



**Muma v G4S Kenya Limited (Appeal 34 of 2020)  
[2023] KEELRC 1510 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1510 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 34 OF 2020  
B ONGAYA, J  
JUNE 16, 2023**

**BETWEEN**

**NYABUTO MUMA ..... APPELLANT**

**AND**

**G4S KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The appellant filed the statement of claim in the trial Court on January 23, 2019 through Ondabi & Company Advocates. The appellant's case was that the respondent employed him as a night guard on September 4, 1999 and he worked for 18 years until August 24, 2018 when he was given a termination letter. He alleged the termination was unfair and unlawful because he was not given sufficient reasons and laid down procedure had not been followed. He claimed and prayed for judgment against the respondent for:
  - a. A declaration that the termination was unlawful and illegal.
  - b. Payment of a sum of Kshs 4, 877, 559.00 including:
    - i. Salary up to age of 60years  $26, 200 \times 12 \times 12 =$  Kshs 3, 772, 800.00.
    - ii. Gratuity  $Kshs 26, 200.00 \times 18 =$  Kshs 471, 600.00.
    - iii. 3-months' salary notice payment  $Kshs 3 \times 20, 600 =$  Kshs 61, 800.00.
    - iv. Salary August 2018 = Kshs 61,800.00.
    - v. Terminal benefits Kshs 300, 000.00.
    - vi. Overtime  $2 \times 8 \times 12 \times 18 \times 30 =$  Kshs 103, 630.00.
    - vii. 9 public holidays per year for 18 years at Kshs 873, 337.33 per day = Kshs 141, 479.00.



- c. An order to pay leave days earned but not utilised.
  - d. Interest on the sum amount at 25% from the date of termination till full payment.
  - e. Issuance of certificate of service.
  - f. In alternative the termination decision be rescinded by the respondent and the claimant reinstated to salary pay roll.
2. The respondent filed the memorandum of response on March 1, 2019 through Hamilton Harrison & Mathews Advocates. The respondent pleaded that it employed the appellant on permanent basis from 2000 and denied the appellant earned Kshs 26, 200.87 per month. His basic salary was Kshs14, 421 plus house allowance Kshs 2, 163.15 and also earned overtime as it accrued. The appellant was terminated on account of sleeping while on duty thus failing to perform the guarding duties as assigned. The respondent further pleaded that the show cause letter was issued on August 23, 2018 and attended hearing in presence of union representative. By letter dated August 24, 2018 he was notified of the summary dismissal. The respondent pleaded as follows:
- a. No basis to award salary up to the age of 60 years.
  - b. Dismissal was under Protective Security Services (Wage) Order and thereby the appellant lost the gratuity.
  - c. Notice pay was not due because of the summary dismissal.
  - d. August 2018 salary was processed and paid.
  - e. Terminal dues as claimed were not particularised and were denied.
  - f. Overtime was paid as earned.
  - g. Work on any public holiday was duly paid.
3. The respondent further stated that the termination was fair because the appellant was afforded a fair hearing, reasons for termination were justified, the reasons amounted to gross misconduct, and due procedure had been followed. The respondent prayed that the suit is dismissed with costs.
4. This is a first appeal. The role of the Court is to reevaluate evidence and make conclusions one way or the other bearing in mind that the Court did not by itself take the evidence. The trial Court findings will not be interfered unless misdirection in material respect is established.
5. The appellant has raised the grounds of appeal that the trial Court erred in law and fact as follows:
- a. By failing to appreciate requirements of section 45 of the *Employment Act* in arriving at her findings.
  - b. By failing to appreciate that the appellant having been issued with a warning letter, he was thereby punished and continued to work for 4 days, and there was no reason or ground to dismiss him again upon the same allegation.
  - c. By failing to appreciate that the appellant was not accused of any offence for which he was summarily dismissed as he had already been punished for the alleged offence of sleeping at the Nairobi Hospital on August 14, 2018 when he was working as a security guard.



- d. By upholding the dismissal, the trial Court allowed the respondent to breach the rules of natural justice as the appellant was punished twice over the same allegation of being found asleep while on duty.
  - e. There was no provision under Employment Act that the employer could initiate review or appeal of its own decision.
  - f. By finding the appellant was found sleeping on duty at Nairobi Hospital at Galleria on the night of 14.08.2018 yet no evidence was tendered in that respect.
  - g. By failing to appreciate provisions of Section 41 (2) of the Employment Act, 2007 as applicable to the appellant's case.
6. The appellant prayed for orders:
- a. That the appeal is allowed and the Court to make own findings.
  - b. In alternative the matter is heard de novo by another court.
  - c. Costs of the appeal.
  - d. Any other order the Court may deem just.
7. The Court has considered the parties' respective submissions.
8. The 1<sup>st</sup> and main issue in the appeal is whether the trial Court erred by failing to appreciate that the appellant wrote admitting the charge of being found asleep on duty, the respondent imposed a warning, and thereafter, upon the same charge, a disciplinary process ensued leading to the summary dismissal. The evidence on record for both the respondent and appellant shows that was precisely the case. The Court finds that once the warning was imposed, the respondent became functus officio and its power to punish the appellant upon the spent charge became exhausted incapable of being revived as was purportedly done in the appellant's purported and subsequent disciplinary process. By that finding the Court finds that all grounds of appeal as urged for the appellant must succeed with exception of ground (f) because the claimant by his own written admission had shown indeed he was found sleeping while on duty on the night of 13<sup>th</sup> crossing to August 14, 2018. The Court has perused the trial Court's judgment and finds that indeed the learned trial Magistrate erred as that crucial point on double jeopardy was not addressed at all as it was skipped.
9. The Court has considered the trial Court's judgment on remedies and returns as follows:
- a. The Court has found that indeed the termination was unfair and unlawful in procedure and substance. The mitigating factor in favour of the respondent per section 43 of the Act was that the claimant had admitted to being found asleep while on duty. A factor in favour of the claimant is that he had a long clean service of 18 years. Accounting for the two factors to balance justice for parties the claimant is awarded 6-months' compensation making Kshs 16, 584.00 (house allowance plus basic pay per payslip of June 2018) x 6 = Kshs99, 504.00.
  - b. As the summary dismissal was unfair and unlawful, under the Protective Security Services (Wage) Order, gratuity is awarded at 16, 584 x 18 = Kshs 298,512.00.
  - c. Notice payment in lieu of termination notice is awarded at Kshs 16, 584.00.
  - d. The other remedies claimed for and prayed for the appellant are declined per findings of the trial Court and the submissions as urged for the respondent.



10. The appellant has significantly succeeded in the appeal and is awarded costs of the suit.

In conclusion the appeal is hereby determined with orders:

- a. The trial Court's orders in the judgment and subsequent decree dismissing the appellant's suit with costs is set aside and substituted with orders as follows.
- b. The respondent to pay the appellant a sum of Kshs 414, 600.00 (less PAYE) by September 1, 2023 failing interest to run thereon at Court rates from the date of this judgment till full payment.
- c. The respondent to pay the appellant cost of the suit in the trial Court.
- d. The declaration that the termination of the claimant's employment was unlawful and illegal.
- e. The respondent to deliver the certificate of service in 30 days.
- f. The respondent to pay the appellant's costs of the appeal.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16<sup>TH</sup> JUNE, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

