



REPUBLIC OF KENYA



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**Mwangi v G4S (Kenya) Ltd (Cause 244 of 2017)
[2022] KEELRC 4125 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4125 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 244 OF 2017
DN NDERITU, J
SEPTEMBER 22, 2022**

BETWEEN

GEORGE GACHAU MWANGI CLAIMANT

AND

G4S (KENYA) LTD RESPONDENT

JUDGMENT

I. INTRODUCTION

1. The claimant commenced this cause by way of memorandum of claim dated June 6, 2017 filed through Munene Chege & Company Advocates seeking the following:-
 - a) A declaration that the claimant's dismissal was unlawful, unjust and discriminatory and the same amounts to unfair dismissal.
 - b) Compensation for unfair termination
 - c) An order compelling the respondent to settle the outstanding benefits as enumeration at paragraph 27 of the claim
 - d) General damages
 - e) Cost of the suit and interest thereof at court rates
 - f) Any other relief that this court may deem fit to grant.
2. As expected, the memorandum of claim was accompanied with a verifying affidavit, claimant's statement, and a list of documents with copies of the listed documents.



3. The respondent filed a statement of response dated 1st February, 2019 through Hamilton, Harrison & Mathews Advocates, witness statements, a list, and bundle of documents. The respondent filed a further list and bundle of documents on March 24, 2020.
4. In the response to the claim, the respondent denied each and every material aspects of the claim and prayed that this cause be dismissed with costs.
5. This cause was heard on October 4, 2021 when the claimant (CW1) testified in chief, was cross-examined, re-examined, and he closed his case. On the same day, Benard Natembeya (RW1) testified in-chief, was cross-examined, and re-examined. On November 10, 2021 Jacqueline Onyango (RW2) testified in-chief, was cross-examined, re-examined, and the respondent closed its case at that point.
6. 6. Counsel for both parties addressed the court by way of written submissions; counsel for claimant filed on February 1, 2022 and counsel for the respondent on February 21, 2022.

II. CLAIMANT’S CASE

7. Based on the pleadings filed, the oral and documentary evidence by the claimant (CW1), and the written submissions by his counsel, the claimant’s case is that he was initially engaged by the respondent as a courier rider in 2013 but on September 6, 2016 he was elevated to a courier driver and signed a contract to that effect. The terms and conditions of the engagement are spelt out in that contract which was produced as an exhibit.
8. The claimant alleges that on March 17, 2017 he was procedurally, unwrongfully, and irregularly dismissed by the respondent.
9. He testified that he was based at Nakuru and allocated motor vehicle KAX 563L Mitsubishi canter which was also available to and was indeed used by other drivers during night shifts and whenever the claimant was off-duty or on leave. He testified that he was terminated due to discrepancies in the mileage as per odometre readings and the tracking system (GPS) leading to alleged loss of fuel.
10. The claimant complained in his testimony that the alleged discrepancies related to the period between 1st and December 31, 2016 when he was on leave and hence he was not liable. He stated that if he had stolen/siphoned fuel from the said respondent’s vehicle he ought to have been charged in court, yet that did not happen. He lamented that he was summarily dismissed and denied both substantive and procedural fairness as the respondent allegedly ignored and violated the law in executing and effecting the dismissal.
11. The claimant alleged that he was not paid his dues upon dismissal and that the same remains unsettled to this day.
12. The claimant alleged that he did not attend any disciplinary hearing as alleged by the respondent and that he always submitted daily records of his use of the said motor vehicle to his supervisor one Mr Mwangi. He alleged that the fuel management policy produced by the respondent as an exhibit was availed to him on February 26, 2017 when he was under investigation and that the respondent was looking for a way of justifying what was a predetermined dismissal.
13. The claimant stated that he was earning a basic salary of Kshs 19,138/= and a house allowance of Kshs 2,871/=, making a total of Kshs 22,009/= as at the time of his dismissal.
14. The claimant held the above position in cross-examination and on the basis of the foregoing prayed for the reliefs as per the memorandum of claim.



