



**Obaga v G4S Kenya Ltd (Cause 47 of 2020)  
[2023] KEELRC 1166 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1166 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 47 OF 2020  
AN MWAURE, J  
MAY 12, 2023**

**BETWEEN**

**ALBERT OBAGA ..... CLAIMANT**

**AND**

**G4S KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. The appellant has filed appeal via memorandum of appeal dated March 26, 2020.
2. The appellant avers he was aggrieved by the judgment of Hon Murage (MS) SRMA delivered on February 28, 2020 and in particular he avers that the trial magistrate relied on extraneous matters to arrive to her judgment.
3. He says the magistrate erred in failing to find that the applicant had proved his case on a balance of probability.
4. He says that the respondents did not produce any documents. He says other errors the trial magistrate made is to fail to appreciate no documents were produced by the respondent including employment contract and the photographic evidence produced was not properly filed. He further says the trial magistrate failed to consider their submissions but considered the respondent's submissions which were not relevant.
5. The appellant says the trial magistrate erred in failing to evaluate the evidentiary import of the evidence adduced and so committed a grave error of law and fact and therefore prays that the appeal be allowed and the judgment and decree delivered on February 28, 2020 be set aside. He also prays that judgment be entered against the respondents as prayed in the memorandum of claim dated January 15, 2019. Finally he prays that the respondents pays costs of the lower court and of this particular appeal.



### **Appellant's submissions**

6. The appellants avers that the accusation that led to the dismissal was as per the respondent's averment was supported by his employment contract and the code of ethics. They aver that the respondent did not produce the employment contract. Those are the documents that provided that sleeping on duty called for summary dismissal. The code of ethics was not dated or signed by the maker or sealed. It has no details of the employer.
7. The appellant says that the memo referred and dated August 24, 2018 referred to the code which code was disputed as it was not signed or sealed by the respondents. The memo was not available to the appellant in person. He says the code of ethics documents were not even produced in court and hence the three documents are not authentic and are of no evidential value to the case.
8. The appellant raised issues on the photograph produced alleging he was found asleep which he described as hearsay as the person who purported to take the photo one Mr Mambo did not give evidence.
9. The appellant also says there was no certificate of authenticity of electronic evidence signed by the responsible person for the computer where the document was produced. He therefore submits the photograph is unadmissible contrary to section 106(b) of the *Evidence Act*.
10. As for the disciplinary hearing he says he was only given 24 hours to prepare and not 2 days as indicated in the invitation form. He says he did not have sufficient time to prepare for his defence.  
He therefore submits that the learned trial magistrate erred in dismissing the appellants claim.

### **Respondent's submissions**

11. The respondent filed his submission dated February 24, 2023. The respondent briefly submitted that contrary to the appellant's submissions the respondent witness James Gachanja produced the exhibit during the trial and the court under Rule 21 of *employment and labour relations court(procedure) rules* can proceed to determine a suit on basis of pleadings, affidavits, documents filed and submissions presented by the parties.
12. As pertains to the issue of the photograph produced which the appellant submitted was unadmissible the respondent avers that the appellant should have objected to its production during the pre-trial conference. He says he cannot object to the same during submissions – (see the case of *Mwanabamisi Omar Mzee also known as Fatuma Mohamed Ali vs Chengo Kabindi & Another* (2018) eKLR.
13. The respondent says that as pertains to the evidence applied by the trial magistrate considered the photograph produced showing the appellant asleep on the job. The respondents submissions are that taking into account all evidence detailed herein the respondent reasonably concluded that the appellant slept on the job and that act compromises the security operations of the respondent and puts the life of the guard at risk.
14. As for the procedure followed the respondent says they complied as they issued him a notice to show cause and then took him through disciplinary hearing. He was informed the charge against him and he knew the same from the night of August 3, 2018 and August 4, 2018 to the date of the hearing August 9, 2018 and so had sufficient time to prepare for the same.
15. The respondent submits that claimants salary was kshs 14,421/- and 2,163/- house allowance and overtime would be paid when accrued. They deny his salary was Kshs 26,208/- as claimed.



