



**Kenya National Private Security Workers Union v Granton Babz Security Limited
(Cause 1651 of 2017) [2023] KEELRC 1593 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1593 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1651 OF 2017**

SC RUTTO, J

JUNE 30, 2023

BETWEEN

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT

AND

GRANTON BABZ SECURITY LIMITED RESPONDENT

JUDGMENT

1. The claimant has brought the instant suit on behalf of the grievant, Nicholas Nyaremba Abara who it avers, was employed by the respondent on January 7, 2011. The claimant avers that the grievant worked diligently until January 17, 2016 when he was told that there was no job for him and he was thereafter ordered to handover his uniform without any reason whatsoever. According to the claimant, the grievant's termination was unlawful and unjustifiable hence it seeks inter alia; a declaration that the respondent's action of terminating the grievant from employment was illegal, unlawful, unfair and inhumane; underpaid wages, notice pay, compensatory damages, service pay, punitive damages and a certificate of service.
2. The respondent denied the claimant's averments that the grievant was terminated from employment. It avers that its client demanded that the grievant be changed but he refused to be reassigned duties and returned the company uniform to his supervisor. The respondent contends that the grievant left on his own accord without any word or letter. On this account, the respondent has asked the Court to dismiss the Claim and enter judgment against the grievant for one month's salary.
3. During the hearing which proceeded on January 26, 2023 and February 15, 2023, both sides called oral evidence.



Claimant's case

4. The grievant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He further produced the bundle of documents filed together with the claim as exhibits before Court.
5. He informed the Court that he was employed by the respondent as a security guard on January 7, 2011 at an initial salary of Kshs 7,000/= which he contended was below the stipulated government wage. He further stated that the respondent did not bother to pay him house allowance, standard overtime, public holiday and other statutory payments.
6. It was his evidence that he was terminated on 17th January, 2016 when he was absent from work for only one day as he was unwell. He further testified that he had asked for permission from his supervisor, Mr. Masinde. When he went back to work, the manager told him to return the uniform and then chased him away.
7. The grievant further stated in evidence that he was not issued with a warning and was not taken through a disciplinary hearing prior to his termination. It was his evidence that he was not paid anything including his salary for that month.
8. The grievant further avers that the respondent was uncooperative and refused to meet the claimant to resolve the matter amicably.
9. Closing his testimony in chief, the grievant asked the Court to allow the claim as prayed.

Respondent's case

10. The respondent called oral evidence through its Operations Officer, Mr. Nelson Eregae, who testified as RW1. At the outset, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
11. It was his evidence that while assigned duties at Edenville Estate courts, the grievant would occasionally abscond/neglect his duties to perform other tasks like washing cars thereby leaving his assignment unmanned hence causing a security gap in the assigned court.
12. RW1 further stated that the grievant would also refuse to report to work without giving any proper intimation to official authorities and always gave a deaf ear to verbal warnings. The grievant was summoned to the operations office in order to be assigned duties elsewhere after he was rejected by the client at Edenville Estate. However, he refused to heed the instruction and was absent from work for 19 days.
13. It was RW1's evidence that the grievant was not terminated from employment and that he vanished on January 13, 2016 after refusing to be assigned duties elsewhere. He never gave the respondent any notice nor did he give a resignation notice.
14. It was his further evidence that the grievant's negligence of duty damaged the respondent's reputation.

Submissions

15. It was the claimant's submission that the grievant was terminated wrongly and unlawfully without any proper reason. It was further submitted that the respondent evaded a legal obligation on their part to follow fair procedure before dismissing the grievant. That the respondent never made any effort to call the grievant for a hearing or serve him with a notice. In support of the claimant's submissions, the



cases of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR were cited.

16. It was the respondent's submission that the grievant was never terminated from employment and that he has not discharged his legal burden of proof. Citing the case of *Sea bolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the respondent maintained that the grievant deserted his duties.

Analysis and determination

17. I have considered the pleadings on record, the evidentiary material before me and the rival submissions, and find the issues falling for determination as being: -
 - a. Whether the grievant absconded duty or was unlawfully terminated from employment; and
 - b. Is the grievant entitled to the reliefs sought?