III. Respondent'S CASE

15. The respondent's case is captured in the response to the claim, the oral and documentary evidence of RW1 and RW2, and the written submissions by counsel.
16. In paragraph 8 of the response to the claim the respondent pleads that between 1st and December 30, 2016 the claimant's designated motor vehicle KAX 563L had an abnormally high rate of fuel consumption and this prompted the respondent to initiate an investigation. The respondent alleges that it was established that the claimant and the other drivers who operated the said motor vehicle had artificially manipulated the odometre and that the respondent had lost fuel worth over Kshs 30,409.90.
17. The respondent through RW1 stated that none of the drivers concerned, including the claimant, had reported about the faulty odometre and none of them was able to explain how they were recording the odometre readings from a faulty odometre. The respondent produced the internal investigation report as an exhibit.
18. The respondent through RW2, states that the claimant was invited to a disciplinary hearing which took place on March 10, 2017 having been issued with a notice on March 8th, 2017. The said notice and the minutes of the hearing were produced as exhibits by the respondent. It is after the hearing that the respondent took the decision to summarily dismiss the claimant as per the letter dated March 17, 2017 which was produced as an exhibit. The respondent insists that the conduct of the claimant amounted to gross misconduct hence the summary dismissal.
19. Further the respondent insists that the claimant either by himself and or in concert with the other drivers who operated the said motor vehicle stole from the respondent through misrepresentation of mileage and in the process siphoned fuel from the said vehicle. The respondent stated that it summarily dismissed other three (3) employees alongside the claimant for that fuel and mileage manipulation scandal.
20. RW2 testified that after dismissal of the claimant the respondent tabulated the claimant's dues in the sum of Kshs 31,649/= and that the same were applied as per the statement of discharge which was produced as an exhibit.
21. The respondent insists that the claimant was lawfully dismissed for gross misconduct under section 44 of the Employment Act (the Act) and that it followed the laws to the letter in taking the said action.
22. It is on the basis of the foregoing that the respondent prays that the entire claim by the claimant be dismissed with costs.

IV. ISSUES FOR DETERMINATION

23. From the foregoing analysis of the evidence and the positions taken by the parties the following issues commend themselves to this court for determination:-
 - i. Was the summary dismissal of the claimant by the respondent wrongful, unfair, unjust, and discriminative and hence unlawful?
 - ii. If (i) above in the affirmative, is the claimant entitled to the reliefs sought?
 - iii. Costs.



IV. TERMINATION/DISMISSAL

24. The jurisprudence on the mandatory requirement for both substantive and procedural fairness is now fairly settled by this court (ERLC) through a multitude of decided cases such as *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
25. Substantive fairness relates to the reasons (s) for the dismissal or termination. An employer has to have a good reason and recognized in law before taking action against an employee that may lead to dismissal or termination. The reason has to be valid founded on sections 43, 44 (summary dismissal), 45, 46, and 47(5) (f) of the Act. Those provisions of the law are to the effect that an employer cannot dismiss or terminate an employee based on whims, caprice, or malice. There has to exist a reason recognized by law for such dismissal or termination to satisfy the demands of the law.
26. Besides the substantive fairness as mentioned above, based on good reason recognised by the law, an employer must meet the requirements of procedural fairness as envisioned in article 47 of the *Constitution*, sections 35, and 40 (on redundancy), 41, and 44 (on summary dismissal), of the Act. The rules of natural justice apply as well.
27. It is against the above background that the reason (s) given by the respondent for summarily dismissing the claimant and the procedure adopted that this court has to determine whether the summary dismissal was wrongful, unfair, unjust, and unlawful as alleged by the claimant.

