



Two Four Seven Guards Limited v Kanyigua (Employment and Labour Relations Appeal E008 of 2022) [2022] KEELRC 13549 (KLR) (15 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13549 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2022
ON MAKAU, J
DECEMBER 15, 2022**

BETWEEN

TWO FOUR SEVEN GUARDS LIMITED APPELLANT

AND

SAMUEL NDIRITU KANYIGUA RESPONDENT

*(Being an appeal against the judgment and decree of Hon. M. N. Munyendo
(Principal Magistrate) delivered on 10th June, 2022 in Othaya PM)*

JUDGMENT

Introduction

1. The respondent was employed by the appellant as a Night Guard from 1st February, 2018 to 26th February, 2020 when, allegedly he was dismissed from service by the appellant. At the said time he was earning a monthly salary of Kshs.8,000 and he was based at Othaya KMTC.
2. On 4th June 2020, the respondent filed suit at the Senior Resident Magistrate's Court Othaya alleging that his dismissal was unfair and unlawful. He also alleged that his salary was underpaid since the minimum statutory salary was Kshs.9,931.71. Therefore he prayed for the following reliefs:
 - a. Declaration that he is entitled to the minimum terms and conditions of employment provided in the *Employment Act* and the *Labour Institutions Act* in the place of the terms and conditions of employment between him and the appellant.
 - b. Compensation for unfair termination at the rate of $\text{Kshs.9,931.75} \times 12 = \text{Kshs.119,180.90}$.
 - c. One month salary in lieu of notice.
 - d. Interest on (b) and (c) above.
 - e. Certificate of service.



- f. Costs of the suit with interest.
 - g. Any other relief the court may deem fit.
3. The appellant filed defence on 24th June, 2021 denying liability and the matter went to trial. After considering all the material presented by both sides, the trial court (Hon. Munyendo – PM) delivered the impugned judgment on 10th June, 2022 in which he framed the following issues for determination:
- a. Whether the claimant absconded duty or the respondent terminated his employment.
 - b. Whether the termination of employment of the claimant was wrongful, unfair and unlawful.
 - c. Whether the claimant is entitled to the reliefs sought.
4. The court analyzed the evidence and made a finding that the answer to all the three issues framed was in the affirmative. Consequently it granted the declaratory order sought plus Kshs.103,632 as compensation for unfair termination. Costs and interest were also awarded to the claimant.
5. The appellant was aggrieved and brought the instant appeal challenging the whole decision on the following 5 grounds:
1. The learned trial magistrate erred in law and in fact in holding that the claimant was summarily dismissed, yet there was no letter from the appellant summarily dismissing him or terminating his employment.
 2. The learned trial magistrate erred in law and in fact in holding that the respondent was unfairly terminated and consequently awarding 12 months gross salary as compensation for unfair termination.
 3. The learned trial magistrate erred in law and in fact in holding that the respondent had not absconded work having left his workplace for about 10 months as he was undergoing a criminal trial.
 4. The learned trial magistrate erred in law and in fact in holding that the claimant was entitled to some benefits yet he was the one who absconded work.
 5. The learned trial magistrate erred in law and in fact in failing to appreciate that the appellant made effort by asking the respondent to report to work vide a report to work letter after being discharged from the criminal case and even compensating the complainant on the respondent’s behalf in order to secure his release to enable him to report to work, but instead he still refused to report to work.
6. The appeal was canvassed by written submissions. On the first ground of appeal, the appellant faulted the trial court for finding that the claimant was summarily dismissed yet there was no dismissal letter issued by it or was tendered as evidence. It was submitted for the appellant that paragraph 3 of the Memorandum of Claim only alleged that the claimant was orally dismissed but it did not state who terminated the services and when. Accordingly, it was submitted that there was no sufficient proof that the claimant was dismissed.
7. For emphasis, reliance was placed on Section 47(5) of the *Employment Act* which provides that the burden of proof in any complaint of unfair termination rests on the employee. Reliance was also placed on the case of *Kipkere Limited v Peterson Ondieki Tai* [2016] eKLR where the court held that he who asserts must prove his case.



