



**Emira v Securex Agencies (K) Ltd (Cause 1596 of 2018)
[2023] KEELRC 2940 (KLR) (17 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2940 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1596 OF 2018
B ONGAYA, J
NOVEMBER 17, 2023**

BETWEEN

ERICK OMERI EMIRA CLAIMANT

AND

SECUREX AGENCIES (K) LTD RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of claim on 10.12.2018 through S.J Nyang & Co Advocates. The claimant prayed for judgment against the respondent for:
 - a. An order compelling the respondent to pay the claimant his terminal dues and salary in lieu of notice all totalling to Kshs.340,087.00.
 - b. General damages for mental torture, stress anguish as a result of loss of employment.
 - c. Reinstatement to employment together with withheld salary to date.
 - d. Costs of the claim and interest on (a) and (b) above at commercial rates.
 - e. Or in the alternative payment of withheld salaries together with orders (a,b&c).
2. The reply to claim was filed on 04.04.2019 through Simiyu Wekesa Advocates. The respondent prayed that the claimant's suit against it be dismissed with costs.
3. The claimant's case was that he was an employee of the respondent from 02.02.2013 until 18.12.2015 when without reasonable justification, the respondent casually terminated his services without notice.
4. That on 11.06.2015, the Kenya Power & Lighting Company through their employees or representatives made a malicious complaint to the Muthaiga Police Station to the effect that the claimant together with others had stolen a 22KVA transformer serial no. 1256438 at the Ruaraka Kenya



power complex contrary to section 268 as read with section 275 of the Penal Code and later arraigned in court on the 18.06.2015 in criminal case no. 1925 of 2015 at Makadara law courts, Nairobi.

5. The claimant was tried before the Principal Magistrate's Court at Makadara Law Courts where after lengthy trial the claimant was acquitted under section 210 of the criminal procedure code.
6. It is the claimant's case that the respondent did not procedurally terminate his employment. Instead, it relied and focused on the allegations of theft, which allegations caused the claimant to be put in custody for some days, during which, he was alleged to have deserted duty and his services summarily terminated without giving him a fair hearing.
7. The claimant stated that on 17.06.2015 he received a report from the main office of the respondent instructing him to inform his night shift colleagues not to leave the assignment the next day, 18.06.2015.
8. That KPLC sent police officers to arrest the claimant and two of his colleagues Daniel Ouma and Peter Natembea. The police did not arrest the rest of the claimant's colleagues who were twenty-seven in number. The claimant and his colleagues were held at Industrial Area Prisons, and the claimant was bailed out on 26.06.2015 by his uncle.
9. The claimant pleaded that on 29.06.2015 he went to the respondent's base office seeking to resume work, but, he was given a notice to report back to the base office on 02.07.2015 for a hearing.
10. That on 02.07.2015 the claimant went to the respondent's base office as instructed and met his colleague Peter Natembea who had equally been notified to attend a hearing on same day. That after 3 hours of waiting, they were informed that their area manager one Mr. Nderutu was not available and that they should leave and return on 07.07.2015.
11. On 07.07.2015 the claimant arrived at the respondent's offices at 0820 Hrs. He met discovered that his colleague Peter Natembea had already arrived. They were the informed that Mr. Nderutu, the human resource manager, operations and shop stewards were in a meeting, and that they should wait.
12. When the meeting ended, Mr. Nderutu informed the claimant that he had to attend to an emergency in the field. Some of the shop stewards approached the claimant and Peter Natembea, and tried to convince them to write resignation letters so that they get paid quickly like their colleague Daniel Ouma.
13. The claimant and his colleague declined to write the resignation letters, and were informed to return to the respondent's offices on 08.07.2015.
14. On 08.07.2015 the claimant returned to the respondent's offices. Mr. Nderutu was not available and thus the meeting could not take place. The respondent's secretary asked the claimant to leave his contacts behind, which he states, he wrote down on a piece of paper.
15. The claimant states that he fundraised amongst his friends and used the monies to relocate, together with his family, back to his home in Busia County.
16. That on 11.01.2016 he returned to Nairobi purposely to collect his school certificates which were in the custody of the respondent. That he was requested to return the respondent's property before being given his certificates, which he states he did on 12.01.2016. On the same date his certificates were handed over to him together with a certificate of service and a cheque for the days he had worked in the month of June 2015.



