



**Omondi v International Committee of the Red Cross (Cause
648 of 2019) [2023] KEELRC 2073 (KLR) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2073 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 648 OF 2019
AN MWAURE, J
AUGUST 18, 2023**

BETWEEN

MAURICE ODWAR OMONDI CLAIMANT

AND

INTERNATIONAL COMMITTEE OF THE RED CROSS RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Claim dated 19th September 2019 on grounds that the Respondent terminated his employment without any lawful or justifiable reason.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent as a security officer from 2nd September 2002 to 26th June 2019 and that his last salary was Kshs 95,255/- and house allowance of Kshs 14,288 per month, net taxes and advances.
3. Claimant avers that for 14 years, he worked faithfully and diligently for the Respondent to the extent he was awarded 'very good' rating in all categories until the Respondent recruited a senior staff who picked a grudge with the Claimant at diverse times. That the Respondent's senior staff/administrator used derogatory language and abusive words against the Claimant and that the unprofessional behaviour started when the senior staff was recruited and immediately the Claimant's senior supervisor was fired.
4. He says that since the year 2016, the Respondent's administrator could intimidate and/or frustrate the Claimant and other staff without any justifiable cause.
5. The Claimant avers that on 10th June 2019 he received a gross misconduct letter from the Respondent summoning him for a meeting in which allegations were levelled against him based on a review of GPS which showed a wrong turn on Mombasa road and passing on a passage near Panari Hotel which



captured himself and five other employees, however, he was the only one who was terminated vide a letter stating the offence committed was a serious one and amounted to gross misconduct despite it being his first offence.

6. The Claimant avers that from the traffic rules records, he has no case of breach of traffic rules and that the steps taken by the committee of the Respondents was full of mischief, baseless, malicious and a well calculated move to terminate the Claimant without any justifiable grounds.

Respondent's Case

7. The Respondent filed its response dated 31st October 2019 and admitted the Claimant was its employee as a safety & security officer from 2nd September 2002 and that in performance of his duties, the Claimant was required to drive security vehicles assigned to him for conducting patrols and that the vehicles bear diplomatic plates and an emblem that clearly show they belong to the Respondent.
8. The Respondent averred on 6th May 2019, the GPS tracking system of the vehicle assigned to the Claimant revealed he had disregarded, disobeyed and broken traffic rules by driving on the wrong direction on a one-way lane connecting Road C to Mombasa road near Panari Hotel contrary to his duties, the Respondent's code of conduct and staff regulations.
9. The Respondent avers that on 15th May 2019, it issued the Claimant with letter to show cause why disciplinary action should not be taken against him for his negligent driving and failure to observe traffic rules to which the Claimant responded to alleging that a traffic officer allowed him to use the wrong lane. This triggered further investigations by the Respondent which revealed that he had wrongly used the one-way lane on other occasions thereby discrediting his claim that the traffic officer was on site.
10. The Respondent aver that upon receipt of the new information, the Claimant was issued an updated show cause letter dated 6th June 2019 and accorded an opportunity to make oral representations at the disciplinary hearing held on 10th June 2019 which the Claimant attended accompanied by a fellow employee and that he was furnished copies of evidence in support of the allegation.
11. The Respondent's aver that its disciplinary committee in considering the Claimant's written and oral representations against the allegations found the Claimant's actions were contrary to its traffic rules, code of conduct and staff rules and the immediate consequence was withdrawal of his right to drive any of the Respondent's vehicles.
12. The Respondent aver the Claimant's conduct amounted to gross misconduct that warranted to summary dismissal but the Respondent on humanitarian grounds terminated the Claimant under Section 35 of the *Employment Act*.
13. That on 19th July 2019, the Claimant lodged a complaint to the Respondent's Global Compliance Office (GCO) citing inappropriate behaviour including bullying and harassment. The complaint was referred to the HR Employees Relations Unit for final assessment which established that he did not fall within the scope of GCO as the Claimant was contesting the motive behind the disciplinary proceedings rather than raising a harassment claim and the Claimant was informed his complaint should be referred to the competent authority to be managed as an appeal. However, on 11th September 2019, the Claimant was informed the Appellate Committee would not determine the internal appeal since the Claimant had already issued a demand letter.
14. The Respondent admitted that in 2016, none of the security staff received positive appraisals on ground that they failed on their duties when a massive fraud involving truck tyres was discovered.