8. It was further urged that the letter by Komu & Kamenju Advocates which stated that the respondent had been summarily dismissed was not a dismissal letter and it was not written by the appellant. It was further submitted that the defence witness one Ms. Teresia Wacuka Gathara told the court that she was not aware of the said letter by the advocate. The appellant maintained that the alleged summary dismissal was also not proved since no evidence of the alleged oral termination was tendered.
9. As regards the second ground of appeal, the appellant submitted that the trial court erred in law by holding that the respondent was unfairly dismissed and in awarding 12 months salary as compensation for unfair termination. The appellant maintained that the claimant did not prove by evidence that he was orally dismissed as alleged.
10. The appellant, further argued that the trial court erred in law in holding that the respondent had not absconded work yet he stayed away from work for 10 months while facing criminal case. It was submitted that up to 16th November, 2020 when the respondent's case was withdrawn, he never reported to work and he never did so thereafter even after a letter was written to him on 18th November, 2020. It is the appellant's case that after bailing out the respondent and having the criminal charges withdrawn, the respondent left employment without a word.
11. From the foregoing submissions, it was submitted for the appellant that the trial court erred in law and fact in holding that the claimant was entitled to some benefits yet he was the one who absconded work.
12. Finally the appellant submitted on the fifth ground of appeal that the trial court erred in law and fact in failing to appreciate its effort and good faith in pursuing the withdrawal of the respondent's criminal charges and writing to him on 18th November, 2020 to report back to work after the discharge. Therefore the appellant urged the court to allow the appeal because the alleged oral termination was not proved and the respondent was not entitled to the reliefs granted by the court.
13. The respondent opposed the appeal and urged the court not to interfere with impugned judgment submitting that the trial court properly analyzed the evidence and found that the appellant had failed to prove that there was valid reason for the dismissal and that a fair procedure was followed.
14. Regarding the first ground of appeal, the respondent submitted that the appellant admitted vide its advocate's letter dated 3rd May, 2021 that it summarily dismissed him. Consequently the court was urged to resolve that issue in favour of the respondent because the court cannot be faulted for making a finding that the respondent was summarily dismissed.
15. As regards the second ground of appeal, the respondent submitted that the trial court was right in holding that he was unfairly dismissed. It was argued that the dismissal was done orally without affording the respondent any hearing because he was in lawful custody until 3rd March, 2020. He was also not issued with a certificate of service until he filed the suit.
16. It was argued that the trial court properly analyzed the evidence on this issue at paragraph 14 to 18 of the impugned judgment and made a finding which cannot be faulted that the appellant had failed to discharge its burden of proving the reasons for the dismissal and that fair procedure was followed.
17. As regards the third ground of appeal, the respondent submitted that the appellant admitted vide the Certificate of Service that his employment ended on 26th February, 2020. He further submitted that the letter by Komu & Kamenju Advocates dated 3rd May, 2021 stated that he was summarily dismissed. He contended that the dismissal occurred one day before being arraigned in court on 27th February, 2020 and therefore the alleged absconding of work for 10 months was not factually correct. He contended that there was no abscondment in the circumstances since he was not in employment during the period he was facing criminal trial.



18. As regards the fourth ground of the appeal it was submitted that the relief awarded was a necessary consequence of the finding of liability against the appellant and therefore the trial court was well within its mandate to grant the reliefs to the respondent.
19. Finally the fifth ground was opposed and the court urged to find that the summary dismissal was admitted by the respondent vide its Advocate's letter and Certificate of Service that the respondent had been summarily dismissed on 26th February, 2020. Consequently, the letter dated 18th November, 2020 asking the respondent to report back to work was inconsequential and an idle afterthought. Accordingly the court was urged to dismiss the appeal with costs.

Analysis and Determination

20. From the submissions filed, it is clear that the following issues comment themselves for determination:-
 - a. Whether the respondent absconded employment or he was summarily dismissed by the appellant.
 - b. If the answer to (a) above is summary dismissal, whether the same was unfair.
 - c. Whether the respondent was entitled to the reliefs sought in the primary suit.
 - d. Who bears costs of the appeal?
21. This being a first appeal I am enjoined to revisit the evidence presented before the trial court, analyze it in order to arrive at my own independent conclusion but bearing in my mind that I did not see or hear the witnesses when they testified. The foregoing mandate has been upheld by a legion of judicial precedents in this country.

Absconding v Summary dismissal

22. The appellant maintained that the respondent left work on 26th February, 2020 when he was arrested for failure to prevent theft at place he was assigned guard on 25th February, 2020. It is the appellant's case that the respondent was charged in court and remained in custody until 3rd March, 2020 when he was released on bail. Thereafter he failed to report to work until he was discharged on 16th November, 2020 after its intervention by compensating the complainant in the criminal case.
23. The appellant further submitted that even after the discharge on 16th November 2020, the respondent never reported back despite a letter dated 18th November, 2020 which was addressed to him to report to work for deployment.
24. The respondent has however maintained that he was orally dismissed by the appellant one day before he was arraigned in court to face the criminal charges. He contended that the letter by appellant's advocate, Komu & Kamenju Advocates dated 3rd May, 2021 and the Certificate of Service given by the appellant after filing the primary suit corroborates his case that he was summarily dismissed by the appellant on 26th February, 2020. Consequently he maintained that alleged abscondment of work for 10 months from 26th February, 2020 does not arise in the circumstances.
25. I have carefully considered the pleadings, evidence and the rival submissions on record. It is clear that the respondent pleaded in paragraph 3 of his Statement of Claim that he was dismissed on 26th February, 2020. No details were pleaded on who dismissed him and the place where it occurred. There is also no details of how the dismissal was communicated to him.



