



**Isabwa v Kenya Kazi Services Limited (Cause 637 of 2017)
[2023] KEELRC 1658 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1658 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 637 OF 2017**

MN NDUMA, J

JULY 6, 2023

BETWEEN

BONIFACE MUYONGA ISABWA CLAIMANT

AND

KENYA KAZI SERVICES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on April 3, 2017 seeking the following reliefs:-
 - (a) Declaration that the termination of the claimant's employment was procedurally wanting and therefore unfair.
 - (b) Payment of one month's salary in lieu of notice.
 - (c) Damages for wrongful dismissal and unfair termination of employment contract as per section 49 and 50 of the Employment Act, that is:
 - (d) Service pay for 11 years of service.
 - (e) Any other remedy that this honourable court may deem fit to grant.
 - (f) Costs of the cause.
2. CW1, the claimant testified that he was employed by the respondent as a security guard from April 2, 2004 and worked diligently and without blemish for a period of 11 years when on February 18, 2015, the respondent summarily dismissed him from employment without notice, notice to show cause or a hearing to explain himself.
3. That at the time of dismissal he earned a monthly salary of Kshs 19,967.



4. That the respondent wrongly accused the claimant of not reporting to work on February 16, 2015. CW1 testified that the claimant had obtained permission from the respondent to attend to personal issues out of a fire and theft incident which had occurred at his house. That the claimant went for two days as authorised and when he returned to work he was summarily dismissed.
5. That the summary dismissal was unlawful and unfair.
6. In the letter dated February 18, 2015, the respondent alleges that the claimant did not report to work since February 16, 2015 and had not been authorized to be away from work.
7. The claimant's advocate wrote a demand letter to the respondent dated November 8, 2016 which was not heeded to hence the suit.
8. Under cross-examination by counsel for the respondent Mr Kamau, the claimant reiterated that he received a letter dated February 18, 2015 on April 14, 2015 alleging that he had deserted work. That he had been sent home verbally by the Operations Manager on February 16, 2015. That he kept coming back to find out when he would resume work but the manager kept sending him back home until he was finally given the said letter on April 14, 2015.
9. The claimant said that he had on February 9, 2015 written a letter to the respondent to allow him to attend to personal issues at home. That he had requested for 3 days off. That the claimant was given a dispatch note on February 9, 2015 allowing him to go for three (3) unpaid leave days. The dispatch was written by a field officer named Mr Njeru. The claimant produced the dispatch note. That on February 5, 2015, his house had been burnt down. That the claimant was on standby during that period awaiting to be assigned work but reported daily. That he still kept company property because the respondent did not clear him upon summary dismissal. That he was dismissed on February 16, 2015. That between the 9th to February 16, 2015, he was on standby and was not assigned any post. That he was only away on 7th, 8th and February 9, 2015.
10. RW1 Norine Silwe, the Human Resource Officer of the respondent testified in the matter and produced exhibits '1' to '5' dated July 17, 2015. RW1 told the Court that he was employed by the respondent on June 1, 2016. He was not there when the claimant was summarily dismissed. RW1 stated that the document produced by the claimant to show that he was on standby is not a genuine company Guard book. He said he had issue with the entries shown by the claimant for the period February 9, 2015 to February 16, 2016. RW1 stated that though he was not employed by the respondent then, the claimant has not demonstrated that he was at work during the material period. That he was therefore lawfully dismissed for desertion.
11. RW1 stated that no due process was followed before dismissing the claimant since he had deserted work and was not available. RW1 stated that he has no record that the respondent either called the claimant by phone or wrote him a letter during the material period. RW1 stated that he was not employed then so he had no firsthand information on what transpired then between the claimant and his supervisors. RW1 stated that the claimant was not paid any terminal benefits because he did not clear with the respondent. That his dues were also not calculated. That the claim be dismissed with costs.

Determination

12. The issues for determination are:-
 - (i) Whether the claimant deserted work or he was summarily dismissed unlawfully.



- (ii) Whether the claimant is entitled to the reliefs sought.
13. The parties filed written submissions which the court has carefully considered together with the testimony adduced before court.
 14. The claimant had served the respondent faithfully and diligently for a period of eleven (11) years. The claimant had no adverse record all this period. The claimant gave a clear testimony that was not contradicted by the respondent that on or about February 5, 2015, his house caught fire and his property was stolen. That he sought permission to be given three (3) days off to attend to the personal issue. That he was granted three (3) days off between the 6th and February 9, 2015. That he was given a dispatch note by a field officer namely Njeru to take the off which he did. That he returned to work on the February 9, 2015 and was kept on standby and not allocated any post until the February 16, 2015. That on February 16, 2015, the Operations Manager sent him home from work until further notice. That the claimant kept coming back to work to find out when he would be deployed but that did not happen until he received a letter dated February 16, 2015 in April, 2015 for alleged desertion between the February 9, 2016 and February 16, 2016. The claimant denied before court that he had deserted work during the period. RW1 who was not employed by the respondent at the time did not adduce any credible evidence to rebut the credible and candid testimony by the claimant.
 15. The court finds the testimony by the claimant truthful.
 16. RW1 did not have any documentation or record to show that the respondent had telephoned or written a notice of desertion to the claimant at the material time. RW1 admitted that the respondent did not follow any due process before summarily dismissing the claimant and giving him a backdated letter. The court finds that the backdated letter was written in an attempt to sanitise the otherwise unlawful summary dismissal of the claimant by the respondent.
 17. The court finds that the summary dismissal violated sections 36, 41, 43 and 45 of the Employment Act, 2007 and was unlawful and unfair.
 18. The claimant is entitled to payment of terminal benefits set out in the statement of claim and proved by the claimant and to compensation in terms of section 49 (1) (c) and (4) of the Employment Act, 2007.
 19. Accordingly, the court grants the claimant terminal benefits as against the respondent as follows:-
 - (i) One month salary *in lieu of* notice in the sum of Kshs 19,967.
 - (ii) Severance pay in terms of the security service order calculated at 18 days salary for eleven (11) years of completed service in the sum of Kshs 131,769.

Compensation

20. With regard to compensation, the court has considered that the dismissal of the claimant from service was wrongful and the claimant did not contribute to it. The claimant had rendered unblemished service to the respondent before he was unfairly victimized and lost his means of livelihood unfairly and without notice. The claimant was not compensated for the loss nor paid any terminal benefits to ameliorate the loss and pain of unplanned loss of salary and income. The claimant intended to continue serving the respondent. The claimant had just lost his house through a fire and no empathy was shown to him at all by the respondent who should have known better. The court has relied also on the case of Andrew Ondieki v DHL Supply Chain Limited – cause No 562 of 2018 eKLR to grant the claimant equivalent of ten (10) months' salary in compensation for the unlawful and unfair termination of employment in the sum of (Kshs 19,967 x 10) = Kshs 199,670.



21. Final judgment is entered in favour of the claimant against the respondent as follows:-

- (a) Kshs 199,670 in compensation.
- (b) Kshs 19,967 notice pay.
- (c) Kshs 131,769, service gratuity payable to the security cadre for every completed year of service.
Total award Kshs 351,406.
- (d) Interest at court rates from date of judgment till payment in full.
- (e) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 6TH DAY OF JULY, 2023.

Mathews N. Nduma

Judge

Appearances

Mr. Okello for claimant

Mr. Kamau for Respondent

Ekale: Court Assistant

