



REPUBLIC OF KENYA



KENYA LAW
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**Mukenya v Texas Alarms (K) Limited (Appeal E083 of 2021)
[2023] KEELRC 2482 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2482 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E083 OF 2021
M MBARÚ, J
OCTOBER 12, 2023**

BETWEEN

CHRISPINUS WASWA MUKENYA APPELLANT

AND

TEXAS ALARMS (K) LIMITED RESPONDENT

*(being an appeal of the judgment and decree of Hon. Charles Ndegwa
delivered on 29 November 2021 in Mombasa CM ELRC No. 397 of 2019)*

JUDGMENT

1. The appeal herein follows the judgment in Mombasa CM ELRC No. 397 of 2019 delivered on 29 November 2021 following a claim of the appellant against the respondent on the grounds that the appellant was employed by the respondent in September 2008 as a security guard at a wage of Kshs. 12,000 per month and placed at Pandya Hospital but the respondent accrued him of taking bribes from motorists who parked at the venue. He was summoned by the manager on 14 September 2018 and confronted about such conduct and told that there was a CCTV footage showing his conduct, directed to hand over and his employment terminated. He claimed notice pay, untaken leave days, pay for work during public holidays, house allowances, underpayments and gratuity pay and compensation for unfair termination of employment.
2. In response, the respondents case was that the appellant was employed on 1st November 2014 and before, he was working on and off on casual terms. His last gross wage was Kshs. 13,900 per month being a basic wage of Kshs. 11,815 and a house allowances of Kshs. 2,085. On 11 September 2018, while the appellant was stationed at Pandya Memorial Hospital, he allowed a strange motor vehicle to be parked against the given instructions and upon investigations, it emerged that he was compromised to sell the parking space to a person from outside and had no business at the hospital. He also left his duty station unmanned. The appellant admitted to these facts a meeting was held with the appellant and assistant human resource manager Ms, Janet Karoki and Bernard Aduda and upon admitting his



mistake a decision was taken to terminate his employment through letter dated 19 September 2018 but he refused to receive it. all terminal dues were paid and confirmed by the Labour Officer at a meeting held on 8 January 2019.

3. The appellant's wage was Kshs. 13,900 per month which included a house allowance and there was summary dismissal when he left his duty station unmanned and he admitted this much. Upon hearing on 18 September 2018 the reasons given in defence were not satisfactory leading to summary dismissal which was justified.
4. The trial court in judgment dismissed the entire claim on the grounds that the appellant admitted that on 18 September 2018 he left his station unmanned and he did apologise for his conduct and this formed the reasons for his summary dismissal through notice dated 19 September 2018. Dismissal from employment was due to gross misconduct, there was a hearing and the sanction taken was justified.
5. Dissatisfied with the judgment, the appellant filed this appeal on the grounds that there was summary dismissal without a hearing, no reasons were given to justify such finding and the prayers made for payment of notice, leave, work during public holidays, house allowance, underpayment and gratuity were never addressed and hence the appeal should be allowed and the claims made assessed and awarded together with compensation for unfair termination of employment.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that his employment was not challenged but following an incident at his workplace on 10 September 2018 where he was accused of allowing a stranger to park his vehicle at the premises of Pandya Hospital where he was guarding, he was never issued with any notice to show cause and this much was admitted by the witness called by the respondent, Bernard Aduda. During the disciplinary hearing, he was not advised to look for another employee of his choice. This resulted in unfair termination of employment as held in *Radar Limited v Amos Ogachi Nyaata* Civil Appeal No. E091 of 2022 (Mombasa) that due process must be adhered to before termination of employment in terms of Section 41 of the *Employment Act*, 2007. The Minutes of the disciplinary hearing on 18 September 2018 demonstrate that the appellant had no representative present contrary to the findings by the trial court.
8. The appellant submitted that failure to assess the claims made was in error and these should be heard with regard to notice pay due in unfair termination of employment, leave for the year 20118 and 2017 had not evidence of payment, work during public holidays, house allowances, underpayments should be assessed and awarded, gratuity pay and compensation for unfair termination of employment. in the case of *Loice Otieno v Kenya Commercial Bank Limited* [2013] eKLR the court held that even where employment is terminated, the court has a duty to assess the claims made and award where due.
9. The respondent submitted that employment commenced through letter of appointment dated 9 April 2010 and not as claimed by the appellant. On 10 September 2018 the appellant admitted to his gross misconduct where he allowed a stranger to park at Pandya hospital his allocated work site and had also admitted to leaving his work station unmanned. Investigations revealed that the appellant would receive payments to allow strangers who had no business in the premises to park at the site. He was invited to a disciplinary hearing and on his admission, summary dismissal notice issued dated 19 September 2018 which he declined to acknowledge receipt. Later, at a meeting held on 9 January 2019 with the Labour Officer, his terminal dues were paid. summary dismissal is allowed in terms of Section 44(4) of the *Employment Act* where an employee admits to his gross misconduct as held in *Oliver Gambo Nuri v Texas Alarms (K) Limited* Cause No. 632 of 2017. On the summary dismissal, notice pay and compensation are not due.



