



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gichana v Security Group Kenya Limited (Cause 2556 of 2016)  
[2023] KEELRC 2648 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2648 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2556 OF 2016  
MN NDUMA, J  
OCTOBER 19, 2023**

**BETWEEN**

**PETER NYAUMA GICHANA ..... CLAIMANT**

**AND**

**SECURITY GROUP KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant Peter Nyauma Gichana filed the suit on 13/12/2016 against the respondent Security Group Kenya Limited seeking the following reliefs:-
  - a. Gross underpayment in salary and benefits at Kshs.905,000.00 x 43 months = Kshs.38,915,000.
  - b. Damages for unfair and wrongful dismissal at Kshs.1,430,000.00 x 12 Kshs.17,160,000.Less total received of Kshs.2,551,153.00 net claim of Ksh.53,523,847.00
2. C.W.1, the claimant adopted his witness statement dated 9/12/2016 as part of his evidence in Chief. He stated that he was a holder of a Bachelor degree in Commerce (Accounting/Finance) from University of Nairobi and MBA in Corporate Strategy from Washington International University of USA as well as Diploma in Marketing from the Institute of Management in Cyprus.
3. That he had served in diverse industries including being the General Manager for G4s Kenya, Kobil Petroleum and Mobil Petroleum Company, Kenya.
4. That prior to joining the respondent he was the Chief Executive Officer of Monarch Group of Companies based in Nairobi where his last salary was Kshs.964,000 per month.



5. That on 9/7/2012, he applied for a vacancy advertised by the respondent and upon a thorough recruitment process he was hired on 4/11/2012 as the Managing Director and was posted to Tanzania. The salary attached to the position was Kshs.1,430,000 per month inclusive of benefits and allowances.
6. That he was in December, 2012 unilaterally and without notice transferred to Nairobi and his salary was reduced to Kshs.525,000 per month. That C.W.1 was shocked because he had changed his life style upon acquiring the new job including status of his Childrens' School. That he chose to remain in the Respondent's employment and continued to serve diligently. That he was recognised at the end of each year due to his ability and performance.
7. That on 16/11/2015, C.W.1 was shocked to receive a show cause letter to which he responded to in December, 2015. That C.W.1 was invited to disciplinary meetings. That the Vice Chairman at one of the meetings resolved to have the dispute resolved amicably, and requested C.W.1 to give a proposal which C.W.1 proceeded to do on 7/4/10. Instead of responding to the proposal, the respondent issued C.W.1 with a letter of dismissal which was delivered at his residence at night a month later. The 14 days appeal time allowed had already expired.
8. C.W.1 stated he was devastated by the malicious conduct by the respondent which was meant to destroy C.W.1's successful career. C.W.1 decided to file this suit as a result. C.W.1 produced various exhibits in support of his claim marked bundle '1'. C.W.1 said he was recruited by Manpower who had advertised for the job and he received letter of appointment on 4/11/2012.
9. That when posted to Tanzania, his salary was USD 14,300 per month excluding benefits which included passages for C.W.1 and family, a company car fully fuelled and maintained, Driver, telephone and Airtime. That C.W.1 was also paid for to be a member of Dar-es Salaam Yatch Club.
10. That when transferred to Kenya, his relationship with the Board was okay but that with the Group Managing Director was frosty. C.W. 1 said he had a good relationship with the Chairman of the Board. C.W.1 produced further bundle of documents marked '2'. C.W.1 stated that in terms of the Group Human Resource Manual, disciplinary process was to take 30 days. C.W.1 stated that the letter of dismissal dated 28/7/2016 was delivered to him on the night of 20/7/2016. That the dismissal was for gross misconduct. C.W.1 stated that the dismissal was not for a valid reason and was unfair and unprocedural.
11. Under cross-examination, C.W.1 stated that his letter of appointment was by Security Group Tanzania Limited. That he had accepted the offer and signed it. That in terms of the letter the salary package was USD 14,300 and not 11,300. C.W.1 said he also signed Senior Staff Service Agreement and had also signed confidentiality Agreement. C.W.1 agreed under cross-examination that he has now sued Security Group Kenya Limited because he had since been transferred to Kenya from December, 2012
12. C.W.1 said that the two companies have a common share holding and the Chairman was in both companies. C.W.1 insisted that he worked for the Kenya Group from 18/12/2016 when his employment was terminated. C.W.1 said he had verbally protested the transfer and reduction in his remuneration but continued to serve. C.W.1 stated that on 2/11/2015 he had received a letter of suspension and received 50% of his salary during that period. That on 16/4/2015 he then received a show cause letter with 22 charges to which C.W.1 had responded. C.W1 denied that he is the one who caused adjournment of several disciplinary hearing meetings. C.W.1 denied that he had insisted that he was to be accompanied by his advocates. C.W.1 said he however attended two meetings with his advocates.
13. C.W.1 said the disciplinary panel was appointed by the company and not by himself. That some of the names he had suggested were put in the panel. C.W.1 said he did not sign the minutes of the hearing



