Oaga v G4S Kenya Limited (Employment and Labour Relations Claim E015 of 2021) [2022] KEELRC 4097 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4097 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS CLAIM E015 OF 2021

DKN MARETE, J

SEPTEMBER 28, 2022

BETWEEN

JAMES MOMANYI OAGA ..... CLAIMANT

AND

G4S KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. This matter was originated by way of a memorandum of claim dated March 23, 2021. The issue in dispute is therein cited as;

   Unlawful and wrongful suspension, unlawful and wrongful termination of employment

2. The respondent in a statement of response dated April 30, 2021 denies the claim and prays that the same be dismissed with costs.

3. The claimant's case is that he was employed by the respondents on January 2, 1999 as a security guard. His pay was Kshs 3,540.00 per month. By the time of his unlawful termination he earned Kshs 24,299.00.

4. The claimant's further case is that he worked for the respondent until October 15, 2018 when he was dismissed on allegation that he was found sleeping while on duty which he denies.

5. His other case is as follows;Prior to his dismissal, he was issued with a suspension letter on October 3, 2018 and advised to return all uniforms in his possession pending disciplinary hearing – all this is unlawful. It is his contention that the respondent did not discharge his liability under section 45 and 47 of the *Employment Act* 2007.

   Again,

   8. The claimant avers that the respondent's action flouted the *Constitution*, the provisions of the *Employment Act*, the tenets of good labour practice and the principles of natural justice in that;

i) During the disciplinary hearing, the respondent did not produce the relevant documents to prove that there was a justifiable reason to warrant the dismissal.

ii) The minutes were not the true reflection of what transpired in the meeting, there was no investigation report arising from the suspension from duty.(Annexed and marked JM-7 are copies of the minutes).

iii) There was no evidence that he was found sleeping to justify a summary dismissal of the grievant. Section 41 and 45 of the *Employment Act* on fairness of procedure were not observed as provided in the GD3 form.(Annexed and marked JM-8).

iv) The only fair and logical answer to this sleeping at work is not explicitly enumerated in section 44(4) of the *Employment Act* 2007 as one of the grounds for summary dismissal.

v) The suspension was not based on any legit reasons. It stated that the grievant was required to return all company uniforms and equipment in his possession.

vi) The respondent issued both the suspension and the notice to appear before a disciplinary panel to the complainant, it failed to notify his union and yet he was a member.

vii) The claimant did not commit a criminal offence against or to the substantial detriment of the employers.

viii) The respondent acted in a rush and extremely inconsiderate manner.

ix) All the requirements of the law were thrown out in the haste to dismiss the claimant.

9. The claimant avers that the union initiated negotiations through the ministry of labour however the respondent despite being served severally and having acknowledged receipt of the letters inviting them for conciliation, failed to attend the conciliation meetings as scheduled by the Ministry of Labour prompting the issuance of the certificate for the next level of arbitration.(Annexed and marked JM-9).

10. On May 24, 2019, the conciliator issued a certificate as per section 69(b) of the *Labour Relations Act* and the following were the recommendations; "in cases of unfair (from employment), section 49 of the *Employment Act*, 2007 provides for remedies as a means of settling the dispute.

The law also outlines a number of factors which should be taken into account before recommending such remedies. In this regard, I have carefully considered the submissions from both parties and also weighed the merits and demerits of their arguments for and against this dispute. As guided by the law and the above considerations, I recommend that the Management of G4S pay the complainant in this dispute as follows;
All his terminal dues in accordance with the CBA12 months compensation for wrongful dismissal."(Annexed and marked JM-10 is the conciliation report dated May 24, 2019).

13. The claimant avers that for the period he was employed he was never served with a warning letter, notice to show cause or any disciplinary action to show any wrong doing. The grievant had been diligent in his duties and he was even given a commendation letter for a well done job, whereby he prevented theft which would have taken place by being alert.(Annexed and marked JM-11 is a copy of the commendation letter).

14. The claimant avers that the respondent did not consider the following before terminating him as per the company policy.

    a) Whether the occasion was a one-off or was it happening regularly and if the same would have been avoided through training or counselling.

    b) The length of service (19) years of service (Annexed and marked JM-12 is a copy of the certificate of service).

    c) The implication of sleeping at work- was there a serious issue and;

    d) The health condition before the termination.

    e) There was no evidence suggesting that the situation could not be remedied by further training to avoid a repeat of a misconduct.

