



**Masakha v Eveready Security Guards Co Limited (Cause 842 of 2016)
[2023] KEELRC 2515 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2515 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 842 OF 2016
L NDOLO, J
OCTOBER 18, 2023**

BETWEEN

MANFRED SIFUNA MASAKHA CLAIMANT

AND

EVEREADY SECURITY GUARDS CO LIMITED RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated May 9, 2016 and filed in court on May 12, 2016, the Claimant proceeds against the Respondent seeking relief for unlawful termination of employment. The Respondent filed a Memorandum of Response dated September 8, 2016.
2. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Operations Manager, Paul Muriuki Njung'u. Thereafter, the parties filed final submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent from September 1, 2009 until March 26, 2016 when his employment was terminated. He gives his monthly salary as at the time of termination as Kshs. 12,200.
4. According to the Claimant, the termination of his employment was without justifiable cause and in violation of due process. In particular, the Claimant complains that he was not given an opportunity to defend himself. He adds that he was not paid his terminal dues.
5. The Claimant tabulates his claim as follows:
 - a. 3 months' salary in lieu of notice.....Kshs. 36,600
 - b. Unpaid leave.....12,200



- c. Severance pay for years worked.....85,400
- d. House allowance for years worked.....153,720
- e. General damages for wrongful dismissal
- f. Costs plus interest

The Respondent's Case

6. In its Memorandum of Response dated September 8, 2016 and filed in court on September 22, 2016, the Respondent states that it engaged the services of the Claimant as a Security Guard at a monthly salary of KShs. 6,750 effective September 2, 2010.
7. The Respondent denies the Claimant's claim of unlawful termination and states that the Claimant was summarily dismissed for gross misconduct particulars being; neglecting to perform duties assigned to him, absenting himself from duty without leave or lawful excuse and reporting to work while intoxicated.
8. The Respondent gives the following chronology of events:
 - a. On March 16, 2014, the Claimant was absent from work without permission. He was served with a warning letter which he signed;
 - b. On March 17, 2014, the Claimant wrote a letter admitting that he was absent from work without permission and asking for forgiveness;
 - c. On December 26, 2015, he absconded from work and did not report to the Respondent's office. On December 27, 2015, he was served with a warning letter which he signed;
 - d. Further, the Claimant wrote a letter dated December 26, 2015, admitting that he was absent from duty without permission and asking for forgiveness;
 - e. On January 26, 2016, the Claimant absconded from work without permission. He wrote a letter addressed to the Respondent, admitting the same;
 - f. On March 16, 2016, the Claimant went to work while drunk. He wrote a letter addressed to the Respondent admitting that he was smelling of alcohol on that day;
 - g. The Claimant was summoned for a meeting with the Respondent's General Manager and Operations Manager where he was notified of the allegations. He was informed of his right to respond to the allegations but he did not deny nor did he respond to the allegations;
 - h. Pursuant to the foregoing, the Respondent made a decision to summarily dismiss the Claimant and he was issued with a dismissal letter on grounds of misconduct.
9. The Respondent maintains that the Claimant was lawfully dismissed for valid reasons in accordance with the law being; wilfully neglecting to perform duties assigned to him, absenting himself from duty without leave or lawful cause, and reporting to work intoxicated thereby rendering himself incapable of performing his work properly.
10. The Respondent submits that although it was entitled to summarily dismiss the Claimant for gross misconduct without notice, it chose to issue him with a one-month notice on humanitarian grounds.
11. The Respondent states that the Claimant was granted leave in 2012, 2013, 2014 and 2015 upon making a formal application which was the standard company practice.



12. The Respondent adds that there are years when the Claimant opted to forego his leave for pay. For instance, in 2014, the Claimant was accorded an opportunity to proceed on leave but he sought compensation in lieu which was approved.
13. The Respondent denies owing the Claimant any money and maintains that the Claimant was paid all his dues.

Findings and Determination

14. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

15. The Claimant claims that his employment was terminated verbally without notice and without justifiable cause.
16. Section 47(5) of the [Employment Act](#) provides as follows:
 5. For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
17. As held in [Peter Otabong v County Government of Busia](#) [2017] eKLR an employee alleging unlawful or unfair termination of employment bears the initial burden to establish a prima facie case in this regard upon which the employer's burden to justify the termination kicks in.
18. In his Memorandum of Claim dated May 9, 2016, the Claimant pleads March 26, 2016 as the date of termination of his employment while in his witness statement dated May 9, 2016, he states March 16, 2014 as the date of termination. In his testimony before the Court, the Claimant stated that the Respondent was his employer from 2009 until 2014 when his employment was terminated.
19. In its decision in [Bakari Abdalla Mwangazi v Kwale International Sugar Company Limited](#) [2020] eKLR, this Court held that an employee who prevaricates on the date of termination of employment cannot be said to have discharged their evidential burden under Section 47(5) of the [Employment Act](#).
20. In the present case, the Claimant so contradicted himself regarding the date of the termination he was complaining about that the Court could not tell when his alleged cause of action arose. In the absence of any credible explanation regarding the glaring discrepancy on such a crucial aspect of the Claimant's case, I find and hold that he has failed to discharge his burden under Section 47(5) of the [Employment Act](#).
21. In the result, the Respondent is discharged from its evidential burden and the ultimate finding is that the Claimant's claims for damages for wrongful dismissal and notice pay are without basis and are dismissed.



Other Claims

22. The claims for house allowance, leave pay and severance pay were not supported by any evidence. These claims are therefore disallowed.
23. Finally, the Claimant's entire claim fails and is dismissed.
24. Each party will bear their own costs.
25. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF OCTOBER 2023

LINNET NDOLO

JUDGE

Appearance:

Ms. Mwangi for the Claimant

Mr. Waiyaki for the Respondent