- produced by the respondent and said the same were not a true reflection of what took place at the hearing. C.W.1 said he had received the minutes after the hearings but he did not sign them. C.W.1 said that he had good explanation why he had hired a vehicle while on official trip and not during his free time. C.W.1 also explained that he is not the one who had hired his son to the company but that was done by the Chairman himself upon conduct of an interview in which C.W.1 did not participate. C.W.1 said many relatives of staff worked in Security Group Africa. That this was not against Group Policy. C.W.1 said also he had a medical cover which covered his family upto 21 and 25 years of age.
14. C.W.1 denied that he claimed for payment of medical expenses to his son while he was over 26 years as alleged. C.W.1 however admitted that his son upon being employed had declared he was 26 years old. That C.W.1 had claimed for the eye treatment of his son.
  15. C.W.1 insisted that he was denied a chance to appeal the dismissal and the disciplinary process was not concluded since he had been asked to make a settlement proposal which he had done but same was not responded to. Instead he got a dismissal letter. Claimant prays to be awarded as prayed.
  16. The respondent called R.W.1 Richard Mwesiga in defence of the claim. R.W.1 told the Court that he is a Ugandan national and was the Group Managing Director of the respondent. That the claimant was well known to R.W.1 and was employed by the respondent on 18/12/2012 upon signing a contract of employment. That the claimant was at the time based at the Regional Headquarters in Nairobi as the Group Director Organisation Development, a position held until May, 2015 when he was appointed to act as the Managing Director – Kenya reporting to the Group Managing Director.
  17. That during his tenure as the Acting Managing Director, he refused, failed and/or neglected to perform his responsibilities and breached his contract of employment. He inter alia fraudulently employed his son despite knowing very well that his son had given false information to the Human Resource Manager regarding his father. That on numerous occasions, he obtained per diem allowances in the disguise that he was visiting the branches which he never did thereby fraudulently obtaining money from the company.
  18. That C.W.1 was suspended on 2/11/2015 and was notified of the reasons that led to the suspension vide a show cause letter dated 16/11/2016.
  19. That before he could respond to the show cause letter, C.W.1 wrote a letter to R.W.1 threatening to report R.W.1 to the Immigration Department, CIC Chairman the National Assembly as well as the Media for reasons better known to C.W.1. In the letter C.W.1 blamed R.W.1 for his inadequacies, This was meant to intimidate R.W.1 from taking action on his slackness. R.W.1 stated that the allegations by C.W.1 that R.W.1 forced him out of office are false.
  20. That on 10/12/2015, C.W.1 responded to the Show Cause Letter, after a series of back and forth correspondence. Efforts to get the claimant to appear for a disciplinary hearing in the month of December, 2015 were futile as he claimed to have proceeded for the Christmas festivities.
  21. That C.W.1 attended the hearing in the fist week of February, 2016 in the company of his advocate. The hearing was adjourned because the advocate answered questions instead of the claimant.
  22. A second hearing was scheduled for 9/3/2016, but the claimant did not attend for reasons given.
  23. Another hearing was scheduled for 24/3/2016 which was adjourned because claimant stated he needed to consult his advocates.
  24. Another hearing date was scheduled for 11/5/2016, but the claimant did not attend the disciplinary hearing having failed to acknowledge the notice to attend issued to him on 5/5/2016. C.W.1 calls went unanswered. The panel was disbanded accordingly and another one was constituted and the claimant



was invited to attend on 7/6/2016. C.W.1 wrote to R.W.1 demanding the members whom he wished to constitute the disciplinary panel to hear his case. R.W.1 stated that the demand by C.W.1 was granted and last disciplinary hearing was scheduled for 21.6.2016, which proceeded in the presence of C.W.1. That the hearing was minuted and proceeded without disruptions.

R.W.1 said that C.W.1 accepted all his failures, negligence, and misconduct and raised no objection to the evidence adduced against him.

25. R.W.1 stated that the panel resolved to terminate the services of C.W.1. C.W.1 was given opportunity to appeal that decision but did not do so.
26. That the terminal dues for C.W.1 were tabulated and duly paid on 9/9/2016 which he duly acknowledged by signing a release certificate.
27. That the termination of employment of C.W.1 was lawful and fair and the suit be dismissed with costs.

### **Submissions**

28. The claimant filed written submissions dated 20/2/2023 whereas the respondent filed submissions dated 8/6/2023. The Court has duly considered the same together with the evidence adduced by the parties and has delineated the following issues for determination:-

- a. Whether the claimant is entitled to payment of alleged underpayment in salary and benefits for 43 months amounting to Kshs.38,915,000.
- b. Whether the termination of employment of the claimant was for a valid reason (s) following a fair procedure.
- c. Whether the claimant is entitled to an award of damages for the termination.

29. It is not in dispute that the claimant was on 4/11/2012 employed as Managing Director and posted to Dar-es-salaam in Tanzania pursuant to a signed contract of employment between the claimant and Security Group Tanzania limited dated 21/11/2012 and produced before Court by the claimant. In terms of the said contract of employment, the claimant was paid a gross salary of USD 14,300.

30. The claimant was under circumstances set out in the Memorandum of Claim brought back to Kenya in December, 2012.

The claimant stated in his witness statement that the transfer from Tanzania to Nairobi in December, 2012 was unilateral and without notice and his salary was immediately reduced to Kshs.525,000 per month as opposed to Kshs.1,430,000 which was attached to the position held in Tanzania hitherto for a short period. It is on the basis of this unilateral transfer that the claimant seeks payment of the difference in salary aforesaid for the 43 months he served the respondent from December, 2012 up to 28/7/2016, the date of termination of employment of the claimant.

31. The claimant seeks the aforesaid payment less the Kshs.2,551,153.17 terminal benefits paid to him upon separation by the respondent.

32. It is the respondent's case that the underpayment claim lacks any basis because the claimant signed a new employment contract with the respondent upon return to Kenya in December, 2012 and was lawfully entitled to payment of the agreed salary of Kshs.538,400. That the Claimant continued to receive this salary without any protest until when he was placed on suspension on 2/11/2015 pending hearing and determination of disciplinary charges levelled against the claimant by the respondent. At the time of suspension, the claimant was the Acting Managing Director and Group Director Organisation Development of the respondent.



33. The claimant has not sued and/or joined Security Group Tanzania Limited to this suit. The claimant testified that Security Group Kenya Limited and Security Group Tanzania Limited were one, and the same as they share same directors and their Chairman was the same.
34. The evidence before this Court does not support the allegation by the claimant that he was entitled to continue enjoying the packages agreed between him and Security Group Tanzania Limited, whilst he served in Dar-es-salaam. Indeed, there is no iota of evidence before Court that support that claim by the claimant.
35. The claimant in his own words accepted the reduced salary of Kshs.525,000 upon his return to Kenya which salary he continued to enjoy without any written protest until the date of his suspension. Security Group Tanzania Limited, is a separate legal entity which is not before this Court. Any such claim against security Group Tanzania Limited, may only be filed in the United Republic of Tanzania and cannot be claimed though its sister company Security Group Kenya Limited, the Respondent.
36. The decision by the Court of Appeal in *Kenya Breweries Limited 3 Others -vs- Symon- Wairobi Gatuma* [2017] eKLR is on point where the Court of Appeal cited the case of *Kolaba Enterprises Limited -vs- Shamsudin Hussein Varvani & Another* [2014] eKLR that:-
- “It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co. Ltd v Salomon* [1897] A. C. 22 H. L. that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.”
37. In the present case, the claimant admits that he was offered and paid a higher package of USD Kshs.14,300 per month which at the time he states was equivalent to Kshs.1,430,000 per month by Security Group Tanzania Limited. The claimant admits that he was transferred to Kenya without his consent but upon return entered into a new agreement with Security Group Kenya Limited in which he accepted to be paid a much less monthly salary of Kshs.525,000.
38. To this end, the claim by the claimant to be awarded the difference in salary paid to the claimant by the two distinct and separate legal entities is completely devoid of any merit as against Security Group Kenya Limited, the respondent before this Court. Accordingly, the said claim is dismissed for lack of any merit.
39. On the second question, whether the termination of employment of the claimant was for a valid reason and the respondent followed a fair procedure in terminating the employment of the claimant, this Court has carefully considered the charges of misconduct and negligence levelled against the claimant in the notice to show cause dated 16/11/2015. R.W.1 gave elaborate testimony regarding the misconduct by the claimant and the protracted effort made by the respondent to hold a disciplinary hearing to give opportunity to the claimant to be heard in defence of the charges laid against him. This Court notes the various evasive steps made by the claimant which led to the delayed conclusion of the disciplinary hearing, including a demand that the claimant appoints persons who comprised the panel to hear his case, which demand was acceded to by the respondent.



40. The Court is satisfied that the claimant was availed fair and sufficient opportunity to defend himself in compliance with Section 41 of the *Employment Act*, 2007. The claimant was represented by his advocate in most of the sittings that took place. The Court notes that the proposal to resolve the matter amicably made to the respondent by the claimant did not negate the disciplinary process.
41. It is the Court's considered finding that the respondent produced tangible evidence and reason why the employment of the claimant had to be terminated in compliance with Sections 43(1) and (2) and 45(1) and (2) of the *Employment Act*, 2007.
42. In the converse, the claimant did not discharge the onus placed on him in terms of Section 47(5) of the *Employment Act*, 2007 to demonstrate that the termination of his employment was wrongful and unfair.
43. The Court relies on the decision by the Court of Appeal in *Kenya Breweries Limited 3 Others -vs- Symon- Wairobi Gatuma* [2017] eKLR (*supra*) to emphasise that the suit by the claimant against the respondent lacks merit in its entirety. The decision by the respondent met both substantive and procedural fairness. The termination was for valid reasons given, and the respondent followed a fair procedure in terminating the employment.
44. Given the manner in which the claimant was moved from Tanzania to Kenya; the reduction of his salary for the period of 43 months and the good service he had rendered to the respondent before the matters that led to the termination arose, the Court considers this an appropriate case in which each party to meet their own costs of the suit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearance**

Mr. Okumu for claimant

Mr. Michuki for Respondent

Ekale: Court Assistant

