



**G4S Security Services Kenya Limited v Alego (Appeal E004 of 2022)
[2022] KEELRC 13449 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13449 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E004 OF 2022
CN BAARI, J
DECEMBER 8, 2022**

BETWEEN

G4S SECURITY SERVICES KENYA LIMITED APPELLANT

AND

PETER COLLINS ODHIAMBO ALEGO RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate Hon. W.K. Onkunya delivered on the 26th January, 2022 in Kisumu CMELRC NO. E045 OF 2020)

JUDGMENT

1. This appeal arises from a judgment rendered on January 26, 2022, where the trial court found in favour of the respondent herein, and proceeded to make a declaration that the termination of the claimant now respondent, was unlawful, unfair and unprocedural, and further proceeded to award one month's salary in lieu of notice, 12 months' salary for the unfair termination, an order for issuance of a certificate of service and costs of the suit and interest thereon.
2. The appellant being aggrieved by the decision of the trial court, lodged this appeal on February 24, 2022.
3. The appeal is premised on the following grounds:
 - i. That the learned magistrate erred in failing to hold that there were fair and valid reasons to terminate the respondent's employment;
 - ii. That the learned magistrate erred in disregarding the reasons for dismissal as set out in the letter to the respondent dated August 11, 2020;
 - iii. That the learned magistrate erred in holding that the appellant's witness, the Human Resource Business Partner, Stephen Owuor, was biased against the respondent, when that was not a matter in issue before her, and was not addressed by the parties and no evidence was led thereon;



- iv. That the learned magistrate did not observe the considerations of section 49 (4) of the [Employment Act](#), and made an award of 12 months' pay as compensation for unlawful termination, which is inordinately high and excessive in the circumstances of the case; and
- v. That the learned magistrate erred in awarding the respondent one month's salary in lieu of notice.

The Appellant's Submissions

4. It is submitted for the appellant that the learned magistrate erred in finding that the appellant's witness, its Human Resource Business Partner, one Stephen Owuor, was biased against the respondent, premised on the fact that the issue of the alleged bias was not a matter in issue before her, and was not addressed by the parties and no evidence was led to prove such bias.
5. It is the appellant's further submission that the learned magistrate failed to substantiate her finding of bias. The appellant sought to rely on the holding in [Galaxy Paints Co Ltd v Falcon Guards Ltd](#) [2000] 2 EA 385, cited with authority in [Central Bank of Kenya v Davies Kivieko Muteti](#) [2009] eKLR, where the Court of Appeal emphasized that:

“It is trite law that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended, the trial court, may only pronounce judgment on issues arising from the pleadings or such issues as the parties have framed for the court's determination”.

6. It is the appellant's submission that the learned magistrate erred when she found that the respondent's representation was not considered before the final verdict was made.
7. The appellant further submits that the respondent admitted at the disciplinary hearing that he did not seek approval for the transportation of the household goods on behalf of his brother-in-law, and which the trial court observed as much in the impugned judgment.
8. The appellant submits that an employer has no obligation to overlook an employee's gross misconduct simply because the employee apologized. The appellant further submits that the respondent's apology did not take away the breakdown of the employer-employee trust relationship, and that the apology did not mitigate the seriousness of the gross misconduct. The appellant had reliance in the holding of the court in [Charles Mokuu Nyamari v Tudor Health Care Limited](#) [2020] eKLR to support this proposition.
9. The appellant submits that having proved that there were valid reasons for termination of the respondent's employment, and that procedural fairness was observed, the court erred in making the award of compensation.
10. The appellant further submits that the award of 12 month's pay as compensation for unlawful termination, is inordinately high and excessive. The appellant relied in [Robert Kimutai Rutto v Hotel Cathay Limited](#) [2018] eKLR where the Court of Appeal stated:-

“..... compensatory damages for unfair dismissal must always be seen as first of all not mandatory or automatic meaning that they should be awarded only in deserving cases; and even where appropriate, there must be an assessment with the range of zero to twelve months in mind.”