VI. SUBSTANTIVE FAIRNESS

28. In the letter of summary dismissal dated March 17, 2022 the respondent addressed the claimant as follows

“We make reference to the disciplinary hearing held at Nakuru office on the March 10, 2017 and the investigations that have been ongoing in relation to fuel usage by courier vehicles at Nakuru branch. It has been established that you could not account for 81.51 litres of fuel that was fueled into vehicle KAX 563L which had been assigned to you as a driver for period 1st December to December 30, 2016. Your action amount to gross misconduct hence you are hereby dismissed from company service with effect from the date of this letter as per the *Employment Act* 2007.”
28. The necessary implication of the above contents in the letter of summary dismissal is that the claimant had either stolen or misappropriated the fuel in question or carried out his duties in such careless or negligent manner to the extent that he was unable to account for the alleged fuel. All these propositions are grounds for summary dismissal under section 44 (4) (c) (g) of the Act. It did not matter whether there was in place a fuel management policy or not.
30. However, it has been alleged by the claimant in his testimony, and the respondent has admitted so, that the claimant was not the only driver who operated motor vehicle KAX 563L. The claimed named at least two other drivers who alternated with him in the use and operation of that particular motor vehicle. The claimant testified that while he operated the said motor vehicle during the day, other drivers used the same vehicle for deliveries at night.
31. The respondent through RW1 admitted that the vehicle had a faulty odometre and that all the drivers filed trip recordings that could not be verified. From the investigation report filed by the respondent and produced as an exhibit, the said vehicle was operated by David Mungai and John Ndung'u



- Mwihia besides the claimant. However, none of the drivers, including the claimant had reported the malfunctioning of the odometre or the abnormal fuel consumption by the said motor vehicle.
32. The claimant alleged that he was on annual leave from 1st to December 15, 2016 and RW2 confirmed this in cross-examination. RW1 also admitted in his testimony that the claimant was on leave during the said period and admitted that fuel was also lost on the days when the claimant was on leave.
 33. RW1 and RW2 also admitted in cross-examination that the claimant was made to sign the fuel management policy on February 26, 2017, which was after the period subject of the investigation.
 34. In the entire circumstances, as per the analysis of evidence above, it was not possible for the respondent to establish with certainty if and or whether the claimant was involved in the theft and or loss of fuel as alleged or the same was lost or stolen by the other drivers who drove the same motor vehicle during the same period.
 35. The investigations report by the respondent at page 21 states that the fuel was lost between 1st and December 16, 2016 yet RW1 and RW2 admitted that the claimant was on leave during that period.
 36. In as much as the respondent felt that the claimant was part of the racket that allegedly stole or siphoned fuel from the said vehicle nothing in the evidence specifically points to the claimant and or how he was involved and the extent thereof.
 37. However, the claimant admitted that he was aware of the faulty odometre yet he did not report on the same to the respondent. A faulty odometre gave rise to manipulated or inaccurate records on distance covered by the claimant and the other drivers and hence the respondent could not be able to assess how much fuel ought to have been consumed relative to the distance covered.
 38. In the investigations report at the recommendations section, the claimant is alleged to have failed to account for 117.59 litres of fuel valued at Kshs 10,087.46. It was also recommended in that report that action be taken against the supervisor David Muchira for his failure to account for the movement of the said vehicle.
 39. The notice inviting the claimant for the disciplinary hearing dated March 7, 2017 states the charge/offence as -

“Between December 1, 2016 and December 31, 2016 you were assigned to drive courier vehicle KAX 563L for delivery/collection. The vehicle you were assigned covered 2451Km as per the vehicle tracking report and not 3467KM that you purported to have covered. You were unable to account for 118.50 litres of diesel worth Kshs 10,165.27.”
 40. On the other hand, the investigations report in the recommendations indicated that the claimant had lost or was unable to account for 117.59 litres of fuel valued at Kshs 10,087.46. Further, during the disciplinary hearing held on March 10, 2017 it was alleged that the claimant had lost, stolen, or was unable to account for 81.51 litres of fuel valued at Kshs 7,044.58.
 41. The above analysis clearly indicates that the respondent as neither certain nor sure of the quantity of fuel that the claimant was unable to account for and or the value thereof.
 42. Section 44(4)(g) of the Act provides that it may amount to gross misconduct so as to justify summary dismissal of an employee for a lawful cause, where “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property” (emphasis added).



