



REPUBLIC OF KENYA



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Uwanamo v Maxiguard Equities Limited (Employment and Labour Relations Cause 303 of 2014) [2022] KEELRC 13429 (KLR) (6 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 303 OF 2014**

**HS WASILWA, J
DECEMBER 6, 2022**

BETWEEN

GEORGE SHITOKA UWANAMO CLAIMANT

AND

MAXIGUARD EQUITIES LIMITED RESPONDENT

JUDGMENT

1. The suit was instituted vide the memorandum of claim dated July 7, 2014. The Claimant alleges to have been unfairly terminated and seeking to be compensated for the unfair termination. He sought for the following prayers;
 - a. One-month salary in lieu of notice.
 - b. Underpayments.
 - c. Normal overtime.
 - d. Off duties.
 - e. Two annual leave.
 - f. Salary for 21 days worked in April, 2014.
 - g. Uniform deductions of Kshs 2400.
 - h. Compensation under section 49(1)(c).
 - i. Cost of suit to be borne by the Respondent.



Claimant's case.

2. The Claimant's case is that he was employed by the Respondent as a night guard on the April 9, 2012 at a salary of Kshs 4,500 per month. That he clocked in to work at 6pm to 6am every day of the week without any off day. He added that he worked on all public holidays without any extra pay.
3. He states that during his tenure at the Respondent's employ, he was not allowed to take his annual leave neither was he compensated for the same. He also stated that the Respondent deducted Kshs 2400 as uniform fees which was not refunded upon termination.
4. The circumstances leading to his termination is that on April 21, 2014, he sought for 26 days leave, which had accumulated, to go to his rural home and handle some family matter. That the said leave was allowed but he learnt later that the leave was without pay contrary to the law. Upon resuming back on the May 18, 2014, he was barred from entering the Respondent's premises and ordered to surrender his uniform. It is at that point that he learnt that he had been fired.
5. The Claimant avers that he was unfairly terminated from employment because no reason was given for his termination, neither was he subjected to any disciplinary hearing as envisage under sections 41 and 43 of the Employment Act.
6. In the reply to defence filed on August 8, 2014, the Claimant reiterated his claim and in addition states that the allegation by the Respondent that the company was incorporated in 2013 is not backed up with any evidence as such should not be relied upon. He maintained that he was unfairly terminated and urged this Court to allow the claim's prayed.

Respondent's Case.

7. The Respondent entered appearance on the July 25, 2014 through the firm of Githui and Company advocates and filed a defence and counterclaim on even date, denying the entire claim and in addition stated that the Claimant worked from June, 2013 to April, 2014 as such did not work for more than 12 months. It is stated that the Claimant upon being employed failed to offer his full allegiance to the Respondent instead took up another employment with a fruit vendor within the same premises where the Claimant had been allocated to guard, a fact which only came to the Knowledge of the Respondent when one of the tents which the Claimant was tasked by the fruit vendor to guard got lost. It is further stated that the issue of the lost tent was arbitrated and the Claimant agreed to pay Kshs 15,000. During the same period, the Claimant sought to take leave but since he had not yet clocked 12 months to enjoy the said leave, the Respondent declined the same. The Claimant nevertheless absented himself on April 19, 2014 and never went back to work till a month later only to turn up and ask for his pay for days worked in April, 2014.
8. The Respondent avers that, the company was incorporated and registered on June 4, 2013 and therefore it was not in existence in 2012 when the Claimant is alleging to have been employment. It maintained that the Claimant was employed on June 4, 2013.

Hearing.

9. During hearing the Claimant testified as CW-1 and adopted his witness statement of March 9, 2018 and a further statement of June 20, 2022. He also produced the list of document of July 10, 2014. He then urged the Court to allow the claim as tabulated by his advocates.
10. On cross examination by Alwala Advocates, the witness testified that he was employed in 2012. He testified that the contract of employment produced by the Respondent indicating his employment



was on June 4, 2013 was never issued to him, neither is the signature appearing therein his. He denied ever taking any off days. He maintained that he did not abscond duty and that upon termination he raised the issue with the Labour office but did not receive redress.

