



**Kizito v Kenya Kazi Services Limited (Cause 1568 of 2016)  
[2022] KEELRC 4139 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4139 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1568 OF 2016**

**M MBARŪ, J  
APRIL 28, 2022**

**BETWEEN**

**MUGANDA KIZITO ..... CLAIMANT**

**AND**

**KENYA KAZI SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant in the year 1996 as a security guard and his last wage was Ksh.23,690 per month.
2. The claim is that on 12<sup>th</sup> February, 2016 the respondent terminated the claimant's employment without notice, hearing or payment of terminal dues and is claiming the following;
  - a) Notice pay for one month at Ksh.23,690;
  - b) Unpaid leave for a year Kssh.23,690;
  - c. Compensation at 12 months Ksh.284,280;
  - d. Punitive damages for breach of constitutional rights; and
  - e. Costs of the suit.
3. The claimant testified in support of his claims that in November, 1996 he was employed by the respondent as a security guard where he worked diligently when until 12<sup>th</sup> February, 2016 when he was accused of being drunk while at work with two others. He was summarily dismissed without notice or a hearing he had not taken his annual leave or his overtime work paid.
4. The claimant testified that he was invited to a disciplinary hearing but never admitted that he had been drunk while at work, he lodged an appeal but this was rejected. He was sent to the AAR clinic for



blood and alcohol samples which were interpreted and alcohol was found. He was only paid the wage for the month.

5. In response, the respondent's case is that the claimant was employed as a security guard in the year 1996 and which position required utmost trust and responsibility but was summarily dismissed for gross misconduct due to unprofessional activities detrimental to the respondent's operations and image ad contrary to the terms of the employment contract and his legal obligations to the employer.
6. The claimant reported to work intoxicated on 31<sup>st</sup> January, 2016 and once at his assignment he was reported to be drunk and was taken to AAR Healthcare for an alcohol blood test and the results indicated he was grossly intoxicated.
7. The claimant was invited to a disciplinary hearing on 11<sup>th</sup> February, 2016 in the presence of two union officials and was found to have no good explanation for his conduct leading to summary dismissal by letter dated 12<sup>th</sup> February, 2016.
8. The claimant lodged an appeal but this was dismissed as he had no justifiable grounds for acting unprofessionally and was in breach of trust and responsibility as a security guard. The claims made should be dismissed with costs.
9. Norine Silwe the human resource officer of the respondent testified that the claimant was dismissed from his employment for being found drunk while on duty he was taken for a medical test and which turned positive for alcohol. His was gross misconduct and summary dismissal was justified. He as paid all his dues. the claimant was allowed to lodge an appeal but he did not raise any good justification for his conduct.
10. There is medical report filed and proceedings of the disciplinary hearing. Terminal dues were paid at ksh.13,641.

### **Determination**

11. The employer is lawfully allowed to terminate employment where the employee is of gross misconduct. the safeguard to the employee is that the employer must hear the employee in his representations and defences pursuant to Section 44(4) and 41 of the *Employment Act*, 2007 (the Act).

Under Section 41(2) of the Act, the law provides that;

12.
  - (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.
13. In 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. See *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR and *Alinur Mohamed Abdi v County Government of Garissa* [2021] eKLR.
14. on 12<sup>th</sup> February, 2016 the respondent terminated the employment of the claimant for being found at work while drunk. He was found to have been drunk while at work on 31<sup>st</sup> January 2016 and his supervisor took him for an alcohol test at AAR Healthcare centre and a blood analysis was conducted and which found him to be drunk.



15. The claimant was taken through a disciplinary process in the presence of union representatives. He was also allowed to lodge an appeal.
16. In employment and labour relations, an employer is justified to dismiss an employee who is found drunk and intoxicated while at work. Section 44(4)(b) of the Act provides that;
17.
  - (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
    - ...
    - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
18. The claimant does not deny that when the employer suspected that he was intoxicated while at work on 31<sup>st</sup> January, 2016 he was taken to a health facility for a blood test and which found him intoxicated. He was taken through a disciplinary process and his rights secured.
19. Employment terminated lawfully and is justified. Notice pay and compensation are reliefs not available.
20. The claimant was paid his terminal dues at ksh.13,641 without an explanation as to what this related to save that this was for the terminal dues. the aspect of leave pay is not addressed.
21. The claimant has attached his payment statement and the basic wage is Ksh.12,221 which is due in leave pay pursuant to Section 28 of the Act.
22. On the paid terminal dues of Ksh.13,641, this is higher than what is due and hence the claimant cannot claim beyond such date.
23. The claim herein is found without merit and is hereby dismissed. each party shall pay own costs.

**DELIVERED IN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**M. MBARŪ JUDGE**

**In the presence of:**

Court Assistant: Okodoi

..... and .....