43. The above provisions of the law avail several facets of what may amount to gross misconduct and what may amount to reasonable and sufficient grounds for an employer to suspect that an employee had committed an offence against the employer or to substantial detriment of employer's property.
44. It is in the considered view of this court that while the respondent suspected the claimant to have committed an offence against it and its property, the said suspicion did not form reasonable and sufficient grounds to take the drastic action that it took in summarily dismissing the claimant. Further, the loss alleged to have been incurred by the respondent in the sum of about Kshs 10,000/- was not too substantial to the detriment of the respondent. As noted elsewhere in this judgment, the respondent was not able to establish and demonstrate with accuracy how much fuel was lost or stolen by the claimant in isolation of the other drivers who drove and operated the same vehicle with the claimant.
45. This court is not saying that an employer has to have a case beyond reasonable doubts against an employee in order to take disciplinary action. However, mere suspicion is not enough as the grounds leading to disciplinary action have to be reasonable and sufficient that the employee has committed an offence as above -see the holding in *Kenya Revenue Authority v Reuwell Waithaka Gitahi & 2 Others* (2019) eKLR.
46. Further, it is the opinion of this court that the action that was taken by the respondent in summarily dismissing the claimant was unreasonable and excessive in the circumstances. It is the view and opinion of this court that a warning and recovery of any lost money (surcharge) from the claimant would have been adequate in the entire circumstances of this matter and the evidence adduced.
47. The respondent as the custodian of the all relevant employment records under sections 10 and 74 of the *Act* failed to produce the mileage records that were allegedly falsified by the claimant and the other drivers and this creates doubts as to whether any such records existed at all.
48. For all the reasons stated above this court takes the view and holds that the respondent had no substantive reason (s) in taking disciplinary action against the claimant as it did culminating in the summary dismissal of the claimant.

VII. PROCEDURAL FAIRNESS

49. After the respondent conducted investigations as per the investigations report produced as exhibit, it was recommended by the pannelists that disciplinary action be taken against the claimant and the other drivers who were found to have engaged in what the respondent considered to be gross misconduct.
50. Consequently, the claimant was issues with "notice of disciplinary enquiry/hearing" dated March 7, 2017. The hearing was to be held on March 10, 2017 at 1400 hours at respondent's Nakuru office. The alleged offence/charge is clearly stated therein. The claimant was also elaborately informed of his rights. The said notice was served upon the claimant on March 8, 2017 although the said notice does not bear the signature of the respondent's representative the claimant was issued with a.
51. Nonetheless, the claimant appeared before a disciplinary hearing pannel on March 10, 2017 accompanied by a colleague employee, Samson Maina, and union shop- steward Joshua Okoth. It is after this hearing that the respondent decided to summarily dismiss the claimant based on the recommendations of the pannel.
52. The claimant was issued with a letter of summary dismissal dated March 17, 2017.
53. To a large extent the respondent complied with the procedural fairness steps as provided for in the Act, and moreso in line with article 47 of the *Constitution* or what is known as the rules of natural justice at common law. To that extent, this court finds no reason to fault the procedure adopted by the



respondent in the disciplinary hearing against the claimant except that the claimant was not informed of his right to make a written response to the charges. However, in the opinion of this court that did not prejudice the claimant who was given an opportunity to defend himself during the hearing.

VIII. RELIEFS

54. This court has found and held elsewhere in this judgment that although the respondent may have had suspicion of misconduct against the claimant, there was no reasonable and sufficient grounds into holding that the claimant was responsible for the loss of fuel as alleged. This is because the vehicle driven by the claimant was also driven by other drivers within 24 hours cycle and it was not possible to attribute any particular loss of fuel to the claimant.
55. There is also the issue of the malfunctioning odometre which the respondent could not establish who was responsible for artificially manipulating the same.
56. In view of the foregoing it is the opinion and holding of this court that while the respondent was suspicious of the conduct of the claimant, there were no reasonable and sufficient grounds for the respondent to take the decision it did to hold disciplinary hearing against him as the alleged loss was not attributable to the claimant alone but to a number of drivers who drove the said motor vehicle.
57. To the extent discussed above the respondent did not act in accordance with fairness, justice, and equity.
58. Substantive and procedural fairness go hand in hand and even if an employer observes one but fails to pursue the other the outcome shall remain faulty, and that is the situation in this cause. While the respondent, to a large extent, afforded the claimant procedural fairness, the substantive part, or the reason for dismissal, has been found to be wanting as explained above.
59. This court shall now proceed to consider each of the reliefs sought as hereunder.
60. Prayer (a) is for a declaration that the claimants dismissal was unlawful, unjust, and discriminative, and hence unfair. There is no evidence that the dismissal was discriminative as there is no demonstration or evidence that the claimant was treated differently from other similar cases handled by the respondent on similar facts.
61. However, this court has found, as discussed at length in an earlier part of this judgment, that the summary dismissal was wrongful, unfair, and hence unlawful for lack of substantive fairness and it is so declared.
62. Prayer (b) is for compensation for wrongful dismissal under Section 49(1)(c) of the *Act*. The claimant is seeking the maximum 12 months compensation of gross monthly salary in the sum of Kshs 264,108/=. The payslip for February, 2017 produced as an exhibit by the claimant indicates that his gross monthly salary was Kshs 22,009/=.
63. This court has considered the factors provided for under section 49(4) of the *Act*. In filing this cause in court the claimant has expressed his wish to be fully separated from the respondent. He has not expressed any wishes to be re-engaged by the respondent.
64. However it is evidently clear that the claimant contributed greatly to his dismissal. Had the claimant reported the faulty odometre which he suspiciously denied he knew about, the situation would have been resolved before the respondent incurred the alleged losses. The conduct of the claimant was irresponsible, dishonest, and unprofessional. In the very minimum he was careless and or negligent in performance of his duties.