11. On re-examination he testified that he was employed in 2012, even though documents were produced to the contrary.
12. The Respondent's director, Josephine Kagendo Gichuru, testified as RW-1 and filed one statement of December 8, 2014 and a further statement of June 23, 2022. In addition, she stated that the Respondent was incorporated on June 4, 2013 and thereafter the Claimant was employed in 2013. She testified that she gave the Claimant off days. She also admitted that the Claimant worked for 12 hours. She testified that when the Claimant deserted work, they wrote to the labour office and informed them of the said action by the Claimant. She also stated that the Claimant went for leave for 26 days in the year 2014. She confirmed that he is entitled to overtime pay and that he was paid in April, 2014. She also affirmed that the Respondent deducted uniform fees.
13. Upon cross examination by Maragia Advocate, the witness testified that she knows Maxiguards Securities Limited and that it is still in existence but that it is separate from the Respondent herein. She testified that upon desertion the Claimant reported later and returned the uniform without the sweater. She also testified that when the Claimant deserted work they raised the issue with the labour office, who directed them to call the Claimant however that her efforts to get in touch with the Claimant were futile as his phone was not going through. She admitted that they did not subject the Claimant to any disciplinary process.
14. On re-examination, RW-1 testified that the Respondent and MaxiGuard Securities Limited are two different companies and the Claimant seems to have been employed by MaxiGuard Securities Limited in 2012 but joined the Respondent in 2013.

Claimant's Submissions.

15. The Claimant submitted from the onset that he was employed by the director of the Respondent, while still operating Maxiguard Securities Limited and later transferred to MaxiGuard Equities Limited, both which are solely owned by the Respondent's director one, Josephine Kagendo Gichuru. To prove this the Claimant stated that the contact number for both companies save for postal address are the same, a clear indication that the said companies are one and the same thing and the differentiation raised by the Respondent is merely to run from paying for services rendered to it from the inception on April 9, 2012.
16. It was submitted that the reason for termination was on alleged desertion due to lost tent. It was argued that if indeed there was such a case then the Respondent ought to have summoned evidence and call witnesses in support of their case. It is their argument that there was no such issue with the Claimant and the Respondent was merely using the same as an excuse to give reason for the unfair termination.
17. On the reason for desertion, the Claimant took issue with the letter dated June 9, 2014, which was produced by the Respondent in support of its claim that it took steps to reach out to the Claimant. That the said letter was only filed in this Court under further statement and the same was not raised in the defence to Claim or in the Respondent's statement as such that the said letter is an afterthought. He argued that save for purported phone call, the Respondent did not take any further steps as they



should have. To support this argument he cited the case of *Judith Atieno Owuor V Sameer Agriculture and Livestock Limited*[2020] eKLR where the Court held that;

“Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the Court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this Court it did accord the Claimant a fair hearing prior to her termination. In the case of *Felistas Acheha Ikatwa v Charles Peter Otieno* (2018) eKLR it was held:“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

17. He also relied on the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

17. The Claimant further relied on the case of *Ronald Nyambu Dandi V Tornado Carries Limited Mombasa*[2019] eKLR where the Court held that;

“Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR).”

17. In light of the foregoing, it was submitted that there is nothing to show efforts taken by the Respondents to comply with the provisions of section 41 of the *Employment Act*. Accordingly, that the termination was not justified in the circumstances and therefore the Claimant urged this Court to allow its claim as prayed.

18. With regards to the counterclaim, the Claimant submitted that the same is not proved and therefore not grantable.

Respondent’s Submissions.

17. The Respondent on the hand submitted that as per the evidence of it witness, the Claimant was indeed employed by Maxiguard securities limited in 2012, where the said RW-1 was manager. He argued that the Respondent was incorporated in 2013 and employed the Claimant as its first employee as such the Claimant’s employment with the Respondent began on June 4, 2013 and not 2012 as pleaded. He argued that the two companies are separate entities with different directors and any claim against Maxiguard Securities Limited ought to be pursued separately.

18. On whether the termination was unfair, it was submitted that section 45(3) of the *Employment Act* bars any claim for unfair termination when an employment has not lasted for more than 13 months.



