



**Mmene v Brinks Security Services Limited (Cause 927 of 2017)
[2022] KEELRC 12842 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12842 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 927 OF 2017
B ONGAYA, J
OCTOBER 14, 2022**

BETWEEN

KENNEDY KIBIYI MMENE CLAIMANT

AND

BRINKS SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on December 19, 2017 through MK Mulei & Company Advocates. The claimant's case is that he worked diligently for the respondent as a security guard from February 4, 2012 to March 28, 2015 at a monthly salary of Kshs 9,500.00. He pleads that the termination involved alleged theft charges as per criminal case No 573 of 2015 but which was subsequently withdrawn. The claimant's advocates issued a demand letter dated March 28, 2017 alleging unlawful termination and breach of contract. The claimant's case is that the termination was unfair and unlawful as it was against section 41 of the [Employment Act, 2007](#) and the claimant had done nothing wrong to occasion the termination. The claimant prayed for a declaration that his termination was unlawful and unfair. He also prayed for payment as follows:
 - a. Salary in lieu of notice Kshs 9, 500.00.
 - b. Salary arrears for the month of April 2015 Kshs 19,000.00.
 - c. Leave allowance 2 years Kshs 19,000.00.
 - d. Compensation for unlawful termination $12 \times 9, 500 =$ Kshs 114,000.00.
 - e. Service pay 15 days for 4 years Kshs 180,500.00.
 - f. Certificate of service.
 - g. Costs and interest of the suit.



- h. Any further award as the court may deem fit.
2. The respondent filed the memorandum of response on June 7, 2018 through Ndirangu Kamau Advocates. The respondent admitted employing the claimant as a security guard but denied sacking or terminating his employment. The respondent pleaded that upon his being charged with the alleged criminal offence and the case being withdrawn, the claimant failed to report back at work. The respondent's further case was that the claimant therefore deserted duty and the respondent claimed that it was entitled to one-month salary in lieu of the termination notice. The respondent admitted receiving the demand letter but did not reply because the claimant had deserted employment. The respondent pleaded it was ready to pay leave, salary for March and April 2015 and that the claimant being a member of NSSF, he was not entitled to service pay. The respondent pleaded that the suit be otherwise dismissed with costs.
3. By consent at the hearing on July 26, 2022 a partial judgment was entered for the claimant for:
- One-month salary for March 2015 Kshs 9,500.00.
 - Certificate of service be delivered by August 5, 2022.
 - Leave for 2014 Kshs 9,500.00 and 3 months for 2015 Kshs 2,375.00.
 - Claim on service pay dropped.
 - Amount awarded be paid by August 5, 2022.
4. The outstanding issue for determination is whether the termination was unfair or unlawful. The claimant testified as follows. On February 4, 2012 he was on a guarding assignment at a place known as sub-station. In the process it was reported that a certain cable had gone missing. The missing cable had been cut from an area not assigned to the claimant to guard and the supervisor had discovered that the cable had been cut. The supervisor known as Etyang alleged that the claimant had attempted to steal the cable in issue. The supervisor called the duty officer from KenGen and the cut cable was taken away. The supervisor then asked the claimant to handover the uniform and to report to the police station at Changamwe. The claimant was charged with a criminal offence but the criminal case was withdrawn on June 9, 2016. He further testified thus,

“I reported to the respondent. I met Chengo Bernard the Manager. Kiarie was also present. I requested for terminal dues. He rejected my request. I sued. I was not given termination notice or a disciplinary hearing. I was fired verbally. It was verbal one week after June 9, 2016.”

The claimant testified that his last day at work was on March 28, 2015 and after withdrawal of the criminal case, he reported at the office in June 2016 after a year and 3 months. His further evidence was that he could not report at work as long as the criminal case had not been concluded.

5. The respondent's witness (RW) was Bernard Kyengo Kawea, the respondent's Branch Manager overseeing the operations in Coast Region. His evidence was that after March 28, 2015 the claimant was arrested and prosecuted - and he had reported back at work sometimes in 2016 after a long time had lapsed. Further, the complainant in the criminal case had been the respondent's client (KenGen) and not the respondent. RW testified that after the arrest and charging, the claimant had been released but had failed to report at work promptly. The respondent had the claimant's phone number but had never tried to reach him until he resurfaced in 2016. Further, when the criminal case ended, he reported back to the respondent.



6. The court has considered the evidence and the submissions filed for the parties. The mutual evidence is that the claimant's last day at work was on March 28, 2015 when he was arrested. The further mutual evidence is that after the discharge in the criminal case the claimant reported to the respondent sometimes in 2016 and he demanded his terminal dues – and not to continue in employment. The court finds that the termination was on March 28, 2015 when the supervisor asked the claimant to hand in the uniform and he was subsequently arrested and charged. The court further finds that the termination on March 28, 2015 was in breach of section 41 of the [Employment Act, 2007](#) on notice and hearing in presence of a representative. By his own evidence, in early 2016 the claimant reported back and demanded his final dues. The court finds that the termination was unfair for want of due process of a notice and a hearing as per section 41 of the [Act](#).
7. The claimant has prayed for 12 months' salaries in compensation. The court has considered the mitigating factors in favour of the respondent. First, there is no dispute that the claimant was arrested and subsequently charged with a criminal offence. It appears to the court that the complainant being the respondent's client (KenGen), the respondent has established that the reason for separation on March 28, 2015 existed as at the date of that separation. Second, while the respondent failed to contact the claimant after the arrest, the claimant equally took no steps to contact the respondent until sometimes in 2016. Nevertheless, under section 41 of the [Act](#), the respondent carried the obligation to initiate the disciplinary proceedings and no reasonable ground has been established as barring the respondent to do so. The court has considered that if the respondent had afforded the claimant the disciplinary notice and hearing, then the claimant would have had an opportunity to explain himself or to exculpate. In the circumstances and to balance justice for the parties, the claimant is awarded three months' salaries for the unfair or unlawful termination that was unprocedural. The claimant is also awarded one-month salary in lieu of the termination notice and in terms of section 36 of the [Act](#). Thus, the award is for Kshs 9,500 x 4 making Kshs 38,000.00. The court has considered the partial judgment on record already satisfied and all circumstances of the case and awards the claimant only partial costs of the suit now fixed at Kshs 30,000.00 only.
8. In conclusion, judgment is hereby entered for the claimant against the respondent for:
 1. The declaration that the termination of was unlawful and unfair.
 2. The respondent to pay the claimant a sum of Kshs 68,000.00 by December 1, 2022 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 14TH OCTOBER, 2022.

BYRAM ONGAYA

JUDGE

