



REPUBLIC OF KENYA



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**Agandi & another v KK Security Limited (Cause 7 of 2016)
[2022] KEELRC 1607 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1607 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 7 OF 2016
SC RUTTO, J
AUGUST 5, 2022**

BETWEEN

JACK ODINGA AGANDI 1ST CLAIMANT

ALFRED OBANDE OKINDO 2ND CLAIMANT

AND

KK SECURITY LIMITED RESPONDENT

JUDGMENT

1. The instant suit was commenced by way of a joint statement of claim, through which it is averred that the 1st claimant was employed by the respondent on September 30, 2006 while the 2nd claimant was employed on February 17, 2007. The claimants aver that they were summarily dismissed on January 30, 2015. In this regard, they have faulted the disciplinary process they were subjected to, hence consider their dismissal as unfair. Accordingly, they claim against the respondent, notice pay, compensatory damages and unpaid salary for the days worked in January, 2015.
2. The claim did not go unopposed. The respondent avers through its reply to the claim, that the claimants failed to follow due process by moving a mobile response team vehicle (MRT) to an undisclosed base which was detrimental to its operations and contrary to the terms of their contracts of service and their legal obligation as employees under the *Employment Act*. That the claimants were invited to a disciplinary hearing where it was found that they had failed to carefully and properly perform their duties hence were summarily dismissed. That as such, the claimants were lawfully dismissed and there is no claim arising against the respondent.
3. The matter proceeded for part hearing on November 16, 2021 and later on March 31, 2022 when the respondent presented and closed its case.



1st Claimant Case

4. The 1st claimant was the first to go. He adopted his witness statement and bundle of documents to constitute his evidence in chief. He testified that he was initially employed as a security guard and later promoted to the position of a crew commander. That his crew was accused of having stationed their mobile base patrol vehicle at Total Petrol Station in spring valley area instead of the usual base at Kyuna roundabout, along Shanzu road in Westlands. He maintained that they had always parked at the said Total Petrol Station.
5. It was his further testimony that on January 15, 2015, he had been informed by his counterpart and coworker, Mr Benson Ekasiba, that their new night base was to be at Total Petrol station along Lower Kabete road. That according to Mr Ekasiba, the directive had come from their sector commander Mr Muruli and was documented in the occurrence book. That he was therefore obliged to obey the new directive.
6. That he was not on duty on January 24, 2015 and when he reported for his night shift on January 25, 2015, the 2nd claimant informed him of a new directive through an occurrence book, of an incident that took place on January 24, 2015. That on the said January 24, 2015, the respondent's directors had found their patrol vehicle stationed at Total Petrol Station and hence, had issued a directive that the same should not be stationed at the said location.
7. That the said directive contradicted the initial directive by their sector commander Mr Muruli and which he had complied with. He reiterated that he was not on duty when the respondent's directors found the patrol vehicle at Total Petrol Station. He stated in further testimony that the respondent's motor vehicles have GPRS hence it was always easy to tell where they are located. That there is therefore no way the respondent's management would have failed to notice their location from the very day that they had been directed to move base to Total Petrol Station.
8. It was his further testimony that on January 26, 2015, he received a notice to attend a disciplinary hearing on January 29, 2015. That at the hearing he was not given an opportunity to express himself and answer the charges directed at him. That his defence was therefore null and void. That he also expected his sector commander Mr Muruli to be in attendance at the hearing, as he is the one who had issued the directive to change their base location from Kyuna to Total Petrol Station. That there was also no statement issued by the said Mr Muruli denying that he had issued the directive. He further told court that their representative in attendance at the hearing was passive and didn't assist them. That he just supported the respondent.
9. In further testimony, the claimant stated that he was later dismissed on grounds that he had failed to adhere to instructions of a mobile response base despite several reminders. That he appealed against his dismissal but the same was dismissed. He asked the court to consider his case favourably and allow his claim as prayed.

2nd Claimant

10. The 2nd claimant also adopted his witness statement and documents filed together with the claim to constitute his evidence in chief. It was his testimony that he was initially employed as a security guard and later promoted to the position of a crew commander. That he was not on duty on January 14, 2015 as he had gone to the respondent's office to attend to a personal issue.
11. That he was transferred from Zulu 20 (Kiptagat base) to Zulu 19 (Total petrol Station) on January 22, 2015. That as such, the directive to move the base from Kyuna to Total Petrol Station, came before



his transfer. That he came to learn of the change of base of the motor vehicle, from his colleague, Mr Benson Ekasiba. That he was notified that the directive had been issued by the sector commander Mr Muruli.