- On that basis it was submitted that the Claimant was employed by the Respondent on the June 4, 2013 and terminated on April 21, 2014 less than 12 months as such the claim herein is untenable.
19. The Respondent nevertheless argued that the Claimant was engaged in other employments arrangements with third party that caused him loss of a tent for a third part and upon inquiring on the same, the Claimant deserted employment and despite frantic efforts taken to reach out to him, his mobile phone was off as such they could not reach him. It was therefore submitted that disciplinary hearing could not be conducted as the Claimant was out of reach.
 20. On the reliefs sought, it was submitted that the Claimant absconded duty therefore not deserving any of the reliefs sought. On the flip side the Respondent urged this Court to award it one-month salary in lieu of notice as the Claimant failed to give it notice before deserting employment.
 21. On the claim for underpayment, it was argued that the underpayment sought is for the period between May 1, 2012 to April 30, 2013 when the Claimant had not joined the Respondent's employment as such the same is not payable. He added that any underpayment between June 4, 2013 to April 18, 2014 is admitted.
 22. On overtime pay, the Respondent submitted that night guards as per law work for 60 hours in a week translating to 10 hours a day. It was admitted than the Claimant worked 12 hours each days as such the overtime of 2 hours a day is admitted but only for the period between June 4, 2013 to April 18, 2014.
 23. On the off days pay, it was submitted that the Claimant was granted one day off per week and never worked on any public holiday as such is not deserving of this relief. He urged this Court to disallow the claim under this head. He also denied the claim for uniform and argued that the Respondent does not deduct any fees for uniform.
 24. On leave pay, the Respondent admitted that the Claimant did not take his annual leave as he was yet to clock one year at the Respondent's employ, nevertheless that if the same is due it be pro-rated and the claim be awarded Kshs 5,732 for 17 days leave earned.
 25. The Respondent also admitted the 18 days pay not paid for April, 2014.
 26. On costs, it was submitted that the law is clear that when notice of intention to sue is not served, then costs will not be payable. On that basis, he argued that, no demand notice was served upon the Respondent therefore costs of the suit should not issue.
 27. I have examined all evidence and submissions of the parties herein.
 28. The Claimant herein has averred that he was terminated by the Respondent after he came from his 26 days leave.
 29. He returned from the leave and learnt that the leave was without pay contrary to the law. He was then barred from entering the Respondent's premises. No reason was given for his termination.
 30. The Respondent denied terminating the Claimant's services but insist that the Claimant deserted duty and proceeded for leave that he was not entitled to and which had not been approved.
 31. They aver that when the Claimant deserted duty they wrote to the Labour officer and informed them of the said action.
 32. The Respondent aver in their pleadings that the Claimant absconded duty from April 19, 2014 for a month and came back just to demand for his April 2014 salary.



33. The letter the Respondents purportedly wrote to the Labour officer is dated June 9, 2014 and it indicates that the Claimant with others had absconded duty.
34. This evidence however contradicts the evidence given by the Respondent that the Claimant went on leave which was unauthorized and came back a month later to demand for his April 2014 salary.
35. If indeed that was the correct position, the Respondent had a chance to subject the Claimant to a disciplinary process for absenteeism which was never done.
36. The evidence of the Respondent that the Claimant absconded duty therefore fails. There is no evidence that the Claimant was subjected to any disciplinary evidence for absenteeism and neither was there any evidence that this fact of his absenteeism was established.
37. In the circumstances I find the termination of the Claimant was unfair and unjustified as per Section 45 (2) of the [Employment Act 2007](#) which states as follows;-

- “ 45. (1).....
- (2) A termination of employment 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”.

17. I therefore find for the Claimant and I award him as follows;-

1. 1 Month’s salary in lieu of notice = 11,633.55/=
2. Underpayment for June 2013 to May 2014 = 4,500 x 11 = 49,500/=
3. Overtime pay for the same period of 11 months = 1.5 x 3 hours per day for 11 months
 3 hours x 6 days = 18 hours a week x 4 weeks = 72 hours in a month = 72 hours x 11 months
 = 825 hours x 1.5 x 8,873.80/195
 = 56,314.5/=
4. Leave pay for 1 year = 11,633.55/=
5. Salary for May 2014 for 18 days = 8,782.20
6. Uniform deduction = 2,400/=
7. 6 months’ salary as compensation for the unfair termination
 = 6 x 11,633.55/=
 69,801.30/=



Total Awarded = 210,065.10/=

Less statutory deductions

8. The Respondent will pay cost of this suit plus interest t Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Maragia for the Claimant – present

Machoka for the Respondent – present

Court Assistant – Fred

