



REPUBLIC OF KENYA



KENYA LAW
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Kenya National Private Security Workers Union v KK Security Limited (Cause E045 of 2022) [2023] KEELRC 2770 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2770 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E045 OF 2022
CN BAARI, J
NOVEMBER 2, 2023

BETWEEN
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT
AND
KK SECURITY LIMITED RESPONDENT

JUDGMENT

Introduction

1. This suit was instituted through a Memorandum of Claim dated 7th September, 2022, and filed on 17th October, 2022. The Claimant seeks payment of one month's salary in lieu of notice, gratuity, salary for January, 2021, leave pay, compensation for unfair dismissal, issuance of a certificate of service and cost of the suit.
2. The Respondent entered appearance on 30th November, 2022, through the Firm of Omondi, Abande & Co. Advocates, and subsequently filed a memorandum of defence to the Claimant's claim dated 2nd February, 2023.
3. The Claimant's case was first heard on 1st February, 2023, when the same proceeded undefended, the Respondent not having filed their response and being absent on the date the matter was fixed for hearing. This proceeding were later set aside, upon application by the Respondent.
4. The hearing of the Claimant's case, then took place on 27th March, 2023 with the participation of the Respondent. The Claimant testified in support of his case. He adopted his witness statement and produced documents filed as exhibits in his case.
5. The Respondent's case was heard on 4th of July, 2023. The Respondent presented one Christine Madanji to testify in support of its case. Ms. Madanji adopted her witness statement and produced documents filed as exhibits in support of the Respondent's case.



6. Submissions were filed for both parties.

The Claimant's Case

7. The Claimant's case is that the grievant was employed by the Respondent in Nairobi and later transferred to various parts of the country as a security officer/dog handler, on a monthly gross salary of Kshs. 7,000/= per month.
8. It is the Claimant's case that before being dismissed, the grievant's salary had risen to a basic of Kshs.14,038, Kshs.5,700 in overtime pay, and Kshs. 2000 per month as housing allowance.
9. The Claimant states that while working in Eldoret, the grievant was accused of failing to assist his colleagues when intruders came into their workplace to siphon fuel from the generators, on 10th January, 2021.
10. It is the Claimant's further case that on 11th January, 2021, the grievant was issued a letter inviting him to attend a disciplinary hearing before a panel, and that he was further requested to write a statement.
11. It is the Claimant's case that nothing was stolen on the date of the incident subject of the dismissal, and there was therefore no reason to discipline the grievant.
12. The Claimant states that the grievant and 3 other colleagues were arrested by the police, but later released due to lack of evidence.
13. The Claimant further states that the grievant was issued with a dismissal letter dated 13th January, 2021, after appearing before a disciplinary committee on 11th January, 2021. It is its case that the grievant lodged an appeal against the dismissal, but which was subsequently dismissed.
14. The Claimant states that the grievant reported the matter to the Ministry of Labour, and that the Conciliator conciliated the dispute and issued a certificate of unresolved dispute dated 2nd March 2022, after the Respondent failed to attend.
15. On cross-examination, the grievant told Court that the disciplinary hearing took place virtually due covid.19 that was at its peak at the time. He further stated that his letter of appointment did not indicate his position as that of a dog handler, but a security guard.
16. It is the grievant's evidence that his last day at work was 10th January, 2021, and that he is owed 21 days salary arrears. He further states that it is true intruders entered the Respondent's guarded premises on a mission to siphon fuel from tanker, and further that a dog handler that he worked with raised an alarm at about 5a.m
17. It is CW1's evidence that he received a show cause letter and that he responded to the letter. He also testified being knowledgeable about disciplinary procedures, being himself a union representative.
18. He states that the disciplinary process took about three days, having been issued a show cause letter on 10th January, 2021, followed by an invitation to attend the disciplinary process issued on 11th January, 2021 and a dismissal letter issued on 13th January, 2021.
19. It is the grievant's further testimony that though he was informed to appear with a representative of his choice, the representative who attended the hearing was not his choice. He further states that he did not complain about it during the hearing.
20. The grievant confirmed on cross-examination that he received his certificate of service through email.
21. It is the Claimant's prayer that he be awarded the reliefs listed in his memorandum of claim.



