



**Chepkwony v Brinks Security Services Limited (Cause 276 of 2017)
[2022] KEELRC 1783 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1783 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 276 OF 2017
SC RUTTO, J
JULY 22, 2022**

BETWEEN

FESTUS KIPLANGAT CHEPKWONY CLAIMANT

AND

BRINKS SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. It is not in dispute that the claimant was employed by the respondent on 12th August, 2015 as a security guard and that he was dismissed on 25th July, 2016. It is the circumstances surrounding that dismissal and the benefits payable thereafter that are in contest.
2. From the claimant's perspective, he performed his responsibilities in an exemplary manner and his dismissal was unfair, wrongful, and unlawful. It is on this account that he claims against the respondent notice pay; compensatory damages for wrongful and unfair termination; underpayment of wages; underpaid house allowance; unpaid leave; and unpaid salary.
3. The claim did not go unopposed. The respondent denied through its response that the claimant's dismissal was unfair, wrongful and unlawful.
4. The respondent averred that it received reports that the claimant was found sleeping instead of performing his duties. That the actions of the claimant created a bad image in the eyes of its client and amounted to negligence of duty and gross misconduct on his part. As such, the respondent avers that the claimant is not entitled to any of the claims particularized under the Memorandum of Claim. Consequently, the respondent urged the Court to dismiss the suit with costs.
5. The matter proceeded for trial on 28th March, 2022 with each side presenting oral evidence.



Claimant's case

6. The claimant testified as CW1 and at the outset, sought to adopt his witness statement and documents filed in support of his claim, to constitute his evidence in chief. The said documents were also produced as his exhibits before Court.
7. The claimant told Court that on 23rd July, 2016, the respondent's manager passed by his work station at around 10 pm and enquired what his problem was, to which he responded that he was unwell. That subsequently, he was asked to write a statement and thereafter, he was dismissed from employment on 25th July, 2016. It was his testimony that he was not called for any disciplinary hearing prior to being dismissed from employment. The claimant denied sleeping while at work and testified that he was unwell on that day. In closing his testimony in chief, the claimant asked the court to allow his claim as prayed.

Respondent's case

8. The respondent presented oral evidence through Mr. Raymond Nzioka who testified as RW1. He identified himself as the Human Resource Manager of the respondent. At the outset, RW1 adopted his witness statement and bundle of documents filed on behalf of the respondent to constitute his evidence in chief. The documents were also admitted as the respondent's exhibits before Court.
9. RW1 testified that on the night of 22nd/23rd July, 2016, the claimant was stationed at Muthangari, Safaricom Headquarters. That instead of performing his duties, he was found sleeping on cartons he had spread on the floor. That upon being asked, the claimant stated that his cell phone which he normally uses to keep himself awake, was spoilt. That indeed, the claimant admitted to sleeping while at work and apologized in writing for his actions.
10. It was RW1's further testimony that the actions of the claimant amounted to negligence and gross misconduct, hence was escalated to the Chief Operations Manager. He testified that the claimant's behaviour tainted the image of the respondent's company hence it was resolved that his services be terminated. RW1 further testified that the claimant was informed of the reason for his dismissal. He told Court that the claimant's dues are ready but he had not gone to collect the same.

Submissions

11. It was the claimants' submission that a reasonable employer would not in the circumstances dismiss an employee on the first infraction in the face of a plausible explanation. That further, he was never given a chance to defend himself and was not accorded a fair hearing. That the legal procedures under section 41 of the *Employment Act* were never adhered to by the respondent. The claimant invited the Court to consider the determination in the case of *Francis Ndirangu vs Nakumatt Holdings limited* (2016) eKLR.
12. The respondent submitted that the reasons for dismissing the claimant were valid and fair. That further, he was given a chance to explain himself but he failed to convince the respondent that he was not guilty of the offence as alleged. That the claimant's summary dismissal was justified, lawful and was without malice. To buttress its argument, the respondent placed reliance on the case of *Rudolf Sbitandi Daraja vs Zablon Juma Atulo t/s Z.J Atulo & Co. Advocates* (2016) eKLR.

Analysis and determination

13. Having considered the pleadings on record as well as the evidentiary material placed before me, the following issues fall for the Court's determination: -



- a. Whether there was a justifiable cause to terminate the claimant's employment?
- b. Whether the claimant was subjected to fair procedure prior to being dismissed from employment?
- c. Is the claimant entitled to the reliefs sought?

Justifiable cause for termination?

14. Section 43(1) and 45 (2) (a) and b) of the *Employment Act* (Act) is key in determining whether there was a justifiable cause for termination of an employee. In this regard, Section 43(1) of the Act places the burden of proving the reasons for termination on an employer and failure to do so, such termination is rendered unfair. That is not all, Section 45 (2) (a) and (b) of the Act, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
15. The aforementioned statutory provisions constitute substantive justification.
16. In the case herein, the reasons for which the claimant was summarily dismissed, can be discerned from his letter of summary dismissal which is couched as follows: -

“RE: Summary Dismissal

Your attention is drawn on the above subject. You have been one of our guards assigned at Safaricom Muthangari Parking. It has been reported that on 23rd July at around 2230hrs, you failed to perform your duties as required of you. Contrary to the assignment instructions, you spread a carton on the floor and slept on it.

The above is a gross misconduct and cannot be condoned in the service whatsoever. You totally failed to carry out your duty as a guard as you decided to sleep instead. This is unacceptable and created a very negative image of the company. When queried, you stated that your cell phone got spoilt and this is the gadget that you use to keep you awake. Of course, this is a lame excuse to cover your ill mannered.

Consequently, you have been summarily dismissed from employment for negligence in accordance with the *Employment Act* 2007 section 44(4) c Laws of Kenya.

You are therefore required to hand over all company property upon which you will be paid your final dues.”

17. From the reproduced letter, it is evident that the claimant was dismissed on account that that he was found sleeping while he was required to be on duty. Through a written apology dated 23rd July, 2016 the claimant admitted to sleeping while at his assigned place of duty. He apologized for the same and asked for another chance to continue serving the respondent.
18. Seemingly, the claimant was not pardoned as he was terminated from employment.
19. It is apparent that the claimant did not dispute the fact that he was sleeping while on duty.
20. The claimant was a security officer and as such, he was required and expected to be alert and vigilant at all times. It is therefore evident that his actions impacted negatively on his assignment.



21. Section 43(2) of the Act provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee.

22. In the case of *Kenya Power & Lighting Company Limited vs Aggrey Lukorito Wasike* [2017] eKLR, the Court of Appeal had this to say on the import of section 43 (2) of the Act: -

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.”

23. Taking into context, the nature of the allegation against the claimant, his admission to that effect and the kind of work he was assigned to do, it would thus appear that the respondent genuinely believed that he was unable to perform his duties as expected hence had to let him go.

24. In light thereof, the respondent had justifiable reasons for commencing termination of the claimant’s employment.

Whether the claimant was subjected to fair procedure prior to being dismissed from employment?

25. Despite the respondent having a justifiable cause to take disciplinary action against the claimant, it was bound to subject him to a fair process pursuant to Sections 45 (2)(c) and 41 of the *Employment Act*. Under section 41, an employer is required to notify an employee of the reasons it is considering terminating his or her services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative of own choice.

26. Section 41 (2) of the *Employment Act* is also pertinent in this case as it relates to summary dismissal. It provides as follows: -

“(2) Notwithstanding any other provision of this Part, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.” Underlined for emphasis

27. In the instant case, the claimant state that he was not subjected to a fair process prior to his dismissal. The respondent has refuted this assertion.

28. From the evidence presented by the respondent, there is no proof indicating that the claimant was required to answer to the allegations against him as required under section 41 of the Act. As it is, the respondent did not tender any evidence before Court to prove that it issued a notification to the claimant to that effect or accorded him a hearing.



29. In view of the fact that the allegations against the claimant were likely to result in the termination of employment and which likelihood came to pass, it was prudent that the respondent accords the claimant an opportunity to defend himself. There was no evidence that he was subjected to such a process and the respondent is at fault.
30. Regardless of the claimant's transgressions, he deserved to be taken through fair process.
31. In assessing the import of section 41, the Court of Appeal in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR, had this to say;
- “It is our further 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...”
32. I fully concur with the position taken by the Court of Appeal in the above precedent and hold that the respondent's actions of dismissing the claimant without according him a hearing as demanded by section 41, fell outside the legal parameters and on that basis, the dismissal was unlawful and unprocedural.
33. Having so found, is the claimant entitled to any of the reliefs sought?

Reliefs

One month's salary in lieu of notice

34. As I have found that the claimant was not terminated in line with fair procedure, I will award him one (1) month's salary in lieu of notice.

Compensatory damages

35. The claimant has prayed for compensatory damages in the sum of Kshs 146,652.00 which is equivalent to 12 months of his salary. As I have found that the claimant's dismissal was procedurally unfair, I will award him compensatory damages equivalent to three (3) months' gross salary. This award takes into account his own contribution towards his termination from employment and the length of the employment relationship.

Underpayment of wages

36. The claimant has further averred that his salary was underpaid contrary to the minimum wage order. From the evidence presented, the claimant was stationed within Nairobi, hence pursuant to Legal Notice No. 116 of 2015, which prescribed the applicable minimum wage payable to various categories of employees, he was entitled to a monthly basic salary in the sum of Kshs 12,221.10. This therefore confirms his assertion that his salary was underpaid to the tune of Kshs 1,221.00 per month.



Unpaid house allowance

37. The claim for house allowance also succeeds, as the Legal Notice No. 116 of 2015 expressly provides that the minimum wage payable is only in respect of basic salary and is exclusive of house allowance. This is also founded on the provisions of section 31 (1) of the [Employment Act](#) which provide as follows:

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

38. The Court of Appeal in the case of [Grain Pro Kenya Inc. Ltd vs Andrew Waitbaka Kiragu](#) [2019] eKLR determined the rate payable as house allowance as follows; “To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.” This rate is also in tandem with the General Wages Order.

Unpaid leave days and overtime worked

39. These reliefs fail as the claimant has not proved entitlement to the same. Indeed, it is not clear how the figure was arrived at. On this issue, I will echo the determination in the case of [Rogoli Ole Manadiegi vs General Cargo Services Limited](#) (2016) eKLR, where the Court expressed itself as follows:-

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

40. In light of the above decision which I wholly adopt, the claimant was bound to prove entitlement to the claim for overtime and unpaid leave. Having failed to do so, the claim to this extent fails.

Salary for 12 days

41. The claimant is awarded salary for days worked prior to his termination as there is no evidence that he was paid the same.

Orders

42. In the final analysis, the claim succeeds and the claimant is awarded: -

- a. Compensatory damages in the sum of Kshs 42,162.45 which sum is equivalent to 3 months of his gross salary.
- b. One month’s salary in lieu of notice being Kshs 14,054.15.
- c. Unpaid Salary being Kshs 5,621.60.
- d. Underpaid salary for 11 months being Kshs 13,431.00



- e. Unpaid house allowance being Kshs 20,164.65
- f. The total award is Kshs 95,433.05.
- g. Interest on the amount in (f) at court rates from the date of Judgement till payment in full.
- h. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2022.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimants Ms. Kisiangani

For the Respondent Ms. Mutua

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE

