



**Onyiego v Kenya Kazi Services Limited (Cause 306 of 2017)  
[2022] KEELRC 1573 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1573 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 306 OF 2017**

**JK GAKERI, J**

**JUNE 8, 2022**

**BETWEEN**

**HENRY OYARO ONYIEGO ..... CLAIMANT**

**AND**

**KENYA KAZI SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated 14<sup>th</sup> February, 2017 and filed on 15<sup>th</sup> February, 2017, the Claimant sued the Respondent alleging unfair dismissal and refusal for pay terminal dues, amounting to Kshs.807,956/-.
2. It is the Claimant's case that he was employed by the EARS Company Limited in February 2001 which merged with the Respondent on 1<sup>st</sup> March, 2007 and employees were notified that there would be no loss of benefits.
3. That his consolidated salary was Kshs.30,612/- per month and was paid over time until he was summarily dismissed from employment on 10<sup>th</sup> December, 2015 on the ground that he had a verbal exchange with the supervisor in front of other officers.
4. The Claimant avers that no notice to show cause was issued to defend himself and no allegations were made.
5. The Claimant prays for:
  - i. A declaration that the Claimant's dismissal was wrongful.
  - ii. 12 months' salary for the wrongful dismissal, Kshs.367,344/-.
  - iii. One-month salary in lieu of notice Kshs.30,612/-.
  - iv. Service gratuity at one (1) months' salary for each year 36,000 x 14 = Kshs.404,000/-



- v. Any other relief or orders as the Court may deem fit and just to grant
- vi. Costs of this suit
6. The Respondent filed a reply to the memorandum of claim on 29<sup>th</sup> May, 2017 admitting having employed the Claimant as a security guard.
7. It however denies paying him the salary of Kshs.30,612/- per month.
8. It is the Respondent's case that the Claimant's performance was poor, he was negligent and lacked professionalism.
9. The Respondent avers that it lawfully terminated the Claimant's employment on 10<sup>th</sup> December, 2015 for gross misconduct for engaging the supervisor in verbal exchange in front of other officers which was contrary to the Respondent's policies and terms of contract of service and brought the Respondent's image into disrepute.
10. That the Claimant was issued with a notice not to report for duty on 9<sup>th</sup> December, 2015 for reporting to work late.
11. That he was invited to appeal the dismissal
12. The Respondent prays for dismissal of the suit with costs.

#### **Claimant's Evidence**

13. In his statement, the Claimant testified that between 2001 and 10<sup>th</sup> December, 2015, he was an employee of the Respondent as a guard and on 9<sup>th</sup> December, 2015 he was stationed at the International School of Kenya as a Security Officer.
14. The statement makes no reference to his reporting to work late. He states when he went for tea at 9.00 am, the Base Commander, one Eunice queried about his lateness that morning.
15. It is the Claimant's testimony that Eunice sent an email to the Head Office and chased him away.
16. That when he went to the Head Office the following day, it was alleged that he had threatened to kill Eunice.
17. The witness testified that he appeared before a panel of 5 persons who questioned him about the incident and was summarily dismissed.
18. It is his testimony that the Respondent paid him Kshs.65,000/- in February, 2016.
19. That he served the Respondent diligently for 14 years and the alleged incident on the night of 9<sup>th</sup> December, 2015 was a fabrication.
20. On cross examination, the Claimant admitted that he was employed on 3<sup>rd</sup> May 2002 and had reported to work late on 9<sup>th</sup> December, 2015 and was stationed at the US Embassy.
21. The witness confirmed that his basic salary was Kshs.10,912/- per month and the NSSF contributions were remitted.

#### **Respondent's Evidence**

22. RW1 Norine Silwe testified that on 9<sup>th</sup> December, 2015 the Claimant reported late and subsequently engaged in a verbal exchange with the supervisor in full view of other employees.



