



**Otieno v Collindale Security Limited (Cause 558 of 2016)
[2022] KEELRC 1172 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1172 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 558 OF 2016
NZIOKI WA MAKAU, J
APRIL 26, 2022**

BETWEEN

EUPHACE OMONDI OTIENO CLAIMANT

AND

COLLINDALE SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 1st April 2016 suing the Respondent for unfair unlawful and unfair termination of his employment. He avers the Respondent employed him as a Security Guard on 3rd September 2014 and later promoted him to the position of a Crew Commander. That he earned a monthly basic salary of Kshs. 14,652/- and served the Respondent for 1 year 3 months before it terminated his employment on 5th December 2015. It is the Claimant's averment that on 20th November 2015 he was involved in a motorbike accident on his way to work and the Respondent took him to Mbagathi District Hospital where he was treated and recommended for 1 month bed rest and that the Respondent took care of the medical expenses. He avers that he took a copy of the sick sheet to one of the Respondent's assignments at Koja Mosque and also notified and requested the in charge of the control room at the Respondent's head office, one Mr. Maina, to pick the sick sheet from the assignment at Koja Mosque.
2. The Claimant avers that after a few days Mr. Maina confirmed having received the sick sheet and that he could go ahead and take the bed rest. The Claimant avers that however when he reported back on 21st December 2015, he was given a letter dated 5th December 2015 terminating his services on account of desertion of duties. The Claimant contends that termination of his employment was untimely, unlawful and unjustified since it was done devoid of procedures in law such as giving him notice and reasons for the termination and hearing or considering any representations he may have had in defence. He seeks for a declaration that his termination of employment was unlawful and unfair. He further avers that he is entitled to terminal benefits and dues owed to him including: one month's notice or



- wages in lieu of notice; December 2015 salary; 1 year accrued annual leave; overtime; public holidays; compensation; service pay; uniform deductions; and certificate of service. The Claimant further seeks an order that the Respondent pays the costs of this claim and interest on all payments at court rates.
3. The Respondent filed a Memorandum of Reply dated 10th August 2018 admitting to have employed the Claimant but denies the facts and events pleaded by the Claimant in the Memorandum of Claim. It further denies that it unlawfully and unfairly terminated his employment and failed to pay him and avers that the Claimant was absent from work without properly informing the Respondent. The Respondent contends that the Claimant's Certificate of Service has not been denied to him and has always been ready for his collection. It prays that the suit be dismissed with costs to the Respondent. The Respondent also filed a Witness Statement made by its HR Manager Caroline Odhiambo who asserts that the Respondent terminated the Claimant's employment after he failed to inform the Respondent of his whereabouts and that he would be away from his assigned place of work. She denies that the Respondent received any sick sheet showing the Claimant proceeding on sick leave and states that the Respondent cannot verify the validity of the sick sheet. She further states that the Respondent paid the Claimant his dues after which he signed a clearance form.
 4. The Claimant responded in a Reply dated 23rd August 2018 averring that the Respondent has failed to prove any grounds for termination. He denies that he absented himself from work without informing the Respondent and reiterates that the Respondent declined to issue him with a certificate of service.
 5. The Claimant submits that he has rightfully discharged his evidential burden by producing the sick sheet from Mbagathi Hospital during his testimony in Court, as proof of his case. The Claimant submits that it is trite law that he who asserts must prove on a balance of probabilities provided under Sections 107 and 108 of the Evidence Act and affirmed in the case of Simon Mbiti Mbane v Inter Security Services Limited [2018] eKLR and that similarly in the case of Joseph Nzioka v Smart Coatings Limited [2017] eKLR, the Court held that dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the concerned employee and that show cause letter was issued to such employee to show cause why their services should not be terminated for absconding duties. It is the Claimant's submission that the Respondent has failed to adduce evidence proving it made efforts to contact him without success through phone calls or that it wrote or emailed him. The Claimant submits that if indeed he had deserted duty then he would not have returned to work on 21st December 2015 and that he therefore did not abscond duty as alleged by the Respondent but was terminated from employment.
 6. It is submitted by the Claimant that the Respondent summarily dismissed him from employment while he was on sick leave that was to run from 20th November 2015 and 20th December 2015. The Claimant submits that as the Respondent has failed to prove that he was a deserter, it has failed to prove the reason for terminating his employment and justify its grounds for doing so as required under Sections 43(1) and 47(5) of the Employment Act, 2007. The Claimant submits that Section 45(2) of the Employment Act provides that an unfair termination occurs when an employer fails to prove the validity and fairness of the reason for the termination and that the employment was terminated in accordance with fair procedure. It is the Claimant's submission that he has discharged his burden required under Section 47(5) of the Act whereas the Respondent has failed to discharge its burden of proof and that therefore his termination was unfair, wrongful, unlawful and untimely. The Claimant submits that he is entitled to the reliefs sought in his Claim having established the unfairness of the termination of his employment. The Claimant submits that he is entitled to notice pay and full payment of his December 2015 salary since he was summarily dismissed without notice upon returning to work on 21st December 2015; to annual leave as he never went on leave or paid in lieu of leave by the Respondent; to service pay because the Respondent never remitted all NSSF deductions made from



his salary; and to uniform deductions of Kshs. 200/- per month as shown in his payslips in Appendix 2 of the Claimant's Bundle of Documents, submitting that he is entitled to a refund since he returned his uniforms upon termination. The Claimant further submits that he is entitled to overtime and public holidays because he worked for extra hours outside normal working hours and during public holidays without being paid in lieu of overtime and that the Private Security Regulation Act, 2016 Laws of Kenya a watchman is to work for 60 hours per week which is 10 hours per day. On the prayer for compensation for the unfair termination, the Claimant relies on the case of Abisalom Ajusa Magomere v Kenya Nut Company Limited [2014] eKLR where the Court awarded the claimant 12 months' salary in compensation in addition to one month's salary in lieu of notice, service pay for every year worked, salary for 7 days worked in the month he was dismissed and costs of the suit.

7. The Respondent submits that the Claimant's dismissal from employment was lawful considering he deserted duty and that the Claimant never provided to the HR office the sick sheet when he showed up at work on 21st December 2015. The Respondent submits that the Claimant also failed to call the said Mr. Maina to testify that he received his sick sheet and that he failed to use the Respondent's communication channel for when one is sick and would like to proceed on leave. Furthermore, the Claimant did not have an email address or next of kin in his personnel file and the only way it could have reached him was through his phone which he declined to respond to. The Respondent submits that Section 44(4)(a) of the Employment Act provides that an employee who absents themselves from work without leave or other lawful cause is liable for summary dismissal and that it has proved its case through documentary and oral evidence that the Claimant deserted duty. The Respondent submits that the Claimant failed to prove that his dismissal was unfair as he could not during oral evidence correctly account for the date when he was involved in an accident and when he went to hospital for treatment. That the Claimant could not also prove that he called the HR Manager and sought sick leave and that the Claimant admitted during oral examination that he received all his terminal dues. The Respondent relies on the case of Ali Omar Mwanyuni v Kwale International Sugar Company Ltd [2020] eKLR where Ndolo J. held that under Section 47(5) of the Employment Act, an employee alleging unfair termination or wrongful dismissal bears the burden of proving their allegations, and that the Court held in Bakari Abdalla Mwangazi v Kwale International Sugar Company Limited [2020] eKLR that an employee who prevaricates on the date of termination of employment cannot be said to have discharged the evidential burden placed by Section 47(5). It also relies on the dicta in Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia [2021] eKLR wherein DK Marete J. held that the claimant had not adduced evidence in support of termination on a balance of probabilities and found a case of no termination of employment.
8. The Respondent submits that the Claimant's claim must thus fall for failure to prove unlawful and unfair termination and that this Court should dismiss all his prayers. That the Claimant also failed to prove non-payment of accrued annual leave, overtime and public holidays (which cannot be proved through the payslip for May 2015 referred to by the Claimant). It further submits that the Claimant was neither entitled to service pay or gratuity as he was a member of NSSF and his contract did not provide for gratuity and that the provisions of Section 35(6) of the Employment Act exclude him from such claim. On uniform deductions, it submits that it paid him the same together with leave days, overtime and other terminal dues as shown in the clearance form annexed to the Respondent's Memorandum of Reply.
9. The Claimant was required to prove his case on a balance of probabilities. He failed to prove that he handed over the sick sheet to a Mr. Maina of the Respondent. The Claimant knows the procedure for sick off at the Respondent but he portends to have handed over the sick sheet to an amorphous being named Mr. Maina. He did not even have the said employee's full name or position in the company. The Respondent demonstrated it paid the Claimant all his dues and he thus has no other relief available



from the Court. As such, having failed to show he was dismissed without cause his case fails and is accordingly dismissed with no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

Nzioki wa Makau

JUDGE

