



REPUBLIC OF KENYA



**Wekesa v Fidelity Security Limited (Cause 1939 of 2017)
[2023] KEELRC 585 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 585 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1939 OF 2017
BOM MANANI, J
MARCH 2, 2023**

BETWEEN

HUDSON SISIA WEKESA CLAIMANT

AND

FIDELITY SECURITY LIMITED RESPONDENT

JUDGMENT

Introduction

1. Until his termination from employment on May 15, 2015, the Claimant was working for the Respondent in the position of a security guard. The Claimant asserts that the Respondent's decision to terminate his contract of employment was without valid reason and in contravention of due process. Accordingly, he has filed these proceedings seeking compensation for unfair termination of his contract of service.
2. The Respondent has denied liability. According to the Respondent, the Claimant was negligent on duty a matter that led to his summary dismissal.

Claimant's Case

3. The Claimant avers that on the night of 13th April 14, 2015, the Respondent assigned him the duty of providing security at Sarova Panafric Hotel, one of the Respondent's clients. The Claimant avers that he was sent to this assignment together with other security guards. He, together with one Margaret, was assigned to guard the hotel's staff gate.
4. According to the Claimant, their role at the gate was to carry out body searches on staff coming in and out of the hotel premises. On entry, members of staff with baggage were required to deposit them at the gate.



5. It was the Claimant's evidence that whenever members of staff took out garbage from the hotel premises, there was an arrangement on searching the content of such garbage. It was his case that the garbage would be inspected at the disposal point outside the gate since there was not enough space at the gate to undertake the exercise.
6. In his evidence, the Claimant indicated that the Respondent had posted a security guard at the dumpsite whose work was to search the garbage once it had been unloaded. The purpose of the searches was to prevent members of staff from sneaking out with the hotel's property either when going to throw out garbage or when leaving for the day.
7. On the material date, the Claimant asserts that a member of staff walked through the gate with garbage for disposal at the dumpsite. The Claimant indicates that his colleague, Margaret searched the employee before the employee proceeded to the dumpsite. That shortly after, the said employee was apprehended with bottles of wine hidden in the garbage bags.
8. The Claimant's evidence on this issue is somehow conflicting. On the one hand he asserts that the duty to search garbage bags lay with the guard at the dumpsite, not the guards at the gate. On the other hand he states that the employee who had stolen the wine bottles was in fact searched by the Claimant's colleague at the gate, one Margaret.
9. It is the Claimant's case that this night incident resulted in his transfer to another assignment. Meanwhile, the Respondent's management summoned him for a meeting on April 18, 2015 during which he gave an account of what had transpired. The Claimant denies that this meeting was a disciplinary session.
10. The Claimant asserts that shortly after the meeting of April 18, 2015, he was issued with a letter terminating his employment. He states that he was neither given the reason for the decision nor taken through a disciplinary session.

Respondent's Case

11. On its part, the Respondent asserts that the Claimant was assigned to guard its client's property on the material night. That the Claimant failed to discharge this task when he allowed an employee of the client to sneak out wine bottles under his watch. That it was part of the Claimant's tasks to search employees to ensure that they did not illegally carry away property belonging to the Respondent's client.
12. The Respondent asserts that the incident dented the Respondent's image causing the client to demand that the Claimant be removed from the assignment immediately. That as a result, the Claimant was taken to another assignment.
13. The Respondent asserts that the Claimant was asked to give a written account of what had transpired on the material night. That in his self recorded statement, the Claimant acknowledged that the task of searching outgoing garbage was for the guards manning the staff gate and that they had failed to discharge this mandate.
14. The Respondent avers that it convened a disciplinary session on April 29, 2015 at which the Claimant was given a chance to explain his side of the story. That at the meeting the Claimant was represented by two shop stewards. It was the Respondent's witnesses' case that the parties had convened another session on the issue earlier on around April 18, 2015.



15. It is the Respondent's case that after the session of April 29, 2015, a decision was made to summarily terminate the Claimant's employment contract. That this decision was communicated to the Claimant through the Respondent's letter of May 15, 2015.
16. In the Respondent's opinion, it had a valid reason to terminate the Claimant's contract. The Claimant's conduct suggested either negligence on his part or complicity by the Claimant in the malpractice that led to the near loss of the Respondent's client's property. This conduct, according to the Respondent, amounted to gross misconduct for which the Respondent was entitled to summarily dismiss the Claimant. Further, the Respondent contends that the Claimant was heard on the matter in the presence of two shop stewards of his choice before the decision to dismiss him from employment was reached. As a result, his termination followed due process.

Issues of determination

17. The parties do not dispute existence of the employer-employee relation between them. What is in dispute is whether the contract was lawfully terminated and whether the parties are entitled to the reliefs sought in their pleadings. These two are the issues that I propose to determine in this decision.

Analysis

18. The Respondent asserts that the Claimant's contract of service was terminated on account of gross misconduct. This brings the dispute within the purview of sections 41, 43, 44, 45 and 47 of the [Employment Act](#). In order to analyze the matter appropriately, it is imperative that the law on termination on this ground is set out.
19. Under section 41 of the [Employment Act](#), an employer is entitled to terminate an employee's contract of service on grounds of misconduct, poor performance and or physical incapacity. However, before relieving the employee of his employment, the employer is obliged to: inform the employee of the grounds for the proposed decision in a language that the employee understands; permit the employee to respond to the grounds; and permit the employee to call witnesses in his defense.
20. The employer is expected to issue the employee with the requisite notice to terminate employment under section 35 of the [Employment Act](#). Alternately, he should pay the employee salary in lieu of the notice period.
21. Gross misconduct is expounded under section 44 of the [Employment Act](#). Any of the several grounds under section 44 (4) of the [Act](#) constitute gross misconduct for which the employer may summarily dismiss an employee. The concept of summary termination basically denotes the fact that the employer is entitled, in the premises, to dismiss an employee without notice or with less notice than is sanctioned by law.
22. Even though the employer has the right to summarily terminate an employee under section 44 of the [Employment Act](#), such employee is still entitled to the procedural safeguards provided under section 41 of the Act before his contract is closed. In particular section 41 (2) of the [Act](#) provides as follows:-

“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”



23. Where termination of employment has happened, the employer bears the burden of justifying the validity of the decision to terminate in terms of sections 43 and 47 of the *Employment Act*. The employee's evidential burden to demonstrate the illegitimacy of the termination is considered as discharged once the employee provides prima facie evidence showing that there has been a termination of the contract and that the facts point to some impropriety in the decision.
24. Section 45 of the *Employment Act* requires the employer to prove two things in order to discharge the burden of proof placed on him by section 43 of the Act. These are: that the reason informing the decision to terminate the contract of employment was a valid and fair reason; and that the employment was terminated in accordance with fair procedure. Absent these, the employer's decision will be rendered unfair and therefore unlawful.
25. In proving the reason for termination, the employer is entitled to rely on facts which caused him to entertain a genuine belief that a reason to validly terminate the contract had arisen. In this respect, section 43 (2) of the *Employment Act* provides as follows:-
- “The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
26. In my understanding, the essence of this provision is to permit the upholding of the employer's decision to terminate an employee's contract of employment where the decision falls within the band of decisions that another reasonable individual, faced with the same facts, would have made. This test has been cited with approval in a number of decisions including *Kenya Revenue Authority v Reuwel Waitbaka Gitahi & 2 others* [2019] eKLR. In the case, the court quoting Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642, stated as follows about the test:-
- “...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”
27. In the current case, the Respondent states that it terminated the Claimant's services because there was evidence that the Claimant was either negligent on duty or he had colluded with an employee of the Respondent's client to attempt to steal wine from the client. The Claimant denies the charges.
28. The evidence on record shows that it is true that an employee of the hotel sneaked out wine bottles from the Respondent's client's premises. The evidence also shows that these bottles were smuggled through the gate that the Claimant and some other guard were watching over.
29. The Respondent insists that it was the Claimant's responsibility to search employees as they left the hotel to ensure that they were not taking away unauthorized material. That this process included searching garbage bags that were being ferried by the employees for disposal.



30. On the other hand, I understand the Claimant to have reacted to the Respondent's case in two contradictory ways. First, he denied that the responsibility to search garbage bags fell on the guards at the staff gate where he was stationed. It was his evidence that this duty fell on other guards who were stationed at the dumpsite. According to the Claimant's further witness statement, the guard at the dumpsite on the material night and who ought to have searched the garbage bags was one Benson Musyoka. By this, the Claimant insinuates that the attempted theft nearly succeeded because of the failure of Benson Musyoka to execute his duties of searching garbage bags at the dumpsite.
31. Second, the Claimant appeared to admit that the duty to search garbage bags fell on the guards at the staff gate who included him. This is apparent from the Claimant's self recorded statement dated April 16, 2015. The Claimant admits having authored the statement in response to the attempted theft incident. It was produced in evidence.
32. In the statement, the Claimant states that it is guards at the staff gate who used to search garbage bags but from a special room just outside the gate. After the search, the staff would sign the garbage register and proceed to dump the garbage.
33. The Claimant admits that on the fateful night, the employee who is suspected to have smuggled out the wine indeed came to the gate with garbage bags. That the Claimant's co-guard, one Margaret searched the garbage bag before allowing the staff to dispose of the bags.
34. Apparently, this time round the Claimant took the position that he was not responsible for the attempted theft since the employee who smuggled out the wine was searched by the Claimant's co-guard at the gate but not the Claimant. As such, responsibility for the loss ought to be attributed to this other guard: not the Claimant.
35. These two statements by the Claimant are contradictory. One suggests that no garbage searches were to be conducted at the gate. Therefore, responsibility for the attempted theft lay elsewhere: with the guard who was assigned the task to search garbage bags at the dumpsite. The other suggests that the duty to search garbage bags lay with the gatekeepers. However, responsibility for the attempted theft lies with the Claimant's compatriot at the gate since she is the one who searched the culprit.
36. What is more, although in his further statement dated April 29, 2019, the Claimant categorically states that he was not required to search garbage bags at the gate, in his self recorded statement to the Respondent dated April 16, 2015, he states that searching of these bags was part of his responsibility. These contradictions can only mean one thing: that the Claimant was being less than candid on this matter.
37. The Respondent maintained that it was part of the Claimant's duty to search garbage bags at the gate. That on the material night, the Claimant and his compatriot at the gate, one Margaret, failed to discharge this function when they permitted an employee to sneak out wine bottles. That the Claimant's compatriot absconded duty after the incident.
38. In view of the wishy-washy manner in which the Claimant handled this critical aspect of the case, I believe that the version of evidence presented by the Respondent on the subject is the truthful one. I believe the Respondent's position that the Claimant and his compatriot failed in their duties either deliberately or negligently.
39. Did the Respondent have a valid ground to terminate the Claimant? With the evidence on record, I think that the answer to this question must be in the affirmative.
40. It is conceded that wine bottles were smuggled out of the Respondent's client's premises. It is conceded that this smuggling was done through a gate that was under the watch of the Claimant and a compatriot



