



Kibet v G4S Kenya Limited (Employment and Labour Relations Appeal E145 of 2022) [2023] KEELRC 1776 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1776 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E145 OF 2022**

**SC RUTTO, J
JULY 14, 2023**

BETWEEN

NGENO EMMANUEL KIBET APPELLANT

AND

G4S KENYA LIMITED RESPONDENT

(Being an appeal against the Judgment of Hon. Gathogo Sogomo Principal Magistrate, Nairobi, delivered on 29th July, 2022 in Employment and Labour Relations Cause Number 08 of 2020)

JUDGMENT

1. The appellant instituted a suit at the Chief Magistrate’s Court at Milimani being ELRC No 8 of 2020. It was his case that he was employed by the respondent as a dog handler from December, 2007 until April 17, 2019 when his employment was unlawfully and unfairly terminated. According to the appellant, his termination was unlawful, unfair, motivated by the desire to get rid of him and generally amounted to an unfair labour practice contrary to article 41 of the *Constitution*. As a consequence, the appellant sought against the respondent the sum of Kshs 906,537.06 being one month’s salary in lieu of notice, unpaid salary for 17 days in April, 2019, accrued leave for 12 years, service pay for 12 years and compensation for unfair termination.
2. Opposing the Claim, the respondent filed a Statement of Response through which it denied that the appellant discharged his duties with indisputable professionalism, diligence and loyalty. The respondent further averred that the appellant’s employment was terminated for gross misconduct and fundamental breach of his duties. It contended that it had valid grounds to terminate the employment of the appellant and that it took into consideration his representations during the disciplinary hearing against the evidence presented and the gravity of his misconduct before taking the decision to terminate his employment. To this end, the respondent asked the Court to dismiss the claim with costs.



3. Upon evaluating and analyzing the evidence on record, the trial Court delivered its Judgment on July 29, 2022, thereby dismissing the appellant's Claim with costs.

The Appeal

4. The appellant was aggrieved by the Judgment of the trial Court hence lodged the instant Appeal through which he raises the following three grounds: -
 1. The learned magistrate erred in law and in fact by finding that the appellant was fairly and lawfully terminated by the respondent and further in dismissing the whole of the claim.
 2. The learned magistrate erred in law and in fact by reaching at a conclusion on liability that is contrary to the evidence before him, the witnesses' testimonies and the appellant's submissions.
 3. In all the circumstances of the case, the findings of the learned magistrate were characterized by misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion.

The Submissions

5. The Appeal was canvassed by way of written submissions. On February 21, 2023, parties took directions on the filing of written submissions. Both parties complied and I have considered their respective submissions.
6. On his part, the appellant submitted that the allegation that he abandoned his place of work was never proved as no evidence or testimony of the witness of him abandoning the site was placed before Court. He further maintained that his termination was indeed unfair, unlawful and discriminatory and that the reasons advanced for the said termination were not plausible.
7. It was the appellant's further submission that an analysis of the proceedings of the disciplinary committee points to unfairness, a predetermined decision to terminate, discriminate and oppress him. According to the appellant, the mere invitation to defend oneself in a disciplinary hearing does not amount to a fair hearing.
8. The respondent on the other hand, submitted that at the disciplinary hearing held on April 11, 2019, it rightfully reached the decision to terminate the appellant's employment after considering all the statements and representations made. The respondent further posited that the learned trial Court rightfully applied the facts, considered the evidence before him and the law and arrived at the correct finding. To this end, the respondent urged the Court to uphold the trial Court's finding that the appellant's termination was lawful and fair.

Analysis and Determination

9. This being the first appellate Court, it has the duty to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. Such was the determination in *Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, where it was held that: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

10. In this regard, I am enjoined to revisit and retrace the record in order to arrive at my own independent conclusion noting that I did not see or hear the witnesses as they testified.
11. Upon considering the record before me, the opposing submissions, as well as the law, the following issues stand out for determination by the Court: -
 - a. Whether the respondent proved that it had a justifiable reason to terminate the appellant’s employment;
 - b. Whether the dismissal of the appellant was in line with fair procedure; and
 - c. Whether the remedies sought by the appellant lie in law.

Justifiable Reason?

12. Section 43(1) of the *Employment Act* (Act) places the burden of proving the reasons for termination on the employer and in default, such termination is rendered unfair. In addition, Section 45 (2) of the Act, renders a termination of employment unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee’s conduct, capacity or compatibility; or based on its operational requirements.
13. In the instant case, the appellant’s summary dismissal was communicated through a letter dated April 17, 2019. The said letter reads in part: -

“We make reference to the disciplinary hearing held on April 11, 2019 where it was found that;

1. You absented yourself from the place appointed for the performance of your work without permission or properly being relieved leading to loss of customer’s property.
2. You performed your duties negligently by tying the company dog while you had gone to run your personal errands.

The above action constitute (sic) gross misconduct and this letter therefore, is to advice that you have been dismissed from (sic) company service with effect from the date of this letter as per the Employment Act 2007 section 44.

Your terminal dues will be paid as follows...”

14. Essentially, the respondent was dismissed from work on grounds of absenteeism from his appointed place of work and negligence in the performance of his duty. It was not in dispute that the appellant’s dismissal was connected to the theft of the metal grills/drain covers from a compost pit at the commonwealth war graves where the appellant had been assigned duty.
15. It was also not in dispute that the appellant was on duty together with one Sylvester Kioko on the night of March 30, 2019 having taken over duty from James Mukhebi. It is also apparent that following the theft incident, the respondent conducted investigations in which several persons were interviewed. These included the appellant, Sylvester Kioko and James Mukhebi. Notably, the three were assigned duty at the commonwealth war graves where the theft of the drain covers took place.



16. According to the statement of James Mukhebi who was the day guard, he detected the incident on March 31, 2019. That he realized this after he took over duty from the night team. According to him, the drain covers were there when he left duty the previous evening. On the other hand, Sylvester stated that it was his first day of duty at the site and that the appellant left the site at midnight and went to pick a commonwealth staff who resides within the premises. The appellant on his part, stated that he was not aware that there were drain covers on the compost pit.
17. The respondent in its investigations concluded that the night guards were not alert at the time the incident occurred hence the matter was escalated to disciplinary.
18. At the disciplinary hearing, Sylvester Kioko who was on the night duty with the appellant maintained that it was his first day at the assignment and that he (appellant) received a call from somebody he claimed was a commonwealth staff, requesting to be picked outside the compound. That the appellant tied the dog and rode out of the compound. Sylvester further stated that the appellant left duty before the day guard arrived and left him to handover duty to the day guard whom he had not met nor taken duties from on March 30, 2019.
19. The appellant stated that he was not aware of the theft but admitted that he took over duty from James Mukhebi on March 30, 2019 and handed over duty to him the following morning on March 31, 2019. Notably, during cross examination he testified that he was not obliged to handover duty to James Mukhebi.
20. Testifying under cross examination the appellant admitted that it is James Mukhebi who noticed the theft and informed him via cell phone the following day on March 31, 2019. He further admitted that it was possible to see through the gaps in the fence.
21. From the foregoing, it is apparent that the theft incident took place on the night of March 30, 2019 when the appellant was supposed to be on duty. It is also apparent that he failed to detect the theft as it was his day colleague who made the discovery the following day. The appellant stated that the place where the drain covers were located, were outside his area of coverage and patrol. This does not seem plausible given that his colleague whom he took over duty from, detected the same. Further, the respondent had to reimburse its client the cost of replacement of the drain covers. What this means is that the drain covers were located within an area where the respondent's guards were required to watch over and the appellant being on duty, it was his duty to watch over the said area.
22. In the case of *Kenya Revenue Authority vs Reuwel Waitbaka Gitahi & 2 others* [2019] eKLR, the Court of Appeal found that the standard of proof applicable in employment disputes is on a balance of probability and not beyond reasonable doubt, and all the employer is required to prove, are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. The learned Judges further opined as follows:

"The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondents had committed gross misconduct in their employment and had done acts which were substantially detrimental to KRA. It is not for the court to substitute its own 'reasonable grounds' for those of the employer."
23. Similarly, and being guided by the finding in the aforesaid case, I hold that the respondent only needed to prove that the reasons for the appellant's dismissal, are those reasons it genuinely believed to exist at the time. In this case, the reasons touched on the appellant's diligence and vigilance while at work.



24. Noting that the appellant was employed as a security guard, it was essential that he observes diligence and vigilance in the performance of his work at all times. In my considered view, the circumstances of this case do not portray the appellant as being a diligent and vigilant employee. I say so because, first, a theft took place at a site he was supposed to be guarding at the material time and second, he failed to detect the theft hence at the time he left duty, he was unaware of the theft. Coupled with that, he even testified that he was not aware of the existence of the drain covers.
25. Faced with this scenario, the respondent had a fair and valid reason to take disciplinary action against the appellant. This was coupled by the statement of the appellant's colleague Sylvester, who told the respondent that the appellant had left his work station at midnight.
26. In addition, the actions or commissions of the appellant had a cost implication on the respondent as it had to reimburse its client the costs of replacing the stolen drain covers. This was confirmed by the email from Daniel Achichi on April 15, 2019 where he addressed the respondent as follows: -

“ Good morning Fredrick,
Please note, we have replaced the stolen silo grill. I have attached an invoice for reimbursement.”
27. All things considered, it is my finding that the respondent had a reasonable and sufficient reason to take disciplinary action against the appellant and ultimately, terminate his employment on account of negligence of duty.
28. I must also add that the appellant's claim that he was singled out for disciplinary action does not hold water as the record bears that the respondent's disciplinary panel recommended that his colleagues being James Mukhebi and Sylvester Kioko be issued with warning letters in view of the theft incident.

Procedural fairness?

29. The requirement for fair procedure is generally provided for under section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
30. From the record, the appellant tendered his written statement dated April 2, 2019. He was subsequently invited to appear for a disciplinary hearing through a notice dated April 2, 2019. Through the said notice, he was advised of the date, venue and time of the hearing. He was also notified of his rights at the said hearing which included his right to be accompanied by one union representative. The record bears that the appellant attended the disciplinary hearing and made representations. Indeed, he admitted during the hearing at the trial Court that he was accompanied by two shop stewards. He even had a shot at the appeal stage.
31. Applying the provisions of Section 41 of the Act to the case herein, it is noteworthy that the appellant was notified of the allegations against him in a language he understood, given opportunity to respond and appear in person before the respondent's disciplinary committee, in the presence of a union representative.



32. In considering the import of Section 41 of the Act, the Court of Appeal had this to say in the case of *Postal Corporation of Kenya vs Andrew K Tanui* [2019] eKLR:

“Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

33. Applying the above decision to the instant case, I am satisfied that the respondent complied with the spirit of Section 41 of the Act.

34. In the circumstances, I find and hold that the appellant was accorded procedural fairness hence his termination was lawful.

35. In total sum, I find that the appellant’s dismissal was not unfair and unlawful.

Reliefs?

36. As the Court has found that the appellant’s dismissal was not unfair and unfair, the claim for notice pay and compensatory damages does not lie.

37. With regards to the claim for leave days, for 12 years, it is notable that the appellant’s terminal dues as computed by the respondent, was inclusive of outstanding leave days at the time of his termination. It is also instructive to note that pursuant to Section 28(4) of the Act, the appellant was only entitled to recover leave days for 18 months preceding his exit from the respondent’s employment. Section 28 (4) provides as follows:

“The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.” Underlined for emphasis

38. Therefore, the appellant’s claim for unpaid leave dating back to 12 years prior to his dismissal is unsustainable.

39. Another issue that arose was the manner in which the respondent applied the appellant’s terminal dues. As I have found that the respondent was entitled to commence termination of the appellant’s contract of employment on account of his negligence of duty, it follows that it was entitled to surcharge him as much for the loss it sustained in reimbursing its client for the stolen drain covers. In this regard, the respondent exhibited an email received from Daniel Achichi on April 15, 2019, forwarding an invoice for purposes of reimbursement. It is therefore apparent that the respondent had to settle the cost of replacement of the stolen drain covers. This would not have been the case had the appellant exercised more diligence and vigilance in the performance of his duty. The respondent was therefore within its right to recover the amount spent in replacing the stolen drain covers from the appellant’s dues.



40. The net effect of my finding is that the appellant is not entitled to any reliefs he had sought at the trial Court.

Orders

41. It is against this background that that I dismiss the Appeal in its entirety and make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Appellant Mr. Munyoki

For the Respondent Ms. Kirimi

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

