



**Kilungu v Xfor Security Solutions Kenya Limited (Cause 1775 of 2017)  
[2023] KEELRC 1031 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1031 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1775 OF 2017**

**K OCHARO, J  
APRIL 27, 2023**

**BETWEEN**

**BENSON KIOKO KILUNGU ..... CLAIMANT**

**AND**

**XFOR SECURITY SOLUTIONS KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a Memorandum of Claim dated 1<sup>st</sup> 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 Ksh.442,920 with the interest thereon.
  - c. The Respondent to pay the costs.
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 24<sup>th</sup> October 2017 and filed a memorandum of reply on 1<sup>st</sup> December 2017 and later an amended Memorandum of reply on 17<sup>th</sup> 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 19<sup>th</sup> 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 was employed by the Respondents from 26<sup>th</sup> December 2014 as a guard where he served the Respondent continuously and diligently and his last salary was computed at Ksh.13,400 per month.
7. The Claimant contends that on the 31<sup>st</sup> December 2017 after completing the day's work, they were summoned by the Respondent's operations Manager and informed that their contracts had been terminated and consequently they were to return the Respondent's uniform as they awaited communication from their office.
8. The Claimant avers that he returned the uniform but was never called back to work. The Claimant avers that the Respondent's action of terminating his employment was unfair against the basic tenets of *the Constitution*, the Labour laws and the principles of natural justice in that; he had done nothing wrong to warrant the dismissal, no notice was issued to him before the dismissal and that the due process was ignored in haste to summarily dismiss him.
9. Due to the unfair and unlawful termination by the Respondent, the Claimant claims his terminal dues as tabulated hereunder:
- i. One month salary in lieu of notice.....Ksh.13,400.
  - ii. Unpaid/untaken leave for 1 year 13,400 x 2years.....  
.....Ksh.26,800.
  - iii. Overtime worked being Ksh.13,400 /30 x 1/8 ( Ksh 56 per hour x 4 hours x 30  
days x 12 month x 2 years x 1.5.....  
Ksh.241,920
  - iv. 12 months compensation for the unfair termination of  
employment..... Ksh.160, 000.
10. At the hearing the Claimant testified that he reported to work as usual where the Operations Manager called them to a parade and informed them that their assignment had been terminated abruptly and there was no work for them.
11. He did not abscond and had worked for the Respondent for three years. He was not at work in the month of February. The Respondent alluded that he was meeting with the dog handler. He was not in that section as he was not a trained dog handler. The Respondent's version was untrue.
12. It was his testimony that he was not served with any notice to show cause or a call from the employer concerning the alleged abscondment.
13. When cross-examined it was his testimony that overtime was being paid during holidays and his pay slip had an item for the extra days. He was not at work in the month of February and it was not true that he had absconded duty.
14. On re-exam it was his testimony that the Respondent was not dutifully paying the overtime as they could pay some time and other times not. Overtime was for holidays.



### **The Respondent's case**

15. The Respondent's case was presented by Linus Mwakio its Human Resource Manager. He confirmed that the Claimant was their employee vide an employment contract earning Ksh.13,400 per month.
16. The Claimant was not terminated. There was a mail from the Operations Manager that there was allocation of duties but he was not present. He was being allocated duties because he was on duty.
17. The Claimant was handling dogs and was the one referred to in the email having deserted duties. The overtime and the untaken leave were unfounded. The pay slip show that the Claimant was paid for the overtime and the holiday at the month of occurrence.
18. When cross-examined he told the court that it was untrue that Collins had told them that their assignment had been terminated. The Claimant was working in February. He had not filed any document to prove that he was working in the month of February. Furthermore, he did not have an attendance register.
19. The Claimant deserted duties. The called him but he could not pick but there was no evidence in form of call log extract. They did not also inform the Labour Office.
20. It was his testimony that the claimant was a security officer and handled dogs. Overtime would be paid whenever he would work for the same.

### **The Claimant's submissions**

21. The Claimant filed his submissions on 14<sup>th</sup> June 2022 ventilating three issues for determination thus:
  - a. Whether the Claimant was guilty of absconding.
  - b. Whether the claimant was subjected through a fair disciplinary process prior to dismissal.
  - c. Whether the Claimant is entitled to the reliefs sought.
22. On the first issue the Claimant submitted that section 43 of the *Employment Act* provides that any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for the termination and where the employer fails to do so, termination shall be deemed to have been unfair. Furthermore, the Claimant was never furnished with the reasons for his dismissal.

Reliance was further placed on the case of *Walter Ogal Anuro vs 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.”