of his. The court has found that the Claimant was required to search employees as they took out garbage from the hotel premises. The fact that an employee was able to sneak wine bottles out of the hotel can only mean that the Claimant and his compatriot either deliberately allowed it or were negligent in doing their work.

41. With this evidence, it is clear to my mind that the Respondent had genuine grounds to believe that the Claimant had committed an act of misconduct in terms of section 44 of the *Employment Act*. There was evidence pointing to either neglect of duty or complicity in crime both of which are grounds for gross misconduct.
42. The next question for determination is whether the Claimant's contract was terminated in accordance with fair procedure. As stated earlier, the procedure for terminating an employee for gross misconduct is stipulated under sections 41 and 44 of the *Employment Act*. Without doubt, such employee is not entitled to notice prior to the decision to terminate him, should the employer establish that there is sufficient evidence to point to gross misconduct by the employee.
43. However, the employee is still entitled to be notified of the transgression that he is accused of and be allowed a chance to respond to the accusations. During the disciplinary process, the employee is entitled to attend the meetings in the company of and be represented by a fellow employee or a trade unionist.
44. In the case before me both the Claimant and the Respondent agree that there was a meeting held on April 18, 2015 during which the issue of the attempted smuggling of wine bottles from the hotel on the night of 13th-April 14, 2015 was discussed. The Claimant admits that he was invited to this meeting and that he was asked to explain "the happenings of the material day." He asserts that he had not been notified that he had been accused of anything. Yet, in his Memorandum of Claim, he states that "he was summoned to a hearing to explain what had transpired."
45. What is critical is that the Claimant admits that two shop stewards attended the said meeting: one Ezekiel Wanyama and one Taabu. The Respondent's witness stated that these union officials attended the meeting as representatives of the Claimant. Indeed, this is what the law contemplates. At such sessions, Trade Union officials represent the interest of the employees and not the employer. The Claimant did not dispute the Respondent's assertion that the two union officials attended the meeting as representatives of the Claimant.
46. Although the Claimant remained ambivalent about the meeting of April 29, 2015, the record shows that at some point, both parties confirmed that there was a session on April 29, 2015 at which the issue was revisited. However, the Claimant argues that neither of the two sessions was a disciplinary meeting.
47. The law does not provide for the manner in which a disciplinary session contemplated under section 41 of the *Employment Act* ought to be conducted. The employer is only required to demonstrate that he notified the employee of the accusation and allowed the employee an opportunity to offer his response unhindered in the presence of a representative of the employee.
48. In the case before me, it is evident that the Claimant was notified of the matter under inquiry and required to respond to it in writing. Otherwise, it would be impossible to account for the Claimant's self recorded statement dated April 16, 2015. The statement is evidence that the Claimant had been asked to respond to matters arising from the incident of 13th-April 14, 2015. The statement gives a clear account of the issues that were under inquiry. On this basis, I am satisfied that the Claimant was notified of the accusations against him and had clear particulars of the accusations.



49. There is also evidence that two meetings were held on the issue under inquiry. The Claimant does not deny that he attended the meetings and that he was asked to account for the events of the night of 13th-October 14, 2015. Although the Claimant denies that the meetings were disciplinary sessions, he does not deny that a union official by the name Ezekiel Wanyama attended one of the meetings as the Claimant's representative as asserted by the Respondent's witness. In the premises, I am convinced that there was a disciplinary session which the Claimant attended in the company of a shop steward as required under section 41 of the Act and at which, he was offered an opportunity to account for what happened as he indeed admits in his evidence.
50. The Claimant's employment contract was terminated after these sessions. In view of the fact that he was heard on the matter in the presence of his representatives, I find that the Respondent terminated the Claimant's contract of service in accordance with due process.

Determination

- a. The court finds that the Respondent had valid reason to terminate the Claimant's employment and that the contract of service between the parties was terminated in accordance with due process.
- b. In the premises, the court holds that the current claim is without merit.
- c. Accordingly, the case is dismissed with costs to the Respondent.

Dated, signed and delivered on the 2nd day of March, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

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