12. That on the night of January 24, 2015, he took over duty as a crew commander at 1700 hours until 2200 hours when he was visited by two directors of the respondent company. That the said directors enquired why the motor vehicle was stationed at Total Petrol station instead of Kyuna, to which he responded that they had relocated from their previous base with effect from January 15, 2015, following the instructions of the sector commander Mr. Muruli. That subsequently, he was directed by the said directors to move the motor vehicle to its initial place. That the directive contradicted the one initially issued by Mr Muruli. That nonetheless, he informed the controller as much and recorded it in the occurrence book. That further, the respondent's motor vehicles have GPRS hence it was always easy to tell where they are located. That there is therefore no way the respondent's management would have failed to notice their location from the very day that they had been directed to move base to Total Petrol Station.
13. That he was later issued with a notice on January 26, 2015 through which he was required to attend a disciplinary hearing on January 29, 2015. That Mr Muruli was not at the disciplinary hearing despite them requesting that he appears. That there was also no statement by the said Mr Muruli, denying that he had issued the directive for change of base of the motor vehicle. It was his further testimony that he was not given an opportunity to defend himself at the disciplinary hearing. He therefore termed the disciplinary hearing as unfair. That he was later dismissed from employment by a letter dated January 30, 2015 and his appeal against the same was declined. He asked the court to allow his claim as prayed.

Respondent's Case

14. The respondent called oral evidence through Ms Norine Silwe, who testified as RW1. She identified herself as the respondent's human resource officer. At the outset, she adopted her witness statement and bundle of documents filed on behalf of the respondent to constitute her evidence in chief. She also produced the documents as the respondent's exhibits before court. She testified that though she was not an employee of the respondent at the material time, she was well versed with the facts of the case and that her testimony was based on the claimants' employment records.
15. She testified that on January 24, 2015, the respondent's directors Mr Richard Guy and Mr Oatway, found a mobile response team (MRT) vehicle at Total Petrol Station along Kabete road. That this was a breach of duty and due process as the vehicle was stationed at an unauthorized base. That the actions of the claimants were detrimental to the respondent's operations and contrary to their contractual terms. That it is the national control room that issues commands and that the claimants were not to be based at Total Petrol Station. She further told court that the claimants had been involved in other incidences.
16. That consequently, the respondent summoned the claimants to a disciplinary hearing whereafter they were summarily dismissed for carelessly and improperly performing their duties. That the claimants appealed against the dismissal and they appeared before an Appeal Committee on 2February 7, 2015. That the dismissal of the claimants was confirmed by the Appeal Committee. That thereafter, the respondent paid the claimants' terminal dues.
17. RW1 termed the claimants' termination as lawful hence regraded the claim as misconceived, misplaced and an abuse of the court process. She asked the court to dismiss the claim with costs.



Submissions

18. The claimants submitted that their dismissal was a witch-hunt as it was clear that they were acting on the instructions of their superior Mr Muruli. That the said Mr Muruli was not called for the disciplinary hearing to equally answer to the allegations brought against him by the claimants. The claimants termed their dismissal as unfair, unprocedural and unlawful. In further submission, they stated that they were not afforded a fair trial as the respondent chose for them a co-employee instead of allowing them to choose one for themselves. The case of [*Peter K Kabau & 2 others v Riley Services Limited*](#) [2022] eKLR was cited in support of the claimants' submissions.
19. On the other hand, the respondent submitted that the claimants failed to follow due process as they accepted that they had based the MRT vehicle at Total Petrol Station without confirming with anyone in the management team, about the change of base. That their actions were therefore contrary to their obligations arising out of their contracts of service. That the claimants' dismissal was therefore lawful. It was further submitted on behalf of the respondent, that the notices issued to the claimants were adequate and that they were given an opportunity to be heard and to respond to the allegations against them.

Analysis And Determination

20. Flowing from the pleadings, the evidentiary material placed before me and the rival submissions, this court is being called resolve the following questions: -
 - a. Whether the respondent had a justifiable reason to dismiss the claimants from employment?
 - b. Whether the claimants were afforded a fair hearing prior to being dismissed from employment?
 - c. Whether the claimants are entitled to the reliefs sought?

Justifiable reason?

21. Section 43(1) of the [*Employment Act*](#) (Act), is the guiding light in the determination of this issue as it requires an employer to prove the reasons for an employee's termination, failure to which such termination is deemed to be unfair. Closely related to this provision, is section 45 (2) (a) and (b) of the [*Act*](#), which provides that a termination of employment is unfair, if 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 its operational requirements.
22. The aforementioned is what constitutes substantive justification or rather proof of reasons that resulted in an employee's termination.
23. In the instant case, the reasons for the dismissal of the claimants can be discerned from their letters of dismissal which are worded similarly. As per the said letters, the reason advanced by the respondent is that: -

“You are aware failing to adhere to instructions of a mobile response base despite several reminders. This is in line with [*Employment Act, 2007*](#) section 44 (4) (c)”
24. From the totality of the evidence on record, it is apparent that the issue in contention and which led to the claimants' dismissal from employment, was that they had relocated their base to Total Petrol Station without getting proper authorization. The claimants maintained that they moved their base based on the instructions issued by their sector commander, Mr Muruli.



25. In support of their case, the claimants exhibited a copy of an occurrence book in which it is indicated as follows against January 15, 2015: -

“ Attention: instraction (sic) from s/commander Muruli station Total.”

26. On its part, the respondent exhibited email correspondence dated January 26, 2015 from Mr Peter Cardovillis to Mr Patrick Gitonga which reads in part: -

“ At 2240 hrs Z19 Peponi area MRT called the control room and reported that Mr Richard Guy and Mr Oatway Derek (KK Chairman) they found them at Total Petrol Station which is their current night base, but as per Mr Richard Guy they were instructed to relocate from the base as (sic) night. The crews reported that they (sic) given the new instructions about a week ago to relocate back to Total Petrol Station from Shanzu road by sector commander Muruli. The chairman requested the sector commander to see them on Monday to explain where he received the instructions from for the Mrt to relocate back to Total Petrol Station as their night base.”

27. Further, the respondent exhibited an incident report dated January 26, 2015 by Mr Muruli, in which he stated as follows: -

“ Nature of incident: parking at Total Petrol Station

It was at the stated time when I was carrying out night spot check when I found Zulu 19 parked at Total Petrol Station along lower Kabete road. Being new in the area I did not know that they were not supposed to base there at all time of which the car commander who was on duty did not inform me and yet he had information from the branch manager I advised the (sic) to stop the spot check that they were not found at there(sic) base unless given permission from control room car commander C/No 48888 Benson Ekasibah”

28. From the foregoing, it is evident that there are conflicting versions as to how the claimants’ crew came to be stationed at Total Petrol Station. Going by Mr Muruli’s account, it is apparent that he denied the claimants’ allegations to the effect that he had instructed them to change base.

29. From the version of events presented by the claimants, the alleged instructions were issued by Mr Muruli to Mr Ekasiba who transmitted the same to them. As such, it is apparent that the instructions were not issued to the claimants directly. It is also noteworthy that the respondent did not deny the 2nd claimant’s assertions that he was deployed to its Crew 19 after the alleged instructions had been issued. It was also not denied that the 1st claimant was not present when the said Mr Muruli issued the instructions to Mr Ekasiba. It was also common ground that Mr Muruli was superior to the claimants.

30. It is therefore evident that the issue in controversy revolved around Mr Muruli and Mr Ekasiba. Indeed, the two were key and were at the heart of the dispute that led to the eventual dismissal of the claimants. One of them, (Muruli) allegedly issued instructions to the other (Ekasiba) who later transmitted the same to the claimants and who acted upon the same. Nevertheless, it is rather odd that neither of the two was called to attend the disciplinary hearing convened against the claimants.

31. Both claimants having clearly stated that they were not present when Mr Muruli allegedly issued the instructions, to their colleague, Mr Ekasiba, it was prudent to have the two appear at the disciplinary hearing so as to shed light and/or give a clarification on the issues in dispute.



