



**Obachi v Gain Security Services (Cause 982 of 2018)
[2023] KEELRC 3181 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3181 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 982 OF 2018
NJ ABUODHA, J
DECEMBER 5, 2023**

BETWEEN

EVANIS ORONWE OBACHI CLAIMANT

AND

GAIN SECURITY SERVICES RESPONDENT

JUDGMENT

1. The Claimant filed his statement of claim dated 7th June, 2018 pleaded inter alia as follows: -
 - i. The Claimant was employed by the Respondent as a night security guard on or about 30th August, 2011 at a gross monthly salary of Kshs 9, 000/= inclusive of house allowance.
 - ii. The Claimant averred that he was the supervisor of guards. That he was never issued with a contract of service nor an itemized pay slip.
 - iii. The Claimant averred that he worked for the Respondent 5.45 Pm to 6.00 am for 7 days a week and never went for annual Leave. Nonetheless he averred that he worked effortlessly and zealously for the Respondent.
 - iv. The Claimant averred that the Respondent recognized his efforts and increased his salary every year up to 2017 when he was earning Kshs 15,000/- inclusive of house allowance.
 - v. The Claimant averred that on or about 10th January,2018 after he had completed his duties and left work at 6 .00 am as usual, the Claimant received a phone call from the Respondent's security Manager at around 9.00am informing him that he should report to the pipeline branch immediately. He told the Respondent's security Manager that he could not make it at that particular time because he did not have enough money for transport as he had used all his money on medication at the hospital the previous day.



- vi. The Claimant averred that the Respondent's security Manager hang up and after 2 hours he called the Claimant again and told him that he should vacate the company house immediately. His services were no longer needed by the Respondent. He asked him what the problem was but was told to stop questioning and vacate Company house.
 - vii. The Claimant averred that he told the Respondent's Security Company that he could not vacate the house immediately because he did not have any money to move to another house or rather a place to go at that particular time. He then demanded for his 10 days salary for the month of January,2018 to enable him move to another house but the Respondent's security Manager did not respond.
 - viii. The Claimant averred that around 3.00pm the same day the Respondent's Assistant manager together with the company driver and pipeline branch supervisor came to his house and told him to vacate the house so that the new supervisor could move in. He refused to leave stating that he had not prepared to leave to another house. The team then took his household belongings to the company houses that were still under construction near where he was living and they left.
 - ix. The Claimant averred that on 12th January,2018 he went to the Respondent's Nairobi branch to inquire about why they terminated his services but the Assistant manager failed to explain why they had terminated him.
 - x. The Claimant averred that he had always carried out his duties for which he was employed for with due dispatch and diligence and that the dismissal was actuated by malice and clear breach of the Respondent's statutory duty.
 - xi. The Claimant averred that the Respondent failed to give reason for termination, notification of hearing and disciplinary hearing if necessary to hear his case and afford him opportunity to defend himself as per section 41 of the [Employment Act](#) before terminating him. That the Respondent failed to pay his terminal dues and as a result he suffered 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. Payment in lieu of Notice Kshs 15,000.00/=
 - c. Annual leave for 7 years Kshs 60,123.00
 - d. Compensation for wrongful and unfair termination
12 months' salary Kshs 180,000.00
Total Kshs 255,123.00/-
 - e. Costs of the suit and interests on present court rates.
3. The Respondent did not enter appearance or file any response despite service and the matter proceeded undefended.



Evidence

4. The Claimant's case was heard on 6th July, 2023. The Claimant testified and adopted the pleadings and documents filed in court as his evidence in chief. The Claimant further prayed that he be compensated as per his statement of claim.

Claimants' submissions

5. The Claimant filed written submissions dated 10th July, 2023. On the issue of whether he was the Respondent's employee, he produced his work identity card and bank statement from equity bank showing payment of monthly salary by the respondent.
6. On whether his termination was lawful and fair he submitted that he was never informed of the reasons for his termination hence the same was unfair and relied on the case of David Gichana Omuya vs Mombasa Maize Millers Ltd (2004) eKLR.
7. On the procedural fairness the Claimant submitted on section 41 of the *Employment Act* and the above case of Gichana. He submitted that he was never accorded a disciplinary hearing prior to his termination hence procedurally unfair.
8. On the issue of whether the Claimant was entitled to remedies sought he submitted that he was entitled to one month salary in lieu of notice as per section 36 of the *Employment Act*, Annual leave as per section 28(1) (a) of the *Employment Act*, 12 months' Salary compensation as per section 49 of the *Employment Act* and the costs of the suit since the Respondent failed to enter appearance or file response in this matter.

Determination

9. I have reviewed and considered the pleadings, testimonies and submissions by Claimant in support of the case and even though the Respondent did not participate in these proceedings I proceed to make my analysis.
10. I have I have come up with two main issues;
 - a. Whether the Claimant was unfairly and unlawfully terminated.
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly and unlawfully terminated.

11. 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.
12. In this case the Respondent did not enter appearance, file response and participate in these proceedings despite service. In addition, the Respondent did not give and inform the Claimant the reason for termination despite the Claimant serving them for 7 years and visiting their offices to inquire the reason for the termination.
13. It is not in dispute that the Claimant was an employee of the Respondent because he has produced the work identity card and Equity Bank statements to illustrate that he was employed by the Respondent.



14. The Claimant was not given any notice, warning for the termination whether verbal or in writing and there was no reason for termination given.
15. On the issue of the reason for termination I am guided by Section 43 which requires the employer to prove the reason for termination; the reason must be valid and fair and if the employer fails prove so the termination shall be deemed unfair under Section 45 of the Act.
16. 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."
17. In conclusion I find that the dismissal of Claimant's employment was not substantially justified, there being no valid and fair reason for termination.
18. Regarding procedural fairness, it was held in the cases of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eklr and Walter 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 but also procedural fairness.
19. Further I am guided by section 41 of the Employment Act on the procedure for termination.
20. The Claimant submitted that he was never given any notice, no warning either verbally or in writing, no show cause letter was given, no disciplinary hearing was done.
21. The respondent refused and or ignored to take part in these proceedings to rebut the Claimant's allegations.
22. In conclusion I am of the view that the Claimant's termination of employment was procedurally flawed hence unfair under section 45 of the [Employment Act](#).
23. The prayer for one-month salary in lieu of Notice is hereby allowed since the reason for the termination of the Claimant employment have been found to be substantially unjustified and procedurally flawed.
24. The prayer for annual not being rebutted is hereby allowed as prayed.
25. On the prayer for compensation for unfair termination of 12 months I take in to account the years the Claimant has worked with the Respondent which was 7 years and the conduct of the Respondent who refused and or ignored to take part in these proceedings and award the compensation for 10 months.
26. The Claimant is entitled to certificate of service as envisaged by Section 51 of the [Employment Act](#) if it was not given to him.
27. In conclusion the Claimants' claim is allowed as illustrated below with costs to the Claimant.
 - a. One Month notice Kshs 15,000/=
 - b. Annual Leave Kshs 60,123.00
 - c. 10 months Compensation for unfair and unlawful termination Kshs 150,000/=



Total Kshs 225,123/=

28. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY DECEMBER, 2023

ABUODHA NELSON JORUM

JUDGE

