



**Bisonga v Xfor Security Solutions Kenya Limited (Cause 1778 of 2017)
[2023] KEELRC 1029 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1029 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1778 OF 2017
K OCHARO, J
APRIL 27, 2023**

BETWEEN

DENNIS ONDUSO BISONGA CLAIMANT

AND

XFOR SECURITY SOLUTIONS KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated 1st September 2017, the Claimant instituted a Claim against the Respondent seeking the following reliefs:
 - a. A declaration that the Claimant's dismissal from the Respondent's service was unfair and unlawful and totally failed to follow the due process.
 - b. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totalling ksh273,000 with the interest thereon.
 - c. The Respondent to pay the costs of the suit plus interest.
2. The Memorandum of Claim was filed together with the Claimant's witness statement and a bundle of documents that he intended to place reliance on as documentary evidence in support of his claim.
3. Having been served with the summons to enter appearance, the Respondent entered appearance on the 24th October 2017 and filed a memorandum of reply on 1st December 2017 and later an amended Memorandum of reply on 17th January 2020. In it, the Respondent denied the Claimant's Claim and his entitlement to the reliefs sought.
4. Subsequent to the close of the pleadings, the matter was heard inter-partes on merit on the 4th May 2022.



5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents adopted as their documentary evidence.

The Claimant's Case

6. The Claimant avers that he came into the employment of the Respondents on or about the 31st December 2012 as a guard. He thereafter served the Respondent continuously and diligently, up until the 30th June 2015, when the employment was terminated. As at the time, his salary was ksh15,000 per month.
7. The Claimant contends on the 30th June 2015 when he reported to his station of work, he found new guards from another security firm there, guards /firm that had taken over the assignment that he was attached to. The Respondent's supervisor instructed him to go home, intimating that he could be called back when there was work. He was never called back nor communicated to by the Respondent. His relentless efforts to follow up the matter with the Respondent's office, yielded no fruits.
8. The Claimant asserted that by its action, the Respondent terminated his employment and that the termination was unfair, unlawful, and against the basic tenets of the Constitution, the Labour laws and the principles of natural justice in that; he had committed nothing wrong to warrant the dismissal, no notice was issued to him before the dismissal and that due process was ignored in haste to summarily dismiss him.
9. He contended that the unfair and unlawful termination by the Respondent, entitles him to the reliefs hereunder:
 - i. One month's salary in lieu of notice.....ksh15, 000.
 - ii. Unpaid/untaken leave for 1 year 15,000 x 3 years.....
.....ksh45,000.
 - iii. Unpaid /untaken public holiday for the entire period of
service..... ksh33,000.
 - iv. 12 months compensation for the unfair termination of
employment..... ksh180, 000.
10. The claimant strongly refuted the Respondent's claim that he absconded duty.
11. Cross-examined, the Claimant stated that at the time of separation, he was stationed at Bob Mill industries.
12. The Claimant reiterated that he didn't not at any time abscond duty.

The Respondent's Case

13. At the hearing, the Respondent's case was presented by Lenus Mwakio, its Human Resource Manager. It was his testimony that the Claimant was employed as a security guard. His salary was ksh 12000 per a month. The Claimant worked until 11th July 2015, when he absconded duty.
14. The witness testified that on the 22nd July 2015, the Claimant called him indicating that he was not able to reach the operations Manager, mr.Mwema, yet he wanted to return the uniform to the Respondent, as he was no longer its employee. Further that at the time, the Claimant was working at Orbit Chemicals, then the Respondent's client, and which company still remains its client.
15. The Claimant's employment was not terminated by the Respondent, he absconded duty.



16. When cross-examined, he told the court that the Claimant absconded duty, from 11th to 22nd July 2015. Put to him, the witness admitted that he had not placed before the Court any document inclusive the attendance register for the period 30th June to 11th July, to support the Respondent's case.
17. The witness stated that in his correspondences, he had indicated that the Claimant resigned from the Respondent's employment. He asserted that it is the Claimant who informed him so. He went further to state that they didn't issue him with a termination notice because he had already left the employment of the Respondent.
18. The Respondent never reported to the Labour officer that the Claimant had absconded duty.

The Claimant's Submissions

19. The Claimant filed his submissions on 10th June 2022 ventilating three issues for determination thus:
 - a. Whether the Claimant was guilty of absconding.
 - b. Whether the claimant was subjected to a fair disciplinary process prior to dismissal.
 - c. Whether the Claimant is entitled to the reliefs sought.
20. On the first issue, the Claimant submitted that section 43 of the *Employment Act* provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. The Respondent's witness admitted that the Claimant was not given any reason for termination. The termination was unfair. To buttress this submission, reliance was placed on the case of *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited* [2020] eKLR where it was held:

“I find no evidence of either desertion of duty or fair termination by the respondent. I thus return a finding that the termination of the claimant's employment was unfair both substantively and procedurally.”
21. Reliance was further placed on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the court held:

“.... 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.”
22. The Claimant further submitted that the Respondent didn't place any evidence before this court to support its assertion that he deserted duty, and that it did what the law required of it to do in a situation of an alleged desertion. To fortify this point, reliance was placed on the case of *Felistas Achecha Ikatwa v Charles Peter Otieno* [2018] eKLR where the court held:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”



23. On the second issue the Claimant submitted that if at all the Claimant was guilty of desertion, the Respondent ought to have subjected him through a fair disciplinary procedure. There is no evidence that he was taken through any disciplinary process, making the termination unfair. The Claimant relied on the case of *Donald Odeke v Fidelity Security Ltd* 2011 eKLR where the Court held:

“An employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.

I agree with the learned Judge and add that it does not matter what offence the employee is accused of. If the employee is not heard the termination is ipso facto unfair.”

The Respondent’s Submissions

24. Notwithstanding this Court’s directions regarding filing of written submissions, the Respondent didn’t. This judgment shall therefore be without the benefit of consideration of the same.

Analysis and Determination

25. From the pleadings, evidence on record as well as the submissions by the Claimant, the following issues present themselves for determination thus:

- a. Whether the Claimant absconded duty.
- b. If the answer to [a] above is in the negative whether the termination of his employment was fair and procedural.
- c. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant Absconded Duty

26. It was the Respondent’s position that the Claimant had deserted duty with no intention of reporting back to work. In *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), the Court differentiated desertion and absence without leave, thus–

“..... 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.”

27. It is now trite law that where an employer contends that the reason for the separation between him or her and his or her employee was as a result of the latter deserting duty, the employer so contending bears the duty to demonstrate, he or she, made efforts to contact the employee to get the reason why the employee was not presenting himself or herself for work. This Court agrees therefore with the holding in the case of *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR, thus:

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

28. The Respondent confirmed during cross-examination that he had nothing to prove that they called the Claimant over his desertion nor wrote him a letter on the same. Further the Respondent confirmed that they did not write any letter to the labour officer concerning the Claimant’s desertion of duty.



29. In the case of In [Joseph Nzioka v Smart Coatings Limited](#) [2017] eKLR Nduma J. observed and I agree that:

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

30. The court has not lost sight of the fact that the Respondent’s witness stated in his evidence under cross examination that in his correspondences he had alleged that the Claimant left the Respondent’s employment when he resigned. This leaves the court only to conclude that the Respondent’s evidence on the reason for the separation is contradictory.

31. By reason of the premises, this Court comes to a conclusion that the Respondent failed to discharge its statutory burden of proof under section 43 of the [Employment Act](#), - proving the reason[s] for the termination. The Respondent failed to demonstrate by evidence that the reason for the termination was actually the Claimant’s desertion of duty. In the upshot, I hold that the separation between the Respondent and the Claimant did not happen in the manner put forth by the Respondent but in the manner explained by the Claimant.

Whether the Claimant’s Termination was Fair and Procedural.

32. Section 41 of the [Employment Act](#) provides for the procedure that an employer contemplating to terminate an employee’s employment should follow. It is now trite that the procedure is mandatory and any deviation from it shall render the termination unfair.

33. In the case of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR the court held:

“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.”

34. The duty to prove that the procedural fairness was present in the termination of an employee’s employment always lies on the employer. In the instant matter, the Respondent blurred by the position that it had taken on the manner of separation, did not lead any evidence to demonstrate that the procedure contemplated under the above stated provision was adhered to. A legal burden is discharged by adduction of evidence, where none is adduced on the fact to be proved, it is never difficult to conclude that the burden wasn’t. I conclude that the Respondent failed to prove that the procedure under section 41 was followed. Consequently, by operation of the law, section 45[2] of the Act, the termination is found to have been procedurally unfair.

35. The Court of Appeal held in the case of [National Bank of Kenya v Samuel Nguru Mutonya](#) [2019] eKLR, as follows: -

“...to move and terminate without giving regard to Section 41 of the employment Act and its provisions, giving the Claimant a hearing in the presence of this representative, the termination became procedurally unfair... where an employer fails to abide with the procedural requirements of Section 41 of the [Employment Act](#), even where payment in lieu of notice is made immediately, such does not cure the procedural unfairness visited upon the Claimant”



36. In light of the premises brought out hereinabove regarding Section 43 of the *Employment Act*, and the conclusion by this Court on the Respondent's failure to discharge the duty that the law imposed on it therein, I am inclined to and I do, conclude that the termination of the Claimant's employment was substantively unjustified by dint of the provisions of section 45 of the Act.
37. In the upshot, I conclude that the Claimant's discharge from employment was both procedurally and substantively unfair and unlawful.

Whether the Claimant is Entitled to the Reliefs Sought.

a. One Month's Salary in Lieu of Notice.

38. The Claimant's employment was one that was terminable by a twenty-eight days' notice under the provisions of section 35 of the *Employment Act*. No doubt, the notice contemplated in the stated provision was never issued to the him. In the premises, pursuant to the provisions of section 35 as read together with section 36 of the Act, this Court awards the Claimant one month's salary in lieu of notice, ksh 13,400.

b. Unpaid/Untaken Leave.

39. The Claimant urged the court to grant him compensation for his unused leave days in the sum of ksh26,800. Under Section 28 of the *Employment Act*, the employee is bestowed with the right to annual leave. On the other hand, the employer is enjoined to allow the employee to proceed for the leave. Where the leave days are unutilized, the employer has to pay in lieu of the same. The Claimant entered the Respondent's service on 31st December 2012 and separated on 31th June 2015, a period of service of two years and six months. Section 74 of the *Employment Act* enjoins the employer to keep proper records concerning the employee including the leave days taken or not having been taken and the payment thereof. The Respondent's witness confirmed that he had no evidence to prove that the Claimant was ever paid his untaken leave. Consequently, his claim under this head was not rebutted. I hereby award the him ksh26,800 for the unpaid leave days.

c. Unpaid/Untaken Public Holiday for the Entire Period of Service

40. The Claimant further sought for compensation for what he termed "untaken/unpaid public holidays". I take this to mean that he was seeking for compensation for having worked during public holidays, working for which he was not paid. He claimed for a specific figure of ksh 33,000. Where an employee is caused to work on a public holiday or his rest day, he or she is entitled to payment at a rate double his or her wage rate in addition to his or her normal wage. I have keenly considered the claimant's payslip presented before the court as evidence, it is clear that thereon the items for overtime and public holidays are borne. The figures in my estimation appear to flow from a correct computation. By reason of this premise, I find that the Claimant is not entitled to any sum under this head.

(d) Damages for the Unfair Termination.

41. The Claimant sought for ksh 180,000 as compensation for unfair termination. The authority to grant this award is by dint of section 49 of the Employment Act, 2007 and the same is granted depending on the circumstances of each case. Having considered that the Claimant's termination was both procedurally and substantively unfair, I conclude that the Claimant is entitled to the compensatory relief and to the extent of 7 months' gross salary, thus ksh 93,800.



Who Should Bear the Cost of the Suit

- 42. The costs of this suit shall be borne by the Respondent.
- 43. In upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:
 - a. A declaration that the termination of the Claimant from employment was both procedurally and substantively unfair.
 - b. One month’s salary in lieu of notice..... ksh 13, 400.
 - c. Compensation for the unused leave days.....ksh 26,800.
 - d. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act..... ksh 93,800.
 - e. Cost of the suit.
 - f. Interest at court rates from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023

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OCHARO KEBIRA

JUDGE

In the presence of

Ms Omamo for the Claimant.

Mr. Mungut for the Respondent.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

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Ocharo Kebira

Judge