15. The Respondent avers that prior to the disciplinary action, the Claimant was issued a warning letter in August 2015 for failure to report an accident involving the Respondent's staff; a warning letter in April 2018 for having pornographic material in his official phone issued by the Respondent; a show cause letter in August 2018 for misusing the Respondent's funds for newspapers and a show cause letter in January 2019 for the loss of the Respondent's ICRC projector bag.
16. The Respondent's denies that it has not paid the Claimant his terminal dues and avers the Claimant was paid: (a) days worked in June 2019 (b) 1 month salary in lieu of notice (c) accrued leave days (d) end of service pay; and (e) 13 month salary on pro rata basis.

Claimant evidence in Court

Claimant's Submissions

17. The claimant averred in his evidence that he was respondent's security officer. He says on the date in May 2019 he was on duty in the morning and he drove in the wrong direction for security reason since it was early in the morning. He says he was given a show cause letter and a hearing took place. He says he pleaded to be pardoned but he was not pardoned but was terminated.
18. He says he appealed to Geneva the head officer and Geneva offer asked Kenya office to give him another opportunity but they did not do so.
19. He says upon termination he was paid days worked in June and one month salary in lieu of notice. He prays for house allowance and compensation for the years worked.

Respondent evidence in court

20. The respondent witness Abijah Mwakodi is the respondent's human resource manager. The witness says the claimant was mandated to protect the respondent's assets. He says on 16/5/2019 he broke traffic rules by driving the vehicle on the wrong side of the road. He was put through disciplinary proceedings and was found culpable of breaching traffic rules and was terminated.
21. He says the claimant was paid his terminal dues and so his claim should be dismissed. The dues he was paid according to the respondent witness were:
 - a. One month salary in lieu of notice
 - b. Days worked in June 2019
 - c. Leave days
 - d. 13 months salary
 - e. Service pay one month salary for each year worked end of service pay and his loan of kshs 838,000/- was deducted and so the take home was kshs 265,376/-

Claimant's evidence in court

22. It was submitted for the Claimant that the Respondent terminated the Claimant on the basis of evidence in an alleged GPS tracking which has been produced as evidence in chief against the dictates of Section 106B (1,2&4) of the *Evidence Act*. It is submitted that without a certificate before this honourable court of the print out GPS tracking system which form evidence in chief then the Respondent's defence must fail.



23. It was further submitted that the Respondent did not comply with its staff Regulations ICRC Delegation Kenya dated 1st January 2019 which states that an employee should be terminated after having been issued with at least 2 warning letters within a period of 12 months, and that this was not accorded to the Claimant.
24. It was submitted for the Claimant that the Respondent be compelled to pay a maximum of 12 months' salary compensation for unfair and unlawful termination.

Respondent's Submissions

25. It was submitted for the Respondent that the terminal dues form on page 17 of its bundle of documents is in fact a discharge voucher voluntarily executed by the Claimant which states the Claimant would have no further claims once he was paid his terminal dues which included service pay. The Respondent further submitted that the terminal dues form is a valid contract and that the court cannot entertain this suit as the Claimant waived his right to make any further claims with regards to his employment with the Respondent. It relied on the Court of Appeal decision in *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR:-

“ All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement.....

Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.”

26. It was submitted for the Respondent that the Claimant admitted that he did indeed drive on the wrong side of Mombasa road and did break traffic rules while using the Respondent's vehicle and that this was a valid reason for the Respondent to terminate the Claimant's employment. It asked the court to be guided by section 43 (2) of the *Employment Act*:-

“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

27. It was submitted for the Respondent that the Claimant has received and utilized the terminal dues in excess of what is mandated by law therefore he is estopped from raising a claim and this suit should be dismissed.

Analysis and Determination

28. The issues before this court for determination are as follows:-

- a. Whether the Claimant was unfairly and/or unlawfully terminated
- b. Whether the Claimant is entitled to the reliefs sought

Whether the Respondent's decision to terminate the Claimant's employment was valid, lawful and/or justifiable and did the Respondent follow fair procedure prior to the termination of the claimant from employment.

29. Section 45 of the *Employment Act* establishes what amount to unfair termination and states as follows:-

“(1) No employer shall terminate the employment of an employee unfairly.



- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where—
 - a. the termination is for one of the reasons specified in section 46; or
 - b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider—
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (f) the existence of any previous warning letters issued to the employee.”

30. This court takes note of the Claimant’s argument that the GPS tracking document was filed without a certificate contrary to section 106B (4) of the *Evidence Act* and as it forms part of the evidence in chief to the termination of the Claimant, therefore the defence must fail. The court differ with this



argument and takes note that the Claimant during hearing testified that he indeed breached the traffic rules and even sought for pardon during and after the disciplinary hearing vide his letter dated 7th June 2019 by the Respondent. Further the Respondent has tabled other documents which can reasonably support its case.

31. In respect to the validity of the previous warning and show cause letters relied upon by the Respondent, the court refer to the decision made in Kenya petroleum oil workers Union v Kenya Petroleum Refineries Ltd [2013] eKLR in which the court held:-

“In my estimation, although expired warnings may not be used as progressive steps ultimately leading to a dismissal, they may be used as aggravating circumstances once the employee has been found guilty of an offense and there is necessity to decide on an appropriate sanction such as whether to be lenient and or to dismiss the employee.

It is the duty of the employer to establish that cancelled warnings can be taken into account.....”

32. The previous warning letters were necessary to adduce the conduct of the employee during his employment and a factor to consider when determining this case.

33. Section 45 of the Employment Act establishes what amount to unfair termination and states as follows: -
45.

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where –
 - (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee .
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider -



- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- (b) the conduct and capability of the employee up to the date of termination;
- (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
- (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- (e) the existence of any previous warning letters issued to the employee.

34. In *Kenafric Industries Limited v John Gitonga Njeru* [2016] eKLR the Court of Appeal stated that –

“Three things must therefore be satisfied; there must be reason(s) given for the termination, the reason(s) must be fair and the procedure followed too must be fair. These three conditions are designed to cater for all cases in which an employer instigates the termination of employment.”

35. The claimant was terminated for flouting traffic rules and driving an official vehicle on the wrong side. That was contrary to the code of conduct of the employer and obviously is also against the general traffic rules of driving a motor vehicle without due care and attention. Driving on the wrong side of the road is tantamount to careless driving.
36. The claimant had signed code of conduct and so was well aware of the respondent’s rules and regulations. He broke the rules and by his letter of 7th June 2019 he admitted the same and asked for pardon.
37. The respondents invited him for a disciplinary hearing and he attended the same together with his witness one Isaac Hamisi. The claimant admitted he understood safety was important and he apologised. He signed the minutes and his witness also signed the minutes.
38. The meeting took place on 14th June 2019 and thereafter he received a termination letter dated 25th June 2019.
39. Flowing from the above the court is satisfied the respondent gave the claimant a valid reason of terminating his employment due to serious violation of traffic rules which is also against the law of the country as well as the respondent’s code of conduct which the claimant was in possession thereof. The respondent also followed the procedural requirement and gave the claimant a chance to be heard in the presence of his witness which is mandated by section 41 of the *employment act*. Section 41(1) of the *employment act* provides :

“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.”



40. Flowing from the above the court is satisfied that the respondent ably discharged its duty and proved that the claimant was fairly and procedurally terminated.

Is claimant entitled to reliefs sought?

41. The respondent in his letter of termination dated 25th June 2019 undertook to pay the claimant the following:-

- (i) One month salary in lieu of notice
- (ii) Days worked up to and including 26th June 2019.
- (iii) Leave days accrued as at 26th June 2019
- (iv) 13 months' salary on pro rata basis
- (v) Severance pay (one month salary for each year worked until 2nd September 2014)

The court has considered the respondent's statement dated 9th July 2019 which is not even legible and is not able to understand the workings therein. The court will mention the case on 4/10/2023 for the respondent's to appear in court and give a brief explanation on the above to enable the court determine if there are any moneys due to the claimant or not this judgment notwithstanding.

42. Meanwhile each party will meet its own costs considering also the claimant's long service to the respondent.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF AUGUST 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 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 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

JUDGE