The Respondent's Case

22. The Respondent states that the grievant was issued with a confirmation letter on 1st May, 2019, and that he worked as a dog handler or security guard depending on the client's needs.
23. It is the Respondent's case that on 10/01/2021, while offering security services at Lasma Engineering Company, thieves accessed the client's premises with a 20 liters jerrycan with the intent to siphon diesel from the client's generator. The Respondent further states that the grievant had left the door open, allowing intruders free access to the guarded premises, and that the grievant took too long to respond to the distress call by a colleague that he worked with on the material night.
24. It is the Respondent's case that the grievant had left his designated area during the incident, and left the small gate open which thieves used to gain access to the premises that the client entrusted the Respondent to guard.
25. The Respondent states that the grievant's response to the allegations was not sufficient and therefore it invited him to a disciplinary hearing vide a letter dated 11th January 2021, and that the hearing was to take place on 13th January, 2021.
26. It is the Respondent's case that after the hearing, the grievant was served with a letter of summary dismissal dated 13th January, 2021, and informed of his right of appeal. The Respondent further states that the grievant's appeal was dismissed and the decision communicated vide a letter dated 24th February, 2021.
27. The Respondent states that the grievant used up his leave days, was paid house allowance and that gratuity was not part of the contract and therefore, the Respondent owes him nothing.

The Claimant's submissions

28. The Claimant's submission is that the grievant was employed by the Respondent in 2008 and confirmed in 2009.
29. It is submitted that the grievant was not given adequate time to defend himself before being dismissed, and the police also arrested and released him and his colleagues due to lack of evidence.
30. It is the Claimant's further submission that the Respondent is in breach of Sections 43 (1) and 41(1) & (2) of the *Employment Act*, on the basis that the matter was dealt with within 3 days which was not enough time to conduct investigations.

The Respondent's Submissions

31. The Respondent submits that the grievant was procedurally dismissed, having been accorded an opportunity for hearing and being informed of his right of appeal. It is its further submission that the dismissal is fair in law, and with reason in strict compliance with internationally accepted practices and as such, the claim should be dismissed with costs to the Respondent.
32. The Respondent denies the demand and pledges of the Claimant/grievant, and submits that the grievant was paid in lieu of notice.
33. It is the Respondent's submission that gratuity is not a statutory obligation, and is only payable when it is provided for in the Employment Contract. It is its further submission that there was no such provision in the Employment contract between the grievant and itself, and hence the claim cannot succeed.



34. The Respondent further submits that the grievant utilized all his leave days and therefore, is not entitled to any payment under this head.
35. It is the Respondent's submission the grievant is entitled to a Certificate of Service and that the grievant can collect it at any time after clearing.
36. The Respondent submits that the grievant was fairly and procedurally dismissed in accordance with the provisions of the law.
37. The Respondent prays that this Court dismisses the claim with costs to the Respondent.

Analysis and Determination

38. I have considered the pleadings, the witnesses' testimonies and the rival submissions. The issues that arise for determination are:
 - i. Whether the grievant was unfairly dismissed.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Who should bear the costs of the suit.

Whether the grievant was unfairly dismissed

39. The question of whether a dismissal/termination is unfair is by law depended on two vital requirements. The first being adherence to fair procedure as laid out under Section 41 of the [Employment Act](#), 2007, Article 47 of [the Constitution](#) and Section 4 of the Fair Administrative Actions Act.
40. Section 41 states thus: -
 - “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
41. The grievant was summarily dismissed owing to an incident that occurred at 5a.m on 10th January, 2021. The grievant's testimony is that he was issued with a show cause letter dated 11th January, 2021, requiring him to respond to charges of colluding with intruders whose intention was to siphon fuel from the premises of the Respondent's client guarded by the grievant together with a dog handler.
42. It is the grievant's contention that the disciplinary process ran for a total of three days, which did not allow for investigations and hence a violation of Section 41 of the [Employment Act](#).
43. The grievant's testimony, is that he is a union official, and hence he understood the disciplinary procedures that should be adhered to by employers.
44. In the case of Titus Muriuki Ndirangu v Beverly School of Kenya Limited [2022] eKLR the Court emphasized the importance of both substantial and procedural fairness in all forms of termination.



