



**Ongori v G4S Security Services [K] Limited (formerly known as Securicor Security Services) (Formerly Known as Securicor Security Services) (Cause 429 of 2018) [2022] KEELRC 1699 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1699 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**CAUSE 429 OF 2018**  
**AK NZEI, J**  
**APRIL 28, 2022**

**BETWEEN**

**BERNARD MOMANYI ONGORI ..... CLAIMANT**

**AND**

**G4S SECURITY SERVICES [K] LIMITED (FORMERLY KNOWN AS  
SECURICOR SECURITY SERVICES) ..... RESPONDENT  
FORMERLY KNOWN AS SECURICOR SECURITY SERVICES**

**JUDGMENT**

1. Vide a Memorandum of Claim dated 20<sup>th</sup> June 2018, the Claimant sued the Respondent and pleaded as follows:
  - a) that the Claimant was employed by the Respondent as a security guard in 1998 and was permanently employed in 2002.
  - b) that in the year 2006, the Respondent rebranded and changed its name (from Securicor Security Services to G4S Security Services (k) Limited) but retained the Claimant in service until 8<sup>th</sup> November 2017 when it unfairly terminated his services.
  - c) that the Claimant's gross salary at the time of termination was ksh.22,220 per month.
  - d) that in mid-November, the Claimant contracted an occupational disease while on duty and attended Nyali Bridge Mombasa Hospital Limited whereat he underwent an operation on 14<sup>th</sup> August 2017.
  - e) that the Claimant was given ten (10) days rest which the doctor kept extending until 10<sup>th</sup> October 2017 when the doctor issued a letter requiring the Claimant to go for weekly check-



ups at the hospital, which letter the Claimant took to the Respondent; and the Respondent thereupon gave the Claimant a transfer letter to leave for Nairobi.

- f) that on the same date (10<sup>th</sup> October 2019) as he left the Respondent's office, the Claimant was unfortunately attacked by thugs who hit him on his sick hand which started aching and swelling whereupon he was treated at Coast General Hospital and given a report, which he took to the Respondent on 11<sup>th</sup> October 2017.
- g) that the Respondent thereafter purported that the Claimant was not on duty from 10<sup>th</sup> October 2017 and proceeded to subject him to disciplinary proceedings and to terminate him from service on 8<sup>th</sup> November 2017 without according the Claimant a fair hearing.
- h) that the Respondent did not follow the procedure laid out in the Employment Act 2007.
- i) that the Respondent did not give the Claimant leave or pay leave allowance for the entire period that the Claimant worked for the Respondent.
- j) that the Respondent never remitted regularly the deducted NHIF and NSSF to the statutory bodies concerned.

2. The Claimant set out the following claims against the Respondent:-

- a) 18 unpaid leaves @ ksh.22,220.....ksh.339,960
- b) 12 months' pay for unfair termination ... ksh.222,640
- c) gratuity ksh.22,220/2X18 years ....ksh.199,980
- d) notice pay .....ksh.22,220
- e) unpaid salary for October 2017.....ksh.22,220
- Total .....Ksh.807,020

3. The Claimant filed a detailed witness statement dated 14<sup>th</sup> May 2018 and a list of documents dated 20<sup>th</sup> June 2018, both of which accompanied the Memorandum of Claim. A total of ten documents were listed in the said list of documents. These included an offer of employment dated 4<sup>th</sup> September 2002, a letter on change of the Respondent's name dated 4<sup>th</sup> July 2006, a letter of transfer to Nairobi region dated 9<sup>th</sup> October 2017, summary dismissal letter dated 8<sup>th</sup> November 2017, doctor's off duty sheets, a doctor's letter dated 10<sup>th</sup> October 2017 advising on weekly check-ups on the Claimant by a physician, a medical report from Coast General Hospital dated 11<sup>th</sup> October 2017 on the Claimant's condition and treatment at the Hospital on 11<sup>th</sup> October 2017, and police abstract dated 12<sup>th</sup> October 2017.

4. The Respondent on the other hand pleaded; inter-alia:-

- a. that the Claimant's basic salary was ksh.14,421, and also earned overtime as and when it accrued to him.
- b. that the Claimant developed a growth on his right arm sometime in August 2017 and underwent a medical procedure upon which he made a full recovery.
- c. that over the period 2017, the Respondent lost several assignments in Mombasa region with the result that it had a large number of its employees without work, and a decision was made to transfer those employees who no longer had assignments for re-deployment in Nairobi.