10. The appellant took his annual leave and terminal dues paid included prorated leave days for the year 2018 all at Kshs. 6,111. The Record of Appeal and demonstrate that terminal dues paid included;
- Uniform refund at Kshs. 2,500;
 - Prorated leave Kshs. 6,111;
 - September salary Kshs. 6,103;
 - Total Kshs. 14,714
 - Less loan Kssh.400
 - Due Kshs. 14,314.
11. All public holidays worked were paid at month end as evidenced through the submitted pay slips. The wage paid was a basic pay and a house allowance. On alleged underpayments, the last wage paid was Kshs. 13,900 per month as at September 2018 which is commensurate to what was due to a guard like the appellant. Payment of gratuity is not available upon summary dismissal

Determination

12. This being a first appeal, the court is allowed to review the entire record, the pleadings and the judgment of the trial court and make own findings taking into account the lower court had the opportunity to hear the witnesses and seek clarifications.
13. The appellant's case before the lower court was that his employment was terminated over alleged taking of bribes at his place of work and was summoned and issued with notice of summary dismissal.
14. The respondent filed work records and called evidence that the appellant left his work station unmanned, on 10 September 2018 he allowed a strange vehicle inside the compound he was manning at Pandya Hospital and upon investigations, it was established that he was selling parking spaces at a fee while the motorist had no business at the hospital. he was issued with notice and invited to attend a hearing. He admitted to the mistake and apologised but on 19 September 2018 the respondent issued the appellant with notice of summary dismissal for gross misconduct which he refused to accept and the same was placed with the Labour Officer.
15. The appellant does not deny his conduct. The admission of misconduct and apology well placed with the employer, to allow or give the appellant another chance became purely an operational matter and in this case, summary dismissal for the misconduct issued and cannot be faulted. Under the provisions of Section 44(4) of the *Employment Act*, 2007 (the Act) an employer is allowed to dismissal an employee subject to issuance of notice and hearing however short the notice is taking into account the matter of gross misconduct in terms of Section 41(2) of the Act. On his admission to gross misconduct, holding of disciplinary hearing became unnecessary. The matters to be proved at such hearing had already been admitted. The appellant, through his statement on 18 September 2018 stated as follows;
- ... I was on duty as usual one customer called me and gave me 100/- to buy for him Energy Drink for 60/= I responded and bought for him that drink. When I gave him the balance of 40/= he told me to keep change. I am very sorry for that I did not know that it was an offence. I would like to apologise to the offence for that, I will not repeat again ...
16. This was not the first time the appellant had been compromised and found to be of gross misconduct. he did not challenge the various statements he filed with the respondent for such gross misconduct.