45. Further, in *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR, the Court had this to say on procedural fairness:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. (emphasis own)

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

46. The Claimant’s case is that the disciplinary process took about three days, the grievant having been issued a show cause letter on 10th January, 2021, followed by an invitation to attend the disciplinary process issued on 11th January, 2021 and a dismissal letter issued on 13th January, 2021.
47. The Respondent did not dispute or controvert the grievant’s assertion that the disciplinary process was a three-day affair. Further, even where the grievant admitted knowledge of disciplinary procedures, and not having complained against the manner in which the process in his matter was conducted, it did not give the Respondent/employer a free ticket to bypass the requirements of the law on procedural fairness, which are both Constitutional as well as statutory.
48. The grievant was without doubt not accorded sufficient time to respond and prepare for the hearing of the charges against him before the Respondent’s disciplinary committee. This in my view render the dismissal unfair on account of process, and I so hold.
49. On the second limb, the law demands that once an employee has demonstrated unfair dismissal/termination, the burden shifts to the Respondent/employer to prove that the dismissal/termination was based on fair reason (s) in accordance with Sections 43, 45 and 47(5) of the *Employment Act*, 2007.
50. In *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91 Lord Denning described the test of reasonableness in the following words: -

“The correct test is; was it reasonable for the employers to dismiss him” If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

51. The grievant was charged with securing premises on behalf of the Respondent. The Court was told that the grievant failed in not ensuring that the gate to the guarded premises was locked, and which resulted in intruders coming into the premises with an intent to siphon fuel from machinery within the premises.



52. The evidence further shows that a dog handler within the guarded premises raised an alarm when the intruders got into the premises, but that the grievant failed to respond, leading to the conclusion of possible collusion between the intruders and the grievant.
53. The question is whether this would amount to fair reason to dismiss, applying the reasonable employer test. In *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR, the court citing the case of *Thomas Sila Nzivo vs Bamburi Cement Limited* [2014] eKLR held: -
- “The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 (4) (g) of the *Employment Act*, 2007. The Employer was not required to have conclusive proof of the Claimant’s involvement; it was only expected to have reasonable and sufficient grounds.”
54. The grievant’s sole duty was to safeguard the Respondent’s client’s premises and the properties therein. His actions on the material night or early morning if you like, were to the detriment of the Respondent and/or the Respondent’s client’s and its property.
55. I return that the incident subject of the grievant’s dismissal amounts to fair and justified reason to dismiss. I subsequently find and hold that the summary dismissal was substantively fair.

Whether the Claimant is entitled to the reliefs sought

56. The Claimant sought an award of payment of one month’s salary in lieu of notice, gratuity, salary for January, 2021, leave pay, compensation for unfair dismissal, issuance of a certificate of service and costs of the suit.
57. The grievant was issued a show cause letter on 10th January, 2021. This was followed with an invitation to appear before a disciplinary panel dated 11th January, 2021, and which was equally followed in quick succession by a letter of summary dismissal.
58. Although the Respondent’s assertion was that it did pay the grievant in lieu of dismissal notice, no prove of such payment has been placed before this Court. I thus find the claim merited and is allowed as prayed.
59. The grievant admitted during cross-examination that his employment contract did not provide for payment of gratuity. It is settled that for reason that gratuity is not a statutory entitlement for employees or obligation for employers, the entitlement can only be created under the contract of service/employment contract.
60. That the grievant’s employment contract did not provide for payment of gratuity, confirms that it was not the intention of the parties that it forms part of the terminal benefit payable to the grievant. The claim fails on this basis.
61. The grievant has also sought payment of salary for the month of January 2021, being Kshs.14038, plus 2000 for housing and 5600 overtime. Nothing shows that the grievant was paid for the 12 days worked in the month of January, 2021. The claim is allowed limited only to the 12 days worked.
62. Finally, the Claimant claims compensation for the grievant’s unfair dismissal. The award of compensation is guided by Section 49 and 50 of the *Employment Act*.
63. The Court held the grievant’s dismissal substantively fair and the unfair dismissal is solely on account of procedure. This goes to say that the Claimant has not proved a case for maximum compensation.



64. The court record is also awash with warning letters issued to the grievant for various acts of misconduct. In the premise, I deem an award of two (2) months' salary sufficient compensation for the unfair dismissal.

65. I conclude by holding that the Claimant's suit is merited, and orders granted as follows: -

- i. A declaration that the grievant was unfairly dismissed.
- ii. Payment of one-month salary in lieu of notice at Kshs. 21,638/-
- iii. Payment for the 12 days worked in January, 2021 at Kshs. 8655/-
- iv. Two months salary as compensation for the unfair dismissal at Kshs. 43,276/-
- v. Costs of the suit and interest until payment in full.

66. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF NOVEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Odima present for the Claimant

Ms. Raburu h/b for Mr. M. M. Omondi for the Respondent

Mr. Erwin Ongor – C/A