- d. that the decision was communicated to the affected employees, who included the Claimant, by the Respondent's Operations Manager, and the affected employees were served with their transfer letters informing them that they were expected to report to the Respondent's Branch Manager Nairobi region by 11<sup>th</sup> October 2017.
  - e. that although the Claimant acknowledged receipt of the transfer letter and transfer allowance, he did not report to the Branch Manager Nairobi as instructed, but returned to the Mombasa office claiming that the transfer allowance had been stolen.
  - f. that the Claimant presented a sick sheet from Coast General Hospital claiming that he needed to undergo physiotherapy exercises at the hospital and later submitted a different sick sheet from Nyali Bridge Hospital claiming that he had chronic Kidney disease and was required to attend sessions at the hospital, and asked that the previous sick sheet from Coast General Hospital be given back to him.
  - g. that the Claimant fundamentally breached his employment contract by absenting himself from work and then weaved an intricate web of lies to avoid his transfer to Nairobi; as a result of which the Respondent considered dismissing the Claimant and called him for a disciplinary hearing.
  - h. that the disciplinary hearing was held on 8<sup>th</sup> November 2017, the Claimant attended and made his representations which were considered by the Respondent's disciplinary panel.
    - i. that the Claimant's terminal dues were computed and the Claimant was issued with a statement of discharge which he executed confirming that he had no further claim against the Respondent.
5. The Respondent also filed a detailed witness statement by Annette Mombo dated 6<sup>th</sup> March 2019 and a list of documents dated the same date, listing some eight documents. The listed documents included an unsigned letter of the Claimant's temporary employment dated 26<sup>th</sup> January 1998, offer of employment dated 4<sup>th</sup> September 2002, a bundle of the Claimants payslips (for July, August and September 2017), the Claimant's letter of transfer to Nairobi dated 9<sup>th</sup> October 2017, minutes of disciplinary hearing held on 8<sup>th</sup> November 2017, letter of summary dismissal dated 8<sup>th</sup> November 2017, Claimant's Certificate of Service dated 17<sup>th</sup> November 2017 and a statement of discharge.
6. When trial opened on 8<sup>th</sup> November 2021, the Claimant adopted his witness statement referred to in paragraph 3 of this judgment as his testimony and produced the documents referred to in the same paragraph as exhibits. The Claimant further testified, both in chief and under cross examination:-
- a. that his right hand was swollen in July 2017 and he underwent surgery in August 2017 at Nyali Bridge Hospital whereat the Respondent's supervisor went to check on him.
  - b. that he was discharged after two days and took the sick sheet to the Respondent.
  - c. that on 9<sup>th</sup> October 2017, the Claimant was telephoned and called to the office whereat he was told that he had been transferred to Nairobi and was paid ksh.3,700 as transfer allowance (the transfer letter is Claimants exhibit no. 4).
  - d. that the transfer allowance was not enough as the Claimant was supposed to rent a house in Nairobi.
  - e. that on 8<sup>th</sup> November 2017, the Claimant was summoned to the (Respondent's) office and was given a summary dismissal letter.



- f. that the Claimant was not given any warning letter or notice to show cause and was not given any reasons for dismissal.
  - g. that he (the Claimant) never absconded duty and that even when he had to attend hospital, he did so upon permission by his manager.
  - h. that the Respondent never followed procedure in dismissing the Claimant.
  - i. that apart from the swollen hand, the Claimant had a persistent kidney problem, though the swollen hand came as an emergency.
  - j. that the letter of dismissal specified the date on which the Claimant was alleged to have absconded duty.
  - k. that when the Claimant was summoned to the office, he only found managers who had already decided his fate and did not give the Claimant an opportunity to be heard or to bring a witness.
7. The Respondent called one witness, Annette Mombo, who adopted her recorded and filed statement as her evidence in chief, and produced the Respondent's listed documents as exhibits. The Respondent's witness (Rw-1) further testified:-
- a. that the Respondent terminated the Claimant's employment for absenting himself from work and for failing to follow lawful instructions; the instructions having been to proceed to Nairobi on transfer.
  - b. that before being terminated, the Claimant was given an opportunity to be heard on why he did not go on transfer or why he could not be terminated, and that the Respondent's exhibit no 5 were the disciplinary minutes which the witness (RW-1) prepared.
8. Under cross examination, the Respondent's witness (RW-1) stated:-
- a. that she had not indicated anywhere in her recorded and filed statement that the Claimant absconded duty, but had stated at paragraph 8 of her said statement that the Claimant collected his letter of transfer on 10<sup>th</sup> October 2017, hence the Claimant was on duty on 10<sup>th</sup> October 2017.
  - b. that the witness (RW-1) did not issue a notice to show cause and reasons for the intended dismissal were not given; and that invitation to attend disciplinary hearing was done on phone.
  - c. that the Claimant did not sign anywhere in the disciplinary minutes.
  - d. that there were five people present as listed in the disciplinary minutes, and that the Claimant was not accompanied by any person during the hearing, although this had been explained to him.
  - e. that the dismissal letter, dated 8<sup>th</sup> November 2017, was given to the Claimant on 17<sup>th</sup> November 2017, and dismissal was to take effect on 8<sup>th</sup> November 2017.
  - f. that the amount referred to in paragraph 9 of RW-1's filed statement (ksh.4,440) was not paid to the Claimant as he had absent hours.
  - g. that the Claimant was not paid in lieu of notice, and had taken leave during the nineteen years that he worked; though the witness (RW-1) had not filed any leave forms.



