



**Wabwile v Eveready Security Guards Ltd (Cause 2096 of 2016)
[2022] KEELRC 1258 (KLR) (18 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1258 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2096 OF 2016**

JK GAKERI, J

JULY 18, 2022

BETWEEN

AMOS NYONGESA WABWILE CLAIMANT

AND

EVEREADY SECURITY GUARDS LTD RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 11th October 2016, the Claimant sued the respondent alleging unlawful termination, non-payment of terminal benefits, unpaid NSSF deductions and underpayment.

Claimant's Case

2. The Claimant alleges that he was an employee of the respondent from January 2000 to 30th March, 2014 when his employment was terminated by the respondent without any justification or fair hearing.
3. That he served the respondent diligently and had no record of misconduct.
4. It is the Claimant's averment that his employment was terminated arbitrarily without reason or opportunity to be heard and prays for;
 - i. A declaration that the respondent's action of terminating the Claimant is illegal and unlawful.
 - ii. Kshs.878,400/= comprising;
 - a. 3 months' salary in lieu of notice.
 - b. Unpaid leave for years worked.
 - c. Service pay for years worked.



- d. House allowance at 15% for years worked.
- e. General damages for wrongful dismissal.
- iii. Costs of this suit.

Respondent's Case

- 5. The respondent filed a response to the statement of claim on 17th November 2016. It denied the period of the Claimant's employment as alleged.
- 6. It is the respondent's case that the Claimant was guilty of misconduct for having deserted work for 7 days. It denies that the Claimant is entitled to the amount claimed. That he was summarily dismissed and has no claim for salary in lieu of notice.
- 7. Section 44(4) (a) of the *Employment Act* is cited as a justification.

Claimant's Evidence

- 8. In his written statement, the Claimant states that he was employed as a casual by the respondent from 1st January 2000 and was confirmed on 3rd September 2010 and did not miss work on any day due to the respondent's ruthlessness and it was deducting NSSF contributions.
- 9. That he sought 4 days leave to attend to a sick child but when he returned, he was told to return the respondent's items in his possession. That his salary was Kshs.12,200/= as at the date of dismissal.
- 10. On cross-examination, the Claimant confirmed he was employed on 1st March, 2000 and was given a deployment form and was aware that 7 days absence meant absconding duty. That he had applied for 3 days leave from 8th April, 2014 to 11th April, 2014 but when he returned, he was told that his employment had been terminated.
- 11. That in April, 2014, he worked for one week. That he was not a member of the union. The witness stated that his salary was Kshs.12,200/= although he did not produce any payslip as evidence. However, the witness confirmed that he used to receive payslips but they had no entry for house allowance.
- 12. The witness could not remember the amount deposited in his account per month. That he proceeded on annual leave and was paid.
- 13. On re-examination, the witness testified that he was not paid house allowance, was only away for 3 days and was not given a termination notice.

Respondent's Evidence

- 14. RWI, Mr. Benson Musonge testified that he was the Operations Manager of the respondent and the Claimant was employed on 3rd November 2010 as a security guard at a salary of Kshs.12,270/= inclusive of house allowance. It was his testimony that the respondent deducted all NSSF and NHIF contributions from 2010 to 2014. That the Claimant had 4 off duty days in a month which he took, took leave and was paid for public holidays worked.
- 15. That the Claimant had faced the disciplinary committee for drunkenness, absenteeism and sleeping on duty.
- 16. RWI testified that the Claimant was granted 4 days leave from 9th April to 14th April, 2014 and was scheduled to resume on 15th April, 2014 but did not.



17. On 22nd April, 2014, the respondent wrote to the Claimant for an explanation as to his whereabouts. He was thereafter declared a deserter and thus his employment terminated under Rule 12 of Respondent's rules.
18. It was RWI's testimony that the Claimant had a debt of Kshs.26,411/= which he refused to pay.
19. On cross-examination, the witness confirmed that the claimant had taken all his leave days according to the filings in court and worked from September 2010 to 14th April, 2014.
20. The witness stated that he joined the respondent in 1989 and was unaware of the Claimant's employment before 2010. That the Claimant had applied for 4 days leave with 2 extra days to travel upcountry but did not return. A letter was sent to him by post and invitation for disciplinary was made and he was dismissed because he was not available and still retained the company's uniform.
21. The witness stated that the respondent had particulars of the Claimant's next of kin and attempts to contact him through his cell phone were unsuccessful.

Claimant's Submissions

22. The Claimant identifies two issues for determination;
 - i. Whether the summary dismissal of the Claimant from employment was merited.
 - ii. Whether the Claimant is entitled to the reliefs sought.
23. On the 1st issue, the claimant relies on Section 43 and 45 of the Employment Act to urge that the respondent had no valid reason to dismiss the Claimant from employment having failed to contact his next of kin whose details the respondent had.
24. It is contended that the respondent had no valid reason to terminate the Claimant's employment and did not conduct it in accordance with fair procedure.
25. Section 41 of the Employment Act is relied upon to urge that the prescribed procedure was not complied with. It is submitted that the Claimant was not served with a notice to show cause nor given a fair hearing.
26. As to whether the Claimant is entitled to the reliefs sought, reliance is made on the decisions in Hosea Akunga Obwori v Bidco Oil Refneries Ltd (2017) eKLR and Samsung Electronics East Africa Ltd v K M (2017) eKLR to urge that the burden of justifying a termination of employment lies with the employer.
27. On procedural requirements, the decisions in County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others (2015) eKLR and Samsung Electronics East Africa Ltd v K M (2017) eKLR and others are relied upon to underscore the essence of due process in termination of employment.
28. In sum, it is submitted that the termination of the Claimant's employment was unlawful and unfair for want of substantive justification and procedural fairness.

Respondent's Submission

29. On 20th April, 2022, the respondent was given 14 days to file submissions after receipt of the Claimant's submissions. On 23rd May 2022 during a mention to confirm the filing of submissions, the respondent was absent.



30. The Claimant's counsel reported that he had filed and served submissions but had not been served by the respondent.
31. By 22nd June, 2022 when the court retired to prepare this Judgement, the respondent had not filed submissions.
32. Regrettably, the court did not benefit from the insights and perspectives of the respondent's submissions.

Analysis and determination

33. The issues for determination are;
 - i. Whether the Claimant's dismissal by the respondent was fair and lawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
34. As to whether the termination of the Claimant's employment was fair, the home part is the law relating termination of employment as provided by the [Employment Act](#), 2007 and case law.
35. Section 45(2) of the Act provides;

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 termination is a fair reason;
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on operational requirements of the employer and
 - c. that the employment was terminated in accordance with fair procedure.
36. These provisions are explicit that for termination of employment to pass muster, it must be substantively and procedurally compliant.
37. Relatedly, section 43(1) provides;

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
38. This section places a heavy burden on the employers to establish the grounds upon which the termination of employment was based.
39. Courts have interpreted these provisions to mean that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair. This was clearly articulated in [Walter Ogal Anuro v Teachers Service Commission](#) (2013) eKLR and other decisions.
40. Section 41 of the [Employment Act](#) prescribes the mandatory process to be complied in the termination of an employment contract.
41. The decisions in [Hosea Akunga Obwori V Bidco Oil Refineries Ltd](#) (Supra), [Samsung Electronic East Africa Ltd V KM](#) (Supra) and others relied upon by the Claimant to urge his case are spot on in these requirements.



Reason(s) for Termination

42. According to the respondent, the Claimant applied for 4 days leave and additional 2 days effective 9th April, 2014 to 14th April, 2014 but did not resume duty and was declared a deserter.
43. Although the Claimant had different dates and days, documents on record reveal that he proceeded on leave from 9th April, 2014 and was to report to his place of work on 14th April, 2014. The Claimant's evidence is that he reported on 14th but was requested to go home, that he reported the following day when he was informed by the In-charge that his employment had been terminated.
44. The respondent's witness did not deny that the Claimant had an In-charge to whom he was reporting at the time.
45. It is unclear why the Claimant did not report to the Human Resource Department of the respondent before he was declared a deserter.
46. Puzzlingly, although the Claimant led no evidence of his salary entitlement by way of a payslip and could not even remember how much the employer used to deposit in his account, the employer who is the employer who is the custodian of all employment records did not produce copies to disprove the alleged salary or demonstrate that it was paying housing allowance.
47. In his written statement, the Claimant states that he was employed by the respondent on 1st January, 2000 but in cross-examination, the date changed to 1st March, 2000 and led not a scintilla of evidence of his relationship with the respondent for the 10 years preceding the date of employment admitted by the respondent.
48. Section 43 (2) of the [Employment Act](#) provides;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
49. For the above reasons, the court is satisfied that the respondent has on a balance of probability established that it had a valid and fair reason to terminate the Claimant's employment if it had wanted to.

Procedure of Termination

50. As mentioned elsewhere in this judgment and as observed by the Court of Appeal in Pius Machafu Isindu V Lavington Security Guards (2017) eKLR section 41 of the [Employment Act](#), 2007 provides an elaborate and mandatory process which must be complied with before termination of employment.
51. It is worth recapitulating the words of the Court of Appeal in [Postal Corporation of Kenya v Andrew K Tanui](#) (2019) eKLR on the requirements of Section 41 of the [Employment Act](#);

“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.”
52. The court is guided by these sentiments.
53. In the instant case, the respondent did not satisfy the requirements of Section 41 of the Act.
54. RW I testified that the Claimant was not invited for a disciplinary hearing and was not formally dismissed because he was not available.
55. Although the respondent allegedly sent a letter addressed to Claimant dated 22nd April, 2014 on absconding duty, it is unclear if the letter was in fact posted to the address in Bungoma. The respondent led no evidence of postage or certificate of postage and no other or further action was taken thereafter.
56. Be that as it may, even assuming that the Claimant absconded duty, the respondent was still bound to take the Claimant through a fair disciplinary process as stated by Onyango J in *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd* (2020) eKLR as follows;
- “Further even if she had absconded, she is by entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the court . . .
- It is the duty of the respondent to show this court it did accord the Claimant a fair hearing prior to termination.”
57. Relatedly, in *Felistas Ikatwa v Charles Peter Otieno* (2018) eKLR, the court stated as follows;
- The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least is expected to issue a notice to the deserting employee that termination of employment on the grounds of desertion is being considered.”
58. Similar holdings were made in *Boniface Mwangi v B.O.M Iyego Secondary School* (2019) eKLR, *Nzioka v Smart Coatings Ltd* (2017) eKLR as well as *Simon Mbitshi Mbane v Inter-Security Services Ltd* (2018) eKLR.
59. In the instant case, although the respondent produced a copy of a letter allegedly sent to the Claimant, there is no evidence that the letter was actually posted or received by the Claimant.
60. Intriguingly, RWI testified that the respondent had the Claimant’s kin contact but did not attempt to contact them. It was his testimony that attempts to contact the Claimant through his cell phone number were unsuccessful. However, the witness did not inform the court who made the alleged calls to the Claimant and to which cell phone number the call was made.
61. From the evidence on record, the court is satisfied that the respondent has on a balance of probability failed to demonstrate that it made reasonable attempts to ascertain why the Claimant was not reporting to work.
62. For the above stated reasons, it is the finding of the court that termination of the Claimant’s employment by the respondent was procedurally unfair.

Reliefs

63. Having found that termination of the Claimant was unfair, I now proceed the reliefs available.



- (a) A declaration is hereby issued that the respondent's action of dismissing the Claimant from employment was unfair and unlawful.
- (b) 3 months salary in lieu of notice
64. The Claimant led no evidence to demonstrate entitlement of 3 months' salary in lieu of notice. In the absence of a termination notice, the Claimant is awarded one (1) month's salary in lieu of notice, Kshs.12,200/=.
- (c) Unpaid leave for years worked Kshs.183,000/=
65. The Claimant led no evidence on any outstanding leave days and more significantly confirmed on cross-examination that he used to proceed on leave every year and was paid. This is confirmed by the documents produced by the respondent. The claim is disallowed.
- (d) Service pay for years worked
66. On cross-examination, the Claimant confirmed that the payslip issued by the respondent had entries for NSSF and NHIF. RWI confirmed as much as are the leave application forms on record. Consequently, the claim for service pay fails by dint of section 35(6)(d) of the Employment Act, 2007.
- (e) House Allowance at 15% of monthly salary Kshs.329,400/=
67. As adverted to elsewhere in this judgement, the respondent tendered no evidence of the Claimant's remuneration by way of letter of appointment or payslip or bank deposit. However, RWI confirmed that the Claimant's salary was Kshs.12,270/= per month inclusive of house allowance.
68. In the absence of documentary evidence of the Claimant's employment record to ascertain whether the salary was inclusive of house allowance and the parties have diametrically opposed positions, Section 10(7) of the Employment Act, 2007 provides a way out as follows;
- If in any legal proceedings an employer fails to produce a written contract or the particulars prescribed in Section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
69. In this case, the employer has not adduced sufficient evidence to disprove the Claimant's assertion that this salary did not include housing allowance.
70. As a consequence, the Claimant is awarded 15% housing allowance of the basic monthly salary as was the case in Grain Pro Inc Ltd v Andrew Waitbaka Kiragu (2019) eKLR, for the duration served.
71. Documents on record show that the Claimant was issued with a uniform on 3rd September, 2010 and neither party led evidence of any employment relationship before this date, a duration of 3 years and 6 months.
- (f) General Damages for wrongful dismissal
72. Having found that the Claimant's employment was terminated unfairly, the Claimant is eligible for the discretionary relief provided by Section 49(1)(c) of the Employment Act.
73. In arriving at the level of compensation and as ordained by Section 49(4) of the Act, the court has taken the following into account;
- i. The Claimant was an employee of the respondent for a period of 3 years and 6 months.



- ii. Although the Claimant avers that he served the respondent diligently and had not been reprimanded at all, the evidence on record paint a different picture. The Claimant had three warning letters in 2012 for sleeping while on duty and drunkenness. In addition, he had two (2) notices of absenteeism from duty in 2011 and 2012 respectively.

Finally, the claimant had taken a loan from the co-operative savings and credit society and is yet to clear the outstanding sum.

- iii. The Claimant did not appeal the termination or take any step to demonstrate his wish or desire to continue in the respondent's employment.

74. In the circumstances, the court is satisfied that the equivalent of two (2) months gross salary is fair.

75. In the final analysis, Judgement is entered for the Claimant against the respondent as follows;

- a. One (1) month salary in lieu of notice.
- b. House allowance at 15% of the basic monthly pay for 3 years and 6 months.
- c. Equivalent of two months gross salary.
- d. Cost of this suit
- e. Interests at Court rates from the date of judgement till payment in full.

76. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF JULY 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 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 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