6. It is his further case that he was not issued with a letter of warning or termination and that the action against him was too severe and for no good reason.

7. He prays as follows;

    a) A declaration that the respondent's action to summarily dismiss the grievant from employment was illegal, unlawful, unfair and inhumane.

    b) An order for the respondent to pay the grievant his terminal dues as follows:-

        a) 12 months salary as compensation for wrongful dismissal;-

        24,299 x 19 (years worked) =Kshs 461,681/-

        b) Gratuity for the 19 years worked

        24,299 x 18 x 19/30 = Kshs 277,008/-

        c) Days worked up to October 15, 2018.

        d) Overtime and allowances earned up to October 15, 2018

        e) Leave earned but was not taken as at October 15, 2018

    c. An order for the respondent to pay the claimant's costs of this claim plus interest thereon.

8. The respondent admits employment of the claimant on dates and terms set-out but adds that at the time of termination, he earned Kshs 13,369.00 and a house allowance of Kshs 2005.35. The sum of Kshs 24,299.00 is denied.

9. Further, the respondent's case comes out thus;

    4. In answer to paragraph 4 of the claim, the respondent states that the claimant's employment was terminated on October 15, 2018, after he was found sleeping while on duty. The respondent states that the termination of employment was based on a valid reason as more particularly set out hereinafter. This is expressed as follows;

        a) The claimant's employment was governed by the employment contract and the respondent's disciplinary code of conduct;

        b) Clause 8.7 of the disciplinary code stipulates that sleeping while on duty constitutes gross misconduct and attracts the sanction of summary dismissal;

c) The claimant's employment was terminated for fundamental breach of his duties in that, while assigned duties as a night guard at the premises of the respondent's client, British Army Training Units Kenya (BATUK), Nyati Barracks, Nanyuki in breach of such duties, the claimant was found sleeping at his assignment on the night of 2nd/ October 3, 2018;

d) By sleeping on duty, the claimant:

i) Risked his own life and security;

ii) Put at risk the property and lives of those he had been engaged to provide a security service to;

iii) Breached the service level agreement that the respondent has with its client to whom he had been assigned; and

iv) Put at risk the respondent's contract with its customer.

e) The claimant was on October 3, 2018suspended from duty pending a disciplinary hearing and was issued with a notice inviting him for a disciplinary hearing to be held on October 8, 2018;

f) The claimant attended the disciplinary hearing and was accompanied and represented by a shop steward. During the hearing, the claimant admitted that he had been caught by the respondent's radio room operator and one of the client's soldiers who were patrolling the premises, dozing at his assignment;

g) Upon hearing the claimant and considering the gravity of his misconduct and the fact that the claimant was not a first time offender having been issued with warning letters on September 18, 2017 and March 15, 2018 after the was found sleeping while on duty, the respondent in line with the disciplinary code took the decision to terminate his employment by summary dismissal;

h) By a letter dated October 15, 2018, the claimant was notified of the summary dismissal and was informed that he would receive his pay for days worked, leave accrued and any overtime earned but not paid; and

i) The respondent calculated the claimant's terminal dues. The claimant had a pending loan of Kshs.350,000.00 with Nyati sacco for which the respondent was requested to remit the claimant's terminal dues to offset his loan with the sacco. After payment of the loan balance, there were no monies left to be remitted to the claimant's account.

10. It is her case that the dismissal was lawful in the following manner. She expresses this as follows;

a) There is no basis for the declaratory order sought. The claimant's dismissal was proper and lawful.

b) The claimant's employment was lawfully terminated. The claim for 12 months' compensation for wrongful dismissal is without basis;

c) The claim for 19 years' gratuity pay is without basis. Pursuant to rule 17(2) of the Regulation of Wages Protective Security Services) Order, 1988, an employee who is summarily dismissed for a lawful cause is not entitled to gratuity pay;

d) The claim for October 2018 salary is denied. The claimant's October 2018 salary was calculated as part of his terminal dues which were remitted to offset his loan with the Sacco;

e) The claim for overtime earned is denied. At the time of termination of his employment contract, the claimant had accrued 63.46 hours in overtime. These were computed as part of his terminal dues and remitted to offset his loan with Nyati Sacco. In any event. The clamant earned overtime pay as when it accrued as detailed in his August 2018 payslip produced at page 2 of his bundle of documents;

f) The claim for allowance earned is denied. No particulars on the type of allowance claimed have been provided to enable the respondent to respond. In the event the claimant is referring to house allowance, the same is denied as he was paid house allowance on a monthly basis as shown in his August 2018 payslip; and

g) The claim for accrued leave as at the time of termination is denied. The claimant had only accrued 23 leave days at the time of termination of his employment contract. The accrued leave days were computed as part of the claimant's terminal dues and remitted to offset the claimant's loan at Nyati Sacco.