17. On the part of the respondent, it admitted that the claimant was its employee, employed as a security guard effective 01.05.2011 to 30.06.2015 earning a basic salary of Kshs.12,221/= and a house allowance of Kshs.1,833.17/=.
18. That on 09.06.2015 the claimant was assigned duties at Kenya Power and Lighting Company (KPLC) Ruaraka grounds. While on duty at the site, the claimant failed to raise alarm or report vandalism of a transformer that occurred at KPLC Ruaraka grounds which was discovered the following day on 10.06.2015.
19. The claimant was summoned by the respondent on the events that led to the transformer being vandalized and he prepared a written statement on his observations in relation to the security breach at KPLC Ruaraka grounds.
20. The respondent stated that the claimant's actions of failing to raise alarm of the theft resulted in him being issued with a notice to show cause on 29.06.2015. He was required to attend a disciplinary hearing on 02.07.2015.
21. The claimant did not show up for the disciplinary hearing on 02.07.2015 and no reason was given for the absence. The claimant having failed to appear for disciplinary proceedings and having been absent from duty without authority, the respondent summarily dismissed him.
22. The respondent stated that the claimant showed up at the respondent's premises on 13.01.2016 to collect his terminal dues. However, he did not offer an explanation on his whereabouts for the six months that he was absent from employment.
23. The respondent paid his final dues and issued him a certificate of service.
24. The Claimant filed his submissions. Despite service the respondent failed to attend at the hearing and failed to file final submissions. The court has considered the parties' respective cases and makes finding as follows.
25. To answer the 1st issue, there is no dispute that the parties were in a contract of service.
26. The 2nd issue is whether the contract of service was terminated. The respondent states that a notice to show cause was issued on 29.06.2015 for a disciplinary hearing on 02.07.2015. Further, that the claimant failed to show at the disciplinary hearing and resurfaced on 13.01.2016 to collect his terminal dues. The claimant's account is that he received the notice to report back on 02.07.2015 but the hearing was adjourned to 07.07.2015. the claimant stated that on 07.07.2015 the Human Resource Manager for the second time was very busy to meet him and the shop steward who had been in a meeting with the Manager asked him to resign like his co-accused Daniel Ouma had done so as to be paid the worked days. He declined and was asked to go back on 08.07.2015 when the meeting could not take place but the secretary for the Manager asked her to record his address and to go home to be called later. He testified he never received the call until 15.07.2015 when it became unsustainable as he could no longer pay the rent and he did the fundraiser and travelled to his rural home in Busia. He came back to Nairobi on 11.01.2016, handed over and received the final cheque for days worked.
27. The Court finds that the claimant's account upon his own testimony is not challenged at all. It was for the respondent to show that on 02.07.2015 the claimant had failed to attend the disciplinary hearing as envisaged in section 43 of the *Employment Act*. If indeed the claimant had failed to do so, it is not clear why the same could not be revived in January 2016 when the claimant showed up. Instead it appears the respondent decided to give a final pay cheque without reference to the disciplinary process. The Court finds that the respondent frustrated the disciplinary hearing. The Court finds that the procedure adopted was not fair as per section 41 of the Act. The disciplinary procedure having aborted at the



instance of the respondent, it cannot be said that there was established reason for the termination as envisaged in section 43 of the Act. It was unfair in substance and procedure. The submissions made for the claimant are upheld. The claimant exhibits a letter dated 9.08.2018 addressed to his advocate by the respondent stating that the claimant was declared a deserter 18.12.2015 after receiving the letter to show cause dated 29.06.2015 and failing to attend a disciplinary hearing on 02.07.2015. Once again, the respondent fails to explain why the letter on desertion was not issued promptly on 02.07.2015, once again rendering the respondent's account not probable on a balance of probability.

28. The 3rd issue is on remedies. The Court finds as follows:

- a. The claimant was dismissed when the disciplinary process aborted at the respondent's instance and it was without notice as he is awarded Kshs.22,000.00 in lieu of notice.
- b. The court has considered the factors in section 12 of the Act. The aggravating factors are that the respondent failed to conclude the disciplinary process and subjected the claimant to unjustified adjournments. The Court has considered the period served and also considered the claimant otherwise had a clean record of service. He is awarded 8 months' salaries in compensation making Kshs.176,000.00.
- c. There appears no material on record shows the claimant was a member of NSSF and the claim for service pay is declined.
- d. The Court has considered the suffering the claimant went through for the manner he was dismissed and awarded 8 months' salaries in compensation. The claimant has not shown justification for general damages for mental torture, stress and anguish as a separate heading for award. It is declined. There were no submissions made in that regard to justify the award. The submissions made for payment of withheld salaries are found baseless as no claim and prayer had been made in that regard. No submissions were made on the prayer for reinstatement and the same is deemed abandoned and correctly so as it was already statute barred, three years having lapsed from the date of the termination. The termination having been constructive effective 02.07.2015 when the disciplinary process aborted.

29. The claimant has succeeded and the respondent will pay costs.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. Payment of Kshs.198,000.00 by 31.12.2023 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- b. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 17TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

