



**Amumbu v Watchdog Alert Limited (Cause 2468 of 2017)  
[2022] KEELRC 13504 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13504 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2468 OF 2017  
AN MWAURE, J  
DECEMBER 7, 2022**

**BETWEEN**

**JAMES KENGO AMUMBU ..... CLAIMANT**

**AND**

**WATCHDOG ALERT LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant by the memorandum of claim dated the 18<sup>th</sup> day of December 2017 and filed on the same date claims that he was unlawfully and unfairly terminated/dismissed from employment.

**Claimants Case**

2. He alleges that he was permanently employed as a security guard with the Respondent earning a monthly salary of ksh 14,042.00 and had worked for 7 years for the Respondent before being dismissed. The claimant avers that on the 1<sup>st</sup> March 2017, without any justifiable cause, reason and / or justification whatsoever the Respondent put him on a three-month compulsory leave. The claimant says that the aforesaid compulsory leave was improper, unfair and aimed at maligning and forcefully intimidate and pressurize the claimant to tender his resignation which he declined to do so.
3. The claimant says that on the resumption of his duties in the month of June 2017, the Respondent surprisingly handed him a summary dismissal letter penned by Mr David Long, the director. The reasons advanced in the letter was refusal to perform his work which he says was untrue. He further states that the dismissal was improper and nor did they follow the process and procedure as outlined under section 41 of the Employment Act 2007.
4. The claimant prays for the following;
  - a. Compensation for unfair termination 12 months x 14,042 = Ksh 168,504



- b. Overtime = Ksh 47, 580
- c. One month salary in lieu of notice = 14, 402
- d. Severance pay – 15 days salary for each year of completed service = 36,005/=
- e. Unpaid holidays Ksh 22, 932
- f. Interests on (a – e) above at court rates.
- g. Costs of the suit.

### **Respondents Case**

5. The Respondent filed the statement of response in person on the 30<sup>th</sup> of January 2018. The law firm of Khaminwa and Co Advocates then filed the Notice of Appointment dated the 5<sup>th</sup> March 2020 on the 06/3/2020. The Respondent alleges that on the 28<sup>th</sup> /2/2017, the claimant had been assigned duties at the Nairobi West School as a dog handler guarding the school alongside other guards from the Company.
6. The Respondent says that a guard from the Company had called the operation manager Mr Kiio Muli and informed him the claimant was to patrol the school with a dog but had tied the dog and was busy betting in the computer lab. It is alleged that the operation manager then proceeded to Nairobi West School and indeed confirmed that the claimant had tied the dog and was busy betting inside the school computer lab. The claimant was then brought to the main gate along Karen Langata.
7. It is stated that a disciplinary hearing was then held where the Claimant was found to have committed gross misconduct. The claimant admitted the misconduct but declined to receive a warning wherein it was decided he be issued with pending leave and resume on the 1<sup>st</sup> June 2017 when he would be fresh. He received his full salary whilst on leave. That when the claimant resumed duty on the 1<sup>st</sup> June 2017, he was told to sign the warning letter which he had declined to sign on the 29/2/2017. This, the Respondent says, amounted to insubordination and a gross misconduct. The dismissal was therefore lawful and was done within the confines of the law.

### **Claimant evidence**

8. CW 1 James Kengo Amumbo gave sworn testimony and adopted the witness statement and the list of documents all dated the 18<sup>th</sup> December, 2017 as evidence and exhibits respectively. He testified that he was employed as security officer and dog handler by the Respondent for 5 years. He says on the 28/1/2017 he saw his boss running towards where he was working. The boss told him he should go to his office the following morning. The claimant says that he was then informed to go on leave for one month which he did and upon resumption was told to take a further 3 months leave. He says that he returned on the 1/6/2017 and was given a letter of termination.
9. He told court that when on compulsory leave, he got no notice that he was to be terminated or any reasons for such and was not invited for a disciplinary meeting. He testified that as per the letter of termination he was told that he had locked the dog and refused to sign a warning letter which letter he never saw. He worked at Nairobi West School and had been advised to keep the dog safe because of the students. He said that he was only making a cup of coffee yet he was accused of betting. He further says never saw a warning letter till he got summary dismissal. He said he used to earn gross salary of Kshs 21,000/-.



## Respondent's Evidence

10. RW 1 Kiiro Muli gave sworn testimony that he works for the Respondent as Manager and Supervisor. He testified that on the 28/1/2017 he was in his house and was called at around 9 pm by the security and told that the claimant had locked the dogs. He said that upon getting to the workplace where claimant was working he found that dogs were tied to the trees whilst the claimant was betting in the computer lab. They tried to ask him why he had tied the dog but he did not respond. The witness was of the view that there were no students at the time.
11. He further says on the 29/3/2017 the claimant was asked to sign a warning letter but declined to do so prompting the termination under section 44 ( c ) of the Employment Act.