65. While the claimant served the respondent from 2013 to 2017, first as a rider and then as a courier driver from 2016, he let the respondent down by his conduct and hence contributed to his dismissal.
66. Considering the entire circumstances of this cause, this court is of the view and holds that the conduct of the claimant was not forthright although the respondent could not establish the exact extent to which he had contributed to the loss. For all the foregoing reasons, including the fact that the respondent tabulated and processed and paid some dues to claimant, this court is of the considered view that six (6) months gross salary is fair compensation to the claimant. This is calculated as Kshs 22,009/= x 6 = Kshs 132,054/=. This amount is subject to statutory deductions.
67. Prayer (c) is for an order to compel the respondent to pay to the claimant the amounts claimed in clause 27 of the memorandum of claim and each of those items is considered below.
68. It is the duty of an employer to keep employment records in accord with sections 10 and 74 of the Act. The claimant prays for unpaid leave arrears in the sum of Kshs 42,536.43 for the period between May, 2013 to March, 2017 as pleaded in paragraph 18 of the memorandum of claim. The respondent denied this claim but failed to produce documents/records to discount the claim. In the circumstances, the claimed sum of Kshs 42,536.43 is granted.
69. The other claim in paragraph 27 of the memorandum of claim is for one month's salary in *lieu* of notice in the sum of Kshs 22,009/=. This court having held that the dismissal was wrongful and unlawful, the claimed sum of Kshs 22,009/= is hereby allowed.
70. The other claim in paragraph 27 of the memorandum of claim is gratuity in the sum of Kshs 33,013.50. In the letter of appointment executed on September 6, 2016 which contract commenced on September 7, 2016 gratuity was payable only after the claimant had served the respondent for a minimum of five years, among other conditions. The claimant was dismissed summarily on March 17, 2017 and hence did not meet the condition precedent for payment of gratuity as stated above. In the circumstances the claim for gratuity is denied.
71. Prayer (d) is for general damages. There is no basis advanced by the claimant upon which general damages may be paid. No discrimination has been proved or any other reason advanced upon which general damages may be awarded. The law does not provide for award of general damages for wrongful dismissal. For the foregoing reasons, the claim for general damages is denied.

IX. COSTS

72. Costs follow the event and hence the claimant is awarded costs of this cause.

X. DISPOSAL

73. This court makes the following orders in disposal of this cause:-
- a. A declaration be and is hereby issued that the summary dismissal of the claimant by the respondent was unreasonable and wrongful for lack of substantive fairness.
 - b. The claimant is granted the following:-
 - i. Compensation for wrongful
- Kshs 132,054.00
 - ii. Unpaid leave arrears - Kshs 42,436.45
 - iii. One month's salary in *lieu* of notice - Kshs 22,009.00



Total -Kshs 196,609.00

This amount shall earn interest at court rates from the date of this judgment till payment in full.

c. The claimant is awarded costs of this cause.

74. The respondent has adduced evidence to the effect that a sum of Kshs 31,699/= was processed and expended for and on behalf of the claimant as terminal dues. The same is contained in the statement of discharge that was produced by the respondent as an exhibit. This court orders that this sum of Kshs 31,699/= shall be deducted from the amount payable to the claimant as awarded above. The claimant did not deny or rebut that evidence.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE