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. He was only dismissed without being accorded the due process. The Claimant relied on the case of *Donald Odeke vs 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. The Respondent having been given directions to file and serve its written submissions did not file 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. Whether the termination 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 *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited* [2020] eKLR, Onyango J. cited the decision in *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA) for the difference between desertion and absence without leave where the Court stated that –

“...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 good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work. This was held in the case of *Simon Mbiti Mbane v Inter Security Services Ltd* [2018] eKLR

“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. Similarly in the case of *Felistas Achecha Ikatwa vs Charles Peter Otieno* (2018) eKLR it was 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.”

29. The Respondent confirmed during cross-examination that he had called the Claimant over his desertion but had nothing to prove that he had called him. Further it was his testimony that he had not written a letter or informed the Labour officer over the Claimant’s desertion as required by the law.

30. In the case of In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed 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.”

31. The Respondent has not discharged its burden of demonstrating that the Claimant absconded or deserted his duties to warrant the summary dismissal from his employment. The Respondent did not present before this court any evidence in form of attendant register to support its assertion that the Claimant had absconded duties.

### **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 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 vs 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 Claimant reported to work as usual and after completing the day’s work they were called by the Respondent’s operations Manager who informed them that their contracts had been terminated abruptly and were to return the Respondent’s uniform and await being called by their office. The Respondent contended that the Claimant was not terminated but he was on duties during the month of February but had not produced any evidence in support thereof.

35. The Claimant was not given a notice to show cause or informed of the reasons for the termination. The divide and rule mechanism adopted by the Respondent were unjustified.

36. The Court of Appeal held in the case of [National Bank of Kenya -vs- 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.”

37. In the premise, I conclude that the termination of the Claimant from employment was procedurally unfair and unlawful in complete disregard of the mandatory provision of section 41 of the [Employment Act](#) 2007.

38. Section 43 of the [Employment Act](#) requires an employer in dispute like the instant one to prove the reasons for the termination, otherwise the termination will be deemed unfair by dint of the provisions of section 45. It is imperative to state that however that it is not enough for the employer to prove the reasons but must further demonstrate that the reasons were fair and valid as required by the provisions of section 45(2) of the [Employment Act](#) 2007.

39. The Respondent did not discharge this burden that the summary dismissal was pegged on a valid reason. In view of this, I have gained undoubtable impression that the termination of the Claimant from employment was substantively unjustified.



40. In the upshot, I conclude that the Claimant's summary dismissal from employment was both procedurally and substantively unfair and unlawful.

**Whether the Claimant is entitled to the reliefs sought.**

**a. One month salary in lieu of notice.**

41. Having noted as I have hereinabove that the termination of the Claimant from employment was both procedurally and substantively unjustified, the Claimant is therefore entitled to one month salary in lieu of notice. I hereby award the Claimant Ksh.13, 400 as salary in lieu of notice.

**b. Unpaid/untaken leave.**

42. The Claimant urged the court to award him unpaid leave of Ksh.26, 800. Section 28 of the *Employment Act* enjoins the employee to proceed for leave and any leave not taken should be paid for in lieu of having not taken. The Claimant entered the Respondent's service on 26<sup>th</sup> December 2014 and separated on 31<sup>st</sup> January 2017 being a period of two years of service. 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 had no evidence to prove that the Claimant was ever paid his leave entitlement. Consequently, I hereby award the Claimant Ksh.26,800 for the unpaid leave days.

**c. Overtime Pay.**

43. In the case of *Rogoli Ole Manadiegi vs General Cargo Ltd* (2016) eKLR the court held:

“The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee.”

44. I have keenly considered the Claimant's payslip presented as evidence in this matter. It is clear that thereon the items for overtime and public holidays are borne. The computation as regards the same in my view appears correct. By reason of this premise, I conclude that the Claimant failed to prove his Claim under this head. I Consequently decline to make any award in his favour

**(d) Damages for the unfair termination.**

45. The Claimant sought Ksh.160, 000 as compensation for the 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 7 months compensation for the unlawful termination thus Ksh.93, 800.

**Who should bear the cost of the suit.**

46. The cost of this suit shall be borne by the Respondent.

47. 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 salary in lieu of notice..... Ksh.13, 400.
- c. Unpaid/Untaken leave.....Ksh.26,800
- d. 7 months compensation..... Ksh.93, 800.
- e. Cost of the suit & interest.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of

Ms. Omamo for the Claimant.

Mr. Mugudi 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**OCHARO KEBIRA**

**JUDGE**