23. That the notice not to report for duty dated 9<sup>th</sup> December directed the Claimant to report to the office on 10<sup>th</sup> December, 2015 at 9.00 am and was terminated on the same day following an investigation into his conduct and did not appeal the dismissal.
24. The witness testifies that the Claimant was paid Kshs.68,032 and the Claimant's termination of employment was lawful.
25. On cross examination RW1 confirmed that there was no documentary evidence of how long the Claimant was not at the work place.
26. The witness testified that she was unaware of the alleged verbal exchange between the Claimant and the Base Commander and the same could not be confirmed as none of those allegedly present was a called as witness.
27. The witness explained the disciplinary process of the Respondent as follows:
  - (i) Employee is given a notice to show cause and is supposed to respond within a day (24 hours).
  - (ii) Employee is invited to the disciplinary hearing in writing typically between 24 – 48 hours after the response.
  - (iii) Disciplinary hearing is conducted after the response.
  - (iv) After the hearing the committee deliberates and a termination letter may issue immediately or on the following day.
28. The witness was unequivocal that in the Claimant's case the procedure outlined above was not followed.
29. Although the witness testified that the Claimant appeared before a panel of 5 members, she could not recall their identity or designation.
30. Relatedly, although the witness confirmed that the human resource is the custodian of minutes of disciplinary hearings, there were no minutes in this case.
31. The witness confirmed that no notice to show cause was issued and the Claimant was not formally invited for the disciplinary hearing.
32. The witness further confirmed that there was no investigation report on the Claimants conduct and that the Claimant did not appeal the decision.
33. Finally, the witness confirmed that the sum of Kshs.68,032/- paid to the Claimant comprised:
  - (i) One month's salary in lieu of notice Kshs.12,221/-
  - (ii) Days worked up to 10<sup>th</sup> December, 2015 Kshs.6,386/-
  - (iii) Accrued leave Kshs.6,111/-
  - (iv) Completed year of service Kshs.58,601/-
  - (v) Overtime Kshs.3,538/-
  - (vi) One public holiday Kshs.1,304/-.
34. On Re-examination RW1 testified that the Claimant furnished no evidence why he was late for work and confirmed having appeared before a panel though the letter of termination had other reasons for termination.



### **Claimant's Submission**

35. The Claimant identifies two issues for determination;
  - i) Whether termination of the Claimant's employment was unfair and wrongful;
  - ii) Whether the Claimant is entitled to the reliefs sought.
36. As to whether termination of the Claimant's employment was unfair, it is submitted that the Respondent did not comply with the provisions of Section 41 of the *Employment Act*.
37. That the Claimant had not reported to work late since 2001 and when he did by fifteen minutes, on 9<sup>th</sup> December, 2015, he was chased away, appeared before a panel of 5 persons who questioned him about the lateness and was dismissed thereafter.
38. It is the Claimant's submission that the Respondent did not produce a code of or policy manual on the disciplinary procedure and the Claimant should have been warned as opposed to dismissal.
39. At any rate, RW1 admitted that the prescribed procedure was not followed.
40. The decisions in *Florence Atieno Ominde v Techno Service Ltd* [2021] eKLR and *Stella Kanana Gitonga & 2 others v Bliss GVS Healthcare Limited* [2022] eKLR are relied upon to urge that the Claimant should have been warned as the reason for the lateness was justifiable.
41. It is submitted that in the totality of the evidence on record the Claimant's termination of employment was unfair.
42. As regards the reliefs sought, it is submitted that the Claimant is entitled to one-month salary in lieu of notice since the sum of Kshs.68,032/- paid did not include it.
43. That the Claimant is entitled to service pay under Section 35(5) of the *Employment Act* for having served the Respondent for 14 years.
44. Finally, it is submitted that the Claimant is entitled to 12 months' salary for unfair dismissal because the Respondent led no evidence on how late he was or how the lateness exposed the Respondent or its client to danger.

### **Respondent's Submission**

45. The Respondent identifies two issues for determination.
  - i) Whether the termination of the Claimant was lawful;
  - ii) Whether the Claimant is entitled to terminal dues of Kshs.807,956/-.
46. On the first issue it is submitted that RW1 testified that the Claimant reported to work late and engaged in a verbal of exchange with the supervisor and was terminated after an investigation and disciplinary hearing on 10<sup>th</sup> December, 2015 and was informed of the right to appeal.
47. Reliance is made on Section 44(4)(d) of the *Employment Act* to urge that an employer may dismiss an employee summarily for using abusive or insulting language.
48. It is submitted that RW1 testified that the Claimant was supposed to report lateness at least 6 hours before the shift commenced but did not.



49. That reporting to work late and engaging the supervisor in a verbal exchange was a fundamental breach of the contract of service and rendered the Claimant liable to summary dismissal.
50. The decisions in *Evans Kamandi Misange v Bardans Bank of Kenya Ltd* [2015] eKLR and *Titus Mumo Munini v Adix Plastics Ltd* [2021] eKLR are relied upon to buttress the submissions.
51. As regards terminal dues, it is submitted that RW1 confirmed that the Respondent paid Kshs.68,032/- and the Claimant acknowledged receipt.
52. That as at December 2015, the Claimant's basic salary was Kshs.10,912/.
53. That the claim for pay in lieu of notice is spent. It is the Respondent's submission that service gratuity is not payable by virtue of Section 35(6)(d) of the *Employment Act* since the Respondent paid NSSF contributions.
54. The decision in *Lilian Mwendu Nzabo v Trustees and Office Bearers of Anglican Church of Kenya* [2018] eKLR is relied upon to urge that the Claimant is not entitled to service gratuity.
55. As regards compensation it is submitted that he was summarily dismissed for gross misconduct.

### **Analysis and determination**

56. After carefully consideration of the pleadings, evidence and submissions, the issues for determination are whether:
  - i) The termination of the Claimant's employment was lawful and fair;
  - ii) The Claimant is entitled to the reliefs sought.
57. While the Claimant asserts that his termination was unfair for want of a valid and fair reason and a fair procedure as prescribed by law, the Respondent contends that the summary dismissal was lawful as ordained by Section 44(4)(d) of the *Employment Act*.
58. In determining this issue, the home port are the provisions of the *Employment Act*, 2007 germane to termination of the employment contract.
59. Section 45(2) provides that a termination of employment by an employer is unfair if the employer fails to prove –
  - (a) That the reason for the termination is valid.
  - (b) That the reason for the termination is a fair reason.
    - (i) Related to the employees conduct, capacity or compatibility.
    - (ii) Based on the operational requirements of the employer.
  - (c) That the employment was terminated in accordance with fair procedure.
60. The employer's duty to prove the reason or reasons for the termination is further elaborated by Section 43 of the Act.
61. Relatedly Section 47(5) of the Act provides that it is the duty of the employer to justify the grounds for the termination of employment.
62. Section 44 of the Act exemplifies the circumstances in which an employee may be summarily dismissed.



63. Finally, Section 41 of the Act prescribes the procedural precepts to be complied for a termination of employment to pass the procedural fairness test.
64. A summary of the essence of these provisions was articulated by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR.
65. As stated in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair.
66. The gamut of the foregoing provisions and propositions of law is that a separation must be justifiable and fair in the circumstances of every case.
67. I will now proceed to apply the foregoing principles and provisions of law to the facts of this case

### **Reasons for termination**

68. As admitted by RW1 on cross examination the Respondent did not issue a notice to show cause to the Claimant.
69. In a similar vein, the notice not to report for duty merely instructed the Claimant to report to the KK US Embassy/ISK Project office on 10<sup>th</sup> December, 2015 at 9.00 am.
70. Although the letter makes reference to the fact that the Claimant reported on duty late on 9<sup>th</sup> December, 2015 and when asked he stated that he could not report on time owing to a personal commitment, it does not require any response and does not advice the Claimant to do anything else other than report to the office the following day. It would be overstretching imagination to describe it as a notice to show cause.
71. The termination letter dated 10<sup>th</sup> December 2015 states in part as follows
 

“You are aware of the fact that on the night of 9<sup>th</sup> December, 2015 while assigned duties at ISK School as a day security officer, you engaged your supervisor in a verbal exchange in front of other officers, an act which brought the company image into disrepute.

This act of negligence, poor work performance and lack of professionalism contravenes the company’s policies and is an intolerable gross misconduct”.
72. Although the Claimant admitted having reported on duty late by about fifteen minutes on 9<sup>th</sup> December, 2015, a fact confirmed by RW1 on cross-examination, RW1 confirmed that she was unaware of the contents of the alleged verbal exchange and being the only Respondent’s witness, the allegation on verbal exchange could not be explained.
73. On the other hand, although the Claimant testified that he reported on duty after 6.00 pm, he led no evidence of having met the supervisor on the night of 9<sup>th</sup> December, 2015.
74. Both witnesses are in agreement that the Claimant met the supervisor at 9.00 am when he went for tea.
75. Intriguingly, neither the supervisor nor any of the other officers present during the alleged verbal exchange testified. In a nutshell, it is finding of the Court that the verbal exchange between the Claimant and supervisor remains an unsubstantiated allegation.
76. Although the Respondent’s case is that it relied on Section 44(4)(d) of the *Employment Act*, it led no evidence of its applicability to this case. The Section provides:

(4) ...



- a. ...;
- b. ...;
- c. ...;
- d. If an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his supervisor;

77. It is not alleged that Claimant was abusive, used insulting language or behaved in an insulting manner.
78. Similarly, the Respondent did not furnish evidence of the code of conduct or policy allegedly breached by the Claimant.
79. In sum, the only sustainable ground for the Claimant’s termination, which he admitted was his reporting on duty late by fifteen minutes.
80. Puzzlingly, the Claimant was summarily dismissed on the ground that he engaged the supervisor in a verbal exchange in front of other officer which was neither pleaded nor testified about in Court.
81. In the premises, it is finding of the Court that the Respondent has on a balance of probabilities failed to demonstrate that it had a valid and fair reason to terminate the Claimant’s employment.
82. Clearly, the Respondent had no justifiable ground to terminate the Claimant’s employment.
83. Having served the Respondent from 1<sup>st</sup> May, 2002 to 10<sup>th</sup> December, 2015 with no disciplinary issues or warnings, the Claimant deserved another chance.

### **Procedure**

84. According to the Respondent the Claimant’s employment was terminated following an investigation and a disciplinary hearing. Thus, the employer had a justifiable ground to dismiss the Claimant and complied with the procedural requirements.
85. Section 41 of the *Employment Act* sets out the procedural prerequisites of a fair termination of employment.
86. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR the Court of Appeal expressed itself as follows on the import of Section 41

“It is our view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with ...

Four elements must thus be discernible for the procedure to pass muster:

- (i) An explanation of the grounds of termination, in a language understood by the employee.
- (ii) The reason for which the employer is considering termination.
- (iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
- (iv) Hearing and considering any representations made by the employee and the person chosen by the employee.”

87. The Court is bound and guided by these sentiments.



88. The Claimant testified that when he reported to the office on 10<sup>th</sup> December 2015, he found a panel of 5 persons who questioned him about the Base Commander and that he appeared alone. It was the Claimant's testimony that he was not heard.
89. RW1 confirmed on cross examination that if an employee reported to work late a notice to show cause issued. After response, a written invitation for a disciplinary hearing on the specified date and a decision on the same or following day.
90. The witness confirmed that in the instant case the procedure was not followed and there were no minutes of the alleged proceedings. Neither the membership of the panel nor its deliberations were filed by the Respondent.
91. Finally, the witness confirmed that neither a notice to show cause nor invitation for a disciplinary was issued and had no report of the alleged investigation.
92. For the foregoing reasons, it is the finding of the Court that the Respondent has failed to demonstrate that termination of the Claimant's employment was in accordance with a fair procedure.
93. Overall, it is the finding of this Court that termination of the Claimant's employment was unfair for want of a substantive justification and procedural propriety.

### **Reliefs**

94. As regards the reliefs sought by the Claimant, the Court proceeds as follows:
  - a. Having found that termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness, a declaration to that effect is hereby issued.
  - b. One month salary in lieu of notice Kshs.30,612/-
95. From the evidence on record, it is clear that the Respondent did not give the Claimant a termination notice as ordained by section 35 (1) of the [employment Act](#), 2007. The sum of Kshs.30,612/- is awarded as salary in lieu of notice.
  - c. Service gratuity
96. The Claimants letter of employment dated 3<sup>rd</sup> May, 2002 has no provision for service gratuity and no basis has been established to justify an award. Relatedly, it is unclear on what basis the computation is made.
97. But more importantly, the Claimant testified that the employer made NSSF contributions as evidenced by copies of payslips on record.
98. Needless to emphasize Section 35(6)(d) of the Employment
99. Act applies to the Claimant. The claim is declined.
  - d. 12 month's salary for wrongful dismissal
100. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the discretionary remedy provided by Section 49 (1)(c) of the [Employment Act](#), 2007.
101. In determining the quantum of compensation, and as ordained by the provisions of Section 49(4), the Court has taken the following factors into consideration;



- i. The Claimant was an employee of the Respondent for about 13 years and 6 months which is undoubtedly a long period of time.
  - ii. The Claimant had no previous disciplinary matters or warnings.
  - iii. In the Courts view, the circumstances in which the Claimant's employment was terminated did not justify a termination. While the allegation of verbal exchange between the Claimant and the supervisor were not proven, lateness by fifteen minutes which, the Claimant admitted and the RW1 confirmed, would typically not lead to termination of employment in light of the vicissitudes of ordinary life. The employer acted rather harshly. A strong warning in writing would have sufficed.
  - iv. The Claimant contributed to the termination of employment by reporting to work late which instigated the events that culminated in his summary dismissal.
  - v. The Claimant did not exercise the right of appeal as notified by the letter of termination perhaps an indication that he did not wish to continue in the Respondent's employment.
102. In the circumstance of this case, the Court is satisfied that the equivalent of 5 months' salary is fair Kshs.153,060/-.
103. In conclusion judgement is entered for the Claimant against the Respondent for the sum of Kshs.183,672/- with costs.
104. Interest at Court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF JUNE 2022

DR. JACOB GAKERI

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

DR. JACOB GAKERI

JUDGE