17. The failure by the appellant to accept the letter of summary dismissal only support his gross misconduct and correctly, notice to the labour officer issued so as to secure the respondent in terms of Section 18(5) of the *Employment Act*, 2007.
18. However, despite the summary dismissal being justified, all earned dues should be addressed on the merit.
19. Notice pay and compensation are remedies not due to a case of justified summary dismissal
20. Leave pay is due in terms of Section 28 of the Act. in this case, the respondent as the employer filed work records attached at pages 44 to 46 of the Record of Appeal which demonstrate that the appellant took his annual leave days and part of his terminal dues was a payment of Kshs. 6,111 for untaken leave days.
21. On the claim for work during public holidays, a general claim was made from 1 October 2017 to 31 August 2018 for 10 days. Public holidays are not general and each is gazetted by the Minister. A general claim cannot suffice in this regard.
22. On the claim for underpayments, the applicants claim is from 1 May 2008 to 31 August 2018 at a wage of Kshs. 12,926.55 because his wage was paid at Kshs. 12,000 without a house allowance and hence a balance of Ksh.926.55 is claimed for 15 months.
23. On the record, in tabulating the alleged underpayments, the appellant relied on the Regulations of Wages (Agricultural Industry) (Amendment) Orders, 2017. As a security guard, the General Wage Orders applied. In the year 2017/2018 the due wage for a day guard was Kshs. 12,926.55.
24. In his evidence before the lower court outlined at page 111 of the Record of Appeal, the appellant asserted that his last wage was Kshs. 12,000 and upon cross-examination, he admitted that his wage was Kshs. 13,900. He denied ever being paid the sum of Kshs. 13,900. That his terminal dues were paid at Kshs. 14,314 without a breakdown as to what was being paid.
25. The record has several payment statements with regard to the appellant;
26. September 2018 his gross wage was Kshs. 13,900 which comprise a basic wage of Kshs. 6,849 and a house allowance of Kshs. 1,148 but alas! The total pay is Kshs. 8,803.
Gross pay is manipulated and cannot be Kshs. 13,900 at all.
27. There is a gross underpayment from what is due at Kshs. 12,926.55 plus a 15% house allowance thereof as against what was paid at Kshs. 8,803 but the appellant is only claiming Kshs. 13,898.25 under paragraph (vi) of this Memorandum of Claim and reiterated in his written submissions.
28. On this analysis the claim in underpayment at Kshs. 13,898.25 is justified.
29. The separate claim for unpaid house allowances, the respondent filed various payment statements with regard to the appellant.;
30. In September 2018 the statement is that the appellant was paid Kshs. 13,900 gross wage;
July 2017 wage paid at Kshs. 12,680;
June 2015 wage paid Kshs. 11,220;
October 2014 wage paid Kshs. 5,100;
December 2013 wage paid Kshs. 4,800.



31. In the terminal dues paid to the appellant, the respondent made a case that there was payment of 6,103 for days worked in September 2018. These dues were paid upon the intervention of the Labour officer at a meeting held on 9 January 2019. To then file a pay slip allocating payment of a wage of Kshs. 13,900 is not correct.

One record must be a manipulation.

32. The statements filed at page 59 to 63 of the Record of Appeal is hence not correct.

33. Equally, the appellant's evidence was that he was earning a wage of Kshs. 12,000 per month. the claim for a house allowance related to;

House allowance for the period between 1st September 2008 to 31st August 2018 (15% x Kshs. 12,926.55) = Kshs. 1,938.98 x 131 months = Ksh.254,0003.76

34. The wage for the period of employment as evidenced by the letter of appointment dated 1st November 2014 to 19 September 2018 was staggered and to claim a constant house allowance based on a constant wage of Kshs. 12,926.55 is to seek in unjust enrichment.

35. A house allowance is due to the appellant, save, the records submitted with regard to the correct wage paid each month and year do not allow a proper analysis by the court.

The right to a house allowance due cannot be negated on this basis.

36. The respondent as the employer is required to keep all work records and to file them upon a claim being filed in terms of Section 10(6) and (7) of the *Employment Act*, 2007 read together with Section 73 and 74 of the Act.

37. Based on the period of employment from 1st November 2014 to 19 September 2018, parties shall take account of the wage paid, the legal wage due, the due house allowance due at 15% of the wage due and arrive at the house allowance unpaid.

- a. Wage paid from 1st November 2014;
- b. Wage due under the Minimum Wage Orders;
- c. A 15% of the wage due;

Total due in house allowance.

Report to court within 14 days for adoption.

38. Gratuity pay is a benefit allocated under the Regulation of Wages [Protective Security Services] Order, 1998. Regulation 17[1] of this Order grants Guards who have worked for over 5 years, gratuity of 18 days' salary for every completed year of service. however, the benefit is not available in a case of summary dismissal found justified.

39. Accordingly, judgment delivered on 29 November 2021 in CM ELRC No.397 of 2019 is hereby reviewed and the appellant awarded;

- a. underpayment at Kshs. 13,898.25;
- b. House allowance due from 1st November 2014 to 19 September 2018;

The parties shall attend at the shop floor and assess the house allowances due in the following format;



- i. Wage paid from 1st November 2014;
 - ii. Wage due under the Minimum Wage Orders;
 - iii. A 15% of the wage due;
Total due in house allowance.
- c) Orders (b) above shall be addressed within 14 days and report to court for adoption on 30 October 2023.
 - d) For the appeal, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 12 DAY OF OCTOBER, 2023.

M. MBARŪ

JUDGE

