



**Sagasi v Kenya Airports Authority (Cause 45 of 2019)
[2022] KEELRC 12850 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12850 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 45 OF 2019
NJ ABUODHA, J
OCTOBER 14, 2022**

BETWEEN

JOHN KIPSIRUON SAGASI CLAIMANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

JUDGMENT

1. The claimant pleaded that at all material times he was employed by the respondent as a security warden. He was initially appointed on March 7, 2002 and posted to Moi International Airports Mombasa. The claimant was subsequently transferred to Eldoret International Airport and later to Kisumu International Airport.
2. The claimant's initial salary was Ksh 23,951 with a housing allowance of Ksh 14,018/=. At the time of termination, the claimant's basic salary was Ksh 69,626/= and a house allowance of Ksh 26,005/=.
3. The claimant averred that on March 20, 2018 the respondent suspended him from duty alleging that on March 14, 2018 he had been found with twenty rolls of razor wire, the respondent's property. He was arrested and charged at Kisumu Chief Magistrate's Court. The respondent further indicated that the claimant was not to be paid any salary during the suspension.
4. The respondent later sent the claimant a letter to show cause dated May 21, 2015 in which the respondent indicated that one Mr Jotham Mbago had been found in possession of five rolls of razor wire and which rolls Mbago alleged belonged to the claimant. Upon further search at the Public Works residence, sixteen rolls of razor wire were found and it was from the same that the respondent indicated that the management was contemplating severe disciplinary action against the claimant. The claimant responded to the show cause letter denying the allegations.
5. The claimant further alleged that after the arrest, he did not attend any disciplinary hearing. He was later summarily dismissed through a letter dated August 9, 2018 on grounds of gross misconduct.



According to the claimant, the dismissal was without prior notification and further without any hearing being accorded to him in the company of a shop floor union representative since he was a member of Kenya Aviation Workers Union.

6. The claimant further averred that the respondent had him arrested over the alleged gross misconduct without first exhausting its internal disciplinary mechanism as enshrined in its Human Resource Manual and CBA between the respondent and KAWU. The claimant therefore sought the payment of his terminal dues as well as compensation for unfair termination of service.
7. The respondent filed a response to the claim through FKE in which they pleaded among others that the claimant was a former employee of the respondent performing duties of a Security Warden and was stationed at Kisumu International Airport.
8. On March 14, 2018 one of the employees of environmental service provider by the name Jotham Mbago was found in possession of fire rolls of razor wire, the property of the respondent and upon questioning he mentioned the claimant as the owner. Based on the revelation, investigations were commenced and the claimant was issued with a show cause letter to explain why disciplinary action should not be taken against him for the misconduct.
9. The claimant responded to the show cause letter insisting the management should halt any internal process of disciplinary nature since he had been charged in a criminal court.
10. According to the respondent, since the claimant's explanation was wanting, the respondent constituted a disciplinary committee to give the claimant a chance to defend himself against the allegations and where several witnesses gave evidence that was incriminating the claimant. The claimant was consequently dismissed summarily and paid his terminal dues.
11. At the oral hearing, the claimant adopted his witness statements recorded on September 26, 2019 as his evidence in chief. He also relied on the documents filed with the claim.
12. In cross examination he stated that he was issued with a show cause letter and that he responded to it. He stated therein that it was undesirable to discuss the issue because it was pending in court. He denied receiving the letter of invitation to a disciplinary hearing and was not aware if any took place. His services was terminated through a letter dated August 9, 2018.
13. It was his evidence that the criminal case ended in 2019, that it was after he had been terminated. He denied refusing to attend the disciplinary hearing and stated that he never received the letter of invitation to disciplinary hearing.
14. The respondent's witness Ms Jacinta Wafubwa informed the court that she was the acting Employee Relations Manager and that she had worked for the respondent for 19 years. She relied on her witness statement recorded on July 6, 2021 as her evidence in chief. She also relied on the documents filed with the responded to the claim.
15. According to the witness, on March 14, 2018 an employee of the respondent, Jotham had 5 rolls of razor wire in the tractor. As he was passing through a police officer asked him about the razor wire and he said they belonged to the claimant. On further investigation sixteen more rolls were found in Jotham's house.
16. The claimant was consequently suspended as the respondent started its investigations. The claimant was issued with a show cause letter to which he responded and later invited for a disciplinary hearing. He appeared with a representative. He was at the conclusion of the hearing terminated and paid his terminal dues. He was further issued with a certificate of service.



17. In cross-examination she stated that she never participated in the disciplinary proceedings and that she was based in Nairobi while the disciplinary hearing took place in Kisumu.
18. It was Ms. Wafubwa's evidence that the claimant was never found with any razor wire and that the house where the razor wire was found belonged to Jotham and not the claimant. Jotham was not an employee of the respondent. He was an employee of outsourced cleaning services provider. The witness further stated that Jotham was not a witness in the case and that she did not have his statement implicating the claimant.
19. Regarding disciplinary hearing, it was her evidence that the minutes of the disciplinary hearing were not before the court and further that the letter inviting the claimant to the disciplinary hearing was also not before the court however the claimant attended the disciplinary hearing.
20. Section 47(5) of the *Employment Act* places the responsibility to prove reasons for termination on the employer while placing the responsibility to prove that an unfair termination has occurred on the employee. Under the Act a termination will be considered unfair if an employer fails to prove that the reason for termination is a fair reason. The claimant herein was accused of stealing or rather attempting to steal some 21 rolls of razor wire, property of the respondent who was his employer. The facts which are not contested by each side were in material part that the alleged razor wires were found in possession of one Jotham Mbago who stated that they belonged to the claimant. It is on this basis that the claimant was arrested and charged at the same time issued with a notice to show cause and taken through a disciplinary hearing and eventually summarily dismissed. Prior to dismissal, the claimant was placed on suspension to allow the further investigation. No investigation report was filed before the court for perusal.
21. The allegations against the claimant were through a third party. It therefore became critical that the respondent called this 3rd party (Mr Jotham Mbago) as a witness either before the disciplinary panel and or the court. No such allegation was made. Besides the allegations against the claimant being through a third party and were allegedly subjected to further investigations, it was important for the investigation report to be availed both to the claimant and court to enable better understanding over the veracity of the allegations against the claimant.
22. From the above observations and after careful analysis of the evidence, the court is of the view that the respondent failed to discharge the burden cast upon it by section 47(5) read together with section 45 of the *Employment Act*. The court therefore returns a finding that the termination of the claimant's service was unfair.
23. Regarding compensation, the claimant laid claim for unpaid overtime, accrued leave and unpaid public holidays. However, the claimant never produced any document nor led any evidence to support these claims. Both claimant's written statements which he adopted as his evidence in chief and his oral testimony made no reference to the above claims.
24. It is rule of pleadings that facts pleaded must be proved otherwise they remain just mere allegations. To this extent these heads of claim are hereby rejected.
25. The claimant by the time he was dismissed had worked for the respondent for approximately sixteen years. No evidence was produced tainting his work record apart from the allegations forming the claim before court. Considering the reason for which he was dismissed and further having to go through the inconvenience of a criminal trial to defend himself, the court considers it an appropriate case for awarding the maximum twelve months' salary as compensation for unfair termination.
26. In conclusion the court awards the claimant as follows:



Ksh

- a. One month's salary *in lieu of* notice 95,626
- b. Twelve months' salary as compensation for unfair termination. 1,147,512
- c. Costs of the suit
- d. Items (a) and (b) shall be subject to taxes and statutory deductions.

27. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF OCTOBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

