



Ngaanga v Xfor Security Solutions Kenya Limited (Employment and Labour Relations Cause 1782 of 2017) [2023] KEELRC 1030 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1030 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1782 OF 2017**

K OCHARO, J

APRIL 27, 2023

BETWEEN

JUSTUS KATIWA NGAANGA CLAIMANT

AND

XFOR SECURITY SOLUTIONS KENYA LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated September 1, 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 Kshs 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 October 24, 2017 and filed a memorandum of reply on December 1, 2017 and later an amended Memorandum of reply on January 17, 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 May 19, 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 January 10, 2015 as a guard where he served the Respondent continuously and diligently earning Kshs 13, 400 per month.
7. The Claimant contends that he together with other security guards were summoned by the Operations Manager on January 31, 2015 where they were informed that their contracts had been terminated and were to return the Respondent's uniform as they await 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. By the premise of 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 - Kshs 13, 400.
 - ii. Unpaid/untaken leave for 1 year - Kshs 26, 800.
 - iii. Overtime worked being $(\text{Kshs } 13, 400 / 30 / 1/8(56 \text{ per hour}) \times 4 \text{ hours} \times 30 \text{ days} \times 12 \text{ months} \times 2 \text{ years} \times 1.5 = \text{Kshs } 241, 920$.
 - iv. 12 months compensation for the unfair termination of employment - Kshs 160, 800.
10. The Claimant testified that the Operations Manager told them that their service had been terminated and were to return the uniform. The Claimant told the court that he was not given any notice before the termination and had not absconded duty as asserted by the Respondent. He was further not heard by the Respondent before the termination.
11. When cross-examined, he told the court that the Respondent was not paying them overtime. They were also not being paid for the public holidays. Mr Collins was his supervisor and his assertion that he had absconded duty were not true.

The Respondent's Case

12. The Respondent confirmed having employed the Claimant as a security guard at a monthly salary of Kshs 13, 400 per month vide a contract of employment.
13. The Respondent contends that it was not in breach of any law when terminating the Claimant's employment as he wilfully absconded duty with no intention of going back again.
14. 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. The Claimant worked for three months then deserted his employment. He re-appeared in asking for re-employment.
15. DW1 testified that after being re-employed on request, he worked until February 10, 2017 and then deserted duty. The Claimant was being paid for overtime and public holiday whenever he worked.



16. When cross-examined he testified that he had not produced any attendance register. They did not deploy them via a letter.
17. He told the court that he had not adduced any evidence that they called him over his desertion. He further told the court that they did not write him any letter to his last known address nor to the Labour Officer.
18. On re-exam, he told the court that during the redeployment to the Clients there was no letter issued to the employees.

The Claimant's Submissions

19. The Claimant filed his submissions on June 24, 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.
20. On the first issue the Claimant submitted that the law on desertion is well settled and that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee resume duty. 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. For the second issue the Claimant submitted that section 43 of the [*Employment Act*](#) obligates an employer to prove the reasons for the termination of an employee's services and failure to do so the termination is unfair. Reliance was 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. It was submitted that section 41 of the Act stipulates that an employer shall accord the employee with a fair hearing prior to termination of his services. The Claimant relied on the case of [*Kenya Union of Commercial Workers & Allied Workers v Meru North Farmers Sacco Limited \[2013\]eKLR*](#) where the court held:

' Section 41 of the [*Employment Act*](#) is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.'



The Respondent's Submissions

23. The Respondent having been given directions to file and serve its written submissions did not file the same.

Analysis and Determination

24. 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

25. 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.'

26. 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.'

27. 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.

28. 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.'

29. 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.

Whether the Claimant's termination was fair and procedural.

30. 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.



31. 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.'
32. The Claimant was summoned by the Supervisor after finishing the work and informed that the services had been terminated. He was not given reasons for the said termination nor give any notice concerning his termination. The Summary dismissal was unjustified and unlawful against the mandatory provision of section 41 of the *Employment Act* 2007.
33. By reason of the above premise, I conclude that the termination of the Claimant's employment was procedurally unfair.
34. 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.
35. 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.

Whether the Claimant is entitled to the reliefs sought.

- a) One month salary in lieu of notice.

36. Having noted hereinabove that the termination of the Claimant from employment was both procedurally and substantively unjustified and the fact that the Claimant was not given one month notice before his termination, I hereby award the Claimant Kshs 13, 400 as salary in lieu of notice.

b) Unpaid/untaken leave.

37. The Claimant urged the court to award him unpaid leave of Kshs 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 January 10, 2015 and separated on 31st January 2017 being a period of two years of service. Section 74 of the *Employment Act* entitles 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 did not present any proof of the said payment other than denying the same. Consequently, I hereby award the Claimant Kshs 26, 800 for the unpaid leave days.

c) Overtime pay

38. In the case of *Rogoli Ole Manadiégi 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.'



39. 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.

40. The Claimant sought Kshs 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 Kshs 93, 800

Who should bear the cost of the suit.

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

42. 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 - Kshs 13, 400.
- c) Unpaid/Untaken leave - Kshs 26, 800.
- d) 7 months compensation - Kshs 93, 800.
- e) Cost of the suit & interest.

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

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OCHARO KEBIRA

JUDGE

In the presence of

Omamo for the Claimant.

Mr. Mugudi 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.

Ocharo Kebira

Judge

