



**Ogutu v G4s Security Services Kenya Limited (Cause 1895 of 2016)
[2022] KEELRC 1468 (KLR) (17 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1468 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1895 OF 2016
MA ONYANGO, J
JUNE 17, 2022**

BETWEEN

JOSEPH OGUTU CLAIMANT

AND

G4S SECURITY SERVICES KENYA LIMITED RESPONDENT

JUDGMENT

1. Vide his statement of claim dated 31st August, and filed in Court on 14th September, 2016, the Claimant alleges that his employment with the Respondent was unfairly and unlawfully terminated by the Respondent.
2. He states that he was employed by the Respondent in the year 2009 as a dog handler. He was subsequently promoted to the position of driver in June 2013. His last salary was Kshs.32,000/-.
3. The Claimant avers that at all times during the subsistence of his employment with the Respondent he performed his duties diligently and to the Respondent's satisfaction until 24th June, 2013 when the Respondent abruptly, unfairly and illegally terminated his employment without due regard to the laid down laws, in particular the *Employment Act*, 2007 and procedures.
4. The Claimant avers that there was no proof of any misconduct and/or negligence on his part that would warrant his summary dismissal.
5. In the instant claim, he seeks the following reliefs:
 - i. 1-month salary in lieu of notice – Kshs.32,000/-
 - ii. Service Pay of Kshs.80,000/-
 - iii. Leave pay for 2015 Kshs.32,000/-
 - iv. General Damages



- v. In the alternative reinstatement
 - vi. Costs of this suit.
6. The Respondent in its Statement of Response dated and filed in Court on 19th October, 2016 admits that it engaged the Claimant from 22nd February, 2010 as a dog handler and that he was subsequently appointed as a driver with effect from 11th June, 2013.
 7. The Respondent denies that the Claimant was diligent in the performance of duties. It contends that the Claimant performed his duties negligently by failing to comply with the Respondent's policy and traffic regulations. In particular, that the Claimant drove motor vehicle Registration No. KBT 654B negligently along Langata Road on 6th June 2015 and hit a third party vehicle at 92 km/ph. That he subsequently admitted the charge of driving a defective motor vehicle. That the Claimant also caused a colleague who had gone to represent him to be charged with releasing a defective motor vehicle to the Claimant.
 8. The Respondent that following the breaches, the Claimant was suspended from duty on 17th June, 2016 and issued with a notice to appear for a disciplinary hearing to be conducted on 19th June, 2015.
 9. The Respondent avers that following the Claimant's disciplinary hearing, it did consider the Claimant's account of how the accident occurred 6th June, 2015, and found the Claimant was culpable for the accident. The Respondent avers that the Claimant's conduct was tantamount to gross misconduct and therefore a ground for summary dismissal. Consequently, the Claimant's employment with the Respondent was terminated.
 10. The Respondent states that due process was followed and that the termination was fair as the Claimant was accorded an opportunity to defend himself. The Respondent avers that it had a valid reason for the summary dismissal of the Claimant.
 11. The Respondent states that the Claimant was paid all his dues at the time of separation and therefore has no claim against it. The Respondent urged this Court to dismiss the claim with costs to the Respondent.

Evidence

12. The case was heard on 23rd September, 2021 and on 26th January, 2022. The Claimant testified on his behalf and Sibby Ratemo, the Dog Services Manager of the Respondent testified behalf of the Respondent.

Claimant's Case

13. The Claimant adopted his witness statement dated 31st August, 2016 as his evidence in chief.
14. The Claimant testified that he was involved in a road accident on 6th June 2015 while he was on lawful duty. That the police inspected the motor vehicle registration number KBT 054B an Isuzu NKR and prepared a report in which the cause of the accident was that the motor vehicle was defective.
15. The Claimant further testified that he was subsequently charged in Court with driving a defective motor vehicle. That he received orders from his supervisor directing him to plead guilty to the charges. He was remanded in custody until he was released upon payment of the fine by the Respondent on Monday 15th June 2015.



16. The Claimant testified that he was served with a notice for disciplinary hearing on 17th June 2015 and the hearing scheduled in 2 days. That he was not issued with any documents by the Respondent save for the notice. That the Respondent did not consider his representations at the disciplinary hearing and as a result he was unfairly dismissed.
17. The Claimant testified that he lodged an appeal against the Respondent's decision to terminate his employment but did not receive any invitation for the hearing of the appeal.
18. The Claimant maintained that he was not to blame for the accident as alleged by the Respondent. He stated that the cause of the accident was that the Motor Vehicle Registration Number KBT 054B was defective, a fact he had brought to his supervisor's attention.
19. The Claimant denied driving the said motor vehicle Registration Number KBT 054B at high speed or recklessly thus causing the accident as alleged by the Respondent.
20. He maintained that his dismissal was unfair and un-procedural and is therefore entitled to the reliefs sought in his Statement of Claim.
21. On cross examination, the Claimant stated that after the accident the Respondent did conduct its own independent investigations on the accident and that the Respondent's findings were that the Motor Vehicle Registration Number KBT 054B was in good working condition. The Claimant further testified that according to the Respondent's report he had applied harsh brakes around 11 times during the fateful trip. He however denied that he had made that many brakes prior to the occurrence of the accident.
22. The Claimant further denied overspeeding prior to the accident insisting that the motor vehicle's speedometer was defective and as a result he could not tell the speed he was driving at. He denied causing the accident as alleged by the Respondent.
23. The Claimant denied receiving any payment for accrued leave as alleged by the Respondent. He testified that he did not receive any terminal dues at the time of his separation with the Respondent despite the fact that the Respondent indicated in its letter of summary dismissal that it would compute and settle all his dues. He however confirmed having received his salary for days worked prior to his termination.

Respondent's Case

24. RW1 Sibby Ratemo adopted his witness statement dated 27th November, 2016 and filed in Court on 27th January, 2017 as his evidence in chief together with the list and bundle of documents filed by the Respondent.
25. He testified that after the accident on 6th June 2015 the Respondent conducted its own independent investigations, whose results differed from those of the police. He testified that as per the Respondent's investigations the Respondent found that the Claimant caused the accident and was taken through disciplinary hearing.
26. RW1 testified that contrary to the Claimant's contention the Motor Vehicle Registration Number KBT 054B was not defective save for its speedometer that was not functional as was confirmed in the report by Enigma who had fitted the speedometer. He testified that the accident was largely caused by the Claimant's recklessness as the Respondent was able to monitor the said motor vehicle's movement through a gadget which could tell how the vehicle was being driven.
27. RW1 urged this Court to find the Claim devoid of merit and to dismiss it with costs to the Respondent.



28. On cross examination RW1 agreed that he was not on board the Motor Vehicle Registration Number KBT 054B on the day of the alleged accident. He however maintained his evidence is based on the report of the investigations conducted by the Respondent and filed in Court.
29. RW1 testified that as per the report at page 9 the Respondent's conclusion and findings were that the driver of Motor vehicle Registration Number KBT 054B was driving at high speed while chatting thus causing the accident. He further testified that the investigation team did visit the scene of the accident along with the police.
30. RW1 further testified that the Claimant was charged in Court with the offence of driving a defective motor vehicle and not careless driving. He confirmed that it was the responsibility of the Respondent to ensure that the Motor Vehicle Registration Number KBT 054B was in good working condition. He testified that the police did not serve the Respondent with its report on the accident but was orally informed of its contents.
31. RW1 testified that the Claimant was charged alongside Mr. Paul Makonga Onsongo, a representative of the Respondent who was charged with permitting the use of a defective motor vehicle. RW1 testified that the two pleaded guilty and were fined at the Kibera Law Courts.
32. RW1 further testified that the Claimant's termination was on grounds of gross misconduct and that due process was followed in his termination.
33. Parties thereafter filed and exchanged their written submissions to the claim.

Submissions by the Parties

34. It is the Claimant's submissions that his termination was unlawful, unfair and that fair procedure was not followed.
35. The Claimant further submitted that as supported by evidence he did not in any way cause the accident that occurred on 6th June 2015 which formed the basis of his termination. He submitted that as supported by the evidence on record the Respondent had failed to ensure the Motor Vehicle Registration Number KBT 054B assigned to him on the fateful day was in good working condition.
36. He further submitted that as supported by evidence he was not to blame for the accident as alleged by the Respondent and therefore urged this Court to find that the Respondent did not have a valid reason for termination of his employment. Further that fair procedure was not adhered to thus making the termination unfair. To buttress this argument the Claimant relied on the Court of Appeal decisions in the cases of Standard Group Limited v Jenny Luesby [2018] eKLR and CMC Aviation Limited v Mohammed Noor [2015] eKLR on unfair termination.
37. The Claimant further submitted that the Respondent has failed to discharge the burden of proving the grounds for his termination. For emphasis the Claimant relied on the decision in the case of Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR where the Court held that where poor performance is shown to be the reason for termination the employer is placed at a high level of proof as outlined in Section 8 of the *Employment Act*, 2007.
38. It is the Claimant's contention that the Respondent in terminating his employment failed to comply with the mandatory provisions of Section 41 of the *employment Act*, 2007. It is on this basis that the Claimant submitted that the reason for termination was invalid thus the termination was unfair. He relied on the provisions of Section 45 of the *Employment Act*, 2007 and the decision in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR and Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR.



39. The Claimant submitted that he had made a case for unlawful and unfair termination and as a result is entitled to the reliefs sought in his Claim. To buttress this argument the Claimant relied on the provisions of Sections 49 and 50 of the *Employment Act*, 2007 and the case of Maurice Adongo Anyango v Kenyatta International Conference Center [2020] eKLR where the Court awarded the Claimant maximum compensation for wrongful and unfair termination.
40. In conclusion the Claimant urged this Court to find merit in his claim and allow it in terms of the reliefs sought t.

Respondent's Submissions

41. The Respondent on the other hand submitted that the Claimant's termination was lawful and fair. It submitted that following its independent investigations it confirmed that the Claimant was guilty of mishandling the Motor Vehicle Registration Number KBT 054B thus causing the accident of 6th June, 2015.
42. The Respondent relied on the findings of its independent investigations, which report confirmed that the Motor Vehicle Registration Number KBT 054B was in good working condition, a deviation from the Police report that was not adduced as evidence, that indicated that the said Motor Vehicle was defective. The Respondent urged this Court to be guided by the report before it and make a finding in its favour. For emphasis the Respondent relied on the case of Nicholus Muasya Kyula v Farmchem Ltd [2012] eKLR where the Court held that employers are required to have systems to undertake investigations before a decision to terminate is arrived at.
43. The Respondent further submitted that the Claimant was given sufficient notice and a fair hearing conducted as required under Section 41 of the *Employment Act*, 2007 as evidenced by the Claimant's own admission at the hearing. It further urged this Court to be guided by the decisions in Joseph Mwangi Gioche v Gatamaiyu Dairy Farmer's Cooperative Society Limited [2019] eKLR.
44. On reliefs sought the Respondent submitted that the Claimant having failed to prove his case is not entitled to the grant of the reliefs sought in his statement of claim.
45. On the claim for unfair termination, the Respondent maintained that it had discharged the burden of proving that the Claimant's termination was fair and for a valid reason and the Claimant was therefore not entitled to compensation under this head.
46. The claim for one month's salary in lieu of notice was equally denied and the Respondent maintained that the Claimant having been summarily dismissed was not entitled to compensation under this head.
47. On the claim for service pay, the Respondent submitted that the Claimant is not eligible to the same having been a member of NSSF as is evident from his payslips. The Respondent relied on the provisions of Section 35(6)(d) of the *Employment Act*, 2007 and the case of John Magiri Heho v Kenya International Limited [2018] eKLR where the Court held that a Claimant who is a member of NSSF is not entitled to service pay.
48. The Respondent further submitted that the Claimant is not entitled to leave pay for the year 2015 as he had no accrued leave days at the time of his separation with the Respondent. It is further argued that all dues were tabulated and paid out to the Claimant up to 23rd June, 2015.
49. The Respondent further submitted that the Claimant is not entitled to compensation for unfair termination the Respondent having proved that the termination was fair, procedural and based on valid grounds. To buttress this argument the Respondent relied on the findings in the cases of Benson



Muraguri Maina v Kassam & Bros Co. Ltd [2016] eKLR and Robert Kimutai Rutto v Hotel Cathay Limited [2018] eKLR where the Courts denied compensation under this head on the ground that the Claimants' termination was on the ground of gross misconduct.

50. On the Claim for reinstatement the Respondent maintained that the same cannot be awarded by dint of the provisions of Section 12(3)(vii) of the *Employment and Labour Relations Court Act*.
51. In conclusion the Respondent urged this Court to find that the instant Claim is devoid of merit and to dismiss it with costs to the Respondent.

Analysis and Determination**

52. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, there is no dispute that the Claimant was employed by the Respondent until 24th June, 2013. It is further not in dispute that the Claimant's employment was terminated on grounds of causing the road traffic accident that occurred on 6th June 2015 involving the Respondent's Motor Vehicle Registration Number KBT 054B an Isuzu NKR with a third party vehicle Registration Number KAR 649U at Langata Road.
53. The issues for determination therefore are:
- i. Whether the termination of the Claimant's employment was valid both procedurally and substantively;
 - ii. Whether the Claimant is entitled to the reliefs sought.

Unfair Termination

54. Under Section 45(2) of the *Employment Act* termination of an employee's contract of service is unfair where the employer fails to prove that it was grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.
55. The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in Section 47(5) of the *Employment Act*. The Section provides that –
- For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Reason for Termination

56. The reason cited for the termination of the Claimant's employment was the alleged gross misconduct. The Claimant was accused of causing the road traffic accident that occurred on 6th June, 2015 through driving the Motor Vehicle Registration Number KBT 054B above the speed limit, driving the vehicle on free gear which is against Respondent's policy as well as traffic regulations and hard braking eleven (11) times before the accident implying that he was speeding.
57. The Respondent maintained that the accident could have been averted had the Claimant adhered to set guidelines. The Respondent blamed the accident wholly on the Claimant and relied entirely on its incident investigation report of the accident. The Respondent further urged this Court to disregard the police investigations that indicated the Motor Vehicle Registration Number KBT 054B belonging



to the Respondent and driven by the Claimant was defective as the same was not adduced as evidence in this matter.

58. It is evident from the record that the Claimant was charged in Court with the offence of driving a defective motor vehicle alongside Mr. Paul Makonga Onsongo, a representative of the Respondent who was charged with permitting the use of a defective motor vehicle. They both pleaded guilty and were fined.
59. The Claimant maintained that he only pleaded guilty to the charge levelled against him on the Respondent's instructions and that he had no choice but to follow instructions.
60. He maintained his innocence and that the accident was as a result of the Motor Vehicle being defective, as the brakes failed to work and had worn out tyres with a defective speedometer.
61. A judgment is prima facie evidence of the matters decided therein. The Respondent had the opportunity to adduce its evidence in Court to counter the report of the police when it did not. Its employee pleaded guilty to the charge for releasing a defective motor vehicle to the Claimant. The conviction of the Claimant and Paul Makonga Onsongo was therefore proof that the vehicle the Claimant was driving was defective.
62. Indeed, the Respondent's own report confirms that the vehicle the Claimant was driving had a faulty speedometer. Charging the Claimant with overspeeding at 94 km/ph when there is no speedometer to enable him gauge the speed at which the vehicle was moving was unfair.
63. In any event, the report filed by the Respondent at page 31 of its bundle shows that just before the accident occurred the Claimant was not overspeeding. For instant, at 06.14 he was at 0 speed; at 06.19 he was at 23 km/ph. At 06.24 he was driving at 26 km/ph and at 06.29 he was at 0 speed. At 06.34, just before the accident he was driving at 47 km/ph. At the time of impact, he was at 92 km/ph. This was at 06.38.
64. The foregoing is consistent with the Claimant's narrative that the vehicle gained speed because the road sloped. His exact words in the statement at page 22 – 23 of the Respondent's bundle of documents are as follows:

“As usual was on the left lane or that is I kept left and I was now braking since I was approaching bumps and that is when I realised that the brakes were not there. Since in front there was a personal car and the driver had also slowed down, I chose to avoid hitting him from back and change to right lane on my right where I had space.

At this point, the momentum was picking since the road is a slope and looking ahead, I realised there was a stationery lorry, which had not even displayed live savours. I decided to climb to the pavement but in vain since they are so high and now, I was left with limited options. So, to speak as first as lightning, I hooted with full lights on warning the vehicles on my left and immediately I change to the left lane again to avoid a stationery lorry since the person which I hit, the driver had slowed without understanding why I was hooting/ flashing. I tried to penetrate in between the stationery lorry and the personal car but the size that I opted to use did not favour me since the car was still in motion and I ended scratching it on the driver's side.”

[Emphasis added]



65. From the foregoing, it is evident that the Claimant was not overspeeding just before the accident as alleged by the Respondent, and that the vehicle gained speed because of the slope and the brakes were not working.
66. The Respondent's investigation report is thus not accurate in this respect.
67. The findings in the report of the accident at page 14 of the report confirms that the report was not accurate. It reads: The driver took the vehicle in good condition at the commencement of dog deployment in terms of braking system. The driver harsh braked around eleven times during dog collection before the incident – Enigma Report. The brakes then failed later probably as the aftermath of harsh braking. Cases of overspeeding and more so overspeeding preceded by the accident were noted – Enigma Report. The driver was fined 40,000.00/- but paid 34,660.00/- after spending three days in custody/jail. The driver lied to the police officers that the company had given him a defective vehicle subjecting his colleague Company No. 36595 Jared Bosire to unnecessary punitive punishment. The G4S driver was blamed and charged for driving defective vehicle.

[Emphasis added]

68. It is on record that the Claimant had reported the vehicle was defective and the vehicle had been booked for repair of faulty speedometer. See last sentence at page 34 of Respondent's bundle of documents. It reads:
- “The speedometer was faulty and had indeed been booked for repair.”
69. It is also on record that the Claimant during the disciplinary hearing informed the panel that upon inspection of the vehicle, the police found the brakes to be faulty, confirming what was in the Respondent's report at page 14 of its bundle that has been reproduced above.
70. Section 43 of the *Employment Act* provides as follows:
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
71. From the foregoing, I find that the Respondent has failed to prove it had a valid reason to terminate the Claimant's employment.

Procedure followed

72. The Respondent contends that the Claimant was accorded a hearing having been issued with a notice to show cause and a disciplinary hearing held on 19th June, 2015.
73. The Claimant maintained that he was not accorded an opportunity to defend himself of the allegations levelled against him. He maintained his innocence insisting that the Respondent failed to follow due process as set out in Sections 41 of the *Employment Act*, 2007 therefore urging this Court to allow his Claim in terms of the reliefs sought. However, he did not dispute the disciplinary hearing took place.
74. I have perused the minutes from the disciplinary hearing and find that the Claimant was accorded a hearing in line with the provisions of Section 41 of the *Employment Act*, 2007. There is however no



- evidence that the Claimant was issued with a show cause letter with the charges that were to be levelled against him. There is also no evidence that he was given the accident report that was used at the hearing.
75. Under Section 45(2) of the *Employment Act*, for a termination to be fair it must pass the fairness test meaning there must be both substantive and procedural fairness.
76. In the case of *Walter Ogal Anuro v Teachers Service Commission (supra)* the Court held that:
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
77. Having found that the employer has failed to prove on a preponderance of evidence that it had a valid reason for dismissing the Claimant and in spite of the fact that the Claimant was subjected to a disciplinary hearing. The Court finds and holds that the Claimant’s dismissal was in fact unfair and unlawful within the meaning of section 45 of the *Employment Act*.

Whether the Claimant is entitled to the reliefs sought

- (a) 1-month salary in lieu of notice – Kshs.32,000/-
78. Having found that the Claimant was unfairly terminated, he is entitled to this relief by dint of Section 36 and 49(1) of the *Employment Act*, 2007. I thus award him the sum of Kshs.32,000/- being one month’s salary in lieu of notice.
- (b) Service Pay of Kshs.80,000/-
79. The Claimant maintained that he is entitled to service pay of Kshs.80,000/- and urged this Court to award the same. The Respondent on the other hand submitted that the Claimant is not entitled to compensation under this head being a member of the National Social Security Fund.
80. The Respondent is covered by the Regulations of Wages and Conditions of Employment (Protective Security Services) Order which provides for service gratuity at 18 days’ salary per completed year of service for employees in the sector who have worked for a minimum of five years. The Claimant having worked for the Respondent for more than five years, is entitled to the same. Although the Claimant alleges he was employed in 2009, the evidence on record is that he was employed in February 2010. I therefore award him service gratuity for five years at 18 days’ pay per year of service at Kshs.110,769.20. Since he prayed for Kshs.80,000/- only, I award him the same.
- (c) Leave pay for 2015 – Kshs.32,000/-
81. The Claimant maintained that he is entitled to the above relief having not proceeded on leave during the subsistence of his employment with the Respondent.
82. The Respondent did not adduce any evidence to rebut this assertion. I therefore find that the Claimant is entitled to the same and award him Kshs.32,000/- as prayed.
- d. General Damages
83. The Claimant prayed for maximum compensation as general damages for unfair and unlawful termination of his employment. Taking into account the Claimant’s length of service and the fact that there was no valid reason for his termination and further considering all relevant grounds under Section 49(4) of the *Employment Act*, I find that an award of 8 months’ salary as compensation in the sum of Kshs.256,000/- is reasonable and award the Claimant the same.



Reinstatement

84. The Claimant is not entitled to this relief as the same is only available within 3 years from the date of an employee's termination as provided under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*. The Claimant has further not justified an award or reinstatement as he did not raise any special circumstances to warrant reinstatement.
85. The Claimant is awarded costs and interest from the date of judgment until payment in full.
86. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms:
- (a) One (1) month's salary in lieu of notice Kshs.32,000
 - (b) Service gratuity Kshs.80,000
 - (c) Leave pay for 2015 Kshs.32,000
 - (d) Eight (8) months' compensation for unfair termination Kshs.256,000
- Total Kshs.400,000
87. The Respondent shall pay claimant's costs for the suit.
88. Interest shall accrue from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF JUNE 2022

MAUREEN ONYANGO

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 *Civil 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.

MAUREEN ONYANGO

JUDGE

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