



**Kenya National Private Security Workers Union v BOB` Morgan Services Limited  
(Cause 1627 of 2017) [2022] KEELRC 4130 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4130 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1627 OF 2017  
SC RUTTO, J  
SEPTEMBER 30, 2022**

**BETWEEN  
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION ..... CLAIMANT  
AND  
BOB` MORGAN SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant union has brought the instant suit on behalf of Mr. Edward Luttah Ambutsi, the grievant herein and who it avers, is its member. It is averred that the employment relationship between the respondent and the grievant commenced sometimes in November, 2017. It is the claimant's case that the grievant was granted two days leave from June 30, 2016 to July 1, 2016 and was to report back on July 2, 2016. That when he reported back to duty, he was issued with a show cause letter in regards to the two days absence. This put into motion his termination which was effected on July 8, 2016. It is for this reason that the claimant seeks against the respondent on behalf of the grievant, the sum of Kshs 210,000.00 being compensatory damages for unfair termination.
2. Opposing the claim, the respondent avers that the grievant absconded duty at his designated place of work at Barclays Plaza, without prior leave. That it received a confidential report on June 30, 2016, that the grievant was at Electricity House inciting staff against the respondent and its management, over salary issues. That as such, the grievant lost his employment due to his unexplained absence from work. Consequently, the respondent has asked the Court to dismiss the claim with costs.

**Claimant's case**

3. When the matter proceeded for hearing on May 16, 2022, the grievant testified in support of his case and to start with, he adopted his witness statement and the bundle of documents filed together with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.



4. It was the grievant's testimony that on June 30, 2016, while attending a SACCO meeting at Impala Club, he was notified by the caretaker of the place where he lived, that his house was on fire and that everything had perished. That he informed the respondent's field officer by the name Mr. Daniel Langat, who cleared him after he had completed a form. That he was given leave for two days from June 30, 2016. That when he went back to work on July 2, 2016, he was issued with a show cause letter on account of his absence from work for two days. That he was also advised not to report to work until he was advised to do so.
5. The grievant further testified that he was only given two hours to respond to the show cause letter. That he explained his absence from work and attached the dispatch note that had been issued to him by the respondent's field officer. That on 7<sup>th</sup> August(sic) 2016, he was called by the respondent's clerk by the name Mr. Silas, to attend a meeting. That he was not notified of the reasons for the meeting. That on 8<sup>th</sup> August (sic) 2016, he showed up for the meeting, which comprised the respondent's management. That upon enquiring the nature of the meeting, he was informed that it was disciplinary.
6. It was the grievant's testimony that when he enquired why he was not allowed to have his representative at the meeting, he was accused of being rude and uncooperative. That further, he was not allowed to talk or ask questions at the disciplinary hearing. That subsequently, he was issued with a letter of termination. That prior to that, he had never received a warning or caution letter. He concluded his testimony by stating that the two days absence from work were not sufficient to warrant termination.

#### **Respondent's case**

7. The respondent presented oral evidence through Mr. Dennis Michieka who testified as RW1. He identified himself as the respondent's chief of staff. RW1 proceeded to adopt his witness statement and the respondent's bundle of documents to constitute his evidence in chief. The said documents were also produced as the respondent's exhibits.
8. RW1 testified that on June 30, 2016, the grievant was reported as having been absent from work, hence was issued with a show cause letter dated July 4, 2016. That the respondent constituted a disciplinary hearing comprising shop stewards and management officials. That the grievant attended the disciplinary hearing and made his representations. That the grievant admitted that he did not follow the procedure of applying for unpaid leave before proceeding on leave. That he also became uncooperative and disrespectful to the disciplinary panel and management staff. That further, the respondent received a confidential report that on or about June 30, 2016, the grievant was at Electricity House inciting other security officers on salary issues.
9. It was RW1's testimony that the respondent also noted that the fire incident alleged by the grievant was suspect, as he had continued attending the meeting on June 30, 2016, instead of rushing to the scene. That the respondent noted that the employment relationship and trust in the performance of the grievant's assigned duties was no longer tenable, hence a separation was unavoidable. That the disciplinary meeting was chaotic as the grievant did not want to listen to the management. That the respondent considered the grievant's representations at the disciplinary hearing and his length of service, hence he was terminated instead of being summarily dismissed. That as such, the grievant was paid one month's salary in lieu of notice and gratuity for 17 years, notwithstanding that he was a member of the National Social Security Fund (NSSF). RW1 maintained that the grievant's termination was procedurally fair and just. That therefore, he is not entitled to maximum compensation.



## Submissions

10. It was submitted on behalf of the grievant that the respondent failed to demonstrate the reasons for his termination. That two days of absence from work were not sufficient to warrant summary dismissal. That further, the respondent failed to follow due process on termination, hence the grievant is entitled to 12 months compensation.
11. On its part, the respondent submitted that the grievant's termination was procedural notwithstanding his lack of cooperation at the disciplinary hearing. The respondent further argued that it had proved a case for the grievant's dismissal.

## Analysis and Determination

12. I have carefully considered the pleadings on record, the evidence presented as well as the parties' submissions, and I have isolated the following issues for determination:-
  - i. Whether the grievant's termination was fair and lawful
  - ii. Is the grievant entitled to the reliefs sought?

## Whether the grievant's termination was fair and lawful

13. In order to prove that an employee's termination was fair and lawful, an employer has to satisfy two limbs, that is substantive and procedural fairness.
14. Substantive fairness essentially relates to proof of the reason or reasons which led to an employee's termination, while procedural fairness relates to the procedure applied in effecting an employee's termination.
15. I will first consider the question of substantive justification. The key provisions on substantive justification are sections 43(1) and 45 (2) (a) and (b) of the Employment Act (hereinafter the Act).
16. Section 43(1) of the Act provides as follows: -
  - “(1) 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.”
17. In regards to Section 45(2) (a) and (b), the same is couched in the following manner:-
  - “(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 employee's conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer...”



18. From the foregoing statutory provisions, it is clear that by and large, an employer is required to prove the reason for an employee's termination and that the same was fair, valid and related to the employee's conduct, capacity or compatibility or based on its operational requirements.
19. Back to the case herein, it is evident from the record that the grievant was terminated on account of being absent from work for two days. This is discernible from his letter of termination which I will reproduce in part, thus: -

“re: Termination Of Service

Reference is made to the show cause letter dated July 4, 2016 and the disciplinary hearing on July 6, 2016.

Management has noted that on June 30, 2016, you unprocedurally proceeded for leave without being duly cleared. When asked to explain you became rude and uncooperative to the panel that was handling the matter. Your actions are contrary to the company code of conduct.

In light of the above, your services are hereby terminated with immediate effect in line with the terms and conditions of your employment contract. You will be paid any accrued salary and benefits in line with the provisions of the E.A (2007) ...”

20. On his part, the grievant has contended that he was not absent from work but rather, had been granted two days leave by the respondent's field officer by the name Daniel Langat, after his house allegedly burned down. In support of his position, the grievant exhibited a dispatch note. The said dispatch note which is dated June 30, 2016, indicates that the grievant was cleared for two days with effect from June 30, 2016 and contains the name of the said field officer, Daniel Langat.
21. During cross examination, RW1 termed the dispatch note exhibited by the grievant as not being authentic. He further stated that a dispatch is not meant to clear an employee for leave.
22. It is noteworthy that the respondent brought up the authenticity of the dispatch note for the first time, during the cross examination of RW1. The same was neither raised in the defence nor in RW1's testimony in chief. There is also no witness statement or an Affidavit from the said Daniel Langat, disowning the said dispatch note.
23. Coupled with the foregoing, the disciplinary proceedings exhibited by the respondent indicates that the grievant stated that the field officer gave him a dispatch note and an application form which he duly signed. The proceedings further indicate that the same field officer was interrogated and he admitted that he is the one who filled the form.
24. In light of the foregoing, I am led to conclude that the grievant has proved on a balance of probability, that he was indeed authorised to be away from work for two days with effect from June 30, 2016. The respondent despite stating otherwise, did not do much to convince the Court, save for terming the dispatch note as a fake.
25. I must add that from the respondent's defence as well as the totality of the evidence presented, I am of the view that the subtle reason for the grievant's termination was his alleged incitement of staff at Electricity House. That was the real trigger. It was the reason behind the reason.
26. That notwithstanding, the reason presented as per the grievant's letter of termination is absence from work, hence I am enjoined to go by that.



27. Concluding on the issue of substantive fairness, I find that the respondent has not proved on a balance of probabilities, that the grievant was absent from work without permission, hence it had a fair and valid reason to terminate his employment.
28. Turning to the question of procedural fairness, the same is a requirement under Section 45 (2) (c) of the Act. Section 41(1) of the Act provides in detail, the requirements of a fair process. In this regard, an employer is required to notify an employee of the intended termination, the reasons thereof, in a language he or she understands and in the presence of another employee or a shop floor union representative.
29. In the instant case, the grievant has admitted being issued with a show cause letter and responding to the same. He also admitted appearing before a panel for a disciplinary hearing. However, he argued that he was neither allowed representation at the said hearing, nor an opportunity to speak.
30. On the other hand, the respondent contends that the grievant was given an opportunity to appear with a representative of his choice, but he opted not to be accompanied and instead, notified the disciplinary panel that he wished to conduct his own case.
31. Connected to the foregoing, RW1 admitted during cross examination that the grievant was not represented during the disciplinary hearing. This being a credibility contest and the burden of proof resting on the respondent, it ought to have gone an extra mile to prove the fairness of the disciplinary process meted out against the grievant. In this regard, the respondent failed to exhibit a notification through which the grievant was invited to bring along a representative. Further, there is no indication in the disciplinary proceedings that the grievant was allowed representation but waived his right to that extent.
32. Further, from the show cause letter, it is apparent that the grievant was only given two hours to give his explanation. By all means, the period of two hours was quite unreasonable, noting that the grievant's job was on the line. In actual sense, the respondent did not stand to lose anything by allowing the grievant a reasonable time to answer to the show cause letter.
33. On this score, I will associate myself with the findings of the Court in the case of Patrick Abuya vs Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR, where it was held that: -

“Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood. In my view, the Respondents action of writing an invitation letter on 3 March 2014 inviting the Claimant to hearing on the morning of 4 March 2014 when, according to it, he had absconded and therefore his whereabouts were not known was ill motivated and was not in consonance with the statutory requirements of procedural fairness. It was equally not in accord with justice and equity as envisaged by section 45(4)(b) of the Employment Act, 2007. The dismissal was therefore procedurally unfair.”

34. In following with the above decision, I find that the grievant was not accorded procedural fairness and his termination fell short of the legal threshold.
35. Accordingly, I cannot help but find that the grievant's termination was unfair and unlawful.



**Reliefs?**

36. As the Court has found that the respondent did not prove the reason for the grievant’s termination and that the said termination fell short of the legal threshold, I will award him six (6) month’s gross salary as compensatory damages.

**Orders**

37. To this end, Judgment is entered in favour of the claimant against the respondent and the grievant is awarded compensatory damages in the sum of Kshs 105,000.00 which sum is equivalent to six (6) months of his gross salary. Interest shall apply on the award at court rates from the date of Judgement until payment in full.

38. The respondent shall also bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Wanyama

For the Respondent Mr. Njuguna

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