## Claimant's Written Submissions

12. The claimant submits that there was no compliance with the requirement of fair procedure as required by section 41 of the Employment Act 2007 as he was not given proper notice, valid reasons nor a hearing prior to the termination contrary to the law. He relied on the holding in Walter Ogal Anuro versus Teachers Service Commission 2013 eKLR to support the contention.
13. On the substantive justification, the claimant argues that he was not accorded an opportunity to respond to the issues raised or be heard in relation thereto, contrary to the express requirements of the section 41 of the Employment Act and section 4 of the Fair Administrative Actions Act he says that nothing points to the validity or fairness of the reasons for termination. The claimant relied on the case of Loice Otieno versus Kenya Commercial Bank Limited Cause Number 1050 of 2011 for the proposition that it is a mandatory requirement to comply with the principles of natural justice.
14. The Respondent did not file the written submissions.

## Determination

### Issues for Determination

- a. Whether the claimant was unfairly terminated
  - b. Whether the claimant is entitled to the reliefs as sought.
15. Section 45 (1) and (2) of the Employment Act 2007 provides that– “(1) No employer shall terminate the employment of an employee unfairly. (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.”
  16. Section 47(1)(5) of the Employment Act 2007 provides that ‘For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
  17. In Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR, the Court of Appeal said that – “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also,



Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

18. Similarly, in *Walter Ogal Anuro versus Teachers Service Commission 2013 eKLR* the Court held that,

‘However, for a termination of employee to pass the fairness test it must be shown there was not only substantive justification but also procedural fairness’

19. The Court of Appeal in *CMC Aviation Limited versus Mohammed NOOR 2013 eKLR*’ expressed itself as follows;

We respectfully agree that unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of the statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of the employment contract, like where the employer dismisses the employee without notice or without the right amount of notice.

20. There are rival statements on the circumstances leading to the dismissal of the claimant. The Respondent says that the events leading to the termination occurred on the 28/2/2017 at around 9 pm when the claimant is said to have gone to a computer lab whilst leaving the dog tied contrary to what was expected as per the work regulations. That the claimant thereafter declined to sign the warning letter when called to do so leading to the termination after the claimant had gone for leave. In my view, the evidence of the Respondent that it decided to issue a warning letter instead of letter of termination after the alleged actions, even if true, serves to show that it never actually deemed the alleged actions by the claimant in themselves serious enough to warrant summary dismissal.

21. After the claimant had allegedly refused to sign the said warning letter, the Respondent never wrote to the claimant explaining that the failure to sign the warning letter had led the Respondent to ask that the claimant proceed on leave and that it was contemplating or had made the decision to terminate him. It was from this letter that the basis of the claims made by the Respondent would have been clear. The warning letter was issued on 28<sup>th</sup> February 2017 and claimant was then sent on compulsory leave from 1<sup>st</sup> March 2017. He was then dismissed on 1<sup>st</sup> June 2017 and was accused of failing to do his duties and refusing to sign and receive a warning letter.

22. At any rate, the claimant led evidence that he could not let the dogs out when the students were still out and that they were not betting but only making coffee. The court should therefore have heard from other witnesses at the school to arrive at the decision taken by the Respondent that the claimant was betting whilst the dogs were tied contrary to the Company regulations. There was for instance no name given of the person who called Respondent witness to the school nor has it been explained why he/she did not testify.

23. There was also no compliance with section 41 of the Employment Act as to the procedure adopted as claimant was not put through disciplinary hearing and was not advised to call a fellow worker as his witness. Section 41 of Employment Act provides:

41. (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.

24. The employment law and numerous authorities now provide that no employer should terminate the employment of an employee without a valid reason and not following the right procedure renders termination both wrongful, unlawful and unprocedural.
25. The case of *Loice Otieno vs Kenya Commercial Bank Ltd* cause no 1050 of 2011, the court held:  
summary dismissal even in the face of fundamental breach of employment contract/ obligations or gross misconduct must not be resorted to without complying with procedural fairness/natural justice. An employer who summarily dismisses an employee without a hearing will be falling a foul of section 41(2) of the Employment Act”.
26. From the following it is clear that the court finds that the respondent has failed to justify fair and lawful termination of claimant’s employment. In the premises judgment is entered in favour of the claimant. He is awarded the following reliefs.

### **Remedies Awarded**

- a. The claimant is awarded 8 months gross salary compensation under section 49 (1) (c) 14,042 x 8 = 112,225/-
- b. The claimant is also awarded 1 month salary in lieu of notice, 21,463 x 1 = Ksh 14,042/-
- c. The court has seen the salary payslip with the indication that there were deductions for the social security payments. The claimant never led evidence why severance pay was justified in the circumstances. The prayer therefore fails.
- d. There was no evidence led as to how the overtime payments and for the holidays arose. The prayers are therefore rejected.
- e. Total award is Kshs 126,378/-
- f. Costs of the suit are awarded to the claimant.
- g. Interest is also awarded from date of judgment till full payment
- h. Certificate of service to be given to the claimant within 14 days from today’s date.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7<sup>TH</sup> DECEMBER, 2022.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice,



the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**ANNA NGIBUINI MWAURE**

**JUDGE**