Abscondment of duty or unlawful termination?

18. The main issue in contention is the manner in which the employment relationship was severed. Whereas the grievant states that he was verbally dismissed from employment on 17th January, 2016, the respondent contends that he vanished on 13th January, 2016 after refusing to be assigned duty.
19. In support of its position, the respondent exhibited a report prepared by RW1 indicating the days the grievant was absent from duty. It is not clear why the respondent would exhibit the said record and leave out the primary document, for instance, the attendance register wherefrom the said information would ordinarily be extracted.
20. Being the employer in this case hence the custodian of employment records and the one alleging desertion on the part of the grievant, the onus was on the respondent to prove his desertion. Coupled with the foregoing, the grievant's former supervisor by the name Mr. Masinde was not called in as a witness seeing that he was the one on the ground and further given that the grievant had alleged that he had given him permission to seek medical attention.
21. If indeed, the grievant deserted duty for 19 days as alleged by the respondent, one wonders why it did not take disciplinary action against him noting that absence from work without permission is a ground for summary dismissal under section 44(4) (a) of the *Employment Act*, 2007.
22. As has been held severally by this court, it is not sufficient for an employer to allege that an employee deserted duty. The employer alleging desertion ought to demonstrate the steps undertaken in ascertaining the whereabouts of such an employee. Ordinarily, such an employer is expected to put the concerned employee on notice that it is considering termination of the employment contract on account of the said desertion.
23. In this regard, the respondent was under an obligation to prove the grievant's desertion of duty and more importantly, that it notified him that it was considering terminating his services on that account.
24. In this case, despite the respondent stating that the grievant absconded work without notice, there was no concrete evidence to support this fact and what's more, there was no evidence that it subjected him to the process contemplated under section 41 of the *Employment Act* upon noting his desertion.
25. As the respondent was categorical that it never terminated the grievant's employment, it is evident that he was still within its control hence there was no reason why it failed to subject him to due process. With an employment relationship spanning close to five years, the channels of communication were



established and the respondent must have had means of reaching the grievant, but seemingly, it made no attempt to contact him. It simply let him go without much ado.

26. It is against this background that I find that the evidence on record tilts in favour of the grievant that he was unfairly terminated from employment and that the said termination was outside the parameters established under Section 45 of the Employment Act, 2007. That said, I now turn to consider the reliefs available to the grievant.

Appropriate Reliefs

27. As the Court has found that the grievant's dismissal was unfair, he is awarded one (1) months' salary in lieu of notice and six (6) months' gross salary as compensatory damages. This award has been informed by the length of the employment relationship.
28. The claimant has further averred that the grievant's salary was underpaid contrary to the prevailing minimum wage order at the time. From the evidence, the grievant was stationed in Kiambu hence pursuant to the relevant Legal Notices stipulating the minimum wage, it is evident that he was paid below the statutory minimum rates payable to workers in his category noting that the respondent did not dispute that he was paid the sum of Kshs 7,523.00 per month.
29. The claim for service pay is declined as the grievant testified that he was contributing to the National Social Security Fund. Therefore, this places him within the ambit of section 35(6) of the Employment Act hence he is not eligible for service pay.
30. As the employment relationship was not disputed, the grievant is entitled to a Certificate of Service.

Orders

31. In the end, I enter Judgment in favour of the claimant against the respondent and the grievant is awarded: -
- a. One (1) month's salary in lieu of notice being the sum of Kshs 12,221.00.
 - b. Compensatory damages in the sum of Kshs 73,326.00 which is equivalent to six (6) months of his gross salary.
 - c. Underpayments being Kshs 144,132.00 calculated as follows; (Kshs 9,572.00-Kshs 7,523.00 x 52 months) + (Kshs 12,221.00 -Kshs 7,523.00 x 8 months).
 - d. The total award is Kshs 229,679.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
 - f. The claimant shall also have the costs of the suit.
32. The respondent shall issue the grievant with a Certificate of Service within 30 days from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.

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STELLA RUTTO

JUDGE

Appearance:



For Claimant Ms. Wanyama

For the Respondent Ms. Ochieng

Court assistant Abdimalik Hussein

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

