



**Opagala v IRG (International Reserve Group) (Cause 1753 of 2017)
[2022] KEELRC 3873 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3873 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1753 OF 2017**

SC RUTTO, J

JULY 22, 2022

BETWEEN

DAVIS OPAGALA CLAIMANT

AND

IRG (INTERNATIONAL RESERVE GROUP) RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent on August 8, 2018, as a dog handler. He states that in the course of his employment, he served the respondent diligently and to the satisfaction of its management. Seemingly, the respondent thought differently as the employment relationship was short-lived given that the claimant was terminated on February 17, 2017. The claimant perceives his termination as inhumane, unlawful, unfair and against the provisions of the *Employment Act*. It is for this reason that he is claiming against the respondent the sum of Kshs 551,250/= being notice pay, unpaid house allowance, remainder of the contract period and compensatory damages.
2. Opposing the claim, the respondent avers that contrary to the express terms of his contract, the claimant failed to attend work on time; failed to adhere to the company's standard operating procedures; failed to carry out his duties with due diligence and professionalism; carried out his duties in a casual manner; spoke rudely to his team members and supervisor; failed to uphold the interests of the company; and refused to carry out the instructions of his supervisor. The respondent further denied that the claimant's dismissal was inhumane, unlawful, unfair, harsh and discriminatory as alleged. Consequently, the respondent asked the Court to dismiss the claim with costs.
3. The matter proceeded for hearing on March 17, 2022 and both sides presented oral evidence.



Claimant's case

4. The claimant testified in support of his case and at the outset, sought to adopt his witness statement and documents filed on his behalf to constitute his evidence in chief. The documents were also produced as exhibits before Court.
5. It was the claimant's testimony that on February 17, 2017, the respondent's officer who was in charge of security, by the name Mr Yosi, informed him that his services were no longer required and subsequently, asked him to handover his uniform. That when he returned the uniform on February 20, 2017, he was handed his termination letter by the respondent's director by the name Mr Cohen. In further testimony, the claimant stated that he had not committed any mistake or error in his work and that he was not informed of the reason for his termination. He further testified that he was not issued with a show cause letter nor taken through a disciplinary hearing. He asked the Court to allow his claim as prayed.

Respondent's case

6. The respondent called oral evidence through four witnesses. The first to go was Ms Purity Kagure, who testified as RW1. She told Court that she is based at Westgate Shopping Mall and serves as a supervisor at the control room. She also adopted her witness statement as her evidence in chief and produced the documents filed on behalf of the respondent as exhibits before Court.
7. RW1 told Court that she was supervising the claimant and that he was not diligent in his work. That from the control room, it is possible to monitor the movement of the dogs, the guards and the K9 officers. She further testified that the claimant was trained on K9 handling for one month but was not successful. That it was frustrating to work with the claimant as he had disciplinary issues and was not a team player. That he would report late to work, have extended lunch hour breaks, preferred to work in less demanding areas and would often beat the dogs when he lost his temper. That as a consequence to his actions, the dogs never wanted to work with him and his team members found it unfair that he always took the least demanding position. That further, security was compromised and he was always being reported to the head of security.
8. Mr Joseph Kariuki Wanjiku took the stand and testified as RW2. He also adopted his witness statement as his evidence in chief. He testified that he is a K9 handler at the respondent company. That the claimant was his colleague at Westgate Shopping Mall. That he was the first person to complain about the claimant since, he would beat the dogs at the main motor vehicle entrance and even in front of clients. That he would also take long breaks hence would eat into the break time for the rest of the team, was also slow in working and always wanted a reliever hence the rest of the team had to take more demanding tasks.
9. Mr Elphas Khamati testified as RW3. He also adopted his witness statement to constitute his evidence in chief. He identified himself as a K9 officer, employed by the respondent and stationed at Westgate Shopping Mall. He testified that he was the claimant's coworker at Westgate. He further stated in testimony that K9 officers work with sniffer dogs. As per his testimony, the claimant's work was bad since he refused to wash the dog kennels, would extend his lunch breaks hence would eat into the breaks of the other team members, would not heed the instructions of his supervisor, spoke rudely to the said supervisor and would constantly report to work late.
10. Mr Cohen Haim testified as RW4. He adopted his witness statement to constitute his evidence in chief. He identified himself as the Managing Director of the respondent. He testified that the claimant was not successful in his training as a dog handler but the respondent opted to give him a chance.



It was his testimony that the claimant was not good at his work and that he called him several times to discuss his performance. That he started receiving complaints from the claimant's supervisors and colleagues. That further, the claimant was not able to handle the dogs well. He further testified that when he wanted to change the claimant's designation, he refused hence he had to go. It was his further testimony that he invited the claimant for a hearing but he refused to attend.

Submissions

11. It was submitted on behalf of the claimant that the allegations against him were not substantiated and that the respondent's witnesses failed to give valid reasons for his termination. That the respondent did not table evidence to prove poor performance on his part. The case of *Jane Samba Mukala vs Ol Tukai Lodge Industrial* Cause No 823 of 2010 was cited in support of this position.
12. That further, the respondent undermined the process under section 41 of the *Employment Act*. To buttress this argument, the claimant cited the *Donald Odeke vs Fidelity Security Ltd*, Cause No 1998 of 2011.
13. The respondent submitted that the claimant bore the burden of proving on a balance of probabilities, that an unfair termination of employment took place and that he had not met the burden. It was further submitted that the claimant's behaviour satisfied the context of gross misconduct under Section 44(4) of the *Employment Act*.
14. That further the issues with the claimant were in regards to misconduct and not performance which would dictate a performance improvement plan. The case of *Kenya Revenue Authority vs Reuwel Waitbaka Gitabi & 2 others* (2019) eKLR was cited by the respondent to fortify this argument. The respondent further submitted that the claimant had not given any account or evidence of differential treatment he had received.

Analysis and determination

15. Flowing from the pleadings, the evidentiary material placed before me and the opposing submissions, the Court is being called to resolve the following questions: -
 - a) Whether there was justifiable cause to terminate the claimant's employment?
 - b) Whether the claimant was subjected to a fair process prior to termination?
 - c) Is the claimant entitled to the reliefs sought?

Justifiable cause for termination?

16. It is the claimant's case that the respondent did not have valid reasons to terminate his employment. The respondent disagrees.
17. Section 43(1), of the *Employment Act* (Act) is relevant in resolving this issue, as it requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. That is not all. Section 45 (2) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. It is instructive to note that the burden of proof lies with the employer.
18. There is no letter of termination on record hence the reasons for the claimant's termination cannot be discerned therefrom. Be that as it may, from the totality of the evidence presented by the respondent,



the claimant was dismissed from employment on account of lateness, alleged acts of misconduct while at work and failure to perform his duties in a proper manner.

19. One of the allegations against the claimant was that he had consistently reported late for work. To substantiate this allegation, the respondent exhibited work attendance records covering different periods of time. The said attendance records, indicate that there were instances when the claimant reported to work late past the stipulated 7:00 a.m. From the respondent's Standard Operating Manual for its K9 unit, the reporting time is indicated to be from 7:00 am. Notably, the manual was incorporated into the claimant's contract of employment. The evidence presented considered alongside the said Standard Operating Manual, corroborates the testimony of all the respondent's witnesses that the claimant would report late for work.
20. The claimant was also accused of other acts of misconduct while at work for instance, extending his lunch breaks, beating the dogs and preferring to work in less demanding areas. It is noteworthy that the testimony of all the respondent's witnesses in this regard, tallied.
21. In light of the foregoing, it is evident that the claimant by his own actions and omissions, gave the respondent a justifiable cause to commence disciplinary action against him and which could have resulted in his termination.
22. I am therefore satisfied that to this extent, the respondent has discharged its evidential burden under sections 43 (1) and 45(2) (a) and (b) of the Act.
23. I now move to determine whether the claimant was subjected to a fair process prior to termination.
Whether the claimant was subjected to a fair process prior to termination?
24. The requirement of fair process is addressed under Section 45(2) (c) of the Act which provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, Section 41(1) of the Act provides in an elaborate fashion, the requirements of a fair procedure. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a union representative of own choice.
25. In his testimony, RW4 stated that upon receiving the complaints from the claimant's supervisor, he spoke with him on numerous occasions in regards to the issue but no improvement was noted from the claimant's end. Despite these assertions by RW4, there was no documentary evidence to back up the same.
26. As it is, there is no evidence from the record that the claimant was notified of the allegations or complaints against him and that he was given an opportunity to respond to the same. Nothing is documented.
27. As I have found, the respondent had a right to institute disciplinary action on account of the acts and omissions noted on the claimant's part. However, this was subject to compliance with the requirements of fair process as contemplated under section 41 of the Act. In absence of proof that such a process was undertaken, it can only be inferred that there was none.
28. On this note, I would wish to underscore the mandatory nature of the provisions of section 41 of the Act as amplified by the Court of Appeal in the case of Janet Nyandiko vs Kenya Commercial Bank Limited [2017] eKLR as follows: -

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical



incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

29. I adopt and reiterate the findings in above case, to the effect that the respondent was duty bound in a mandatory way to comply with the provisions of section 41. It was therefore not open for the respondent to elect to dismiss the claimant without giving him an opportunity to be heard and consider any representations he may have.
30. The net effect of the foregoing, is that although the respondent had a valid reason to terminate the claimant's employment, it ought to have accorded him to a fair hearing and failure to do so, rendered the termination unlawful.
31. Having so found, what reliefs then avail the claimant?

Reliefs

One month's salary in lieu of notice

32. As I have found that the claimant's dismissal was unlawful for want of procedure, the court awards him one month salary in lieu of notice pursuant to section 35 (1) (c) of the Act.

Compensatory damages

33. The claimant has prayed for compensatory damages in the sum of Kshs 300,000.00 which is equivalent to 12 months of his gross salary at the time. As I have found that the claimant's dismissal though with reasons, was procedurally unfair, I will award him compensatory damages equivalent to two (2) months' gross salary. This award also takes into account the length of the employment relationship and his contribution to the termination of his employment.

Unpaid house allowance

34. The claimant has also prayed for unpaid house allowance in the sum of Kshs 26,250.00. It is noteworthy that Clause 6.3 of the claimant's contract of employment provides as follows in respect of salary; "You will be paid by equal monthly instalments of 25,000 kes (gross) in arrears". The *Black's law dictionary*, 10th Edition defines gross income as the "Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings."
35. A clear construction of the definition above, is that the term "gross" refers to all income payable, which presumably include allowances. To buttress this finding, I draw support from the case of Samson Omechi Ongeru vs Tusker Mattresses Limited [2018] eKLR, where the court found that "Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime."
36. I will arrive at a similar finding in this case and determine that the claimant's salary was inclusive of house allowance. As such, the prayer in that respect is denied.



Payment for the remainder of the contract period

37. The claim as regards the remainder of the claimant's contract period is also denied as there is no justification for the same. In any event, the contract had a termination clause hence it was not automatic that he would serve the entire contract period. If anything, he may also have opted out of the employment relationship amid the contractual term.

Orders

38. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded the following reliefs: -

- (a) Compensatory damages equivalent to two (2) months' gross salary being Kshs 50,000.00.
- (b) One (1) month's salary in lieu of notice, being the sum of Kshs 25,000.00.
- (c) The total award is Kshs 75,000.00.
- (d) Interest on the amount in (c) at Court rates from the date of Judgment until payment in full.
- (e) The respondent shall also bear the costs of this claim.

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

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms Omamo

For the Respondent Ms Kamau

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

