REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1495 OF 2015

(Before Hon. Justice Dr. Jacob Gakeri)

ALFRED OGENCHE NCHORE.....CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant initiated this action by a memorandum of claim dated 21st August 2018 and filed on 25th August 2015, alleging that he was unfairly dismissed and prays for –

(i) Declaratory order that the Claimant's summary dismissal is unfair.

(ii).....Unpaid salary for 10 days worked in February 2016.....Kshs.10,218

(iii).....Gratuity pay for three years worked Kshs.53,166

(iv).....18 months' pay for remaining contract period.... Kshs.581,400

(v).....Pending leave for three years Kshs.72,666

(vi).....One month's salary in lieu of notice Kshs.30,657

(vii).....12 months compensation for unfair dismissal.....Kshs.387,600

(viii).....Interest and costs of this suit.

2. The Respondent filed its reply to the memorandum of claim on 6th October 2015 praying for dismissal of the suit with costs.

Claimant's Case

3. The Claimant avers that he was employed by the Respondent on 15th July 2011 as a security officer on a fixed five year term contract and remained in employment until he was summarily terminated on 10th February 2015 having served for over three years.

4. At the date of dismissal his monthly gross salary was Kshs.30,657/-.

5. It is further averred that on 10th February 2015, the Claimant was summoned to the Human Resource Office and handed a termination letter. That the Claimant was shocked by the development since he had not previously been issued with a warning letter or notice to show cause. That since termination on 10th February 2015, he is yet to receive final dues including a certificate of service. That the summary dismissal was fair in the context of Section 45 of the Employment Act.

Respondent's Case

6. The Respondent submits that the Claimant was its employee from 15th July 2011 under a fixed five year contract.

7. It avers that the duties of the Claimant as a security officer required utmost trust and responsibility.

8. That on or about 2nd February 2015 in the morning, the Claimant was found sound asleep at his place of work leaving the place of duty unmanned and the Respondent client's property exposed. A photograph showing the Claimant was furnished. That the Claimant's act of sleeping at the work place exposed the Respondent's client's life, property and risk of theft.

9. That following the incident, the client deducted Kshs.17,173.69 from the amount due to the Respondent for the services which was detrimental to its business and relationship with the client.

10. It is also averred that on 3rd February 2015, the Claimant wrote a statement admitting that the allegations were true and was suspended from duty for one (1) week to report back on 10th February 2015. That he was invited for a hearing on 10th February 2015 and the disciplinary committee, after hearing him, resolved that he be summarily dismissed and was dismissed on the same day pursuant to Section 44(4)(c) of the Employment Act, 2007. That his terminal dues were computed and paid.

Evidence

11. The Claimant's written statement as adopted replicates the contents of the memorandum of claim.

12. The Claimant testified that he was found sleeping at his duty station on 2nd February 2015. He told the Court that he had a headache and had taken drugs for the same but fell asleep and had explained the same to the Respondent. That he was aware that loss ensued on the Respondent. He admitted having been paid Kshs.27,800/- for the days worked and leave days for 2014.

13. On cross examination the Claimant confirmed that the employment contract was governed by agreed terms and conditions including Clause 9(c) on offences committed by an employee. He confirmed that he had a special contract since he was serving the United States Embassy in Kenya. He confirmed that he was found sleeping at his place of work but had no documentation to prove is indisposition.

14. He further confirmed that he attended a disciplinary hearing on 10th February 2015 and two union representatives were in attendance, Francisco and Geoffrey. That he signed the report on the disciplinary hearing on page 4.

15. Finally, the witness confirmed having been paid for January, days worked in February 2015 and leave days.

16. RW1, MR. NORINE SILWE testified that for ordinary contracts, a security guard could be allocated deities anywhere but for the United Stats Embassy, it was a five-year contract. That the Respondent's clients were diplomats, workers, warehouses and Embassy offices at Gigiri. That if a guard was found asleep, the Respondent would incur liability for the unmanned period.

17. On cross examination, RW1 confirmed that the US Embassy contract was for five years and those whose contracts were renewed had to have a clean record. That although the Respondent is surcharged for the guards' infractions, the guards were not surcharged. That the Claimant was found not alert and given a verbal warning and had no other record of wrongdoing. He further confirmed that the company did not consider redeployment of the Claimant to the commercial sector and the Claimant lost all his terminal dues.

Claimant's Submissions

18. As to whether the termination was fair, the Claimant relies on Section 45(2) of the Employment Act and contends that the reasons for termination must not only be valid but fair and the procedure employed must be fair. It is submitted that the Respondent did not establish that the reason for termination was a fair reason as required by Section 45(2)(b) of the Employment Act.

