



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Aminga v Radar Limited (Cause 994 of 2018)  
[2023] KEELRC 2501 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2501 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 994 OF 2018  
NJ ABUODHA, J  
OCTOBER 11, 2023**

**BETWEEN**

**WILFRED ABUTA AMINGA ..... CLAIMANT**

**AND**

**RADAR LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his statement of claim on 19<sup>th</sup> June, 2018 and pleaded inter alia as follows:-
  - a. The Claimant was employed by the Respondent as a security guard on or about 29<sup>th</sup> September, 2007 at a salary of Kshs 7,500/= which was increased to Kshs 16,669 /= per month at the time of dismissal.
  - b. On 4<sup>th</sup> December, 2017 the Respondent unlawfully terminated services of the Claimant without any lawful cause despite carrying out his duties diligently and that dismissal was actuated by malice and breach of Employment contract/statutory duty hence suffering loss and damage.
2. The Claimant in the upshot prayed for the following against the Respondent;
  - a. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.
  - b. A sum of Kshs 13,134,472.00/= on loss and damages
  - c. Damages for loss and/or payment of salaries and allowances from 4<sup>th</sup> December,2017 until final date of determination of the Claim herein at the Claimant's gross salary of Kshs 16,669.00/=.
  - d. Costs of the suit and interests on present court rates.
3. The Respondent filed a statement of response dated 23<sup>rd</sup> November, 2018 in which it averred inter alia;



- i. The Respondent denied the contents of the claim and averred that the Claimant was dismissed due to gross misconduct as he did not report to work as from 24<sup>th</sup> October, 2017 without prior communication to the Respondent or Claimant's supervisor resulting to his dismissal vide a letter dated 29<sup>th</sup> November, 2017.
  - ii. The Respondent averred that it did not owe the Claimant any salary in lieu of notice since the Claimant was summarily dismissed for his gross misconduct and was not entitled to it.
  - iii. The Respondent also denied owing the Claimant any statutory contributions allowances or overtime payments and that the Claimant spent his leave days and therefore he is not entitled to unpaid leave allowances.
  - iv. The Respondent further averred that the Claimant was unlawfully dismissed as he absconded from work without authorization or any reasonable cause and he was negligent in execution of his duties.
  - v. The Respondent averred that the Claimant was issued with certificate of service and the Compensation of Kshs 13,134,472.00/= has no legal basis and the claim is brought in bad faith, vexatious and an abuse of the court process and should be dismissed with costs.
4. Both the Claimant's and Respondent's case were heard on 23<sup>rd</sup> May, 2023 where each had one witness.
  5. CW 1 the Claimant testified and adopted his witness statement as his evidence in chief. He further relied on the documents filed with the claim as his exhibits in the case.
  6. He further stated that he did not work at the time of the trial. It was his evidence that he was not subjected to any disciplinary hearing before dismissal after he got unwell and was hospitalized.
  7. CW1 testified that he had worked with the Respondent for 10 years before dismissal and he was dismissed by one Sharon.
  8. In cross Examination CW 1 told the court that he did not report to work on 24<sup>th</sup> October, 2017 as he did not have any assignment and that even though he was dismissed on 29<sup>th</sup> November, 2017 he got the letter on 4<sup>th</sup> December, 2017 and he was not issued with certificate of service and he had pending leave days for 9 years.
  9. In Re-exam CW1 confirmed that he was at Zambezi Hospital, the authorized hospital by the Respondent, when he got dismissed.
  10. The Respondent on the other hand called its witness one Beryl Adhiambo Odhiambo. She stated that she was the respondent's HRM. She adopted the statement of Rinah Ondego as her evidence in chief.
  11. In cross examination RW1 testified that she was employed in 2014 and she knew the Claimant as effective worker and he was not subjected to any disciplinary hearing as they were unable to reach the Claimant even on phone and they terminated his services on 29<sup>th</sup> November, 2017 after he deserted duties for about a month.
  12. RW1 acknowledged having documents submitted by the Claimant including the Medical reports and that they used to take staff to Zambezi Hospital but it was not mandatory and the Claimant was to go for review.
  13. RW1 acknowledged that the dismissal letter was not properly headed and that the Claimant was called to pick his letter as they had his number and he came to the office and signed for the letter.



