



**Ekesa v Sas Security Services Limited (Cause 593 of 2016)
[2022] KEELRC 1339 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1339 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 593 OF 2016**

**AK NZEI, J
JUNE 23, 2022**

BETWEEN

ALFRED OKULI EKESA CLAIMANT

AND

SAS SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 9th August 2016 and filed in Court on the same date, the Claimant sued the Respondent and pleaded, inter-alia:-
 - a. that the Claimant was employed by the Respondent as a security guard on 22nd January 2015 to 24th May 2015, earning a basic monthly salary of ksh.6,000, which amount was far much below the then prevailing minimum wage of ksh.9,780.95 for security guards in Mombasa.
 - b. that on 24th May 2015 at about 10.00 a.m, while on duty as assigned and in the course of his employment, the Claimant was apprehended and taken to Central Police Station, Mombasa, on allegations of house breaking and theft of assorted items, which had occurred at one of the houses where the Claimant was guarding.
 - c. that the Respondent's supervisor, one Mr. Kamau, was called to the scene and without any reasonable cause, justification or proper investigation into the matter, he dismissed the Claimant on the spot.
 - d. that the Respondent did not give the Claimant any opportunity to be heard or to remain in employment or suspended pending the outcome of the matter.
 - e. that the Claimant was charged with the offence of house breaking and stealing in Mombasa Chief Magistrate's Court Criminal Case No. 957 of 2015, and the Court acquitted him on 8th



February 2016 as the Claimant and the other listed witnesses failed to attend Court on several occasions.

- f. that upon acquittal, the Claimant wrote a demand letter to the Respondent on 23rd February 2016, requesting to be paid his terminal dues following the unlawful dismissal from employment, but the Respondent refused and/or neglected to respond to the same.
2. The Claimant sought the following reliefs:-
 - a. underpayment for 5 months x(ksh.9,780.95-6000).....ksh. 18,904.75
 - b. one month salary in lieu of noticeksh.9,780.95
 - c. 12 months compensation for unlawful termination (12x9,780.95).....ksh.117,371.40
 - d. house allowance for 5 months @ 1,467.....ksh.7,335
 - e. uniform allowance @ 400 per months x 5.....ksh.2000
 - f. a declaration that the Claimant was unlawfully and unfairly terminated.
 - g. Certificate of Service.
 - h. costs and interest at Court rates.
 3. The Respondent never entered appearance, and never filed any Response to the claim, though it is shown to have been served with the claim, list of documents and witness statement on 15th October 2016. There is on record an affidavit of service filed on 31st October 2016 in that regard.
 4. The Respondent is also shown to have severally been served with mention notices over the years and affidavits of service filed. These include a mention notice dated 12th June 2019 which is shown to have been served on the Respondent on 14th June 2019. The Respondent acknowledged service of the document, and an affidavit of service thereon was filed on 22nd July 2019.
 5. On 7th December 2021, the Claimant filed a substituted list of documents dated 6th December 2021, listing six documents which included a charge sheet dated 25th May 2015 on Criminal Case No. 957 of 2015, acquittal order dated 8th February 2016, the Claimant's bank statement from 1st March 2015 to 19th May 2015, legal Notice No. 196 of 2013 on Minimum Wages, demand letter dated 23rd February 2016 and the Claimant's National Identity Card.
 6. The Court's record shows that the suit herein was first fixed for mention by the Claimant's Counsel on 20th September 2018, 13th March 2019 and 30th July 2019 respectively, and was finally fixed for hearing on 5th May 2021, on which date it was adjourned to 25th November 2021.
 7. When the matter came up for hearing before me on 25th November 2021, Mr. Egunza Advocate appeared for the Respondent and told the Court that the Respondent had changed employees, moved offices, and that documents served on them had gotten lost. He pleaded with the Court to allow the Respondent to defend the suit. I granted the Respondent seven days to file and serve all its documents. I granted corresponding leave to the Claimant to file further documents within seven days, if need be, and fixed the suit for hearing on 15th December 2021.
 8. When the suit came up for hearing on 15th December 2021, there was no appearance on the part of the Respondent. Further, the Respondent had not filed any documents in compliance with the Court's orders dated 25th November 2021. The Claimant's case was heard and closed.



9. The Claimant adopted his filed witness statement, filed on 9th August 2016, as his testimony, and produced in evidence the documents listed on his substituted list of documents dated 6th December 2021.
10. The Claimant further testified that his salary was ksh.6,000 at the time of arrest (termination) and that he was taking ksh.1000 salary advance and ksh.4,300 used to be paid into his bank account by the Respondent after deducting ksh.400 for uniform.
11. The Claimant further testified that his uniform was taken away from him by the Respondent's supervisor, Mr. Kamau, after the Claimant was arrested.
12. The Claimant prayed for judgment as prayed in his memorandum of claim.
13. It is to be noted that the Respondent never defended the suit, though served. The Claimant's evidence was therefore neither controverted nor rebutted. Issues that present for determination, in my view, are as follows: -
 - a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
14. On the first issue, Section 41 of the [Employment Act](#) 2007 sets out mandatory procedural requirements which every employer contemplating terminating an employee's employment must adhere to. Section 41 of the [Employment Act](#) provides as follows:-
 - “(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.”
15. The Claimant testified that he was apprehended on 24th May 2015, the Respondent's Supervisor (a Mr. Kamau) was called to the scene and he dismissed the Claimant on the spot without according him an opportunity to be heard, and without investigation into the matter and without justification. The Claimant further testified that the supervisor (Mr. Kamau) subsequently took away the Claimant's uniform.
16. Regardless of what led to the Claimant's arrest on 24th May 2015, the Claimant was entitled to be taken through the procedural requirements and motions of Section 41 of the [Employment Act](#). Failure by the Respondent to comply with the said statutory procedural requirements rendered the termination of the Claimant's employment procedurally unfair. I find, hold and declare that termination of the Claimant's employment by the Respondent was unfair.



17. It was held in the case of CMC Aviation Limited v Mohammed Noor [2015] eKLR as follows:-

“In view of the foregoing, we find that the appellant’s act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the Employment Act. In Kenya Union Of Commercial Food And Allied Workers –vs- Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act. That applies in a case of termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui –vs –kenya Pipeline Company Limited [2014] eKLR”

18. Before delving into the second issue, I will address the issue of the Claimant’s salary at the time of his dismissal. The Claimant pleaded and testified that he was earning a monthly salary of ksh.6000 at the time of his dismissal, and that this was an underpayment. He further pleaded and testified that the minimum wage of a security guard in Mombasa was ksh.9,780.95. He produced in evidence Legal Notice No. 197 of 2013 Regulation Of Wages(general) (amendment) Order, 2013 and demonstrated that indeed, the minimum wage of a security guard (watchman) in Mombasa at the time of the Claimant’s dismissal was ksh.9,780.95 per month (inclusive of house allowance).
19. On the second issue, and having found that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of nine months salary being compensation for unfair termination of employment (9,780.95 x9 = 88,028.55).
20. The claim for underpayment is allowed, but for four months, not five months (ksh.3,780.95x4 = ksh. 15,123.80).
21. The claim for one-month salary in lieu of notice (ksh.9,780.95) is allowed. The Claimant was not shown to have been served with a termination notice pursuant to Section 35 of the Employment Act.
22. The claim for house allowance is declined. According to Legal Notice No. 197 of 2013, the minimum wage of a security guard (watchman) in Mombasa at the time of the Claimant’s termination (ksh.9,780.95) is shown to have been inclusive of house allowance.
23. The claim for uniform allowance, ksh.2000, was pleaded and the Claimant’s evidence thereon was not rebutted or controverted. The same is allowed.
24. Ultimately, judgment is hereby entered for the Claimant against the Respondent for: -
- a. nine months’ salary being compensation for unfair termination of employmentksh. 88,028.55
 - b. underpayment for four monthsksh. 15,123.80
 - c. one month salary in lieu of noticeksh. 9,780.95
 - d. uniform allowanceksh.2,000.00
- Total ksh.114,933.30
25. The awarded sum is subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
26. The Respondent shall issue the Claimant with a Certificate of Service pursuant to Section 51(1) of the Employment Act within thirty days of this judgment.



27. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 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:

Miss Adagi for Claimant

N/A for Respondent