11. The appellant further submits that while section 49(1) (c) of the *Employment Act*, 2007, grants courts the discretion to make an award for compensation, such discretion, should not be exercised whimsically. They sought to rely in *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* [2019] eKLR, where the Court of Appeal held that a judge who awards the statutory maximum of 12 months' salary without justification has exceeded his powers.
12. It is the appellant's submission that this court sets aside the trial court's findings, and substitute it with a finding that the appellant had a valid reason for terminating the respondent's employment.

The Respondent's Submissions

13. It is the respondent's submission that the trial court applied the law and facts correctly, and was sufficiently and reasonably within its discretion in arriving at the decision, and that the decision did not include non-issues to the case as alleged by the appellant.
14. It is the respondent's submission that the decision adopted by the appellant was procedurally unfair, and not in compliance with section 41 of the *Employment Act*, hence his termination was *ipso facto* unfair, and the trial court did not in any way misguide itself, but fairly arrived at a just conclusion. The respondent had reliance in the case of *Donald Odeke v Fidelity Security Limited* [2012] eKLR where the court held that it does not matter what offence the employee is accused of. If the employee is not heard the termination is *ipso facto* unfair.
15. It is further submitted that the respondent is entitled to terminal dues as per his statement of claim and the trial court was fair to find in his favour, having served the appellant for over 14 years.
16. The respondent submits that payment in lieu of notice is provided for under sections 35(1) and 36 of the *Employment Act*, and that no evidence was led to show that notice was given for the termination of the claimant/respondent.
17. It is submitted that the respondent was unfairly and unlawfully terminated, and ought to be compensated for the unfair termination caused by the appellant in accordance with section 49(1) (c) of the *Employment Act*, 2007.
18. It is the respondent's prayer that this court upholds the decision of the trial court, in finding the maximum 12 months sufficient in light of the over 14 years of service, termination was not due to fault on his part, and finally for reason that the procedure employed to terminate him was pre-determined.

Analysis and Determination

19. I have considered the appellant's record of appeal, the supplementary record of appeal and the submissions by both parties. The grounds of appeal are summarized as follows:
 - a. That the learned magistrate erred in failing to hold that there were fair and valid reasons to terminate the respondent's employment
 - b. That the learned magistrate did not observe the considerations of section 49 (4) of the *Employment Act*, and made an award of 12 months' pay as compensation for unlawful termination, which is inordinately high and excessive in the circumstances of the case; and
 - c. That the learned magistrate erred in awarding the respondent one month's salary in lieu of notice.



20. In *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] EA, Madan JA (as he then was), had this to say on appeals:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

21. On the question of whether or not the appellant had valid reasons to summarily dismiss the respondent, the letter of summary dismissal dated August 11, 2020, lists the reasons for dismissal as misuse of the company vehicle by transporting goods free of charge, abuse of power bestowed on the respondent in the management of the courier department at the Kisumu branch, and denying the company revenue by offering free transportation of goods.
22. The court record shows that the respondent admitted to the charge of using his company (appellant’s) motor vehicle to transport household goods for his brother-in-law, without receiving money for the transportation.
23. The court record further shows that the appellant’s disciplinary committee of five (5) members, was divided down the middle on the appropriate penalty for the respondent’s misconduct, with two members agreeing to a dismissal, and three holding the view that the respondent be retained and instead, given a final warning letter. The decision to summarily dismiss was reached nonetheless.
24. The appellant no doubt had reason to subject the respondent to disciplinary action owing to the fact that the company lost revenue on account of the respondent’s decision to ‘assist’ a needy relative.
25. In my view, an employer does not need a thousand reasons to terminate an employee (see *Julius Kirimo Mwandoro v KCB Bank Kenya Limited* [2021] eKLR). One valid, fair and justified reason is sufficient to terminate or dismiss, subject only to adherence to procedural fairness.
26. The charges against the respondent however, is one the appellant could easily have sir-charged as courier charges applicable from one town to another are known to the appellant, and this having been suggested by the appellant’s disciplinary committee. I thus find that the penalty meted on the respondent was not proportionate to the offence committed.
27. I agree with the trial court that the summary dismissal handed down on the respondent, was too harsh and punitive considering his remorse, the circumstances under which the wrong was committed, his admission of the wrong, and the apology to the employer.
28. On the question of procedural fairness, the respondent was issued with a suspension letter, followed closely by an invitation to appear before the disciplinary committee, which he did, and further indicated that he did not wish to present a representative. In *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR, the Court of Appeal stated as follows in respect of fair hearing: -

“Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for notification and hearing before termination on grounds of misconduct. The court stated that four elements must be discernable for the procedure to pass:



- a. an explanation of the grounds of termination in a language understood by the employee;
- b. the reason for which the employer is considering termination;
- c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
- d. hearing and considering any representation by the employee and the person chosen by the employee.”

29. Further, in *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the court expounded on the provisions of section 41 as follows: -

“To satisfy the requirements of section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.

27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms.”

30. In my view, the court record is proof that the appellant adhered to the tenets of fair hearing in their handling of the respondent’s case. I thus find and hold that the appellant’s decision was procedurally fair.

31. Concerning the award of 12 months’ salary as compensation for the unfair termination, the appellant asserts that the respondent was dismissed for valid and fair reasons, and thus the award by the trial court should be set aside.

32. This court has found the penalty meted on the respondent punitive, and which thus entitles him to an award of compensation. In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR the court held that the measures of compensation should be guided by the statutory capping at the time of termination.

33. The Court of Appeal has now settled that courts must justify the awards they make by providing reasons for the award. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum of 12 months pay, must be based on sound judicial principles, and that the trial Judge must justify or explain why a claimant is entitled to the maximum award.

34. Section 49 (4) (b) of the *Employment Act*,2007 states thus: -

“A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following-

.....

- (b) The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;”

35. The respondent was charged with misuse of a company vehicle by transporting goods without charging courier charges, abuse of power bestowed on him in the management of the appellant’s courier



department at the Kisumu branch, and denying the company revenue by offering free transportation of goods. The evidence before court is that he admitted to the charge of misusing of the company vehicle by transporting goods free of charge. This goes to confirm that the Respondent no doubt largely contributed to his dismissal.

36. In the circumstances, I find the award by the trial court excessive and inordinately high. Further, considering the respondent's long service (14 years) and his contribution to the dismissal, I set aside the award of 12 months' salary and substitute therewith an award for six (6) months' salary equivalent as compensation for the unfair dismissal.
37. On the award of one month's salary in lieu of dismissal notice, the letter of August 11, 2020, dismissing the respondent stated thus:

“You are therefore dismissed from the company services with effect from August 11, 2020.....you are required to hand in all the company property in your possession to enable us process your final dues.”
38. The letter referred to herein above took effect immediately. No notice was thus issued to the respondent upon dismissal, and the payments that were to be processed were according to the letter, in relation only to days worked up to August 11, 2020, leave earned and not taken up to August 11, 2020, and house allowance.
39. The failure to issue notice or pay in lieu of the notice, no doubt entitles the respondent to the award of one-month salary in lieu of termination notice, which is the notice period agreed upon under clause 5 of the respondent's contract of service with the appellant.
40. The award of pay in lieu of notice is upheld.
41. In whole, the court makes orders as follows: -
 - i. That the trial court's award of 12 months' salary as compensation for unfair and unlawful dismissal is set aside, and substituted therewith six (6) months' salary as compensation for unfair and unlawful termination at KShs 328,946.58/-
 - ii. The award of one month's salary in lieu of termination notice is upheld.
 - iii. The appeal having partially succeeded, I order that each party bears their own costs of the appeal
 - iv. The award of costs and interest by the trial court was not challenged, and is thus left undisturbed.
42. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 8TH DAY OF DECEMBER, 2022.

CHRISTINE N BAARI

JUDGE

Appearance:

Ms Odiero present for the appellant

Mr Ketter present for the respondent



Ms Christine Omollo - court assistant.