19. Reliance is made on the decision in **Collins Osoro Lukhale v AAA Growers Ltd [2014] eKLR** where Mbaru J. addressed the issue of fairness. It is further submitted that the employee's right not to be terminated unfairly was a constitutional imperative under Article 41 of the Constitution of Kenya, 2010.

20. It is submitted that the Claimant's act of sleeping was an inadvertent mistake and the Respondent could have surcharged the Claimant.

21. That the Client had not sought his removal from the duty station. That the summary dismissal was an unfair labour practice since the Respondent had other fair options to take. Further reliance is made on the sentiments of Mbaru J. in **Elizabeth Washeke and 62 Others v Airtel Networks (K) Ltd & another [2013] eKLR**.

22. It is submitted that the Claimant's reason for falling asleep was not only plausible but reasonable and the Respondent as a reasonable employer should have considered other option of handling the matter. The decision in **Francis Ndirangu v Nakumatt Holdings Limited [2016] eKLR** is relied upon to reinforce the submission. The decisions in **Jonah Mwaura Ngugi v Safaricom PLC [2019] eKLR** as well **Janet Nyandiko v Kenya Commercial Bank Ltd [2017] eKLR** are cited in support of the proposition that the defence preferred by the employee should be given sufficient consideration if the termination is to be considered fair. It is submitted that Respondent failed to consider the Claimant's defence on its merits and thus acted contrary to justice and equity.

23. On the procedure employed by the Respondent, it is submitted that the Employment and Labour Relations Court jurisprudence has established the correct procedure for summary dismissal or termination. Reliance is made on decision in **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR.**

24. It is submitted that the Respondent did not meet the requirements of procedural fairness. The Claimant assails the language at the

hearing, that the report of the Disciplinary Committee does not indicate the language used since no minutes were produced. That the Claimant's explanation was not considered in arriving at the decision.

25. Finally, it is contended that the Respondent did not demonstrate compliance with its internal disciplinary rules thus the procedure employed was not fair.

Respondent's Submissions

26. The Respondent isolates five (5) issues for determination, namely; whether the dismissal as lawful, whether Claimant was paid for the 10 days in February 2105, entitlement to gratuity for three years worked, leave payment for three years and one (1) month's notice.

27. On termination, reliance is made on Section 44(4)(c) of the Employment Act to urge that the termination was fair. The Court of Appeal decision in **Moi Teaching and Referral Hospital v James Kipkonga Kendagor [2019] eKLR** is relied upon to underscore the duty of the employer under Section 44 of the Employment Act.

28. It is submitted that the Claimant was aware of the nature of his work as well as the contents of clause 9 of the contract of employment and was invited for a disciplinary hearing conducted in English and the Claimant understood the language. That the Claimant admitted sleeping while on duty and accepted that the photograph was him.

29. It is submitted that the Claimant should have applied for sick leave and hence his dismissal was fair.

30. As regards the 10 days worked in February 2015, it is submitted that the Claimant admitted having received payment for the days.

31. As to whether the Claimant is entitled to gratuity for the three years worked, the Respondent submits that clause 10(b) of the contract of employment disqualified him from payment of gratuity because he had not served for five years. The Court of Appeal decision in **Bamburi Cement Limited v Farid Aboud Mohammed [2016] eKLR** is relied upon to urge that gratuity was not payable to the Claimant.

32. With regard to pending leave pay for three years, it is submitted that the Claimant admitted having received leave pay for 2014 and the Respondent led evidence that the Claimant took leave in 2012 and 2013 and therefore no leave payment was outstanding.

33. As regards the one month's salary in lieu of notice, it submitted that Section 44 of the Employment Act was emphatic on how summary dismissal is effected. Clause 9(c) of the contract of employment is also cited to urge that the Claimant was not entitled to the one month's salary in lieu of notice.

34. Finally, it is submitted that the Respondent had demonstrated that the Claimant was dismissed lawfully.

Determination

35. From the pleadings, evidence on record, oral testimony and the submissions, the issues for determination are: -

a) Whether the Claimant's summary dismissal was unfair;

b) Whether the Claimant is entitled to the reliefs sought.

36. As to whether the Claimant's summary dismissal on 10th February 2015 was unfair, Section 45 of the Employment Act is the indispensable starting point. This Section provides the fulcrum for fair and unfair termination of employment contracts. Section 45(2)(a), (b) and (c) provide that –

(2) A termination of employment by an employer is unfair if the employer fails to prove —

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

37. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR,** the Court of Appeal expressed itself as follows:

"There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring

notification and hearing before termination."

