



**Festo v Mars Security Guards Limited (Cause 823 of 2017)
[2022] KEELRC 42 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 42 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 823 OF 2017
K OCHARO, J
APRIL 28, 2022**

BETWEEN

PETER WABWIRE FESTO CLAIMANT

AND

MARS SECURITY GUARDS LIMITED RESPONDENT

JUDGMENT

The Claimant's Case

1. This suit was initiated by a statement of claim dated May 4, 2017 which was later on amended on October 15, 2018. The Claimant pleaded that at all material times, he was an employee of the Respondent and that his employment was terminated without any reason[s]. In the amended statement of claim he sought against the Respondent for the following reliefs and orders:
 - a) Kshs}} 1,208,400
 - b) Cost of the suit
 - c) Interest on (a) and (b) above
 - d) Any other relief that the honourable court may deem fit and expedite to grant
2. The claimant's case was heard on the October 6, 2021. The Claimant sought that his witness statement that was herein filed contemporaneously with the statement of claim be adopted as part of his evidence in chief and the documents that he filed under the list of documents dated May 4, 2017, as his documentary evidence [Exhibits 1-5]. The adoption was done, there was no objection by the Respondent. He testified that he was employed by the Respondent as a security Guard in June 2009, with a monthly salary of Kshs.12,000.



3. He further testified that his said employment was terminated in the month of September 2019. He stated that his troubled relationship with his employer started when one of the clients of the complained that he found him [the claimant] sleeping at work, at 4:00 am. He asserted that contrary to the allegation, that morning he saw the Client training his dog, as the claimant was patrolling the compound. The client called him out but he wouldn't answer immediately as that is what his training dictated. When the client called him for the second time, he answered.
4. The claimant asserted that he was subsequently summoned to the office where he was given a memo dated September 3, 2016, to explain the allegations that he had been found asleep at work on different occasions, and a second one of same date suspending him from work, to allow investigations to be carried out. In the 2nd memo, he was required to report back to work on September 5, 2016, at 9:00 am.
5. He asserted that on the September 5, 2016, he reported back as was directed in the stated memo, only to be told that the investigations weren't yet complete. He was urged to get back home and wait to be called. The calling never came. He got constrained to get back to the Respondent company to inquire about outcome of the investigations and the fate of his job, the Operations Manager told him to re-apply for the job, a thing he did. Thereafter, he never got any response or communication from the Respondent.
6. The claimant contended that he was therefore terminated without being given any reason thereof and or accorded a hearing. He alleged that in the last six months of his service, the Respondent never remitted his NSSF contributions.
7. Cross examined by counsel for the Respondent, the Claimant the former terminated his employment without giving him a termination letter. They did tell him that after investigations they were to call him, but they never did. The Claimant refuted the Respondent's contention that he absconded duty.
8. He further stated that contrary to the Respondent's contention that he was on leave as at September 16, 2016, he wasn't as his leave had lapsed on the 3rd of September 2016. The memo that was issued to him on the September 3, 2016, is testament of this. Shown the NSSF statements in respect of his account, for the month of September 2016, he stated that it reflects that remittances were done by Kleen Homes Security Ltd. However, he wouldn't tell why they were making the same. The statement for the period June 1, 2008 to August 31, 2016, shows Kleen Homes Security Services as the employer.
9. He claims against the Respondent for Kshs 1,208,400 which is outstanding an owing as tabulated
 - a. 3 months' Salary in lieu Kshs 36,000
 - b. Service for ten years worked being 1 month saary for each year worked $12000 \times 7 \times \frac{1}{2}$ Kshs 42,000
Unpaid annual leave for 7 years 12000×7 Kshs 84,000
 - c. Unfair termination Kshs 1,000,000
 - d. Refund for NSSF contribution 400×4 Kshs 1,600
 - e. Uniform payment Kshs 4000
 - f. Salary for the month of September Kshs 12,000
 - g. Distress for 2 years 12000×21 Kshs 288,000
Total Kshs 1, 208,499

In his evidence under re-examination, he stated that he proceeded for leave in August 2016.



Respondent's Case

10. In response to the statement of claim the respondents filed a response dated July 25, 2017 where it denies each and every allegation raised by the claimant. At the hearing it presented its Operations manager to testify on its behalf. The witness moved the Court to adopt his witness statement dated August 10, 2021, and the documents filed herein by the respondent as its documentary evidence.
11. The respondent denies having terminated the claimant's contract of service and avers that the claimant was granted annual leave for the year 2015/2016 which was to commence on August 1, 2016 and end on September 26, 2016 but the claimant failed to resume back a fact that it informed the labour office, through a letter dated September 30, 2016.
12. The respondent states that the claimant having deserted employment cannot purport to be entitled to terminal dues.
13. Under Cross examination by the claimant's Counsel, the Respondent's witness testified that the Claimant's contract of service was not terminated. He proceeded for leave and never returned to work. The claimant proceeded on leave on the August 1, 2016, and was expected back to job on the September 26, 2016. This period was over two months. Annual leave was usually 24 days but he had accrued off days too.
14. The witness acknowledged that the respondent issued two mamos of same date, September 3, 2016. The respondent's witness asserted that the respondent had an arrangement through which an employee would come and work during his leave days and that was the case here. On the September 3, 2016, he was at work.
15. The witness contended that the respondent didn't pay the claimant salary in lieu of notice because the latter didn't terminate his Job. He acknowledged that the claimant was not paid service pay. He had no leave days outstanding, he used to take his leave annually, therefore the respondent would not pay him for any leave days at the termination. The extract of the pay roll tendered as evidence is testament of the taken leave. The master roll is normally signed by employees. The claimant has signed. At no time did he complain that his signature had been forged.
16. The witness stated that claimant was not refunded his uniform amount. He asserted that from the record, the claimant was paid his salary for the month of September.

Claimant's Submissions

17. The claimant proposed three issues for determination; Whether there was a valid reason for termination of the claimant, whether the claimant's termination was unfair in the circumstances of the matter, and whether there are any remedies due.
18. The claimant submits that on September 2, 2016 reported to work as usual at Lion court Highridge at around 4am in the morning and one of the residents came out for a morning walk and started alleging that the claimant was asleep.
19. The claimant submits that on September 3, 2016 he was given 1st memo to explain the allegations and was given a 2nd memo on the same day suspending him from work pending investigations.
20. The claimant submits that on October 26, 2016 he enquired about the investigations and as asked by the operations manager to reapply for the job.



21. He submits that he was never accorded a hearing before his services were terminated and the respondent failed to prove that the reason for termination was valid.
22. He asserted that the termination of his employment was without due procedure, in line with the provisions of section 41 of the [Employment Act](#).
23. As the termination was unfair, the Claimant is entitled to all the reliefs sought in his pleadings, it was submitted.

Respondent's Submissions

24. The respondents in their submissions stated that the claimant went on leave and never came back to work, it also submitted that the claimant was an employee of the rival company Kleene Homes Security Services Limited.
25. The respondents submitted that the claimant having deserted employment is not entitled to the terminal dues as he willingly and voluntarily quit his employment.
26. The respondent urges the court to find that it did not terminate the claimant from his services therefore holds that the claim fails with costs.

Analysis and Determination

27. Considering the pleadings, the documentary evidence, the oral testimony and submissions by the parties, the court distils the following broad issues for determination;
 - [a] Whether the claimant's employment was terminated by the respondent?
 - [b] If the answer to [a] above is in the affirmative, whether the termination was fair.
 - [c] What remedies are available to the claimant if any?
 - [d] Who should bear the costs of this matter?

Whether the Claimant's employment was terminated.

28. No doubt, from the evidence by the parties, the positions taken by the parties as regards how the separation occurred are diametrically opposite. The Respondent contended that the claimant deserted duty, on the 1st of August 2016, never to return to work as was expected on the September 26, 2016. The claimant stated that as at the start of the month of September 2016. Therefore, the allegation by the respondent is untrue.
29. To demonstrate that he was on duty on 2nd and 3rd September 2016, he produced two memos that the respondent issued him with, one requiring him to give a written explanation on the accusations that had been levelled against him as were particularly brought out in the memo. Considering the memo, it has not escaped my sight that the dates of the alleged misconduct by the claimant, are stated in the memo, as August 31, 2016 and 1/09/2016. There is no doubt that the claimant was on duty in the last week of August 2016, and 1st week September 2016.
30. The respondent attempted to depart from its pleadings and its witness from his witness statement, when he under cross examination by counsel for the claimant, he asserted that it was their policy to allow a person who is on leave to come back and work during his leave, and that this is what happened here. I am unable to buy this for the following reasons; there was no evidence, documentary, demonstrating that the claimant was supposed to be on leave up to September 26, 2016; the assertion



seems to be an afterthought, one would expect it to have been raised from the onset in the pleadings and the witness statement, and parties are bound by their pleadings.

31. The claimant testified and I find that his evidence was not shaken in any manner by the respondent, that on the 3rd day of September 2016, he was suspended pending investigations. The Respondent's witness under cross examination admitted that indeed the Memo was issued. According to the Memo, which the respondent's witness acknowledged as having been issued. The respondent required the claimant to get back for the outcome of the investigations on the September 5, 2016. The respondent deemed it fit and I hold conveniently so not to give evidence on what happened on the 5th day of September, 2016, and thereafter. What the outcome of the investigations were, and what action it took after the investigations.
32. I am persuaded to agree with the claimant that when he reported on the 5th as was directed he was told to get back home and wait for a call, on the investigations and way forward.
33. The Claimant testified and I find the evidence unshaken by the Respondent through any evidence, or the cross examination that were on him that when he later on got back to inquire the fate of his job. He was told to re-apply. In *Rebecca N. Nyangolo v Prashant Raval* [2021] eKLR, this Court, held;

“ 54. The common denominator in all forms of dismissal is that all of them are ultimately caused by the employer. Dismissal, by its definition, is not initiated by the employee, nor is it something which merely happens- *Schmahm v Concept Communications Natal [pty] Ltd* [1997] 8 BLLR 1098 [LC]. In essence some overt action by the employer must be present to bring the employment into termination.”

In the instant matter, I hold that the action by the respondent of telling the claimant to reapply was such an overt act. I come to an inevitable conclusion that the claimant's employment was terminated.

Whether the termination was fair.

34. In considering whether a termination of an employee's employment was fair or not, the court is enjoined to consider two aspects, procedural fairness, and substantive fairness. Absence of any of them or both of them in a termination of an employee's employment, renders the termination, unfair in terms of section 45 of the *Employment Act*.
35. Section 41 of the Act provides a mandatory procedure that an employer intending to terminate an employee's employment must engage. The procedure has three components, the information component- the employer must inform the employee of the grounds on which he contemplates the termination, the hearing component- the employer must give the claimant an opportunity to make representations on the grounds, lastly the consideration component- the employer has to consider the representations before making a decision to terminate. It is incumbent upon the employer to prove that the procedure was adhered to.
36. Blurred by the position it took, that the claimant deserted duty, position which I have indicated I do not agree with, the Respondent didn't lead any evidence to demonstrate that the procedure was adhered to. Consequently, the court holds that the respondent didn't discharge its burden of prove. The termination was procedurally unfair therefore.
37. Section 43 of the Act imposes a duty upon an employer, whenever there is a dispute regarding termination of an employee's employment, to prove the reason for the termination. Section 45 (2) places a further burden on the employer to establish that the reason[s] for the termination were valid



and fair. Having discounted the reason that was advanced by the Respondent that the claimant deserted duty, I am inclined to find as I hereby do that the Respondent didn't discharge the twin legal burdens under the stated sections. In conclusion I hold that the termination was substantively unfair.

What reliefs are available to the Claimant if any

38. The claimant sought *inter alia*, 3 [three] months' salary in lieu of notice. I note that the contract of service that were between the claimant and the respondent was one that would be terminated by either party under section 35 of the [Employment Act](#), by giving the other, a 28 days' notice. There is no doubt and it was admitted by the respondent's witness that; no termination was ever issued to the claimant. The claimant has sought for a notice pay that is neither contractual, as he didn't demonstrate that the same is sought pursuant to a term of the employment contract, nor statutory, as it runs counter to the dictates of the section 35. I decline to award 3 [three] months' salary in lieu of notice. I find that he is only entitled to 1 [one] month's salary in lieu of notice pursuant to section 36 of the Act. Therefore, Kshs. 12,000.
39. The claimant further sought for service pay, for the 7 years period he worked for the respondent. From the evidence by the claimant, the Respondent didn't make remittances to NSSF for the last six months of his employment. In essence he acknowledged that he was a member of the NSSF. Pursuant to section 35(6), he is barred from seeking to be awarded service pay. By reason of this premise, I decline to grant him the figures sought or any amount under the head.
40. The claimant claimed for compensation for unpaid leave for the 7 years, Kshs. 84, 000. On this, it is unfortunate that the claimant wants to make a lottery out of the court process. In his own evidence, while testifying on the memos hereinabove referred to, and the respondent's position, as regards not being at work between August 26, 2016- September 26, 2016, the claimant testified that he has returned from leave long before the month of September. The court finds that he got uncandid here, declines to award any sum under this head.
41. The claimant sought for damages for the unfair termination. The court takes cognizance of the fact that section 49(1)(c) of the [Employment Act](#) bestows authority on the court to make a compensatory award. The making of the award is discretionary, granted depending on the circumstances of each case. Relevant to this matter, I have considered the fact that, the termination was unfair both procedurally and substantively, the Respondent acted in a manner that exhibited blatant impunity, the length of time the claimant was in the service of the respondent, and that the claimant didn't contribute in any way to the termination, and come to a conclusion that the matter merits an award of the relief, and to the extent of 8 months gross salary. Therefore, Kshs. 96,000.
42. The claimant sought for a refund of 4 months NSSF contributions that he alleged were never remitted by the respondent, The respondent did challenge this claim sufficiently, I award the claimant, Kshs. 1600 as sought.
43. As regards the Claim for uniform payment, the respondent's witness admitted that the refund was not made. The claimant is consequently entitled to the Kshs. 4000, sought. He is awarded.
44. Though the respondent's witness asserted that the claimant was paid for the month of September 2016, there was no prove by way of documentary evidence to prove the assertion. Nothing would have been easier for the respondent to show when and how the payment was effected. I award the claimant 12000 being salary for the month of September 2016.



45. I have found considerable difficulty in understanding the basis for the claimant's claim for "Distress for 2 years" To say the least, the same was not proved, no evidence was led to justify the same. I decline to make any award under the head.
46. In the Upshot, I enter Judgment for the claimant against the respondent in the following terms;
- [a] A declaration that the termination of the claimant's employment was procedurally and substantively unfair.
 - [b] One month's salary in lieu of notice, Kshs, 12000.
 - [c] Refund of 4 months withheld NSSF remittances, Kshs. 1,600.
 - [d] Compensation pursuant to section 49(1)(c) of the *Employment Act*, Kshs. 96,000.
 - [e] Unpaid salary for the month of September, 2016, Kshs. 12000.
 - [f] Refund for uniforms, Kshs. 4000.
 - [h] Interest on the awarded amounts at court rates from the date of filing this suit, till full payment.
 - [i] Costs of this suit.

READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

OCHARO KEBIRA

JUDGE

In the presence of

Mr. Ondiso for the Claimant.

Mr. Mboa for the Respondent.

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.

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

OCHARO KEBIRA

JUDGE

