



**Ambutsi v Riley Services Limited (Cause 225 of 2018)
[2022] KEELRC 1453 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 225 OF 2018**

AK NZEI, J

JUNE 9, 2022

BETWEEN

ISAAC MUGALAVAI AMBUTSI CLAIMANT

AND

RILEY SERVICES LIMITED RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated April 10, 2018, the claimant sued the Respondent and pleaded:-
 - a. that the claimant was employed by the respondent as a security guard on 1st June 2013, earning a salary of ksh 11,634.50 per month, to December 24, 2017 when the claimant was terminated from his employment.
 - b. that on December 24, 2017, the claimant received a phone call from the Deployment Officer, a Mr. Clifford, informing him not to report to work.
 - c. that on visiting the respondent's Mombasa branch office, the claimant was not given any valid reasons for his termination, but was instead told to keep checking with the respondent for deployment to another station.
 - d. that the claimant kept going to the respondent's offices with the hope of getting deployment to another station, but in vain.
 - e. that the decision to terminate the claimant's employment was unfair, unprocedural and unlawful as the requirements set out in sections 41,43 and 44 of the *Employment Act* 2007 and in Legal Notice No 24 (Protective Security Services Order, 1998) section 24 were not adhered to; and failure to notify the Claimant of the impending termination or to pay him in lieu of notice was unlawful and unfair.



- f. that the claimant was not allowed to proceed on leave for the time he was in employment with the respondent, contrary to section 28 of the Employment Act and section (Clause) 10 (1) of Legal Notice No 24 (Protective Security Services Order, 1998).
 - g. that the claimant was not paid December 2017 salary by the respondent.
 - h. that the claimant was not refunded uniform deductions at the time of termination.
 - i. that the claimant was not accorded fair administrative action as the respondent did not observe rules of natural Justice as envisaged in section 45 of the Employment Act 2007; and failure to notify him (the claimant) of the impending discharge was unfair and was in breach of articles 41 and 47(1) of the Constitution of Kenya and ILO Convention No. 158 on termination of employment 1982.
2. The Claimant sought the following reliefs:-
- a. one month salary in lieu of noticeksh 11,634.50
 - b. December 2017 salary (ksh 11,634.5 – 3,056)..ksh 8,075
 - c. leave allowance for 4 years, 1st June 2013 to 24th December 2017 (4 years x 11,634.50)ksh 46,538
 - d. uniform refundksh 7,000
 - e. compensation for unfair termination of employment (ksh 11,634.50x12)ksh.139,614
- Total __ksh.212,862
3. Further, the claimant filed his written witness statement dated January 10, 2018 and a list of documents dated April 10, 2018, both of which accompanied the memorandum of claim.
 4. Documents listed on the claimant’s list of documents included copies of the claimant’s identify card, a bundle of (three) payslips, the Claimant’s NSSF statement dated January 4, 2018 and a demand letter dated January 12, 2018.
 5. The respondent entered appearance on June 6, 2018 and subsequently filed a memorandum of rely on October 5, 2018. The respondent:
 - a. admitted having employed the claimant but disputed the date of such employment.
 - b. stated that the claimant deserted work without notice to the respondent when assignment to his station was cancelled and he could not wait to be redeployed on another assignment. That it is the Respondent who should be paid one month salary in lieu of notice.
 - c. pleaded that the claimant was always granted leave and where he did not proceed on leave, payment was made; and that the claimant was in employment for slightly less than one year and hence he had not qualified for leave by the time he left.
 6. The respondent also filed a written witness statement by Edgar Mmbwanga Mwangi dated September 28, 2018 and a list of documents dated the same date, both of which accompanied the memorandum of reply.
 7. The respondent listed only one document on its list of documents aforementioned, being a letter to the claimant’s Advocate dated March 14, 2018.



8. On November 16, 2021, the respondent sought, and was granted leave to file a further list of witnesses and a witness statement substituting the witness statement of Edgar Mwangi. A supplementary list of witnesses and a witness statement of Elijah Cheruiyot (dated 2/2/2022) were subsequently filed on February 2, 2022.
9. When trial opened on February 22, 2022, the claimant adopted his filed witness statement as his testimony, and produced the documents listed on his filed list of documents. The claimant's witness statement basically replicated the averments made in the memorandum of claim, which i have set out in paragraph 1 of this judgment. The claimant further testified:
 - a. that he was employed on June 1, 2013 and worked for six days per week.
 - b. that after the claimant was on December 24, 2017 asked by the respondent's deployment officer on phone not to report on duty without any reasons being given, he (the claimant) was not given any other assignment, did not receive any other phone call from the respondent, was not served with any termination letter, and was not paid his salary for the month of December 2017, amounting to ksh.11,634.
 - c. that for four years that he worked, the claimant never took annual leave, and was not paid uniform refund at the time of termination.
 - d. that he did not desert duty; and that in cases where an employee deserted duty, the respondent (under its rules) called referees provided by the employee, and the employee was called to a disciplinary committee. That the claimant was not called to any disciplinary committee and never received any notice to show cause, warning letter, and none of the claimant's family members or friends was send by the respondent to tell the claimant to report on duty.
10. Cross-examined on his NSSF statement, the claimant testified that he did not work in 2015 and 2016 as the respondent had lost assignments in those years, that he went back to work in January 2017. That his leave for the year 2017 would have fallen due in January 2018.
11. The claimant denied having deserted duty, and asserted that it was the respondent who asked him not to report on duty, whereupon he continued passing by the Respondent's offices from December 25, 2017 until January 10, 2018 when he was blocked at the gate from accessing the respondent's offices.
12. Re-examined, the claimant told the court that he worked from June 1, 2013 to December 24, 2017; and that when there were no assignments (respondent's contracts with third parties), employees still went to work as stand by (guards) and were paid; but were not blocked from accessing he respondent's offices. It was the claimant's further testimony that the respondent's employees signed employment contracts but were not given copies thereof.
13. The respondent's witness Elijah Cheruiyot (RW-1) adopted his filed witness statement as his testimony. The witness told the court that he had been working at the respondent's Mombasa Office as the Branch Manager since 2020, and he had information that the claimant was to be re-deployed to another assignment but he did not turn up, and only turned up on 22nd January 2018 purposely to clear. The witness (RW-1) did not, however, tell the court who gave him this information.
14. The respondent (RW-1) further testified that according to the claimant's NSSF statement, the Claimant did not work during the years 2015 and 2016.
15. Under cross examination, RW-1 told the Court:-



- a. that the respondent keeps a Register called Checklist, for all employees, which the supervisor takes round for the employees to sign at their stations of duty, and that this is done on day to day basis. That the respondent had not filed/exhibited checklists for the years 2013, 2014, 2015, 2016 and 2017, though this would have assisted the Court in knowing whether or not the claimant worked in 2015 and 2016.
 - b. that there was nothing to show that the claimant absconded duty from 2 December 6, 2017 to January 22, 2018.
 - c. that the claimant was not summoned to any disciplinary meeting to explain why he had not reported on duty; and no disciplinary proceedings were conducted on the claimant.
 - d. that the claimant was not paid one month salary in lieu of notice and his salary for December 2017 was not paid.
 - e. that the claimant was not paid for leave days, and there was no evidence that the claimant was paid for leave days in 2013 and 2014.
 - f. that according to the NSSF statement, the claimant worked in 2013, 2014 and 2017, and that there was nothing to show that he did not work in 2015 and 2016.
 - g. that the claimant was not paid for his uniform, and he is entitled to the same.
16. Re-examined, RW-1 told the court that the claimant's December 2017 salary was not paid because the Claimant deserted duty without notice.
17. Parties did not file a joint statement of agreed issues. In my view, issues that emerge for determination are as follows:-
- a. whether the claimant's employment was terminated by the respondent.
 - b. whether termination of the claimant's employment was unfair.
 - c. whether the claimant is entitled to the reliefs sought.
18. On the first issue, the claimant testified that on December 24, 2017, he received a phone call from the respondent's Deployment Officer, a Mr. Clifford, asking him not to report on duty, and that no reason for this was given. That on visiting the respondent's Mombasa branch office, the claimant was told to keep checking with the respondent for an assignment, which he did until January 10, 2018 when he was barred at the respondent's gate from accessing the respondent's offices. This evidence was not rebutted by the respondent. The respondent did not deny having had in its employment the said Mr. Clifford. That person was not called to testify in rebuttal of the claimant's evidence.
19. No evidence was tendered by the respondent in support of its allegation that the claimant deserted duty. Under section 44(4) (a) of the *Employment Act*, desertion of duty is a gross misconduct on account of which an employee can be summarily dismissed. The respondent did not tell the court what action it took if really the claimant deserted duty; whether it commenced disciplinary proceedings by invoking the provisions of section 41 of the *Employment Act*. It was held in the case of *Godfrey Anjere -v-s Unique Supplies Limited* [2015] eKLR as follows:-

“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from



work for awful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.”

20. It was observed in the case of *Stanley Omwonyo Onchwari –vs- BOM Nakuru YMCA Secondary School* [2015] eKLR (cited in *James Ashiemi Namayi –vs- Menengai Oil Refineries Ltd* [2016] eKLR that:

“the employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances and a hearing may be necessary...”

21. At paragraph 4 of its response to the memorandum of claim, the Respondent expressly admits having stopped the claimant from going to work and at the same time accused him of having deserted duty, hence blowing hot and cold at the same time. The Respondent pleaded:-

“4...the respondent avers that it was the claimant who decided to desert work without notice to the respondent when his assignment was cancelled and could not wait to be redeployed on another assignment, it is the respondent to be paid one month salary in lieu of notice.”

22. Parties will forever be bound by their pleadings as filed in court. The respondent did not exhibit any formal communication to the claimant advising him of the cancellation of his posting to his station of work and either re-assigning him other duties or advising him on what to do as he awaited a fresh posting and/or assignment. It is to be noted that the claimant was not even paid his December 2017 salary, a fact admitted in evidence by the Respondent (RW-1).

23. I find and hold that the claimant’s employment was terminated by the respondent.

24. On the second issue, section 41 of the *Employment Act* sets out mandatory requirements which must be adhered to by every employer considering termination of an employee’s employment on grounds of misconduct, poor performance or physical incapacity. Section 41 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.”

25. The respondent was not shown to have complied with the mandatory provisions of section 41 of the *Employment Act*. According to the claimant’s un rebutted evidence, the respondent’s Deployment Officer simply telephoned the claimant and told him not to report on duty, and that was it. In the case of *Walter Ogal Anoru –vs- Teachers Service Commission* [2013] eKLR, the court noted that for termination to pass the fairness test, it ought to be shown that there was both substantive justification for termination and procedural fairness. Further, section 43 of the *Employment Act*



obligates an employer to prove the reasons for termination of employment, failing which termination becomes unfair. The court held that although TSC had a genuine reason to terminate the claimant's employment, it had failed the procedural fairness test. The court found termination of the claimant's employment to have been unfair and awarded him eight months' salary in compensation for unfair termination.

26. In the present case, there was both substantive and procedural unfairness. In find and hold that termination of the claimant's employment by the respondent was unfair.
27. On the third issue, and having found that termination of the claimant's employment was unfair, I award the claimant an equivalent of nine months' salary being compensation for unfair termination of employment, that is ksh.11,634.5x9 = 104,710.5
28. The claim for one month salary in lieu of notice is allowed at ksh.11,634.50. The respondent did not demonstrate that any notice was issued to the claimant prior to termination of his employment.
29. On the claim for leave allowance, the claimant's evidence to the effect that he did not take annual leave during the period of employment was not rebutted by the respondent. The respondent, who was the custodian of all employment records under section 74 of the *Employment Act* 2007, did not exhibit any documents to show that the claimant was either granted annual leave or was paid in lieu thereof. What the respondent appeared to do was to dispute the number of years the Claimant worked.
30. The claimant produced documents to show that he was in the Respondent's employment from the year 2013 to 2017. These documents included payslips for the months of September 2013, January 2014 and August 2017. The claimant also produced his NSSF statement covering the period 1st June 2013 to 30th November 2017. The employer on that statement is shown to have been the respondent herein. The respondent did not dispute the fact that the claimant worked during the month of December 2017, and yet no remittance is shown to have been made by the respondent to NSSF for that month. The respondent did not explain this position.
31. The claimant pleaded that he worked for the respondent from 1st June 2013 to December 24, 2017, and although he appeared to contradict that position under cross-examination by stating that he did not work during the years 2015 and 2016, he quickly corrected that position under re-examination. This position is captured in paragraphs 10 and 12 of this Judgment.
32. The respondent did not exhibit in court any records to show that the claimant was not part of its work force during the years 2015 and 2016, and therefore did not work during the said two years. Further, the respondent did not adduce any evidence showing under what arrangement the claimant allegedly stopped working for two years and whether the claimant rejoined the respondent in January 2017 under a new contract of employment. The respondent appeared to rely on the claimant's exhibit no. 4 (the NSSF statement) in its assertion that the claimant did not work during the years 2015 and 2016 as no remittances are reflected for those years. Could it be that the Respondent simply failed to make NSSF remittances for those years as it did for December 2017? The respondent did not shed evidential light on this issue.
33. I make a finding that the claimant has, on a balance of probability, proved the claim for leave allowance for four years as pleaded and prayed, and I allow the same at ksh.46,538 as prayed. The claim for December 2017 salary is also allowed. The same was not shown to have been paid.
34. The claim for uniform refund was admitted by the respondent in evidence, and I allow the same at ksh.7,000 as prayed.



35. In sum, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered in favour of the claimant against the Respondent as follows:-

- a. compensation for unfair termination of
employmentksh.104,710.5
 - b. one month salary in lieu of noticeksh.11,634.50
 - c. leave allowance for four yearsksh.46,538
 - d. December 2017 salaryksh.8,075
 - e. uniform refundksh.7,000
- Total_khs.177,958__**

36. The Claimant is also awarded costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH 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:

Mr. Iddi for Claimant

No appearance for Respondent