- h. that according to the Claimant's exhibit no. 8 (a report from Coast General Hospital dated 11<sup>th</sup> October 2017 which the Claimant took to the witness), the Claimant's hand was still swollen as at that date.
      - i. that the Respondent did not discriminate on the Claimant by sending him on transfer while he was sick.
9. The Respondent's witness (RW-1) told the Court, both in her evidence in chief and under cross-examination, that she was the Respondent's Human Resource Business Partner since 2016, and was conversant with the facts of the Claimant's case.
10. Upon considering the pleadings filed and evidence tendered by both parties, issues that emerge for determination, in my view, are as follows:-
  - a. whether termination of the Claimant's employment by the responder was unfair.
  - b. whether the Claimant is entitled to the reliefs sought.
11. When making a determination on whether or not termination of an employee's employment was unfair, the first point of reference by the Court seized of the matter is Section 41 of the [Employment Act](#), 2007 which provides, in mandatory terms:
  - (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 this explanation.
  - (2) Notwithstanding any other provision of this part, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make."
12. The Respondent did not demonstrate that before termination of the Claimant's employment on alleged ground of absenting himself from duty and failure to obey lawful instructions given by his immediate supervisor, which constitute gross misconduct under Section 44(4) & (3) of the [Employment Act](#), the Respondent:-
  - a. explained to the Claimant, in a language that the Claimant understands and in the presence of another employee or shop floor representative, the reasons for which the Respondent was contemplating termination of the Claimant's employment.
  - b. considered any representations that the Claimant and any person chosen by the Claimant under Section 41(1) had to make.
13. In her own words, RW-1 (the Respondent's Human Resource Business Partner) told the Court that she did not issue any notice or notice to show cause to the Claimant, and that invitation to the Claimant to attend disciplinary hearing was done by phone. Under such circumstances, and in my view, the disciplinary proceedings alleged to have been undertaken by the Respondent against the Claimant were outside the set down mandatory procedural requirements and were, therefore, invalid and a sham. Any dismissal resulting from such invalid proceedings is unfair.



14. Further, whereas the Respondent pleaded, and subsequently testified that the Claimant was given his transfer letter on 10<sup>th</sup> October 2017, a date on which the Claimant was present on duty, the dismissal letter dated 8<sup>th</sup> November 2017 accused the Claimant of having absented himself from duty without authority or official leave from 10<sup>th</sup> October 2017. This brings the validity of the reasons for the Claimant's dismissal under scrutiny, and indeed invalidates the allegation that the Claimant absented himself from duty as from 10<sup>th</sup> October 2017.
15. On the allegations that the Claimant failed to obey lawful instructions to proceed to Nairobi on transfer, the Respondent never disputed the Claimant's evidence that on 11<sup>th</sup> October 2017 when the Claimant was supposed to report at his new station of duty (Nairobi), the Claimant's hand was still swollen and tender. RW-1 admitted having received the report from Coast General Hospital dated 11<sup>th</sup> October 2017 from the Claimant in that regard. The Respondent never disputed the authenticity of the said document. The question here is whether, under the circumstances of this case, the Claimant refused and/or failed to obey a lawful command. Did he refuse to obey? In my view, he did not refuse. He presented medical evidence, which was not rebutted by the Respondent, that he was sick with a swollen and tender hand. The Respondent pleaded and testified that the Claimant had, in August 2017, undergone a surgical procedure due to a growth on his right hand. The Claimant produced doctor's advice/certificate granting him sick off days prior to the date of the transfer letter (Claimant's exhibit no.6). The Respondent never questioned the authenticity or validity of the said documents.
16. In sum, the Claimant did not, in my view, knowingly refuse to obey lawful instructions. He demonstrated that he was sick and he presented unrebutted medical evidence to the Respondent in that regard. I find and hold that termination of the Claimant's employment was both procedurally and substantially unfair.
17. The Court of Appeal held in the case of *Janet Nyandiko –vs- Kenya Commercial Bank Limited* [2017] eKLR, the mandatory procedure of terminating an employee's employment as follows:-

“Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment 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 acted in accordance with justice and equity. The parameters of 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 terminate 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 upto the date of termination, the extent to which the employer has complied with Section 41. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer.”



18. It is to be noted that even where an employer has a valid reason to dismiss an employee, whether summarily or otherwise, the dismissal will still be unfair if the mandatory provisions of Section 41 of the Employment Act, 2007 are not complied with.
19. On the second issue, and having found that Section 41 of the employment Act 2007, which mandatorily obligates an employer to communicate to an employee and/or to make explanations to an employee in a language that the employee understands when it comes to termination of employment, was not complied with in the present case, it is my view that any document shown to have been signed by the Claimant within the period of termination must be subjected to question as to whether the Claimant knew the contents of such document, and whether the document was in a language that the employee understands.
20. At paragraph 14 of its statement of Response, the Respondent pleaded:-

“ the Claimant’s terminal dues were computed and the Claimant was issued with a statement of discharge which he executed confirming that he had no further claim against the Respondent.”
21. The alleged statement of discharge is the Respondent’s exhibit no.8, in which a sum of ksh.4,421 was shown to be payable to the Claimant. Cross examined on the document, RW-1 told the Court that the said amount was not paid to the Claimant as he had absent days. The said document only relates to days in lieu of notice, days worked upto the date of termination, leave days entitlement, overtime, holidays and house allowance. The Respondent did not address the Court on whether or not the said document was in a language that the Claimant understood and, if he signed it, whether he understood and knew what he was signing.
22. The spirit and tenor of the Employment Act, 2007 is that an employee must understand every document that he or she signs with or in favour of the employer. That is why the signing by an employee of a contract of service must be witnessed by a person other than the employer (Section 9 (2) of the Employment Act) and communication of reasons for contemplated termination of employment must be done in the presence of a fellow employee or shop floor representative and in a language that the employee understands (Section 41(1) of the Employment Act).
23. In my view, an employer is obligated to demonstrate, to the Court’s satisfaction where an employee is alleged to have signed a discharge voucher in favour of an employer, that the employee understood what he or she was signing, and that the document was in a language that the employee understood.
24. In the present case, the Respondent did not demonstrate that the Claimant understood the contents of the alleged discharge voucher and/or that the document was in a language that the Claimant understood. I will, therefore, proceed to disregard the said document, whether or not the Claimant signed the same.
25. The Claimant pleaded that he earned ksh.22,220 per month at the time of termination of his employment but did not exhibit any payslip/salary statement in that regard. On its part, the Respondent exhibited the Claimant’s payslips for the months of July, August and September 2017. The Claimant’s gross salary is shown to have been ksh.14,421 per month.
26. The Claimant pleaded that during the entire period that he worked for the Respondent, the Respondent failed to give him leave or pay him leave allowance. On its part, the Respondent (RW-1) testified that the Claimant took leave during the nineteen years that he worked for the Respondent.



27. Although the Respondent testified that the Claimant took leave during the entire period of employment, no leave forms/records were produced in that regard by the Respondent, despite the fact that an employer is the custodian of all employment records. The Respondent did not dispute the number of years worked. I award the Claimant payment in lieu of leave for twenty one days per each served year for eighteen years, which is ksh.10,094.7x18 = 181,704.6. It is to be noted that failure by the Respondent to allow the Claimant to take leave for the entire period of employment was a continuing injury as contemplated in Section 90 of the Employment Act 2007, and that the same ceased at the point of termination of employment on 8<sup>th</sup> November 2017. The suit herein as filed on 21<sup>st</sup> June 2018.
28. On the claim for compensation for unfair termination, I award the Claimant tern (10) months salary as compensation for unfair termination, which is ksh.14,421x10= ksh.144,210. I have taken into account the circumstances under which the Claimant's employment was terminated, which cannot be said to accord with justice and equity.
29. The claim for payment of gratuity is declined as termination of the Claimant's employment did not result from redundancy.
30. The claim for October 2017 salary is allowed as the Claimant remained an employee of the Respondent upto 8<sup>th</sup> November 2017 when his employment was unfairly terminated.
31. Having made a finding that the summary termination of the Claimant's employment was unfair, I allow the claim for one month salary in lieu of notice.
32. The claim for a Certificate of Service is declined as the Respondent demonstrated that it issued a Certificate of Service to the Claimant on 8<sup>th</sup> November 2017 and that the Claimant signed for the same on 17<sup>th</sup> November 2017.
33. Consequently, judgment is hereby entered for the Claimant against the Respondent as follows:-
  - a. payment in lieu of leave .....ksh.181,704.6
  - b. compensation for unfair termination  
Of employment .....ksh.144,210.00
  - c. salary for October 2017.....ksh. 14,421.00
  - d. one month salary in lieu of notice .....ksh. 14,421.00

Total ksh.354,756.60
34. The Claimant is also awarded costs of the claim and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF APRIL 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**



**Appearance:**

Mr. Otwere for Claimant

Miss Lelu for Respondent