11. This matter came to court variously until the July 15, 2021 when the parties agreed on a determination by way of written submissions.

12. The issues for determination therefore are;

1. Whether the termination of the employment of the claimant was unfair, wrongful and unlawful.

2. Whether the claimant is entitled to the relief sought.

3. Who bears the costs of this cause.

12. The claimant raises and submits a case of unlawful termination of his employment as follows;

6. Under section 43 and 45 of the *Employment Act* 2007, the employer is burdened to prove that there was a valid and fair reason for dismissing the employee in any legal proceedings where the employee alleges unfair termination like the present suit. The respondent did not call all the relevant witnesses and neither did it produce any relevant documents to prove that there was a justifiable reason to dismiss the claimant. The respondent did not call any evidence to prove that the claimant was accorded a fair hearing and allowed to defend himself in the presence of a shop floor union representative or workmate of the employee's choice. In the instant case the respondent miserably failed to prove that the claimant was accorded a fair hearing before the dismissal.

9. During the disciplinary hearing, the respondent did not produce the relevant documents to prove that there was a justifiable reason to warrant the dismissal. The alleged hearing, there was no proof that it was in consonance with section 41 of the *Employment Act*. The allegations were a mere hearsay because the respondent did not produce anything in support of the said allegation, hence the respondent failed to prove on a balance of probability that the dismissal of the claimant was done after following a fair procedure.

10. In the instant case the respondent failed to prove a valid and fair reason upon which the summary dismissal was grounded and that fair procedure was followed. The dismissal was basically unfair within he meaning of section 45 of the *act*.

11. The claimant submits that the respondent failed to prove on preponderance of evidence that the claimant was found sleeping on the job and that if followed a fair procedure before dismissing him from employment, the dismissal was unfair within the meaning of section 45 of the *Employment Act*.

12. Under section 45(2) of the *Employment Act*, termination of employment contract by the employer is unfair if the respondent fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason cited in the dismissal letter was sleeping on the job. The burden of proving that offence was on the respondent, who never called any eye witness or produced any other form of evidence to prove that the claimant was found sleeping on the job on the night of October 2, 2018. The burden of proving that offence was on the respondent but it never called any eye witness or produced any other form of evidence to prove that the claimant was found sleeping on the job. Consequently, the respondent failed to prove and justify the reason for dismissing the claimant as required by section 43 and 47(5) of the *act*.

13. It is inappropriate to dismiss an employee for a first offence unless the misconduct is considered severe and causes the working relationship between the employer and employee to be intolerable. However, for any dismissal to be considered as fair, the employer has to prove both substantive (relating to the employee's conduct and procedural fairness) relating to the process followed when disciplining the employee) regardless of the merits of the case.

14. According to the respondent's disciplinary policy clause 8.3, the claimant ought to have been given a first written warning that is a reprimand or cautionary. The line manager or supervisor should complete the warning order disciplinary form in triplicate for unionized employee and a warning letter for management employees. The exact nature of the alleged misconduct should be recorded. An employee allegedly found to be asleep whilst on duty ought to have been given a second warning and eventually a final warning.

15. ... the respondent issued both the suspension and notice to appear before a disciplinary panel to the complaint and failed to notify his union on the same. it should be noted that the minutes of the disciplinary indicated that the claimant was only dozing while on duty without giving any evidence during the disciplinary hearing. According to the respondent, "sleeping" constitutes summary dismissal, a fact that is not supported by the *Employment Act* or the collective bargaining agreement.

16. ... the respondent did not interpret the meaning of sleeping and dozing and what disciplinary measures should be taken in the event either of them happens. In the instant case, there was no clear evidence to prove the alleged misconduct and whether it was dozing or sleeping. As a matter of fact dozing is not sleeping and similarly they do not carry the same disciplinary measure.

