



**Nyang'au v G4S Security (K) Limited (Cause 776 of 2015)
[2022] KEELRC 1519 (KLR) (17 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1519 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 776 OF 2015
B ONGAYA, J
JUNE 17, 2022**

BETWEEN

POLYCARP ONSONGO NYANG'AU CLAIMANT

AND

G4S SECURITY (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 15.10.2015 through D.N. Omari & Company Advocates. The claimant's case is that the respondent employed him sometimes in November 2008 as a security guard. The agreed monthly payment was basic salary Kshs. 9, 000.00 plus Kshs. 1, 730.00 making am of Kshs. 10, 750, 00. Further, the claimant served diligently but on 16.06.2015 the respondent maliciously and without justification and due notice dismissed the claimant alleging that the claimant was not hard working. Further, the claimant was not paid the terminal dues. As at termination the claimant earned Kshs. 20, 900.00 per month. The claimant claimed as follows:
 - a. Salary arrears from June 2015 to time of filing the suit Kshs. 125, 400.00.
 - b. Two-months' pay in lieu of termination notice Kshs. 41, 800.00.
 - c. House allowance at 15% of basic salary $20, 900 \times 7 \times 15/100 \times 12 =$ Kshs. 263, 340.00.
 - d. Public holidays worked 11 days in each year served $20900 \times 7 \times 2 \times 12 \text{ months} / 30 =$ Kshs. 117, 040.00.
 - e. Compensation for unfair loss of employment 12 months' $\times 20900 =$ Kshs. 250, 800.00.
 - f. Interest till payment in full.
 - g. Costs and incidentals to the suit.
2. The respondent filed the memorandum of reply on 24.11.2015 through Cootow & Associates Advocates. The respondent admitted employing the claimant as pleaded for the claimant. The



respondent denied that the claimant worked with due diligence. Further, the claimant's basic pay plus allowances was Kshs. 12, 548.00 and not Kshs. 20, 900. The respondent's case was that on 03.06.2015 the claimant was found fast asleep at an assignment in complete neglect of duty assigned and expected and, as a Dog Handler he had restricted the Dog's movement and thereby compromising the security and safety of the respondent's client. Further, the claimant had incidences of indiscipline and pursuant to provisions of section 44 of Employment Act the claimant's services were terminated by summary dismissal and he was given a discharge on 24.06.2015 having accepted the respondent's decision. The respondent stated that the dismissal was fair and the claimant was not entitled to the claims and prayers made.

3. The claimant's case was heard and the case closed on 24.09.2021. The respondent's case was thereafter fixed for hearing on 02.03.2022 but the hearing could not proceed as the Court did not sit due to other official matters being that the Judge was attending the Judges' Conference. By an email notice dated 21.02.2022 the Deputy Registrar had notified the parties that the Court would not sit on 02.03.2022 and parties were to attend the registry on 23.02.2022 for purposes of fixing a date. On 23.02.2022 the claimant's advocate's representative attended but the respondent's counsel appears not to have availed a representative – and the case was fixed for hearing on 25.05.2022. On 25.05.2022 the case was called out three times but both parties were absent and the Court ordered (while erroneously observing that the date was fixed in presence of both parties) thus:
 1. The respondent's case is closed.
 2. The claimant may file submissions and serve by 10.06.2022 and the respondent by mention on 14.06.2022 9.00am or soon thereafter for directions on judgment.
 3. Deputy Registrar to serve parties a mention notice today.
4. The Deputy Registrar issued the hearing notice dated 26.05.2022 and the respondent's Counsel attended Court on 14.06.2022 but the claimant's Counsel was absent. Counsel for respondent Mr. Weloba Advocate was informed by Court that the respondent's case had been closed and he submitted that the judgment date be given. The Court directed Counsel to serve the claimant's Advocate a judgment notice for delivery of judgment on 17.06.2022 at 9.00am or soon thereafter.
5. The court has considered the court has considered the pleadings, the documents filed for both parties and the claimant's testimony and returns as follows.
6. To answer the 1st issue, the Court finds that the claimant was employed by the respondent as a security guard from November 2008 to 19.06.2015 (the dismissal letter being dated 19.06.2014 but the claimant confirming by testimony that the correct date was 19. 06.2015.)
7. Parties are in dispute on the claimant's last monthly pay. The claimant has exhibited his pay slips over time and the one for April 2015 particularises his pay as follows:
 - a. Basic pay Kshs. 10, 912.00.
 - b. House allowance Kshs.1, 636.80.
 - c. Nyati Dividends Kshs. 598.50.
 - d. Overtime (1.5) Kshs.6, 074.00.
 - e. Overtime (2.0) Kshs.1, 163.90.
 - f. Rounding B/F Kshs. 7.2.
 - g. Soap allowance Kshs. 50.00.



8. Taking the recurrent monthly remunerative pay to be the basic pay plus the house allowance, the Court returns that as pleaded for the respondent the claimant's last gross monthly payment was Kshs. 12, 548.00.
9. To answer the 2nd issue, the claimant's employment was terminated by the letter dated 19.06.2014 (actually 19.06.2015 free from mutually admitted error). The letter on summary dismissal stated the reason for termination thus, "We make reference to the disciplinary hearing held at Mombasa office on 16.06.2015 where it was established while assigned duties as a Security Officer in Mombasa Branch you performed your duties negligently and have within the last twelve (12) months received 3 warnings letters for repeating a similar offence."
10. The 3rd issue is whether the termination was unfair.
11. On procedure, while alleging the respondent adopted unfair procedure without serving the claimant a notice, the Court finds that under section 44 (1) of the *Employment Act*, the respondent was entitled to summarily dismiss the claimant on account of established gross misconduct without a notice or shorter notice than was contractual or statutory. Thus section 35(4) (b) of the Act states that nothing in the section (prescribing giving of a termination notice) affects the right of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law. The Court returns that established gross misconduct is one such cause recognised under section 44 of the Act that would entitle the employer to dismiss summarily without notice or with shorter notice than was agreed between the parties. In this case, as will be found hereafter, the respondent has established the gross misconduct and want of notice is found unjustified on the part of the claimant. Further, the claimant testified thus, "I see summary dismissal letter dated 19.06.2014 (I say is 2015). I attended disciplinary hearing but I was not heard. Allegations had been made against me...." The Court finds that the claimant was heard prior to the dismissal and the procedure adopted by the respondent was fair as envisaged in section 45 of the Act.
12. While denying in his testimony that he neglected duty, the claimant testified in chief, "The dismissal was unfair. I was not given notice and grounds were not genuine. Is alleged I was found asleep at work." By that testimony the claimant has confirmed that he knew the particulars of the neglect of duty referred to in the letter of summary dismissal related to being found asleep at the assignment. The respondent has exhibited warning order of 05.01.2015; warning order of 19.01.2015; notice of disciplinary hearing dated 11.06.2015; and the disciplinary hearing proceedings of 16.06.2015 and all signed by the claimant. While the claimant purported denying signing of all those documents and which were admitted in evidence, there is no reason to doubt that indeed he signed them. Other than the last misconduct of being found asleep on the assignment that triggered his dismissal, the documents exhibited for the respondent show that the claimant was an extremely difficult employee whose record was very unclean. The misconducts for which he had been warned about and as documented included leaving the assignment unmanned without handing over to the night incoming security officer with full knowledge of the handing –taking over operational policies; being requested to cut his hair but instead retaining it long and thereby showing indiscipline in disobeying his supervisor's directions to keep well groomed; being found at the gate having left his assignment at the parking yard while knowing the operational policy was that the assignment must not be left unattended; failing to wear uniform and being found on assignment in civilian clothing; being found carelessly sleeping next to the road and responding to the supervisor without respect when questioned; and failing four times to report to the office as directed by his superiors.
13. The Court has considered the evidence and finds that the reason for gross misconduct was genuine as at termination per section 43 of the Act; the reason was fair as it related to the claimant's conduct,



capacity, compatibility and to the respondent's operational requirements envisaged in section 45 of the Act; and, the evidence on record cumulatively show that the respondent has discharged the burden of showing the reasons justifying the summary dismissal per section 47(5) of the Act.

14. The Court returns that the termination was not unfair both in procedure and merits. Thus, the claimant has failed to show that he is deserving of the compensation for unfair termination contemplated in section 49 as read with section 50 of the Act.
15. The 4th issue is whether the claimant is entitled to the other remedies as prayed for. The Court returns that the claims and prayers will fail. The claimant has offered no justification for payment of purported salary arrears long after he was summarily dismissed. The Court considers that there is no justification for payment after the contract of service ended and the claimant stopped working for the respondent. The allegation of salary arrears in that regard was misconceived and the same is declined. The termination was not unfair and the Court has already found that the respondent was entitled to terminate with shorter or without notice on account of gross misconduct and by way of summary of dismissal under section 44 of the Act. The claim for two months' salaries will fail as unjustified. The pay slips show that the claimant was paid overtime at 1.5 or 2.0 which confirms that any work done was paid for so that on a balance of probability the claimant was paid for any overtime on public holidays. The prayer will fail. Similarly, the claimant was paid house allowance per his exhibited pay slips and the claim for house allowance was misguided and unjust.
16. The Court has considered all circumstances of the case and each party to bear own costs of the suit.
17. In conclusion the memorandum of claim filed on 15.10.2015 and dated 13.10.2015 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 17TH JUNE, 2022.

BYRAM ONGAYA

JUDGE

