. In the instant case, the Respondent issued a notice to show cause to the grievant on 16th March, 2015 and the grievant received the same on 17th March, 2015. The letter demanded a written explanation of the allegations by 1600 hours on 17th March, 2015 and the Claimant responded by an undated letter copied to the National General Secretary of the Union.
92. By letter dated 17th March, 2015, the Respondent invited the grievant to a disciplinary hearing scheduled for 18th March, 2015, the following day at 14.30 pm. The grievant received the letter at 14.00 pm. The letter was copied to the shop steward.
93. The Claimant attended the hearing in the company of mr Shamalla Jairus, the Unions Dispute Officer who made representations.
94. The grievant did not raise the issue of representation before the panel.
95. On 31st March, 2015, the report of the Disciplinary hearing was reviewed by the Head Office of the Respondent who did not find fault and in the process and affirmed the grievant’s dismissal from employment. The review panel was concerned that the grievant had shown no remorse at all and the representative had only pleaded for leniency.
96. After dismissal by the letter dated 30th April, 2015, the grievant appealed *vide* letter dated 7th May, 2015 and was invited for the hearing of the Appeal slated for 14th May, 2015 at 14.30 pm and was at liberty to be accompanied by a witness and he attended in the company of mr Chrispinus Okhupe who requested the Management of the Respondent to take into consideration the grievant’s many years of service.
97. The appeal was unsuccessful as the Claimant showed no remorse and had not asked for leniency.
98. Puzzlingly, on cross-examination, the grievant stated that he had no proper representation at the disciplinary hearing but similarly confirmed that the invitation letter had notified him that he was at liberty to bring a representative of his choice and attended the hearing with mr Shamalla Jairus. The Claimant made no effort to explain why in his view he had no proper representation at the hearing. This was a weighty statement that required supportive, evidence to sustain it.
99. Although the notice to attend the hearing was fairly short, the Claimant does not appear to have had any challenges with it and did not raise it nor explain who he had wished to invite as his witness. Such evidence would have buttressed his case on representation which implicates the overriding principle of fair hearing.
100. In the absence of evidence touching on time constraints and/or the witness, the grievant intended to invite other than the one he attended with, the court has no evidence on which to fault the disciplinary hearing at any stage.
101. More significantly, the grievant lodged an appeal and was invited for a hearing with the right to be accompanied by a colleague of his choice or a union representative.
102. The grievant had a 7 days notice of the appeal hearing and attended with a union representative.



103. For the foregoing reasons, it is the finding of the court that the Claimant has failed to demonstrate that the Respondent's dismissal of the grievant was carried out in contravention of the provisions of Section 41 of the Employment Act, 2007.
104. In the end, it is the finding of the court that the Claimant has failed to establish that dismissal of the grievant by the Respondent on 30th April, 2015 was substantively unjustifiable and/or procedurally unfair.
105. In the upshot, the Claimant's suit is unmerited and accordingly dismissed.
106. In the circumstances of the case, it is only fair that parties bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF MARCH 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

