



**Mung'au v Brinks Security Limited (Cause 567 of 2016)
[2022] KEELRC 1455 (KLR) (20 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1455 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 567 OF 2016
NZIOKI WA MAKAU, J
JUNE 20, 2022**

BETWEEN

HEZRON OJILO MUNG'AU CLAIMANT

AND

BRINKS SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted the suit on 8th April 2016 vide a Memorandum of Claim dated 31st March 2016 against Bank Security Services Limited, for the unfair and wrongful termination of his employment. He avers that the Respondent employed him on 18th January 2012 as a Security Guard and was earning a monthly salary of Kshs. 9,500/- and that the Respondent posted him to work at various posts within Nairobi with the last one being Cooperative Bank Embakasi Branch. The Claimant avers that while carrying out his guard duties at the Cooperative Bank on 6th February 2016, he suddenly fell ill and when he sought permission from his supervisor to get medical attention, he was given a few days off work to recover through a sick off sheet. The Claimant avers that however when he presented the said sheet so as to be granted sick leave, his supervisor threw the same back at him and instructed that he present a report confirming he was fit to work. The Claimant avers that when he tried to explain, he was informed to consider his employment terminated with immediate effect if he went for sick leave. The Claimant further avers that he decided to take his sick leave considering his ailing condition and the medication he had been put on so as to fully recover and that when he returned to work, the Respondent informed him that his position had been taken up.
2. It is the Claimant's assertion that the Respondent did not have a fair reason to terminate his employment and that he was never paid his terminal dues consisting of one month's salary in lieu of notice, salary for days worked in February 2016, housing allowance, and public holidays. He also seeks damages for unlawful termination and a certificate of service in accordance with the *Employment Act*. He thus prays for judgment against the Respondent for the same and for costs of the suit, all together



with interest at Court rates from the date of filing suit until payment in full. In his written Statement, the Claimant asserts that his salary was never inclusive of house allowance and that he never proceeded for any public holidays or paid for the same while serving the Respondent. He contends that it was unusual for the supervisor to require him to produce a confirmation report that he was fit to work yet he was unwell and could not be certified to work. He states that the communication of his position having been filled was made to him verbally and he reported the matter to the labour office for intervention on 11th February 2016. That the Respondent however refused to respond to the labour office and instead asked him to return his uniform before they could address the issue of payment of his terminal dues. The Claimant states that when he returned his uniform, he was issued with a clearance certificate but the Respondent failed to pay him his dues and that it also failed to attend meetings at the labour office thereafter and hence this suit.

3. In reply, the Respondent filed a Memorandum of Response and Counterclaim dated 18th October 2018, averring that it employed the Claimant from 17th January 2012 and that his last salary was Kshs. 10,800/-. It avers that contrary to his assertions, the Claimant failed to report to work on 6th February 2016 without any communication on the reason for his absence and without seeking permission from the Respondent. The Respondent submits that it tried in vain calling the Claimant on phone to find out his whereabouts and after seven days, considered he had absconded and deserted work and that when the Claimant showed up on 15th February 2016 and informed of the situation, he cleared with the company and returned some of the Respondent's property. The Respondent contends that it only got informed of the documentation of the Claimant's sickness when it received the court papers and that the Claimant never reported the same to it. It denies the allegations of unfair termination and all the particulars of claim for terminal and contractual dues as pleaded in the Claim and avers that the Claimant is particularly not entitled to salary in lieu of notice since he deserted work without notice.
4. In the Counterclaim, the Respondent avers that it is entitled to receive from the Claimant one month's salary in lieu of notice of Kshs. 10,800/- and the cost of the unreturned items of Kshs. 310/- which it is entitled to surcharge from the Claimant's dues, if any. The Respondent avers that without prejudice to its averments, even if the Claimant was to be awarded the prayers in the Claim, the same ought to be subjected to the Respondent's counterclaim. The Respondent further avers that the Claimant has no reason and justifiable basis to bring it to court and ought to thus bear the costs of this suit and counterclaim.
5. The Respondent also filed a witness statement made on 18th October 2018 by its HR Manager, Mr. Raymond Nzioka who further denies that the labour officer served the Respondent with any letters or that the Respondent terminated the Claimant's employment. He asserts that the Claimant left on his own volition and was not even available for any hearing or discussion and that the Claimant having been a deserter, does not deserve any of the claims or prayers made in his Claim.
6. On 8th February 2021, the Claimant then filed a Reply to the Response and Counterclaim wherein he reiterates his averments made in the Memorandum of Claim and further denying the allegations in the Counterclaim. He avers that he was summarily dismissed from work without payment for the days worked and that the Respondent cleared him after he returned all of its properties. He seeks for the Respondent's Response to be struck out with costs for being a sham and evasive.

Claimant's Submissions

7. The Claimant submits that this is a clear case of unfair dismissal from work where he was not given a chance to present his case before his services were discharged. The Claimant submits under Section 44(3) and (4) of the *Employment Act*, 2007, summary dismissal is allowed for a fundamental breach of the employment contract and for gross misconduct with desertion being provided under Section 44(4)



(a) and that Section 41 of the Act gives the antecedent procedures. He relies on the Court of Appeal case of *Standard Group Limited v Jenny Luesby* [2018] eKLR where the Court of Appeal affirmed that notice and hearing should be accorded before summary dismissal otherwise the termination will be deemed unfair. The Claimant further submits that failing to afford him the chance to explain his absence from work and simply discharging him was a violation of the right to a fair hearing as is provided under Section 41 of the *Employment Act*. In his case against the Respondent for unfair termination of his employment, he relies on the decisions in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR; *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR; and *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited* [2013] eKLR. On the allegations of desertion, the Claimant cites the case of *Moses Gichuhi Gateru v Njuca Consolidated Company Limited* [2019] eKLR where the Court opined that like in all cases of misconduct, desertion must be proved through evidence showing efforts to reach the employee and that it is not enough for an employer to simply state that an employee has deserted duty. It is the Claimant's submission that the Respondent has not provided any evidence that the Claimant was ever contacted. The Claimant submits that it is appreciated that sickness or illness can happen in the most unforeseen circumstances and that Section 34 of the Act applies in such cases as reiterated in *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd* [2014] eKLR. The Claimant submits that in any case, the Respondent admitted during the hearing that they do not cater for medication for their employees except for NHIF which is deducted from the employee's salary. It is the Claimant's submission that there were no valid reasons to warrant him being replaced at work by the Respondent and that he adduced medical reports in Court which the Respondent never considered as they had already dismissed him from work.

8. The Claimant further submits that the Respondent is required, based on the evidence produced, to prove the claim in the Counterclaim on a balance of probabilities but did not make any attempt to prove its Counterclaim. The Claimant submits that it clear that the Counterclaim is thus an afterthought and further, the Respondent admitted they were to pay the Claimant salary for 15 days even though the same was not done. He submits that having established that his dismissal was unfair both in substance and in procedure, it would only be fair he be awarded the remedies sought while considering the circumstances and reasons for termination. He prays to be awarded the 12 months' salary as recommended under Section 49(1)(c) of the Act and other prayers as prayed for in his Memorandum of the Claim.
9. The Respondent had not filed any Submissions as at the time of writing the judgment.
10. The Respondent asserts the Claimant deserted work. In the case of *Moses Gichuhi Gateru v Njuca Consolidated Company Limited* (supra) the Court held that like in all cases of misconduct, desertion must be proved through evidence showing efforts to reach the employee and that it is not enough for an employer to simply state that an employee has deserted duty. The Respondent never provided any evidence that the Claimant was ever contacted to lend credence to the assertion that there was desertion. The Claimant fell ill and it is appreciated that sickness or illness can happen in the most unforeseen circumstances without any notice. As such, the Claimant having been denied the chance to go for sick leave he is entitled to claim as he does the unfair dismissal. The Claimant is entitled to receive the pay for days worked as well as the notice for the termination which followed his alleged absence. There was no proof on the counterclaim as the employer did not prove desertion and I hereby dismiss the counterclaim albeit with no order as to costs.
11. In the final analysis I enter judgment for the Claimant for:-
 - i. One month's salary in lieu of notice – Kshs. 10,500/-
 - ii. 15 days worked and not paid – Kshs. 7,250/-



iii. 2 month's salary as compensation – Kshs. 21,000/-

iv. Costs of the suit

v. Interest on the sums in (i), (ii) and (iii) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

