



**Wanagia v Security Group Kenya (Cause 2280 of 2015)  
[2022] KEELRC 1665 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1665 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2280 OF 2015  
K OCHARO, J  
MAY 12, 2022**

**BETWEEN**

**ANZELIMO EKEYA WANAGIA ..... CLAIMANT**

**AND**

**SECURITY GROUP KENYA ..... RESPONDENT**

**JUDGMENT**

**Introduction .**

1. The Claim herein was instituted through a memorandum of claim dated 9<sup>th</sup> December, 2015 against the Respondent for:
  - a. A declaration that the Respondent’s action of sacking the Claimant is illegal, and or unlawful, that the Claimant is entitled to severance pay, terminal benefits, 3 months’ salary in lieu of notice, salary underpayments, all totalling to about Kshs. 714,345 as particularised in paragraph 6 hereinabove.
  - b. General damages for wrongful dismissal as the Court shall assess.
  - c. Costs of this suit and interest.
  - d. Any other relief that this Honourable Court may deem fit and just to grant.
2. The Respondent entered appearance on the 25<sup>th</sup> day of January 2016 and subsequently filed a response on the 4<sup>th</sup> day of February, 2016. The Respondent denied the Claimant’s claim, seeking that the same be dismissed with costs for want of merit.
3. At the close of pleadings, the matter got destined for hearing on merit. Indeed, the Claimant’s case was subsequently heard on the 10<sup>th</sup> August, 2021 and that of the Respondent on the 19<sup>th</sup> October 2021.



4. At the hearing of their respective cases, the parties adopted their witness statements as their evidence in chief and the documents that they had filed herein as their documentary evidence.

#### **The Claimant's case**

5. The Claimant stated that he was employed as a security guard by the Respondent in the month of April 1999, for whom he worked till 15<sup>th</sup> July, 2015.
6. The Claimant contended that on the 15<sup>th</sup> July 2015, he was assigned duties at the Respondent's client's place, Simba Complex. As fate would have it on that day Government agencies conducted an operation within the premises for 3<sup>rd</sup> Generation Alcoholic Drinks, the operation was occasioned by the fact that the premises were housing a tenant who was dealing with that kind of alcoholic drinks.
7. In the process some materials got lost. On the 29<sup>th</sup> July 2015 the caretaker of Simba Complex however, complained of the loss to the Respondent Company. This led to his [Claimant's] suspension to pave way for investigations. The investigations were concluded on the 16<sup>th</sup> September 2015, when he was not found culpable. The suspension was without a formal letter.
8. The Claimant asserted that following the result of the investigations, the Respondent promised to reinstate him but this was never to be.
9. His incessant efforts to get back to work did not bear any fruits.
10. The Claimant asserted that during the suspension period, he was not paid any salary. He was terminated unfairly without any just cause. At the time of his termination his monthly salary was Kshs. 19,859.
11. The Claimant asserted that during his employment, he was not allowed to proceed for leave, yet he was never compensated for the untaken leave days. At termination the Respondent did not pay him his terminal dues.
12. On cross-examination by Counsel for the Respondent, the Claimant stated that his last assignment was at Trackmatt, Mombasa Road. He worked there up to 16<sup>th</sup> September 2015. On this day he was called to the office and given a seven days suspension. The decision to have him suspended was communicated to him orally.
13. After the 7 days, he went back to the office as he had been directed to. However, he did not find the manager, he consequently went back home without seeing him. He went back after three days only to be told that he had to continue being out of work until he called back. Thereafter he was never called by the Respondent.
14. The Claimant clarified that his last day on job was 15/09/2015 and his termination came in on the 16<sup>th</sup> September 2015.
15. The Claimant acknowledged that he did not have a basis for the Claim for three [3] months' notice pay. Too he did not have justification for the claim for transportation pay.
16. The witness acknowledged that during his tenure, he used to proceed for leave. He acknowledged too that the employer [Respondent] used to make NSSF remittances to the relevant agency.
17. He asserted that he did not abscond duty in the circumstances.



18. In re-examination and shown the Respondent's document, the letter dated 7<sup>th</sup> August 2015, the Claimant contended that he is unaware of the same, and that he was never suspended on the 30<sup>th</sup> July 2015.
19. Stating that he never absconded duty, the Claimant went ahead to state that he stayed out of duty as was instructed, to wait for a call to get back, which call the Respondent never made. At all material times, he never changed his mobile phone number, therefore the allegation that he was unreachable is not true.

**The Respondent's case.**

20. The Respondent presented one Daniel Marisa, its Branch Manager, to testify in its defence. The witness testified that on the 16<sup>th</sup> of September 2015, while in office he received information that the Claimant who had been deployed at Crater Automobile along Mombasa Road had not reported on duty to relieve his night counterpart, consequently arrangements were made, and another guard was deployed to cover the shortage.
21. Attempts to reach the Claimant were not fruitful as the Claimant's phone was perpetually off. He did not communicate to the witness to report about his whereabouts and why he was not reporting for duty.
22. The witness asserted that he Respondent gave the Claimant about two weeks hoping that he will call to explain his whereabouts or tun up for duty. By end of September 2011, he had not done any of that.
23. The witness got constrained to on the 29<sup>th</sup> September 2015, escalate the matter to the Respondent's Human Resource Department, urging them to remove the Claimant from the pay roll and subsequently declare him a deserter.
24. He stated that the Respondent's Human Resource Department eventually issued a summary dismissal letter on the 19<sup>th</sup> October, 2015, two weeks after the day he reported the matter to them. The Claimant was dismissed for absenteeism. His dismissal was therefore lawful.
25. The witness asserted that the suspension that the Claimant alluded to was not connected to the subject misconduct.
26. The witness asserted that at the time of the Claimant's dismissal he was not working at Simba Colt Complex. He had been transferred after the operation on illicit brew.
27. The witness testified that the Claimant's assertion that he directed him to go away was untrue. Directing an employee to leave employment in whatever circumstance and manner was a role that didn't fall under his sphere.
28. The Respondent never terminated his employment, he disappeared from duty. He cannot be heard to lay any claim against the Respondent, the witness asserted.
29. The Claimant used to proceed for his leave as exhibited by the Respondent's documents placed before the Court. The Claimant was a member of NSSF, all the deductions that the Respondent made on his salary were remitted to NSSF, the witness stated.
30. The Claimant is at liberty to pursue NSSF for the release of his contribution.
31. Cross examined by Counsel for the Claimant the witness stated that in July 2015, he was Deputy Sector manager, Industrial Area. He asserted that he was manager over the Claimant then.



32. According to the Respondent’s policy, there has to be at least three warnings against an employee before such an employee can be dismissed or his or her employment terminated. There were warnings issued against the Claimant, but as their issuance was of dates far apart from each other, the warnings would not and were not made grounds for termination of the Claimant’s employment.
33. The suspension letter dated 7<sup>th</sup> August 2010, was served upon the Claimant. He picked the same from the Respondent’s offices.
34. The Claimant was not reachable as he had switched off his phone. The witness stated further that though the Respondent had the bank account details of Claimant, it didn’t pay his terminal dues into the account. He worked for the Respondent for a period of 16 years, he was entitled to a certificate of service.

### **The Claimant’s submissions**

35. The Claimant’s Counsel first addressed the Court on whether the summary dismissal of the Claimant was merited. He argued that the Claimant was dismissed without any valid reason. He was investigated and adjudged not culpable through the internal mechanisms of the Respondent. Having been exonerated, the Claimant was entitled to a reinstatement.
36. Section 43 of the *Employment Act* enjoined the Respondent to prove the reasons for the summary dismissal, and section 45, placed an obligation upon it to demonstrate that the reason[s] was valid and fair. The Respondent did not discharge the burden.
37. It was further submitted that Section 41 of the *Employment Act* requires of an employer to before terminating an employee’s employment on grounds of gross misconduct under section 44 of the Act to first accord the employee an opportunity to make representations on the reasons for the intended dismissal or termination. The evidence on record demonstrate that this didn’t the happen before the Claimant was summarily dismissed. The dismissal was therefore procedurally unfair.
38. Citing the case of *Samsung Electronics East Africa Ltd. Vs. KM* [2017] eKR, Counsel for the Claimant argued that in a claim for unfair or wrongful dismissal, a duty falls on the employee to prove that the dismissal / termination was unfair, whilst the employer bears the burden of justifying the grounds for termination. the Claimant discharged the burden.
39. The Claimant further placed reliance on the Court of Appeal decision in *County Assembly of Kisumu & 2 others vs. Kisumu County Assembly service Board and 6 others* [2015] eKLR, where the Court held:

“Whereas the right to a fair hearing varies from one case to another depending on the subject matter in issue, its irreducible minimum is now well settled. In granting that right, the Court or the administrative body or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing”. That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal Counsel where necessary.”



And the holding in Civil Appeal 57 of 2016; *Samsang Electornics East Africa Limited vs. KM* [2017] eKLR [supra], thus;

“Due process is a fundamental aspect of law. It is the right to be a fair hearing. The right to fair hearing is encapsulated in the audi alteram partem rule [no man should be condemned unheard], and founded on the well-established principles of natural justice. It is this right that the legislature secured under section 41 of the *employment Act*.

40. It was submitted that there is ample evidence that the summary dismissal was unfair. The Claimant is therefore entitled to the reliefs sought in his pleadings.

#### **The Respondent’s submissions.**

41. Counsel for the Respondent identified four [4] issues for determination, thus;

- a. Whether the Claimant was terminated by the Respondent on the July 15, 2015.
- b. Whether the alleged termination was lawful.
- c. Whether the Claimant is entitled to the reliefs sought.
- d. Who should bear the costs of this suit?

42. Counsel for the Respondent submitted that the Claimant’s evidence was a radical departure from his pleadings. The Claimant during cross examination confirmed that his last place of work was Crater Automobile where he worked till mid-September 2015.

43. It was further argued that the Respondent through the evidence of its witness was able to establish that the Claimant’s employment was terminated on the 19<sup>th</sup> October 2015, having absconded duty on the 16<sup>th</sup> September 2015.

44. On the 2<sup>nd</sup> issue Counsel for the Respondent argued that the Claimant gave a particular set of facts to the effect that he was terminated on the 15<sup>th</sup> July 2015. However, from the material before the Court it is clear that the Claimant was not terminated on the said date. The facts set out in the pleadings were not established, there shall not be any reason therefore, for the Court to venture into considering whether or not the termination was lawful as none existed.

45. On the reliefs, it was submitted that the Claimant having failed to establish that there was termination, he cannot be entitled to any of those reliefs sought.

#### **Analysis and Determination.**

46. The following issues commend themselves for determination in this matter thus:

- i. How did the separation in employment between the Claimant and the Respondent occur?
- ii. If the separation was as a result of termination or summary dismissal was the same fair?
- iii. Is the Claimant entitled to the reliefs sought?
- iv. Who should bear the costs of this suit?

How did the separation in employment between the Claimant and the Respondent occur?

47. The Claimant pleaded in paragraphs 3 and 4 of his memorandum of claim that the Respondent terminated his employment on the 15<sup>th</sup> July 2015 without any justification and without giving him a



chance to defend himself. However, in his oral testimony in Court he in clarification testified that the termination date as captured in the statement of claim was not correct. His last working day was on 15<sup>th</sup> September 2015 and the termination date was the 16<sup>th</sup> September 2016.

48. To demonstrate that the date mentioned in the aforesaid paragraph of his pleadings was incorrectly captured, he referred Court to his witness statement that was contemporaneously filed with the memorandum of claim, thus;

“The Company called us and conducted investigations to the caretaker’s allegations. The same was concluded on the 16<sup>th</sup> September 2015. The Company found no offence has been committed.”

49. From this statement I get the impression that he was stating that as at the 16<sup>th</sup> September 2015 he was still an employee of the Respondent. This coupled with the fact that he made a clarification on the date of termination, on oath, impels me to conclude that his case is that his employment was terminated on the 16<sup>th</sup> of September 2015.

50. It shall be an abdication of the Courts higher duty to do justice without undue regard to technicalities if I were to proceed to hold the conflict on the dates to the prejudice of the Claimant’s case, even when it is clear from the very initial statement that as at 16<sup>th</sup> September 2015, his employment was current.

51. Having stated this, I now turn to consider how exactly the separation did occur, considering the rival positions that the parties took over the issue.

52. The Respondent’s witness contended that the Claimant absconded duty on the 16<sup>th</sup> September 2015, the Claimant absented himself from work without authority and thereafter failed to return for duty, constraining the Human Resource Department of the Respondent, to issue a summary dismissal letter on the 19<sup>th</sup> October, 2015.

53. I have carefully gone through the list of documents filed herein by the Respondent on the 5<sup>th</sup> February 2015, the list does not have the letter allegedly issued on the 19<sup>th</sup> October 2015 as one of its items. The letter is not among the documents that were placed before this Court. The witness did not explain to Court why the letter was not filed in Court if at all it existed.

54. In his oral testimony in Court the Respondent alleged that the Claimant worked up to 15<sup>th</sup> September 2015. The document obtaining at page 25 of the Respondent’s bundle of documents has caught my eye, it is titled “Hearing Form” and reads in part:

“I Anzelimo Ekeya Wangandi – A Work No. P4939 FGL/SGL/LIT has been accorded a disciplinary hearing on this date 15<sup>th</sup> September 2015 about the issue raised against me.”

55. The Respondent’s witness, I conclude deliberately avoided mentioning anything to do with the stated disciplinary hearing. He was silent on any happenings of the 15<sup>th</sup> September 2015. In fact, his evidence gives an impression that the day a normal working day for the Respondent and the Claimant.

56. By reason of the premises a foregoing, I am of the view that the Respondent was not candid on the manner the separation occurred, and I so find.

57. I am persuaded consequently by the version presented by Claimant that he did not abscond duty, but was on the 16<sup>th</sup> day of September 2015 told to be off duty, and wait to be called by the Respondent, however, he was never.



## Whether the termination was fair.

58. Having accepted the Claimant's position concerning the separation, then it falls on this Court to interrogate whether a termination occurred and whether it was fair. In *Rebecca N. Nyangolo vs. 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 definition, is not initiated by the employee, nor is it something which merely happens – *Schmahm vs. Concept Communications Natal [pty] Limited* [1997] 8 BhLR logz[CC]. In essence some overt act by the employer must be present to bring the employment into termination.”
59. Where an employer sends his or her employee off duty, with an indication that the employee can only get back upon being called but the employer nonetheless fails to call him or her back within a reasonable time or at all, and such failure gets compounded by actions of the employer and or its agents or servants, of thwarting any attempts by the employee from accessing his or her workplace, the actions shall be considered the overt action[s] bringing the employee's employment into termination. Without hesitation, I conclude that the Claimant's employment was terminated.
60. Section 41 of the *Employment Act* provides for a mandatory procedure that must be adhered to by the employer if a termination of employment of an employee has to be found procedurally fair. Procedural fairness encapsulates three components; the notice/information component – the employer must inform the employee of his intention to terminate the employment and the grounds that will form basis thereof; the hearing component – the employed must be accorded an opportunity to make representations on the intention and the grounds; the consideration component - the employer has to consider the representations made by the employer before making his or her decision.
61. The Respondent's witness stated that this did not happen. This supports the Claimant's case that he was terminated without notice and any form of hearing. The obligation to adhere to procedural fairness is one that is placed statutorily on the shoulders of an employer. Allied to this obligation is the burden to prove the adherence whenever a termination of an employee's employment is impugned on account of want of procedural fairness. The Respondent did not discharge the burden.
62. In the upshot, I find that the termination of the Claimant's employment was procedurally unfair.
63. Section 43 of the *Employment Act* places a legal burden on the employer to prove the reason[s] for termination of an employee's employment, if the employer defaults in so proving the termination shall be deemed unfair in terms of section 45 of the *Employment Act*.
64. In this matter, the Respondent chose to deny that the Claimant's employment was terminated, in the manner the latter alleged. On the other hand, the Court has failed to be persuaded that the Claimant absconded duty leading to his removal from the pay roll of the Respondent and finally a dismissal. In this circumstance it became obvious that the Respondent has not shown that there was reason for the termination, and further that there was a valid and fair reason for the termination.
65. Assuming for a moment that the Respondent's version was correct, I would still find that the alleged dismissal was procedurally and substantively unfair, on the reasons that, the Respondent was not able to demonstrate that between the date of the alleged absconding and the date of termination there were efforts to trace the Claimant and inform him of the impending action on account of his absenteeism. The Respondent's witness alleged that the Claimant was called but he would not



be traced, through which telephone number the Court was not told. Evidence establishing that the Respondent attempted to reach the Claimant via phone calls was necessary in the circumstances of this matter.

66. The Respondent's witness asserted that a dismissal letter was issued. This gives me a clear impression that even after 16<sup>th</sup> September 2015, the Respondent had a channel of communicating with the Claimant, it never used the channel to notify the Claimant of its intended actions and invite him to make a representation.
67. The termination was substantively unfair.

#### **Of the Reliefs.**

68. The Claimant sought inter alia notice pay equivalent to 3 [three] months gross salary. The Claimant could not justify why three months and not the one month's gross salary statutorily recognized. Unless there is a contractual notice period given in an employment contract, which is larger than the statutory period, a Court of law cannot make an award outside the statutory period.
69. Pursuant to the provisions of section 35 of the *Employment Act*, the Claimant's employment would be one terminable by issuance of a 28 days' notice. None was issued. I award the Claimant one month's salary in lieu of notice, Kshs. 19,859.
70. The Claimant also sought for unpaid leave for the years worked and "transport one way home." Under cross examination the Claimant acceded that he used to proceed for his leave. Equally that the claim for "transport one way" does not have foundation in the contract of employment or at all. These two reliefs as sought are declined.
71. It is clear from the material placed before this Court that the Claimant was a member of NSSF. It follows therefore that he cannot seek employment of service pay. The provisions of section 35 of the Act, bars such a pursuit.
72. Having found that the termination was unfair, and considering the manner in which the termination occurred, the length of time the Claimant served in the employment of the Respondent, and the substantial deviation by the Respondent from what the law required of him, I find that the Claimant is entitled to an award of compensatory damages, pursuant to the provisions of section 49 of the *employment Act*, to an extent of 7 months' gross salary.
73. Costs follow the event, the event here being a success in litigation by the Claimant, the costs of this cause shall be for him.
74. In the upshot, I enter Judgment for the Claimant in the following terms.
  - a. One month's salary in lieu of notice, Kshs. 19,859.
  - b. Compensation pursuant to section 49 [1] [c] of the *Employment Act*, Kshs. 158,872.
  - c. Interest on the awarded sum at Court rates from the date of this Judgment till full payment.
  - d. Costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

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**OCHARO KEBIRA**



## JUDGE

Delivered in presence of:

Mr. Obuya for Ms Mwangi for the Claimant.

Mr. Mbaabu 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