26. Nevertheless there is evidence that summary dismissal was done on 26th February, 2020 and therefore I will not belabor the point. The respondent served a demand letter through his Advocate Waweru Macharia dated 28th April, 2021 stating that he was orally dismissed by the appellant, and the appellant responded to the demand letter on 3rd May, 2021 stating that the respondent was summarily dismissed under Section 44 of the *Employment Act* for absconding work for over 14 days among other reasons. The appellant's witness admitted under oath during the trial that the claimant's employment was terminated on 26th February, 2020. The NSSF statement filed as exhibit also shows that from March 2020, no remittances were made in favour of the respondent. All the above facts point to the conclusion that the respondent was dismissed by the appellant.

Was the termination unfair?

27. Section 45 of the *Employment Act* provides;

- “(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 employee's 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.”

28. In this case there is no dispute that the respondent was arrested and charged in court for negligence, and absenting himself from work which conduct was not compatible with his contract of service as a Watchman. The respondent produces as evidence court proceedings and statements recorded by the police investigators which point to the reason why the appellant decided to dismiss him.

29. The respondent did not state whether he was arrested while on duty or at home. I therefore find that the reason for the dismissal was valid and fair because it related to the respondent's conduct and compatibility with his contract of service as a watchman.

30. However, considering the evidence before the court, the employer did not prove that it followed a fair procedure before dismissing the respondent. Section 41 of the *Employment Act* provides that;-

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”



31. The defence witness confirmed that the respondent was in remand until 3rd March, 2020 when he secured release on bond. There is no evidence tendered to show that before the termination on 26th February, 2020 the respondent was afforded a chance to defend himself before the dismissal. To that extent I find that the summary dismissal of the respondent on 26th February, 2020 was unfair within the meaning of Section 45 of the *Employment Act*. Based on judicial precedent and the aforementioned law, failure by an employer to afford a fair hearing before dismissing his employee renders the decision unfair.

Reliefs

32. Under section 49 read with Section 50 of the *Employment Act*, the court has the mandate to award compensatory damages to an employee whose services have been terminated unfairly. The awards made herein were as a consequence of the finding that the respondent's employment was unfairly terminated. The compensatory damages awarded was discretionary and this court ought not to interfere with discretionary awards unless, as it was held in *Mrao Ltd v First American Bank of Kenya* [2003] eKLR, if it is demonstrated that the trial court misdirected itself on the law, or that it misapprehended the facts and thereby arrived at a wrong decision.
33. In this case the trial court awarded the maximum award of 12 months salary, as per Section 49(1) of the *Employment Act*. No reason was given for the said award as required under Section 49(4) of the Act. The said subsection provides for the factors to be considered by the court while making the award for unfair termination.
34. Had the trial court considered the said factors, it could have arrived at a different decision. In this court's view, the respondent served for a very short period of about one year and he contributed to the termination through misconduct. In the circumstances the award of 12 months salary was manifestly excess. Consequently, an award of 2 months gross salary is fair enough considering the aforementioned factors.
35. Section 35(1)(c) and Section 49(1) of the *Employment Act* entitles him to one month salary in lieu of termination notice but because he did not file any cross appeal, the same is not granted.

Conclusion

36. I have found that the trial court was right in holding that the respondent was unfairly dismissed by the appellant. I have further found that the trial court was right in finding that the respondent was entitled to the reliefs under Section 49 of the *Employment Act* save that he erred in awarding compensatory damages that was manifestly excessive. Consequently, the appeal is partially allowed in the following terms;
- a. The award of compensatory damages of Kshs.103,632 is set aside and substituted with an award of Kshs.17,272.60.
 - b. The above sum attracts interest from the date of impugned judgment but it is subject to statutory deductions.
 - c. Each party to bear own costs of this appeal since it has only partially succeeded.
 - d. The rest of the awards under the impugned judgment remains the same.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2022.

ONESMUS N MAKAU



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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

