



REPUBLIC OF KENYA



KENYA LAW
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**Mukonyole v BOB Morgan Services Limited (Cause 610 of 2017)
[2022] KEELRC 4036 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4036 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 610 OF 2017
JK GAKERI, J
SEPTEMBER 28, 2022**

BETWEEN

DAVID MUKONYOLE CLAIMANT

AND

BOB MORGAN SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim dated 29th March, 2017 filed on the same day alleging unfair termination of employment/dismissal and non-payment of terminal dues.
2. The Claimant prays for;
 - a. A declaration that termination of the claimant's services and/or employment by the respondent was unlawful, unfair, and/or illegal
 - b. Issuance of certificate of service
 - c. Payment of the sum of money claimed under paragraph 7 above, as damages for loss of employment amounting to Kshs.624,426/=
 - d. Costs and interest of this claim.
 - e. Any other and/further relief this Honourable court may deem fit and/or just to grant.
3. The Respondent filed a reply to the Memorandum of claim on 28th February 2018 praying for dismissal of the suit with costs.



Claimant's case

4. The claimant avers that he was employed by the Respondent on the 1st November 2014 as a security guard on permanent terms and was terminated from employment on 1st August 2014 on an account of failure to report to work.
5. The claimant avers that he was terminated unlawfully and illegally for the following reasons;
 - a. Failure to grant the claimant notice and/or reasons for dismissal
 - b. Failure to grant the claimant a fair hearing
 - c. Unlawfully and unfairly dismissing the claimant.
 - d. Sacking the claimant without lawful exercise and/or due process
 - e. Acting in bad faith in dismissing the claimant from employment.
 - f. Failing to be guided by the rules of natural justice.
 - g. Being unreasonable and unfair in the circumstances
6. The claimant claims for damages for unlawful and unfair termination against the respondent as hereunder
 - a. One month pay in lieu of noticeKshs.16,000/=
 - b. Compensation for unlawful termination
16,000 x 12Kshs.192,000/=
 - c. Overtime 21 hours every week for 192 weeks 16,000/30/10x1.5Kshs.322, 560/=
 - d. Public holidays 16000/30x4x4Kshs.93,866/=Total claimKshs.624,426/=

Respondent's case

7. The respondent avers that the claimant was arrested and remained in custody for more than 14 days from 10th July 2014 and on the 25th November 2014 the claimant's wife delivered the claimant's company uniform to the respondent and a letter informing the respondent that the claimant was still in custody at Industrial Area Police prison.
8. The respondent avers that it acted in conformity of the law by invoking Section 44(4)(f) of the Employment Act and stated that in view of the arrest and incarceration of the claimant it was not possible to hold a disciplinary meeting as the claimant was under strict confinement by security agencies for a period exceeding 14 days.
9. The respondent states that the claimant's dismissal from employment was unavoidable as it required filling the gap left by the claimant and hiring another guard.
10. The respondent states that it is willing to pay the claimant for the 9 days worked in July 2014 but the claim for compensation and notice pay is without merit as the dismissal was occasioned by the claimant's arrest.



11. The respondent avers that the termination of the claimant's employment was substantively and procedurally fair therefore the claimant is not entitled to any of the prayers made in the memorandum of claim.

Claimant's Evidence

12. On the 6th June 2022 the matter proceeded for a hearing with the claimant testifying in support of his claim.
13. He stated that he was employed by the respondent in 1997 as a security guard on casual a basis but in 2006 he transitioned to a permanent employee.
14. He testified that he was summoned by a call by his brother's employers seeing to know his whereabouts as the claimant was his surety.
15. That he was arrested on 10th July, 2014 by the police as they investigated a theft that had occurred. That was released on the same day and reported to work on the 11th July, 2014 but was requested to report on the 15th of July, 2014 on which date he did not work. That he was called on 1st August, 2014 to receive a dismissal letter and went back home.
16. The claimant stated that he did not know who Immaculate was as his wife's name is Margret Nasimiyu and that he gave his uniform and other paraphernalia to a person he used to work with but whose name he could not recall to return them to the employer.
17. On cross-examination the claimant stated that after his arrest he was taken to Kileleshwa police station and released on a police bond. He stated that he was at the police station for one day but reported to work on the 15th July, 2014 as opposed to 11th July, 2014 as indicated earlier.
18. Further, the claimant confirmed that he received the termination letter from one Mbithe on 1st August, 2014 and the uniform and other items had been returned before by a friend but could not recall the dates.
19. That he was charged in 2015 and was released in March, 2022 having been in custody again.
20. The claimant confirmed that he had a SACCO savings of Kshs.103,000/= and a loan of Kshs.3,000/= which the letter dated 25th November, 2014 confirmed.
21. He could not recall the ID card number of Emmaculate Awinja Okwisa whom had introduced as his wife in the letter. He denied having known her.
22. On further cross-examination, the claimant confirmed that the respondent was unaware of his arrest but had told him he could report back after his release. It was his testimony that the respondent was not to blame for his tribulations and case took three years to conclude. He also confirmed that in July, he was in custody and the employer could not reach him for disciplinary hearing.
23. Strangely, on re-examination, the claimant testified that he was arrested on 10th July, 2014 and released on 15th July, 2014 and reported to work.

