



**Omwolo v Securex Agencies (K) Limited (Cause 2617 of 2016)
[2022] KEELRC 1317 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1317 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2617 OF 2016
AN MWAURE, J
JULY 21, 2022**

BETWEEN

HANNINGTON WESONGA OMWOLO CLAIMANT

AND

SECUREX AGENCIES (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed his memorandum of claim dated December 21, 2016 and he filed it on December 22, 2016. The respondent filed his response on January 25, 2017 and is dated January 24, 2017.

Claimant's Case

2. The claimant avers he was employed as a security supervisor on the December 7, 2007 and his salary was Kshs 23,489/= per month.
3. He says his employment was terminated on October 11, 2016 without any reason. He says he did not receive any notice or warning letter before the termination. He says he has not received outstanding wages, severance pay or vacation pay.
4. He says he was an excellent employee whose performance exceeded expected performance and that he attempted to resolve the issue out of court but respondent was not willing.

He is claiming for his dues as follows:-

- 1) Unpaid salary for September Kshs 23,489.00
- 2) A month salary *in lieu* of notice Kshs 23,489.00
- 3) 12 months salary as damages Kshs 281,868.00
- 4) Unpaid leave (one year) Kshs 23,489.00



- 5) Aggravated damages for breach of his constitutional rights
6. Costs and incidental to this suit.

Respondent's Case

5. The respondent claims the claimant was terminated upon a just cause contrary to what is indicated in paragraph 5 of the claim herein. He says the claimant was summarily dismissed and so was not entitled to one month notice, a warning letter, outstanding wages, severance or vacation pay which are denied and claimant is put to strict proof thereof.
6. The respondent claims the claimant was terminated for breach of employment of contract and pursuant to disciplinary meeting held on October 11, 2016 *vide* a letter dated October 11, 2016. The respondent says the claimant was captured on CCTV footage supervising bags being searched poorly at an important assignment of world bank offices in Nairobi.
7. The respondent states that his conduct was not oppressive and was not prejudicial as alleged by the claimant in his memorandum of claim paragraph 9.
8. The claimant was assigned duties at delta centre and CCTV footage indicated bags were being searched poorly.
9. The respondent through his Human Resource Manager sought an explanation from the claimant and convened a disciplinary hearing on October 11, 2016 by a letter dated October 3, 2016. The respondent avers the claimant's suit is not supported by any facts and should be dismissed accordingly.

Submissions

Claimant

10. The claimant avers in his suspension and notice to show cause letter dated October 3, 2016 he was accused that while on assignment at the world bank station items were pilferaged under his watch contrary to work instructions.

He says that at the disciplinary hearing he was shown a CCTV footage with one Francis Meli being caught with milk. He says he was not advised on this information before hand and so this amounted to a surprise and also a prejudice.

The claimant relies on the findings of Justice Maureen Onyango in the case of *Jonathan Chepwoyo vs George Makaleto Achia CEO Export Processing Authority (EPZA) & 2 others* 2021 eKLR.

He submits the show cause letter did not meet the threshold set by failing to disclose the evidence relied by the respondent during the disciplinary hearing.

The claimant concludes he has proved his case on a balance of probabilities and is therefore entitled to the prayers sought in his claim as submitted.

11. The respondent's submissions were not availed to the court. The court nevertheless considered the evidence *viva voce* adduced by the claimant in court and by the respondent witness.

Decision

12. The main issues for determination are as follows:-
 - a) Was the termination of claimant's employment fair.



- b) Is he entitled to the reliefs sought.
13. The employment laws sets out guidelines for termination of employment. The employer is obligated to observe certain procedural guidelines to ensure the upholding of the broad principles of natural justice in terminating employee's employment.
14. According to section 45 of the employment Act 2007 no employer will terminate the employment of an employee without a valid reasons. Supported by the case of Loice Otieno V Kenya Commercial Bank Limited Cause No 1050/2011 the court held that in terminating employment the employer, must expressly state that the termination of the employee was under consideration and secondly state the reason why the termination is being considered.

Similarly in Raymond Cherokewa Mrisha vs Civicon Limited[2014]eKLR Cause 213 the court held that termination of employment without a valid reason and fair procedure amount to unfair termination.

Section 45 of Employment Act 2007 provides as follows:-

- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) 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; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
15. The claimant's accusation is that on September 12, 2016, while assigned duties at World bank premises items were being pilferaged under his watch. This is contrary to work instructions given to him as the supervisor.
- The claimant says no details were given as to items pilferaged, by who and evidence to be relied on. The reason given is a general statement without any specifics. That makes it an unspecified reason and so fails the test of being a valid reason.
- In Loice Otieno vs Kenya Commercial Bank Limited Cause 1050 of 2011 the court observed that an employer who resorted to summary dismissal or instant dismissal was required to demonstrate that the requirements of sections 43 and 45 of the Employment Act had been met.
16. The claimant was called for a hurriedly convened disciplinary meeting on October 11, 2016 where he was shown a CCTV camera whereby a person by the name Francis Meli was allegedly caught with milk. Thus, information had not been disclosed to the claimant before the disciplinary hearing. That meant he had no opportunity to defend himself.
17. The other accusation was that he allowed armed GSU to the assignment and also that unauthorised vehicles were being washed at the premises. These accusations were not raised in the show cause letter.
18. In his defence the claimant said he was not on duty when the alleged goods were apparently removed. Also his shop steward witness Simon Ndiwa said he did not see the claimant on CCTV camera. So his assertion is that there was no valid and verified reason to terminate his employment. He did not



seem to have any comments on the issue of the man Francis Meli who was apparently seen carrying milk from the premises.

19. The court noted the respondent invited the claimant for a disciplinary meeting and informed him he could be accompanied by his representative. In that regard he complied with section 41 of the Employment Act 2007.
20. The issue the court is picking with the respondent is that they failed to give a clear and valid reason or reasons for the termination. In that case the respondent failed to give a valid and fair reason for terminating the claimant as the grounds given were generalized and not specific. The often cited case of Walter Ogal Onur vs Teachers Service Commission Cause 955 OF 2011 provide that where the court observed that for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness. In this case he respondent failed to establish a valid and verifiable reason.

For the foregoing, the court finds the respondent failed to establish substantive justification and so is found to have wrongfully terminated the claimant's employment and therefore enters judgment in favour of the claimant.

Reliefs

After finding the claimant was unfairly terminated for lack of good valid reason I proceed to award him the following:-

- i. One month salary in lieu of notice - Kshs 23,489.00
- ii. Unpaid salary for September 2016 - Kshs 23,489.00
- iii. Overtime pay - Kshs 23,489.00
- iv. Unpaid leave - Kshs 23,489.00
- v. The claimant is awarded 3 months equivalent of compensation inclusive all aggravated damages - Kshs 70,467.00
- vi. Costs are also awarded to the claimant
- vii. Interest is also awarded at court rates from date of judgement till full payment.
- viii. The claimant is to be issued with his certificate of service within 14 days.

Total award to the claimant therefore is - Kshs 164,423.00

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 21ST JULY, 2022

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