38. In **Kenafric Industries Limited v John Gitonga Njeru [2016] eKLR** the Court of Appeal stated as follows: –

> *"Three things must therefore be satisfied; there must be reason(s) given for the termination, the reason(s) must be fair and the procedure followed too must be fair. These three conditions are designed to cater for all cases in which an employer instigates the termination of employment."*

39. In **Barasa Paul Isaac v X for Security Solutions (Ke) L.T.D [2015] eKLR** Makau J. stated that –

> *"Under Section 43 and 45 of the said Act, the employer is burdened to prove that he had a valid and fair reason for dismissing the employee in any legal proceedings where the employee alleges unfair termination like the present suit. He is therefore supposed to call all the relevant witnesses and produce all the relevant documents to prove that he had justifiable reason for dismissing the employee. The employer is also supposed to call evidence to prove that the employee was accorded a fair hearing and allowed to defend himself in the presence of a shop floor union representative or a workmate of the employees choice."*

40. In the instant case, it is undisputed that the Respondent employed the Claimant on 15th July 2011 as a security officer for five years and was terminated on 10th February 2015 for sleeping at his place of work a fact the Claimant admitted but was quick to explain that he had taken medicine for a headache.

41. Instructively, it was around 10.30 am which is typically too early for an employee to sleep.

42. It is also not in dispute that the Claimant was invited for a disciplinary hearing on 10th February 2015 which he attended and the union was represented by two persons and the Claimant signed the record and did not contest any aspect of the proceedings or complain about the notice or absence of specific charges.

43. It is not in dispute that the Claimant was found asleep at his pace of work and a photograph of him taken. He admitted the fact of sleeping and the photograph. The Respondent led no evidence on the duration the Claimant was asleep.

44. Whereas the sleeping at the place of work may be a valid ground for dismissal and or termination of employment depending on the circumstances of the case, was the Claimant's sleeping on 2nd February 2015 a valid and fair reason for dismissal? RW1 testified that the Claimant had a clean record, no previous warning letters or verbal warnings and there was no attempt or proposal to surcharge the Claimant for the amount lost on account of his being asleep. The witness confirmed that the disciplinary committee did not consider redeployment to the commercial sector or other form of soft-landing for the Claimant.

45. As submitted by the Claimant, the Respondent does not appear to have given the Claimant's representation the weight it deserves before recommending summary dismissal.

46. In determining whether the reason for termination was fair, the Court is guided by the sentiments of Mbaru J. in **Collins Osoro Lukhale v AAA Growers Ltd (supra)** as follows:

> *"Even in a case where there is a lawful ground to terminate an employee by the employer, it is accepted labour law jurisprudence that lawfulness cannot be equated with fairness. The tenets of natural justice go beyond lawfulness and require fairness. Accordingly, it is not a defence to an unfair dismissal claim that the employee's dismissal was lawful."*

47. As stated in the South African case in **Council of Mining Unions v Chamber of Mines of SA (1985) 6 ILJ 293 (IC)** relied upon by the Claimant, the Court held;

> *"What it did say however, was that fairness was something more than lawful. This meant that even though conduct was lawful, it was not necessarily fair."*

48. Article 41 of the Constitution of Kenya, 2010 guarantees the right to fair labour practices.

49. Relatedly, as observed in **Francis Ndirangu v Nakumatt Holdings Limited (supra)** –

> *"Reason for terminating an employee is usually measured against a standard of a reasonable employer. If taking the act or omission in issue into consideration, a reasonable employer would dismiss, then the Court will uphold the dismissal but if no reasonable employer would dismiss, then the Court will find in favour of the employee."*

50. The Court has not lost sight of the fact that the Claimant served the Respondent for more than three years, and six months without blemish and had no previous warning or notice to show cause. Would a *"reasonable employer dismisses on the first infraction in the face of plausible explanation?* The Court is not persuaded that a reasonable employer would do so.

51. In this case, the Respondent had several options as opposed to dismissal. It could surcharge the Claimant for the liability incurred. It could also issue a written warning to the Claimant or serious admonition and finally could have redeployed him having been one of its trusted employees.

52. For the foregoing reasons, the Court finds and holds that the Respondent has not on a balance of probabilities shown that the reason for termination of the Claimant's employment on 10th February 2015 was a valid and fair reason within the meaning of Section 45 of the Employment Act as interpreted by Court of Appeal in **Kenafric Industries Limited v John Gitonga Njeru (supra).**

53. On the procedural employed by the Respondent, the Claimant testified that he was invited and attended the disciplinary hearing willingly and neither protested the manner of invitation nor the language used or contents of the report. In fact, he admitted having signed the same at page 4.

54. The submission that Kiswahili was the more appropriate language for the Claimant is speculative as it assumes that the proceedings were conducted in English yet there was no testimony to that effect. More importantly, the Claimant did not raise the issue in evidence.

55. The Court is guided by the sentiments of Nzioki Wa Makau

J. in **Samuel Mwangi Wachinga v Endarasha Farmers' Co-operative Society [2018] eKLR** as follows:

> *"He was summoned to a disciplinary hearing, was heard and dismissed. He wrote a letter of apology and in his pleadings, he did not aver duress or coercion were employed to obtain the letter. He clearly admitted his culpability. It is not each hearing that is undertaken in compliance with Section 41 of the Employment Act that will have a witness for the employee present. Quite often, employees chose to go alone and the mere fact that there was no witness does not of itself invalidate the hearing. Even the absence of the letter of invitation to the hearing is not sufficient cause to disregard the process undertaken if the process is one that gave the employee an opportunity to be heard and present his defence."*

56. The Learned Judge expressed similar sentiments in **Elizabeth Mukuhi Kimando v Karangi Coftea Ltd [2021] eKLR**.

57. In the instance case, the Court is satisfied that the Respondent accorded the Claimant a fair hearing and understood it implications contrary to the submissions on language and consideration of defence.

58. However as observed in **Jonah Mwaura Ngugi v Safaricom PLC [2019] eKLR –**

> *"Though the respondent followed due process, with the finding that there was no substantive justification for the summary dismissal, such procedure is rendered irrelevant. Due process cannot justify an unlawful and unfair action."*

59. From the foregoing, it is evident that a termination is deemed unfair if it fails the substantive or procedural fairness test or both. In this case the summary dismissal failed the substantive test of validity and fairness of the reason for termination.

Reliefs

(a) Declaration under that the Claimant's summary dismissal was unfair

60. Having found that the reason for the summary dismissal was unfair, a declaration is hereby issued that the Claimant's summary dismissal on 10th February 2015 was unfair.

(b) Unpaid salary for 10 days in February 2015

61. On cross examination, and as submitted by the Respondent, the Claimant admitted having been paid the salary for January 2015 and for the 10 days worked in the month of February. The claim is therefore **dismissed.**

(c) Gratuity pay for 3 years worked

62. Paragraph 10(b) of the Claimant's contract of employment which he signed on 19th July 2011 and produced as evidence provides that –

> *"The company will pay gratuity in the event of termination of employment under the following conditions: -*
>
> *(i) It will only be payable to employees who have completed five (5) continuous years of service and who have also been terminated.*
>
> *(ii) It will not be paid at the end of five (5) years of service if an employee is still in employment."*

63. Consistent with Respondent's submissions, the above clause disqualified the Claimant from any gratuity payment. The claim is **dismissed.**

(d) 18 months' pay for remaining contractual period

1. This is a claim for anticipatory earnings not recognised by the Employment Act as a remedy. In **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR** the Court of Appeal was categorical that –

"*Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms.*"

64. Similar sentiments were expressed by this Court in **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR.**

65. More significantly, clause 9(a) of the contract of employment between the Claimant and the Respondent gave either party the right to terminate the contract by giving the other one month's notice or payment of one month's salary in lieu of notice. The claim is therefore **dismissed.**

(e) Pending leave days for 3 years

66. The Claimant neither pleaded nor led evidence on the particulars of the leave days and as submitted by the Respondent, the Claimant took leave in 2012 and 2013 and confirmed on cross examination that he was paid for the pending leave days. The claim is **dismissed.**

(f) One month's salary in lieu of notice

67. Having found that the Claimant's summary dismissal was substantively unfair, the Claimant is entitled to the one month's salary in lieu of notice. The sum of **Kshs.30,657/-** is awarded

(g) 12 months' salary compensation for unlawful termination of employment

68. Under Section 49 of the Employment Act, an employee who has been unfairly terminated or dismissed is entitled to discretionary remedies of one month's salary in lieu of notice as well as compensation equivalent to his/her monthly salary of up to 12 months.

69. In awarding compensation under Section 49(1)(c) of the Employment Act, the Court has considered the following:

i) The Claimant worked for the Respondent for three years and six months and wished to continue.

ii) The Claimant contributed to the summary dismissal since he had the option to seek sick leave for the alleged indisposition.

iii) The Claimant testified that he had suffered immensely since he lost his job.

70. In the circumstances the equivalent of three months' salary is fair, **Kshs.91,971/-.**

71. **The upshot of the foregoing is that judgment is entered for the Claimant against the Respondent for the sum of Kshs.122,628/- with costs.**

72. Interest at Court rates from the date of judgment till payment in full.

73. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF FEBRUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE