



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1130 OF 2017

(Before Hon. Justice Ocharo Kebira on 17th March 2022)

GODFREY BARASA OCHIENG.....CLAIMANT

VERSUS

SECURITY GAURDS SERVICES LIMITED.....CLAIMANT

JUDGMENT

1. At all material times the Claimant was employed by the Claimant as a guard. According to the Claimant the employee-employer relationship came into being on or about the month of February 1997. However, to the Respondent it did on the 1st January 2000. It is not in contestation however that the parties separated, as a result of a summary dismissal against the Claimant. Holding the dismissal to be wrongful and unfair, the Claimant instituted a claim against the Respondent, through a memorandum of claim filed herein seeking for various reliefs and orders against the latter.
2. Upon being served with the summons to enter appearance the Respondent did enter appearance and file a memorandum of response and counterclaim. The Respondent denied the Claimant's claim and entitlement to the reliefs sought in toto.
3. At the close of the pleadings there was a joinder of issues, and consequently the matter took the path of getting to be heard on merit.

The Claimant's case

4. In his statement of claim herein above mentioned, the Claimant sought for the following reliefs.

(a) A declaration that the Claimant's dismissal was wrongful and unfair.

(b) The Claimant be and is hereby paid Kshs.337,917 as terminal benefits as set out in paragraph 14.

(c) The Claimant to pay costs and interest.

5. When this matter came up for hearing, the Claimant urged Court to adopt the contents of his witness statement filed on the 19th June 2017 as his evidence in chief, further that the documents filed under his list of documents the dated 15th June 2017 namely, a demand letter dated 2nd May 2017, pay slips, and NSSF registration form, to be admitted as his documentary evidence. There was no protest from the Respondent, the contents and the documents were so adopted and admitted by the Court.
6. The Claimant orally testified in Court, briefly clarifying matters on his pleadings and witness statement that he held were necessary to. He was then cross examined by counsel for the Respondent before a re-examination by his counsel.
7. The Claimant stated that he was employed by the Respondent in or about February 1997 as a guard. The employment was without a letter of appointment. His monthly salary was Kshs.8,463 which was gradually reviewed to Kshs.10,912.
8. During the entire period that he worked with the Respondent, he would report to work at 6:00 a.m. to work till 6:00 p.m. worked throughout the week and on public holidays, without any off day.
9. The Claimant stated that on the 3rd day of August 2014, he reported to work as usual and as he was waiting to be deployed, the Director,

Mr. Mbugua called him aside and told him that he had been dismissed. The Director told him to go away. The dismissal was verbal.

10. He asserted that he was not given any termination letter, and or a reason as to the termination. At the time of his termination he had worked for the Respondent for 13 years. He had never proceeded on leave.

11. The termination was so abrupt and unplanned, it caused him tremendous financial embarrassment, as it put him in a situation that he would not meet his financial obligations.

12. He testified that he used to proceed for leave on 2nd of May each year.

13. He only received one warning letter, that obtains at page 10 of the Respondent's bundle of documents. He did not receive the other warning letters that the Respondent purports to have issued to him. They are not signed by him.

14. After the termination the Respondent failed to pay him his terminal dues. He further asserted that the termination was contrary to the principles of natural justice and the provisions of section 41 of the Employment Act.

15. He claims for a notice pay of one month's salary, Kshs.12,549, 3 day's salary for the days that he worked in the month August 2014, Kshs. 1,447, leave for 17 years, Kshs. 213,333 and compensation for unfair termination, 12 months gross salary, Kshs. 150,000.

16. Cross examined by Counsel for the Respondent, he reiterated that he came into the employment of the Respondent in the year 1997, without any letter of appointment. Referred to the employment letter obtaining in the Respondent's bundle of documents he stated that the photo thereon is his and that the document shows the year of employment as 2000.

17. The NSSF form that he presented to court shows his date of employment as 1st March 2000. He admitted that he received and signed the warning letter at page 20 of the Respondent's bundle of documents and did an apology letter at page 21.

18. The Claimant stated that he did not affix his thumb print on the warning order dated 17th September 2012. He was not aware that the Respondent used to keep an occurrence book, wherein incidents could be recorded as and when they occurred. The signature on the warning letter is not his.