16. They also pray that even if appellant is found to have been unlawfully dismissed he should be awarded no compensation or only one month compensation considering his habit of sleeping on the job.
17. The other prayer of one month in lieu of notice and unpaid leave are disputed as one appellant was summarily dismissed and secondly he has not demonstrated how he arrived at the unpaid leave. He was according to the respondent not entitled to severance pay as he was not terminated by redundancy.
18. The respondents urges the court to find the learned magistrate rightfully applied the facts and evidence before her and law and prays the appeal be dismissed with costs to the respondent.

### **Analysis and determination**

19. The issues for determination are to find if the trial magistrate erred as per the matters raised in the memorandum of appeal dated March 26, 2020. The overall issue is whether and all fours did the appellant prove his case on the balance of probability.
20. The facts raised were that on August 4, 2017 the claimant who was a security guard and had been assigned duties at the premises of British American Tobacco was found asleep while on duty. A photograph was taken purporting to be of the claimant sleeping and it was produced as evidence.
21. The court is of the view that the respondent should have done a better job since the main evidence is the purported photograph of the claimant. The photograph has no details like of the name and the date and time of the same. The way the photograph is presented can represent anybody and could have been taken at any time and any place.
22. The witness James Gacanja testified on behalf of the respondent. He testified that Mr Amon Mambo took a photograph of claimant sleeping on the job on the night of August 3 and 4, 2018 and gave the same to Mr Gacanja.
23. Considering this was very crucial evidence it would have been of paramount importance for Mr Amon Mambo to write a witness statement and testify concerning that photograph.
24. As it is, this seems to have been a casual manner of handling a serious matter because dismissing an employee summarily is serious and can have far reaching impact on the employee.
25. The said photograph having been a primary document and the main evidence in this case it was trite that the person who took it and printed it produce a certificate of authenticity of electronic evidence as provided in section 106(b)(4) of *evidence act* as read together with section 78 of the *Evidence act*. The person responsible for the computer should have produced certificate of authenticity which is signed in order to certify the qualification set out above. The certificate should describe the manner of creation and particulars of the device as provided in the aforesaid section 106BC2 of the *evidence act*.
26. The court did not find the aforesaid certificate and considering the other observations made about the photograph the court holds the reasons given by the respondent pertaining to the dismissal of the appellant were not proved on a balance of probability.
27. The commonly cited section 45(1) of the *employment act* provide that in order for an employer to terminate the employment of an employee he must give a valid reason. This valid reason is what is regarded in the case of *Walter Ogul Anuro vs Teachers service commission* (2013) eKLR as substantive justification.



28. The same authority buttresses the provisions in section 41 of the *employment act* which provide that mandatory procedure must be followed in conducting a hearing prior to terminating an employee. Section 41(1) of the *employment act* states:

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

29. The appellant was served with a notice on August 8, 2018 to appear for a disciplinary hearing on August 9, 2018. The court found the time given to the appellant was not enough to prepare his defence and to get a witness of his choice present during his representation.

30. Furthermore considering the long period the appellant had worked for the respondent close to twenty years and with no numerous reports of misconduct the appellant could have been given a warning instead of a summary dismissal. Falling asleep for a security guard is serious but may not be gross misconduct and that is why the court would have required the respondent to show compassion to the appellant and give him a warning.

31. Flowing from the above the court is persuaded by the authority cited by the appellant *Rebecca Maina & 2 Others vs Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR where court held:” in order for an employee to respond to allegations made against them the charges must be clear and the employee must be afforded sufficient time to prepare their defence...”

32. The court finds that the respondent did not prove it had a valid reason to terminate the claimant and as well the procedure they followed was flawed.

33. The court therefore finds the learned trial magistrate made an error in law and fact in the findings she made and the court therefore allows the appellant’s appeal.

34. The judgment and decree of the lower court delivered on January 28, 2020 is set aside and the appellant is given the following reliefs:

- a. One month salary in lieu of notice kshs 26,208/- gross pay as per annexed payslip
- b. Payment in lieu of leave for 3 years is not proved and so is declined.
- c. Damages for unlawful termination will be awarded at 12 months considering the long period appellant worked for the respondent 12x26208/-= 314,496/-
- d. This was not termination by redundancy and so severance pay is not applicable.
- e. Costs of the lower court case and costs of this appeal are awarded to the appellant.
- f. Total award is kshs 340,704/-.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**ANNA NGIBUINI MWAURE**

**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 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.**

**ANNA NGIBUINI MWAURE**