14. RW1 acknowledged that the leave application and approval were before the court and that they did not manufacture the same. It was her evidence that Rinah left the Company and the Claimant was cleared to report to work but did not as he was going for review with the next review being 13<sup>th</sup> September, 2017.
15. RW1 confirmed that the hospital never informed them of the Claimant's sickness and they were not aware the Claimant was in hospital.
16. On Re-exam RW1 confirmed that they were not aware that the CW1 was in hospital after deserting duties for about a month and that they gave CW1 certificate of service.
17. The Claimant filed written submissions dated 6<sup>th</sup> July, 2023. The Claimant submitted that the Claimant was on sick leave at Zambezi Hospital having been referred there by the Respondent and all his medical bills were paid by the Respondent and he had not fully recovered by the time he was dismissed.
18. The Claimant further submitted that RW1 was not present when the Claimant was dismissed hence her evidence should be treated as hearsay and that the Respondent did not call Sharon who dismissed the Claimant to refute his evidence and that he was not subjected to any disciplinary process.
19. Claimant submitted that he should be awarded damages for the unfair dismissal and relied on case of *Robinson v Harman* (1948) 1 Exch 850 (at p.855), prayed for exemplary damages and relied on the case of the Court Appeal no 84 of 2005 between Aron Torres and Point Lisa Industrial Port Development Corporation Limited, *Chirau Ali Mwakwere v Royal Media Services Ltd* among others.
20. On the other hand, the Respondent filed its submissions on 16<sup>th</sup> September, 2023 and submitted that the Claimant was involved in the disciplinary process and that he had received several warning letters. The claimant was dismissed for gross misconduct.
21. The Respondent submitted that the Claimant's prayer for a sum of Kshs 13,134,472.00/= should be dismissed for being not strictly proved and relied on *Capital Fish Kenya Limited vs The Kenya Power and Lighting Co. Ltd* (2016) eKLR.
22. The Respondent relied on the case of *Richard Kiplimo Koech vs Yako Supermarket Ltd* (2015) eKLR to submit that absconding duty is misconduct on the part of employee.
23. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The Court has also considered authorities relied on by Counsels.
24. I have Three main issues emerge for determination;
  - a. Whether the reason for the Claimant's dismissal was fair and justified
  - b. Whether the Claimant's dismissal was procedural and fair hence unfair and unlawful dismissal.
  - c. Whether the Claimant is entitled to the reliefs sought.

**(a) Whether the reason for the Claimant's dismissal was fair and justified**

25. The court has stated previously that it is not within its realm to over-analyze the reason for which employment has been terminated. The test usually is the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss"? If the answer be in the affirmative, the court will not interfere.



- 26. In this case, the Respondent alleged that they summarily dismissed the Claimant on grounds of absconding of duties for about a month.
- 27. Whereas the Claimant’s case is that he was dismissed while on sick leave at Zambezi Hospital a facility the Respondent referred him to for treatment. During hearing RW1 acknowledged that their staff used to be treated at Zambezi Hospital though not mandatory and acknowledged that the Claimant used to go for reviews but still testified that they did not know that the Claimant was in hospital by the time they dismissed him.
- 28. The Respondent therefore cannot allege that they did not know that the Claimant was sick when the Claimant stated that they are the ones who referred him and paid his medical bills a fact which the Respondent never refuted and acknowledged that they had the medical documents from the Claimant.
- 29. The Respondent in its submissions submitted that the Claimant was negligent in his duties and was issued with warning letters but none was produced in this court despite the fact that the Claimant having worked with the Respondent for around ten years where his salary was reviewed upwards to mean he was a good employee a fact RW1 acknowledged during hearing.
- 30. It was therefore not correct for the Respondent to claim that the Claimant absconded duty when in fact it was aware he was sick. The reason therefore for the dismissal was not fair and justifiable.
- 31. The Law under Section 44 of the [Employment Act](#), 2007 stipulates when summary dismissal can occur, thus:
  - (1) “Summary dismissal shall take place when an employer terminates the employment of an employee without or with less notice than that which the employee is entitled by any statutory provision or contractual term.
  - (2). .....
  - (3) subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.
- 32. In Addition Section 44 (4) (g) of the [Employment Act](#), 2007 provides on what amounts to gross misconduct and categories of gross misconduct where absenteeism is one of the category which has not been proved.
  - i. In the case of Prof. [Macha Isunde vs Lavington Security Guards Limited](#) [2017] eKLR, the Court of Appeal stated:
    - “There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
- 33. From the foregoing the Court finds and holds that the termination of the claimant’s employment was not justified since there was no valid and fair reason for dismissal.