21. ... in the instant case, the dispute was reported to the ministry of labour and the conciliator was appointed to conciliate and vide a letter dated May 24, 2021, the conciliator recommended as follows as cited on page 16 to 18 whereby the conciliator Mrs FN Gakui stated "in this regard, I have carefully considered the submissions from both parties and also weighed the merits and demerits of their arguments for and against this dispute and I recommend that the Management of G4S pay the complainant in this dispute as follows;All his terminal dues in accordance with the CBA12 months compensation for wrongful dismissal.

13. My consideration on the above is based on the factors below;

1. That James Momanyi had a clean employment record of 19 years prior to the alleged offence (which was not properly proven).

2. The practicability for him to get another similar job and position with another employer may not be attained considering that he is above 50 years of age.

25. The only fair and logical answer to this sleeping at work is not explicitly enumerated in section 44 (4) of the *Employment Act* 2007 as one of the grounds for summary dismissal.

29 .... the respondent did not consider the following before terminating the claimant as per the company policy;

a. Whether the occasion was a one-off or it was happening regularly and if the same would have been avoided through training or counselling.

b. The length of service (19) years of service.

c. The implication of sleeping at work-was there a serious issue.

d. The health condition before the termination.

e. There was no evidence suggesting that the situation could not be remedied by further training to avoid a repeat of the alleged misconduct.

30. The disciplinary code provides that dismissal is most severe form of the disciplinary action and therefore a formal dismissal would have been held and established on a balance of probabilities that the alleged transgression is of serious nature and/ or when he had a valid warning for either the same or similar offence.

14. The respondent in her written submissions dated March 15, 2022 reiterated her case of lawful termination. She relies on section 44(3) of *Employment Act*, 2007 that prescribes summary dismissal for an employee who has his conduct indicated that he has fundamentally breached his obligations arising under a contract of service.

15. It is the respondent's further submission that the claimant's employment was governed by employment contract and the respondent's disciplinary code of conduct which at clause 8.7 provides as follows;

> "An employee is found to be asleep whilst on duty, which actions thereby constitute a compromise to the security operations of the client or company, as well as a danger to himself/herself. Employees who fall sick while on duty or are under medication at the time of reporting must report the same to the area supervisor and/or immediate manager and ask to be replaced. Failure to do so following which an employee is found sleeping on duty will result in dismissal."

16. The claimant's case and submissions overwhelms that of the respondent. It is his case that he had put in 19 continuous and blemish free years of service. His termination coming out of a single and isolated case of being found asleep does not therefore amount to fairness or justice. This cannot be equated to sleeping on the job which would have found him with heaps and loads of disciplinary issues before his employer. This was a one off case of an unfortunate situation and should not have warranted such severe action on the part of his employer. It is not in tandem with standards of reason for termination as per section 43 of the *Employment Act*, 2007.

17. I agree with the claimant's case. The action of summary dismissal by the respondent was not warranted in the circumstances. This is bearing in mind the long, incident free service of the claimant as established.

18. The respondent's disciplinary code of conduct and other regulations touching on employment should be applied with restraint, decorum and in view of the prevailing circumstances of the case. These are intended to maintain order at the workplace and guide disciplinary process but not ebb out injustice on the part of the workers. They are not intended to birth absurdity. Disciplinary process should be administered within the parameters of reasonableness and sense. I therefore find the case of unlawful termination of employment and hold as such.

19. The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the reliefs sought.

20. I am therefore inclined to allow the claim with orders as follows;

    i. One (1) months salary *in lieu* of notice, ...Kshs 24,299.00

    ii. Ten (10) months salary as compensation for unlawful termination of employment .....Kshs 242,990.00

    iii. Service gratuity for 19 years 24,999.00 x 18 x 19/30 = ...Kshs 277,008.00

    iv. 15 days worked up to 15th October, 2018 .....Kshs 12,499.50

    Totals of claim ..... Kshs 556,796.50

    v. The cost of the claim shall be met by the respondent.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

SUBPARA 1.

Mr. Monda holding brief for Miss. Onyancha instructed by Namada & Company Advocates for the Claimant.

SUBPARA 2.

Mr. Sheikh instructed by Hamilton Harrison & Mathews for the respondent.