Respondent's Evidence

24. The respondent's witness Mr. Dennis Michieka, the Quality Assurance Manager at the Respondent's company adopted his statement.



25. He averred that the claimant was arrested on the 10th July 2014 and by 1st August 2014 he was yet to report back to work forcing the respondent to hire a replacement guard to take over his duties.
26. The witness averred that due to claimant's desertion of duty, the respondent invoked the provisions of the *Employment Act* and declared the claimant a deserter.
27. The witness averred that the claimant sent his wife on the 25th November, 2014 to deliver the company uniform and gave her a letter informing the management that he was still in custody long after he had been declared a deserter.
28. The witness stated that the dismissal letter collected by the claimant on the 18th March, 2015.
29. He testified that there is no evidence that the claimant reported to work on 15th August 2014 nor any evidence of his bail and bond.
30. On cross-examination, the witness stated that the letter dated 25th November, 2014 was delivered at the respondent's registry and delivered at his desk on 11th July, 2015 and the claimant was paid as per the payslips on record.
31. He stated that he was paid for overtime from 1997 till 2014 including all the public holidays.

Claimant's Submission

32. The Claimant identifies two issues for determination;
 - i. Termination
 - ii. Overtime
33. On the first issue, the claimant relies on in the holding in *Walter Ogal Anuro vs Teachers Service Commission (2013)* where the court held

“For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination”
34. The claimant also relies on the provisions of section 47(5) of the *Employment Act* which provides that-

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of the employment or wrongful dismissal shall rest on the employer.
35. Reliance is made on the decisions in *Robert Kimutai Ruto V Hotel Cathay Ltd (2018)* eKLR and *Paul Odhiambo Onyango & another V Kalu Works Ltd (2020)* eKLR to urge that termination of the claimant's employment was unfair for want of procedural propriety.
36. On the 2nd issue, the claimant submitted that since employment, he used to report to work at 6:00 a.m to 6:00 p.m without being paid excess of 3 hours a day.
37. The claimant further submitted that the respondent was the custodian of the duty roster but did not produce the same therefore the claimant's evidence was never controverted.



38. The claimant relied on the holding in Milton Wanyonyi Omaka vs Board of Management Nambalayi D.E.B Primary School (2020) eKLR where the court awarded overtime for the last 3 years of service.
39. The claimant further submits that he worked for 7 days a week including public holidays as the premises had to be guarded at all times and relied on the holding in Erasmus Omoiti Eroto vs Board of Management Kapsoya Secondary Eldoret (2016) eKLR where the court awarded overtime and public holidays.
40. The court is urged to enter judgement for the claimant.

Respondent's submissions

41. The Respondent identifies four issues for determination
 - i. Whether the employment contract was frustrated following the arrest and placement of the claimant in custody.
 - ii. Whether there were justifiable reasons for termination of employment.
 - iii. Whether the claimant is entitled to the award for notice pay and compensation.
42. On the first issue, the Respondent submitted that the claimant was arrested on 10th July, 2014 but did not have any cash bail/bond receipt or any other document to show that he was ever released from remand from 2014 to 2022.
43. On the 2nd issue, the respondent submitted that the claimant's failure to attend to his duties at his place of work was no fault of the employer.
44. The respondent further submits that the claimant was to blame for termination of the employment contract by failing to secure his liberty from lawful custody within 14 days.
45. On the third issue, the respondent submitted that the frustration of the employment contract occurred as the relationship became untenable due to change in circumstances beyond the control of parties.
46. The respondent submitted that the circumstances leading to the loss of employment do not warrant for an award of Notice and compensation. Reliance is made on the holding in Halake Guyo v Victory Construction Company Ltd & Another (2019) eKLR where the court declined to award the claimant Notice pay and compensation after finding that:-

“As observed herein above the claimant never secured his liberty with the said limitation period after being arrested and charged with theft which was punishable by imprisonment. His vacancy could not therefore remain open after the close of 14 days limitation period since his services as a watchman were essential. The Respondent was therefore entitled to treat the claimant's contract of service as having been constructively terminated after the lapse of the 14 days without the claimant reporting back after the arrest. Consequently, I return that the claimant's contract of service was not wrongfully terminated by the 1st Respondent.”
47. The respondent further submitted that from the payslips produced by the Respondent, the claimant was paid standard overtime and for public holidays and no particulars have been provided of the outstanding amount.



48. The respondent relies on the holding in John Mulinge Mutuku Vs Karatasi Industries Limited (2019) eKLR where Lady Justice Maureen Onyango held

“As for overtime, the payslips on record reflect that the claimant was paid overtime and no specifics of what was not paid was provided by the claimant. The claim for overtime should be specific as it is a special damage claim. The claimant has asked for overtime for 136 days which despite being provided with payslip to the contrary did not belabour to point out how the deficit arose. Without specifics on the same the claim fails.”

49. The respondent urges that the claim has not been proved and should be dismissed.

Analysis and determination

50. After careful consideration of the pleadings, evidence on record and submissions by counsel, the issues for determination are;

- i. Whether termination of the Claimant’s employment contract was unfair;
- ii. Whether the Claimant is entitled to the reliefs sought.

51. As to whether the Claimant’s dismissal from employment was unfair, the Claimant submits that it was while the Respondent asserts that it had a valid and fair reason and employed a fair procedure rendering the dismissal fair.

52. Section 45(2) of the *Employment Act*, 2007 provides that;

- (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.

53. Section 43(1) of the Act sets out the burden of proof on the part of the employer to establish the reason(s) for the termination of employment failing which the termination is deemed unfair.

54. Section 43(2) of the Act prescribes a test to be met by the employer in justifying the termination of employment. Other elemental provisions are Sections 41, 44 and 47(5) of the Act.

55. The test of termination of employment was highlighted by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR among others.

56. The foregoing provisions and propositions of law are unqualified that for a termination of employment to be deemed fair, the employer must demonstrate that it had a valid and fair reason to terminate the contract of employment and did so in accordance with a fair procedure.

57. In essence, termination of employment must be substantively justifiable and procedurally fair.



58. The termination letter dated 1st August, 2014 states that the claimant was on 10th August arrested by police because of his brother but since then the claimant had failed to report back to work which amounted to gross misconduct leading to summary dismissal.
59. Intriguingly, the claimant did not appeal the decision to summarily dismiss him within 7 days as directed by the dismissal letter dated 1st August, 2014. This would appear to confirm that he was still in remand.
60. The claimant further submits that he was arrested on the 10th of July 2014 and released on the 15th July, 2014 and on reporting to work and signed the register but was suspended for desertion and was terminated on 1st August, 2014.
61. Section 44(4) of the *Employment Act* provides that an employee can be summarily dismissed
- “(f) in the lawful exercise of any power of arrest given by or under any law written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise set at liberty;”
62. Although the claimant alleges that he spent only one day in custody and reported to work on 11th July, 2014 and on 15th July, 2014, there is no shred of evidence to demonstrate that he did so or even reported on 11th August, 2014. He admitted on cross-examination that he was called to collect the termination letter and at the simultaneously accepted part of the contents of the letter dated 25th November, 2014 but disowned others. The letter dated 25th November, 2014 has the Claimant’s signature similar to the one on his statement dated 29th March, 2017, has his payroll number 97710 and the reference is surrendering of the uniform. The letter states that he had been informed to surrender the uniform but was sending it through on Emmaculate Awinja Okwisa of ID No. 3152192 and pleads for assistance as he was still in remand.
63. If indeed the claimant was released on 11th or 15th July, 2014, which appears unlikely, when was he re-arrested so as to be in custody on 25th November, 2014?
64. More intriguingly, the claimant confirmed on cross-examination that the uniform had been returned before 1st August, 2014.
65. Finally, the claimant confirmed that he was released in March 2022 and could not attend court earlier because he was in custody in respect to Criminal Case No. 997 of 2014.
66. The claimant has not provided court with any evidence confirming that indeed he availed himself to work, nor called any witnesses to confirm his presence at the work place on the 15th August 2014 as alleged.
67. On the whole, the court finds the claimant’s testimony contradictory and unsafe to rely upon in many respects.
68. The claimant had a duty to secure his liberty within the prescribed limitation period but did not.
69. Since the respondent was at least by 1st August, 2014 aware that the claimant had been arrested by the police, it was incumbent upon the claimant to demonstrate why he was not reporting to work if at all he was not in custody.
70. The respondent had a reason for termination of the claimant’s employment as he had constructively dismissed himself.



71. More significantly, section 47(5) of the *Employment Act* imposes an obligation on the employee in any claim of unfair termination or wrongful dismissal to demonstrate that indeed an unfair termination or wrongful dismissal from employment has occurred.
72. In the totality of the evidence before the court, the court is satisfied that the claimant has on a balance of probability discharged his burden of proof.
73. The court is guided by the sentiments of the court in *Halake Guyo V Victory Construction Company Ltd and another* (2019) eKLR, where the court observed

“The claimant never secured his liberty with the said limitation period after being arrested and charged with theft which was punishable by imprisonment. His vacancy could not therefore remain open after the close of the 14 days limitation period since his service as a watchman was essential. The Respondent was therefore entitled to treat the claimant’s contract of service to have been constructively terminated after lapse of 14 days without the claimant reporting back after the arrest.”

74. For the above stated reasons, it is the finding of the court that the claimant’s claim herein is unsustainable and is accordingly dismissed with no orders as to costs.
75. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 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

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