**b. Whether the termination of the Claimant’s employment was procedural and fair.**

34. Regarding procedural fairness, it was held in the case of *Walter Ogal Anuro -vs- Teachers Service Commission* (2013) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness.

35. Further the Court is guided by the *Employment Act* under Section 41 which provides for notification and hearing before termination on grounds of misconduct which provides that the employee to be explained the reason for termination in language he understands and consider the representations by such an employee who should have an employee of his choice.

36. The Respondent has maintained that they dismissed the Claimant on gross misconduct and that they were not supposed to adhere to provisions of Section 41 of the *Employment Act*. The Court holds a different view from the Respondent on this fact because Section 41 (2) of the *Employment Act* provides:

“Notwithstanding any provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person if any, chosen by the employee within subsection (1), make.”

37. In *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR the court faced with the same situation held as follows;

“...Worth stating that the view taken cannot hold water, besides being a total mis-read of the Act, it is in ignorance of the provisions of the Fair Administrative Actions Act, relevant International Labour Standards, relevant, and *the Constitution* and more specifically those that relate to fair hearing..the provision cannot be looked in any other way, it provides for a procedure inter alia to be adhered to before an employer summarily dismisses an employee. One is left to wonder how such an express mention of “summarily dismissing” would escape the sight of the Respondents’ Counsel.

38. The Respondent’s witness acknowledged that they did not give the Claimant an opportunity to be heard by convening a disciplinary hearing or even giving him any show cause letter to respond to their allegations as per the requirements of the Act.

39. Concerning procedural fairness the Court holds the view that the Claimant’s dismissal/termination was procedurally flawed hence unfair under section 45 of the *Employment Act*.

**c. Whether the Claimant is entitled to reliefs sought.**

40. The prayer for one month salary in lieu of Notice will be allowed since the reason for the dismissal has been found to substantially unjustified.

41. The Prayer for unpaid leave for 9 years not taken is granted to the Claimant. Even though the Respondent attached some leave application forms none was signed by the Claimant which was requirement that an employee applies then the Respondent approves. It might be true then the same were doctored.

42. Concerning the prayer on 12 month’s salary for unfair termination, the Court notes that the claimant was employed as a security guard and had worked for the respondent for approximately 9 years. The



claimant did not exhibit any special skills that could have made him not be able to obtain any other general work besides the employment could have terminated for any other reason including resignation by the claimant. An award of six months' salary as compensation for unfair termination would be reasonable in the circumstances.

43. The Claimant is entitled to certificate of service as envisaged by Section 51 of the *Employment Act* in as much as the Respondent stated the same was given to the Claimant there is no harm in reissuing the same to the Claimant who has denied ever been issued with the same.
44. The Court declines to award the Claimant other prayers in the claim since no justification or evidence was provided to support them.
45. In conclusion the Claimant's awards the claimant as follows
  - a) One month's salary in lieu of notice 16,669
  - b) Payment in lieu of leave 150,021
  - c) Six months' salary as compensation for unfair termination 100,014  
266,704
  - d) Costs of the suit
  - e) The Respondent shall issue the claimant with certificate of service
  - f) Items (a), (b) and (c) shall where applicable be subject to taxes and statutory deductions
46. It is so ordered

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023.DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023**

**ABUODHA JORUM NELSON**

**JUDGE**

