



**Ngondi v Factory Guards (MBA) Limited (Cause 86 of 2015)  
[2022] KEELRC 1521 (KLR) (17 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1521 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 86 OF 2015  
B ONGAYA, J  
JUNE 17, 2022  
(FORMERLY CIVIL SUIT NO. 2632 OF 2011 IN THE SENIOR  
RESIDENT MAGISTRATE'S COURT AT MOMBASA)**

**BETWEEN**

**DAVIS NGOCHI NGONDI ..... CLAIMANT**

**AND**

**FACTORY GUARDS (MBA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a plaint in the lower Court on 28.11.2011 through H.N. Njiru & Company Advocates. By the order given on 10.11.2014 in Miscellaneous Application No. 21 of 2014 by this Court (Rika J) the suit was transferred to the Employment and Labour Relations Court for hearing and determination. The claimant pleaded that he was employed by the respondent from 01.03.1995 as a permanent guard until 25.03.2008 when his services were terminated after he received a notice of summary termination. His case was that the termination was illegal, unjustified and lacked any justifiable cause. He claimed Kshs. 5, 700.00 one-month payment in lieu of termination notice; one-month prorated leave payment Kshs. 5, 700.00; damages for wrongful dismissal; and severance payment at 18 working days at Kshs.190 per day for 13 years served Kshs. 44, 460.00. He prayed for judgment against the respondent for Kshs. 55, 860.00; general damages for wrongful dismissal; terminal benefits; and costs of the suit.
2. The respondent filed the defence on 24.01.2012 through Mogaka Omwenga & Mabeya Advocates. While denying all the claimant's pleadings and claims, the respondent further pleaded that the plaintiff was suspended from duty after arrest pending investigations on allegations of theft or failing to prevent a felony with regard to theft of motor vehicle registration No. KBA 040B – Toyota Prado which offence was substantially detrimental to the defendant owing to its nature of business and upon being charged and with likelihood of imprisonment for the offence the defendant was at liberty to summarily dismiss



the plaintiff as per the Employment Act. Further, the investigations leading to the arrest and charging of the claimant were beyond the control, power and authority of the respondent and the dismissal was not wrongful. The respondent prayed that the claimant's suit be dismissed with costs.

3. The claimant filed the reply to defence on 01.02.2012 joining issues with the defence and urging that the defence be dismissed with costs.
4. The claimant filed an amended plaint on 01.10.2018. He pleaded that he earned Kshs. 5, 796.00 plus house allowance of Kshs.1, 000.00 and long allowance of Kshs. 450 summing to a gross of Kshs. 7, 246.00 per month. He changed his claims to include:
  - a) Salary for period under wrongful dismissal Kshs.318, 824.00.
  - b) Prorate leave Kshs. 5, 700.00.
  - c) One-month salary in lieu of annual leave Kshs.5, 700.00.
  - d) Damages for wrongful dismissal.
  - e) Severance pay Kshs. 44, 460.00.

He prayed for award of the claims plus costs of the suit.

5. The claimant testified to support his case. The respondent's witness (RW) was the respondent's Human Resource Officer one Caroline Wanga. Final submissions were filed for the parties. The Court has considered the pleadings, the evidence and the submissions and makes the following pertinent findings.
6. To answer the 1<sup>st</sup> issue for determination, the Court returns that the evidence is that the parties were in a contract of service from 1994 when the claimant was hired by the respondent as a security guard on casual basis. He was confirmed on permanent basis by the letter dated 16.03.1995.
7. To answer the 2<sup>nd</sup> issue, the evidence is that the respondent summarily dismissed the claimant from employment under the following circumstances. On the night of 20<sup>th</sup> /21<sup>st</sup> February 2008 the claimant was assigned to guard a premises owned by Marema Investment when motor vehicle registration No. KBA 040B – Toyota Prado belonging to Caroline Makama was stolen. The owner of the motor vehicle reported the theft at Bamburi Police Station and the claimant had not reported on duty until on 24.02.2008 when he reported and was arrested and charged as a suspect with the offence of theft or failure to prevent a felony. By the letter dated 15.03.2008 and on account of the suspicion and the arrest, the respondent suspended the claimant from duty with effect from 24.02.2008 pending investigations into the matter. By a further letter dated 25.03.2008, the respondent summarily dismissed the claimant with effect from 25.03.2008 in view of the arrest, suspicion and charge and as per section 44 (4) (g) of the Employment Act, 2007. The letter further stated thus, "You should further note that the management has undertaken to review your case in case you are acquitted of all charges against you in Court." The claimant had been charged in criminal case No. 501 of 2008 in the Chief Magistrate's Court at Mombasa
8. The evidence is that in February 2011 the claimant reported to the respondent and provided the record of proceedings in the criminal case showing that he had been acquitted on 27.10.2010. The respondent wrote to the claimant the letter dated 09.02.2011 requiring the claimant to resume duty and to report by 19.02.2011 as duly reinstated at work. The reinstatement letter stated thus, "In view of the above, you have been reinstated to your position as a security guard with effect from 4<sup>th</sup> February 2011. You shall retain your employment number P. 3195. You should report to the Operations Manager for deployment immediately but not later than 19<sup>th</sup> February 2011 as our offer shall lapse on that day."



9. The claimant failed to report on duty as reinstated and the respondent wrote the letter dated 02.03.2011 decrying the claimant's failure to report by 19.02.2011 per the reinstatement letter and further stating thus, "In view of the above, you have been summarily dismissed from the services of the company with effect from 2<sup>nd</sup> March 2011 for absence from duty. This is in accordance with the provisions of Part VI Section 44(4a) of the Employment Act
10. You should arrange to return all company property in your possession whereupon you shall be paid your dues. You should note that you have the right to appeal against this decision within 14 days from the date of this letter."
11. On his part the claimant wrote to the respondent the letter dated 08.03.2011 addressed to the Human Resource & Administration Manager as follows:

"Dear Sir,

Referring to the letter dated 9<sup>th</sup> February 2011, which you reinstated me after dismissing me on 25.03.2008, I wish to inform you that I would not accept the offer to re-join the company. Considering that I have been out of the Company for over three (3) years it would be very difficult; due to unavoidable circumstances.

In view of the above I request you to pay my services that I have given over the period I was with the Company and as well my salaries. I wish you will consider my request. Thanks.

Yours faithfully,

Signed,

Davis Ngondi Ngochi P. 3195"

12. On 26.05.2011 the respondent paid the claimant final dues of Kshs. 4, 406.00 separately signed by the claimant on the same 26.05.2011 and computed as follows:
  - a) 20-days salary in February 2008 Kshs. 7, 706.55.
  - b) Less mid-month advance Kshs.1, 500.00
  - c) Less leave advance Kshs.1, 800.00.
  - d) Total deductions Kshs. 3, 300.00.
  - e) Net due Kshs. 4, 406.00.
13. At the hearing the claimant testified that he received the Kshs.4, 406.00 in final dues and of the reinstatement letter he stated, "After I was acquitted I was given the letter to resume duty. Am no longer interested in working for the respondent in view of lapsed time. As at time I received letter of 09.02.2011 I had written a letter on final dues. Is dated 08.03.2011. I say it was after I received letter of 09.02.2011. I did not wish to resume duty. There was lost trust and confidence after suspicion, arrest and prosecution. I had opted to do my own business."
14. The Court has considered the evidence and finds that the respondent dismissed the claimant's long service by the letter dated 25.03.2008 on account of the suspicion, arrest and charging in the criminal case. As to whether that dismissal was unfair, the Court returns that the claim would appear to be time barred (suit being filed on 28.11.2011) in view of the three-years' period of limitation in section 90 of the Employment Act, 2007. However, the Act came into effect or commenced on 02.06.2008 – and the



suit is not thereby trapped by that time of limitation; the applicable time of limitation being 6 years under the provisions of the section 4(1) of the [Limitation of Actions Act](#), Cap. 22.

15. Turning to purported termination by the letter dated 02.03.2011, the Court returns that the purported termination by that letter was misconceived as there was no contract of service concluded between the parties to be subject of the purported summary dismissal. In particular, the respondent offered the claimant a reinstatement (essentially a re-appointment or reengagement) by the letter dated 09.02.2011 and the offer lapsed on 19.02.2011 without the claimant accepting it. In any event the claimant wrote on 08.03.2011 declining the offer of reinstatement. Thus no contract of service concluded and the letter of summary dismissal dated 02.03.2011 was not only misconceived but also superfluous as unnecessary. The Court finds accordingly.
16. To answer the 2<sup>nd</sup> issue for determination, the Court finds that the initial summary dismissal by the letter dated 25.03.2008 was based on the undisputed fact that the claimant had been suspected, arrested and charged in the criminal case. To that extent the reason for termination is found not to have been unfair. However, the respondent erroneously invoked section 44 (4) (g) of the [Employment Act](#) (presumably [Employment Act](#), 2007) but which had not come into effect as the commencement date being 27.07.2017 had not yet come. The section provides that where an employee commits or on reasonable and sufficient ground is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property then the employer is justified to dismiss the employee summarily. The same provision was provided for in the [Employment Act](#) Cap 226 as repealed by the [Employment Act](#), 2007. It is not in dispute that the claimant had been suspected, arrested and charged and the Court finds that despite the mix-up in the applicable law and despite the undisputed fact that the motor vehicle allegedly stolen did not belong to the respondent, the material facts constituting the summary dismissal are established to have undisputedly existed as valid as at the time of the summary dismissal. The Court finds that the initial summary dismissal was not therefore unfair.
17. The Court has found that the [Employment Act](#), 2007 had not commenced as at the time of the termination and the submissions made for the claimant to advance absence of due process per section 41, 45 as read with section 47 of the Act are found misconceived.
18. To answer the 3<sup>rd</sup> issue for determination, the Court returns that the claimant has failed to justify award of any of the prayers as claimed especially that the same was based on provisions of the [Employment Act](#), 2007 but which Act the Court has already found not to apply to the instant case. The Court further finds that after the summary dismissal on 25.03.2005 the parties separated, the claimant did not work for the respondent, and there is no basis for the claimed "payment while on dismissal." All the respondent did in the letter of 25.03.2008 was to summarily dismiss the claimant upon an undertaking that consequential to claimant's acquittal of all charges by the trial Court, the case would be reviewed. The evidence is that consequential to the acquittal, indeed, the respondent reviewed the case and offered the claimant a re-engagement or re-appointment styled as a reinstatement but which the claimant opted to decline. The Court finds that the respondent's conduct and action cannot be faulted and the respondent's submissions are upheld in that regard.
19. The Court has considered the complexity of the case and the issues that have shaped the outcome of the suit including the applicable statutory law taken up by the Court of its own motion. Thus, each party will bear own costs of the suit.
20. In conclusion the claimant's suit as per the amended plaint filed on 01.10.2018 is hereby dismissed with orders each party to bear own costs of the suit.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS  
FRIDAY 17<sup>TH</sup> JUNE, 2022.**

**BYRAM ONGAYA**

**JUDGE**