32. Without the testimony of those two key people at the disciplinary hearing, there was no way of telling where the truth lies. Being confronted with two different versions of hearsay, one wonders how the respondent was able to arrive at the conclusion that the claimants acted by moving their base without proper authorization hence were to blame. Further, it is noteworthy that the respondent did not discount the evidence presented by the claimants in the form of the occurrence book and which had an entry constituting the instructions allegedly issued by Mr Muruli.
33. The long and the short of it is that the controversy would have unlocked by having all relevant parties appear at the disciplinary hearing. Only then, could the veracity of the claimants' allegations that they were acting on Mr Muruli's instructions, be ascertained. As it is, the respondent admitted the version by Mr Muruli hook, line and sinker and did not subject it to further scrutiny so as to establish the truth. This was a grave error on its part.
34. In total sum, I am not convinced that the respondent has discharged its evidential burden under sections 43 (1) and 45(2) (a) and (b) of the Act, by proving that it had a valid and fair reason to dismiss the claimants from employment.
35. In the circumstances, the resultant termination of the claimants was not substantively fair.

Fair Process?

36. The requirement of fair process is generally provided for under section 45 (2) (c) of the Act. The specific requirements of what constitutes a fair hearing are stipulated under section 41(1) of the Act, which mandates an employer to notify an employee of the intended termination and the reasons thereof in a language he or she understands, in the presence of a fellow employee or a shop floor union representative. This is basically the process applied by the employer prior to arriving at a decision to terminate the employment of an employee.
37. The legal parameters under section 41 of the Act could not have been put better as was in the Court of Appeal case of Postal Corporation of Kenya v Andrew K Tanui [2019] eKLR, thus: -

“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...”
38. On record, are two notices dated January 26, 2015, inviting the claimants for a disciplinary hearing. Regarding these notices, the claimants contend that the same were defective in law in that; they did not indicate the reasons they were to attend the hearing; did not indicate any particular company policy / rule they contravened; and did not indicate to them the name of the complainant.
39. From a perusal of the notices issued to the claimants, it is evident that the same were a mere an invitation to the disciplinary hearing. In this case, they did not spell out the allegations the claimants were required



to respond to. Indeed, it is not clear at what point in time and if at all, the claimants were notified of the charges against them. With this apparent gap, one wonders whether the claimants were aware of the charges they were going to face as they appeared before the respondent's disciplinary panel.

40. In the case of *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR, the Court of Appeal found as follows: -

“As also rightly found by the learned trial judge, no evidence was placed before court to show that the respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the respondent only knew in general terms, the allegations he was to face and counter. That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair.”

41. I fully adopt and reiterate the determination the position taken by the Court of Appeal and apply the same to the case herein. As such, the respondent having failed to comply with a crucial requirement on notification of charges, the entire process was tainted with irregularity. Consequently, the ensuing disciplinary hearing fell outside the legal parameters stipulated under section 41 of the *Employment Act* hence the dismissal was unlawful and unprocedural.
42. Against this background, I cannot help but find that dismissal of the claimants was unfair and unlawful.
43. Having found as such, what remedies then, avail to the claimants?

Reliefs

Compensatory Damages

44. As I have determined that the claimants' termination was unfair and unlawful, each of them is awarded compensatory damages equivalent to seven (7) month's gross salary. This award has been informed by the length of the employment relationship and the fact that the respondent failed to prove that it had a justified reason to dismiss the claimants from employment and that in so doing, it adhered to the process of fair hearing.

One Month Salary In Lieu Of Notice

45. Each claimant is also awarded one (1) month's salary in lieu of notice pursuant to the provisions of section 35 (1) (c) of the *Act*.

Unpaid Salary

46. The claim in regards to unpaid salary is denied as the claimants admitted in cross examination that they were paid for the days worked.

Orders

47. Accordingly, judgment is entered in favour of the claimants against the respondent and they are awarded the following reliefs: -

1st Claimant



- a. Compensatory damages in the sum of Kshs 99,302.00 which sum is equivalent to 7 months gross salary.
- b. One month's salary in lieu of notice being Kshs 14,186.00.
- c. The total award is Kshs 113,488.00.
- d. Interest on the amount in (c) at court rates from the date of judgement till payment in full.

2nd Claimant

- a. Compensatory damages in the sum of Kshs 99,302.00 which sum is equivalent to 7 months gross salary.
- b. One month's salary in lieu of notice being Kshs 14,186.00.
- c. The total award is Kshs 113,488.00.
- d. Interest on the amount in (c) at court rates from the date of judgement till payment in full.

48. The claimants shall also be entitled to the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF AUGUST, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the claimants Ms Miya

For the respondent Mr Kamau

Court Assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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