19. The Claimant denied that he ever fought with one of his colleagues, Mr. Mwema, they only disagreed.

20. In the year 2017 he was working as a night guard. His reporting time was 6:00 pm. His last station of work was Rosaline. On the alleged day he was dismissed he was at the Respondent's offices for redeployment as his order at Rosaline had lapsed.

21. The Claimant stated that he knew nothing about the summon to appear for a disciplinary hearing presented by the Respondent to court. He was never given an opportunity to explain himself on any allegations against him.

22. Though he has claimed that he was not being paid house allowance, the pay slip exhibited by him has a house allowance item.

23. He reiterated that he used to go on leave, and therefore the contents of his statement of claim, are misleading to the extent that it is averred therein that he never used to proceed for leave.

24. In his evidence in re-examination, Claimant stated that he never invited to attend a disciplinary hearing. No reason was given to him for the dismissal. He asserted that it was the Respondent's policy that whenever an employee had three warnings he would be dismissed. If indeed he had the alleged warnings he wouldn't have worked for all that long.

The Respondent's case

25. In its memorandum of response, the Claimant admitted that at all material times, the Claimant was its employee, but denied the allegation that the latter's dismissal was wrongful and unlawful.

26. The Respondent presented Earnesto Kingondu to present its defence against the Claimant's case. The witness just like the Claimant did, asked the court to adopt his witness statement as his evidence in chief, and the bundle of documents that had been filed by the Respondent as its documentary evidence. It was the Respondent's case that contrary to the Claimant's assertion, the he came into its employment on the 1st January 2000, as a guard at its offices, by a letter of employment. He was summarily dismissed, on account of negligence and misconduct.

27. The witness stated that the Claimant had been routinely negligent in his duties. He would sleep while on duty. In addition, he was culpable for other incidences of misconduct including reporting to work late and fighting while on duty.

28. He was issued with warning letters dating as far back as 2003. Notwithstanding, he never changed his ways. Between 2003 and 2014, he had a total on 9 warnings orders.

29. On more than one occasion, [i.e. on 8th September 2003, and 16th September 2007] he admitted to his misconduct of sleeping at while on duty, and on both occasions, the Respondent forgave him under a mistaken belief that he would reform.

30. On the 3rd August 2014, the Claimant was found asleep by one of the Respondent's clients while on duty. This was a grave misconduct as it exposed the safety of the client and his property. He too was exposing himself to risk.

31. He was issued with a warning order and summons to attend a disciplinary panel hearing on the 4th August 2014. He attended the hearing, the charges against him were explained to him, and he was heard in defence. Owing to the repeated misconduct and negligence, the Respondent decided to summarily dismiss him.

32. His final dues were computed, he was to be paid Kshs. 4,456 as pro rata leave as at August 2014.

33. He asserted that the disciplinary hearing was conducted in observance of the principles of natural justice. The Claimant's claim lacks merit.

34. In his evidence under cross examination, the witness stated that the Claimant worked from 1st January 2000 to 11th August 2014 when he was served with a summary dismissal letter. The reason for dismissal was expressed in the letter as negligence and misconduct. This flowed from the incident of sleeping at work on 3rd August 2014.

35. That before the summary dismissal, by a letter given to him on the 3rd August 2014, the Claimant was invited for a disciplinary hearing that was slated for the 4th. The Claimant received the letter but refused to sign it in acknowledgement of receipt. The letter disclosed the charge, sleeping at work.

36. The witness stated that the OB extract indicates that the misconduct occurred on the 3rd August 2014. The disciplinary minutes were availed to Court. The witness, one Mr. Mbugua, and, Mr. Ndungu attended the hearing. The minutes presented to Court do not indicate the names of the attendees. Mr. Mbugua was the chairman of the meeting, while Mr. Ndungu was the secretary.

37. The Claimant was accompanied by his colleague Edward Wandera. However, their names are not appearing on the minutes.

38. The witness stated that the Claimant refused to pick the sum that the Respondent was offering to pay him, Kshs. 4,456. However, subsequently, the money was deposited into his account, on 16th August 2014. He admitted that he had no document to prove this.

Claimant's Submissions

39. The claimant identified the following issues for determination.

i. Whether the Respondent had a valid reason to terminate the Claimant.

ii. Whether the Respondent followed due process prior to termination.

iii. Whether the Claimant is entitled to prayers sought.

40. On the issue of whether the Respondent had a valid reason to terminate the employment of the Claimant it was submitted that *Section 43(1) of the Employment Act 2007* places a burden on the employer to prove the reason(s) for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

41. The claimant maintained that despite being dismissed on grounds of gross misconduct, the particulars of misconduct do not appear both in the alleged invitation to disciplinary hearing and in the termination letter.

42. The claimant submitted that the principle of procedural fairness demands that the employer informs the employee of what charges the employer is contemplating to bring against the employee to enable him have a proper opportunity to prepare for his defense and be heard.

43. To buttress this submission the Claimant cited the case of **Antony Mkala Chitavi Vs Malindi Water & Sewerage Company Limited Cause No. 64 Of 2012**. He maintained that the Respondent trying through the documents to sanitize a decision that had been arrived at without adhering to procedural fairness. He argued that the termination was both substantively and procedurally unfair and urged the court to find so.

44. On the reliefs, the claimant submitted that he has made out a case against the Respondent to justify the prayers sought. He maintained that for termination to pass the fairness test, there must be both substantive justification and procedural fairness- elements that the instant case lacks.

Respondent's Submissions

45. The Respondent identified the following issues for determination:

i. When was the Claimant employed;

ii. Whether the dismissal was lawful, fair and procedural;

iii. Whether the Claimant is entitled to the prayers sought.

46. The Respondent submitted that contrary to the claimant's claim that he was employed in 1997, he was actually employed on 1st January 2000. It stated that the claimant in his own Exhibits produced his NSSF Registration document which supports its argument.

47. Regarding the claimant's dismissal, it submitted that a termination of services is only fair if both procedural fairness and substantive justification are proved by the employer.

48. The Respondent argued that its case was backed by several documentary evidence that the claimant was dismissed with a valid reason being that he was negligent in executing his duties and was involved in a number of misconducts including the immediate misconduct being that the he was found sleeping while on duty, amounting to willfull neglect to perform his work.

49. The Respondent submitted that the claimant, through his own testimony admitted that he deserted/absconded duty on his own volition. Putting reliance on the decision in the case of **Kenya Plantation & Agricultural Workers Union -v- Sotik Highlands Tea Estate Limited [2016] eKLR** it was further argued that the claimant failed to prove that his termination was unfair or wrongful in any way or form.

50. As regards procedural fairness, the Respondent submitted that the Claimant was subjected to the required fair procedure before his employment which followed provisions of Section 41 of the Employment Act.

51. It argued that the Claimant's negligence in and abandonment from, executing his duties amounted to gross misconduct. Consequently, Respondent was entitled to invoke Section 44 of the Employment Act to summarily dismiss him from employment.

52. The Respondent urged the court to be guided by the court's decision in **Vincent Abuya Obunga -v- Mast Rental Services Limited [2019] eKLR**.

53. On the reliefs sought, the Respondent submitted that the Claimant was not entitled to notice pay as there was a good reason warranting his summary dismissal and in effecting the dismissal, the Respondent followed the fair procedure as required under section 41 of the Employment Act. It argued that Section 44 (1) on Summary Dismissal allowed the Respondent to summarily dismiss the Claimant without notice pay.

54. The Respondent further submitted that the Claimant was not entitled to the days worked in 2014 as it had proved to court that he was paid for 10 days worked in August 2014 and that there were no further dues owed to him. In addition to this the Respondent stated that the claimant, in his testimony confirmed to the court that he always proceeded for his leave in the month of May each year for all the years worked.

55. As for compensation, the Respondent submitted that the claimant was not entitled to any compensation as it had proved that the dismissal was lawful and procedurally fair. That granting the Claimant any compensation would amount to penalizing the Respondent for following the law. It referred to the case of **Kenya Plantation & Agricultural Workers Union (supra)** to support its argument.

56. The Respondent concluded by submitting that all the reliefs sought by the claimant were not proved and should not be granted all. It urged the court to find that the claim lacks merit and dismiss it in its entirety with costs.

Determination

57. From the pleadings herein, the evidence and material placed before this Court, the following broad issues commend themselves as the issues for determination by this Court, thus;

(a) *Whether the summary dismissal of the Claimant was procedurally fair.*

(b) *Whether the summary dismissal was substantively fair.*

(c) *What reliefs are available to the Claimant, if any?*

Whether the Summary Dismissal was procedurally fair.

58. In the case of **Lydia Moraa Obara vs Tusker Mattresses (2021) eKLR** this Court stated;

“31. Section 45 of the Employment Act dictates that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c) provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair.”

59. Section 41 of the Employment Act supplies the structure for procedural fairness, it provides:

“(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 the explanation.

(2) Notwithstanding any other 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 representations 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.”

60. In **Jane Nyandiko -vs- Kenya Commercial Bank Limited (2017) eKLR**, the Court held, and which was cited with approval by the Court of Appeal in the case of **National Bank of Kenya -vs- Anthony Njue (2019) eKLR**, thus;

“Section 45 of the Employment Act makes provision *inter alia* that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.....”

61. The mandatory elaborate procedure set up under section 41 of the Act, requires notification, a hearing and consideration of the employee’s representations and his co-worker’s before termination. Therefore, the process has three aspects, and absence of any one of them will definitely obliterate the fairness of the process leading to the decision to terminate an employee’s contract of service or summarily dismissing the employee.

62. The Claimant took a position that the dismissal was procedurally unfair. He contended that he was not notified of any disciplinary proceedings, and that he was not heard as he was not given an opportunity to make a representation. The position was buttressed by his counsel’s submissions hereinabove brought forth.

63. I have carefully considered the alleged summon to attend a disciplinary hearing dated 3rd August 2014- the Respondent’s exhibit 6, the document does not bring forth the specific accusation[s] that the Claimant was being invited to defend himself against. The summon purports to refer to a complaint raised against the Claimant in OB dated 04.08.2014, the question that arises is, were the contents of the alleged OB, given to him, for him to be aware of the accusation and prepare for his representation as contemplated in section 41 of the Act? There is no evidence that was led to establish this.

64. The summon, is dated the 3rd day of August 2014, the Respondent’s witness alleged that the same was served on the Claimant on the same day 3rd August 2014, for him to attend the hearing the following day. It cannot be reasonably argued then that he was informed of the charges, since at the time the summon was issued the OB contents had not been created.

65. It was alleged by the Respondent’s witness, and submitted on by its Counsel that the Claimant was issued with a warning order-exhibit 5. I have keenly considered the document, it reveals that the Claimant was found sleeping on duty on that same day, at 9:30 pm. Surprisingly, on it, is indicated that it was issued at 12:36 hours. This compels me to conclude that the document was authored purposely for this matter, but with due respect it wasn’t cleverly done.

66. It is not clear when the summon was served on the Claimant if at all. The Respondent’s witness did not explain how it was possible for the summon to attend the disciplinary hearing for a misconduct that occurred at 9:30 Pm would be said to have been served on same day. When was the decision that he should be taken through a disciplinary process made? This needed to be answered. It wasn’t.

67. The Respondent contended that the disciplinary hearing took place as was scheduled. The Claimant accompanied by his co-worker attended the hearing. The Claimant was given an opportunity to defend himself.

68. The Respondent’s witness stated that the minutes of the disciplinary were kept and that they were presented to Court. I have gone through all the documents that were presented before this Court by the Respondent, there is none that one can call a disciplinary hearing minute. There is none from which it can be discerned that the Claimant and his colleague were in attendance of a disciplinary meeting, and that he was heard.

69. In the upshot, I am convinced that; the Claimant was not; informed that the Respondent was intending to dismiss him from employment and the grounds upon which the decision was being contemplated; served with the alleged summon to appear for a disciplinary hearing; given a chance make a representation as contemplated under section 41 of the Employment Act.

70. In the upshot, I do not agree with the Respondent that in dismissing the Claimant, it did adhere to procedural fairness as it alleged. The summary dismissal was procedurally unfair, I conclude.

Of whether the termination was substantively fair.

71. 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 notice or with less notice than that which the employee is entitled by any statutory provision or contractual term.*

(2)

(3) *Subject to provisions of this Act, an employer may dismiss an employee summarily where the employer has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.*"

72. It is common cause that the Claimant's employment was brought to an end summarily. Whether or not his conduct was one which fundamentally breached his obligation arising under the contract, I shall delve into, shortly hereinafter.

73. Section 43 of the Employment Act places an obligation upon the employer to prove the reason or reasons for the termination, and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45.

74. Section 44 (4) of the Act, provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal against him or her. However, it is imperative to state that the list therein is not an exhaustive list. An employer can summarily dismiss an employee on an account outside those in the catalogue for as long as the account has characteristics such as I will demonstrate shortly hereinafter.

75. It was the Respondent's position that the Claimant's conduct, the subject matter of the summary dismissal was in nature one that justified a summary dismissal both under the law and the contract that were between it and the latter.

76. The Respondent asserted that the reason for the summary dismissal was that the Claimant was found sleeping while on duty. The incident was recorded in the occurrence book. I have no doubt in my mind that the evidence by the Respondent on the reason for dismissal was not shaken by the Claimant. From the material before me I discern no reason why the Respondent would allege that its client had made a complaint against the Claimant on the conduct, if at all the complaint was not made.

77. Whether an employee's misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances, the contextual approach. In **Mickinly -vs- BC Tel [2001] 2 SCR 161,2001 SCC 38[CanLII]** the Supreme Court of Canada was held;

"29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather, the question to be addressed is whether in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist."

39. To summarize, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, courts have held that factors such as the nature and degree of the misconduct, and whether it violated the "essential conditions" of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause."

78. I have considered the circumstances of this matter, including but not limited to the industry that the Respondent trades in, the industry in which the Claimant was working in therefore, the negative impact that incidents such as the one that were the subject matter would have on the confidence of the Claimant's clients in it, the fact that the Claimant had warnings issued to him earlier, and find that dismissal on the account of gross misconduct as was brought out in the summary dismissal letter was valid, fair and justified.

79. Consequently, I find that the dismissal was with a fair and valid reason. The dismissal was substantively fair.

Of the Reliefs

80. The Claimant sought for compensation for wrongful and unfair dismissal pursuant to the provisions of section 49[1][c] of the Employment Act. The Court is Cognizant of the fact that a grant of the compensatory relief contemplated in the provision is discretionary. It is awarded depending on the particular circumstances of each matter. Considering that the Respondent did not adhere to the fair procedure in summarily dismissing the Claimant, and its attempt to prepare documents that were intended to mislead the Court into believing that the procedure was adhered to, and the 13 years that the Claimant worked for the Respondent, I am persuaded that the Claimant is entitled to the relief. I award him 5 [five] months gross salary, Kshs.63,145.

81. The Claimant further claimed for Kshs. 1,447 as salary for the three days that he worked in the month of August. The Respondent asserted that the amount was paid into the Claimant's bank account. There is no prove that the payment was made as such. Consequently, I find that this amount should be paid to the Claimant.

82. The Claim for leave pay for 17 years, Kshs.213,333 is destitute of any merit. The Claimant in his evidence confirmed that he used to take his leave annually, and that the contents of his pleadings regarding untaken leave were misleading. However, I note the evidence by the Respondent that he was entitled to Kshs. 4,456, being pro rata leave pay as at August 2014. True, this is an amount that would be payable to the Claimant. The Respondent asserted without prove that the amount was paid into his account. In absence of prove that the payment was made as such, I do not hesitate of find the only sum payable to the Claimant, under this head, is the Kshs.4,456.

83. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms:

a) The termination of the Claimant's employment was procedurally unfair.

b) Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, Kshs. 63,145.

c) Compensation for unutilized leave days – Kshs. 4,456.

d) 3 days unpaid salary, Kshs.1,447.

e) Interest on (b) [c] and (d) at Court rates from date of filing suit till full payment.

f) Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF MARCH, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Ondigi for the Respondent.

Mr. Kalwale for the Claimant.

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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE