



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC NO. 281 OF 2018**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT**

**VERSUS**

**G4S KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant, a trade union, sued the Respondent for wrongful dismissal of its member, the grievant, one Mr. Richard Nyariki Ochengo.
2. The claimant states that the grievant was employed by the Respondent on 1<sup>st</sup> February, 2005 as a security guard earning a monthly salary of Kshs 11,000/-. The grievant reported to work at 6:00pm and left a 6:00am without getting any overtime pay.
3. It is the claimant's case that the grievant served the Respondent diligently for 12 years with a clean record of employment till 25<sup>th</sup> July, 2017 when he was issued with a termination letter.
4. At the time of said termination, the grievant was working at Kenya Women Finance Trust (KWFT) bank situated in Olenguruone town outskirts of Molo Town.
5. It is stated that the grievant reported the issue to the claimant who set up meetings with the Respondent to iron out the issue to no avail. The matter then escalated to the labour office. Subsequently the Chief Industrial Relations Officer appointed Mr. George Abuto, a conciliator, via letter dated 16<sup>th</sup> February, 2018 who summoned the parties to a meeting on 6<sup>th</sup> March, 2018 and 12<sup>th</sup> April, 2018 however no progress was recorded.
6. Following the said meeting and in light of the failed negotiation the conciliator compiled his report on the 2<sup>nd</sup> May, 2018, recommending that the claimant be reinstated forthwith back to employment and in the alternative he be paid one-month salary in lieu of Notice, pay for pending annual leave, salary for July and August, 2017, 12 months' salary for compensation for wrongful termination, public holidays not paid, gratuity and accrued overtime.
7. Once the claimant received the conciliator's letter dated 2<sup>nd</sup> May, 2018, it immediately prepared its tabulation of the monies payable to the grievant and served upon the Respondent who failed to act on it leading to the filing of this case.
8. The claimant therefore prays for judgment against the Respondent for; -
  - 1) **A declaration that Mr. Richard Nyariki termination was unlawful.**
  - 2) **The Respondent to pay for the following;**
    - a) **One-month salary in lieu of notice.**
    - b) **Pending annual leave.**
    - c) **Salary for July and August, 2017.**
    - d) **Compensation for 12 months' wages for wrongful termination.**

e) **Gratuity for 12 year of service.**

**3) The costs of this suit be met by the Respondent.**

**4) Any other award the court may deem fit to grant.**

9. The Respondent entered appearance on the 18<sup>th</sup> February, 2019 and filed its response on the 27<sup>th</sup> February, 2019.

10. The Respondent admitted that the grievant was their employee having been employed on the 18<sup>th</sup> November, 2005 earning a salary of 11,000/= per month together with overtime that varied depending on the hours worked each months which was paid together with the salary.

11. According to the Respondent, the grievant was not terminated from employment on 25<sup>th</sup> July, 2017 as alleged. The Respondent stated that the grievant was suspended from duty on 28<sup>th</sup> July, 2017 following a complaint raised against him of leaving the manning of KWFT Olenguruone ATM to a stranger on 15<sup>th</sup> April, 2017 and allowing the said stranger to access the premises without any authorization.

12. Following the said complaint, the Respondent dispatched one of the grievants supervisor, based in Molo Town to investigate on the allegation and upon review of the CCTV footage, it was discovered that the grievant was absent throughout the night of 15<sup>th</sup> April, 2017 and a stranger was seen in the said footage manning the said ATM in place of the grievant.

13. Upon further investigation, it is alleged that the grievant by a statement of 25<sup>th</sup> July, 2017 admitted giving his son access to the premises. Further that the grievant reported to duty as usual at 6pm and left at 9pm only to come back the next day at 10am and take over his colleague's day shift who did not report to work.

14. The Respondent contends that it invited the grievant to show cause why disciplinary action should not be taken against him and in response the grievant admitted allowing his son Brian Nyariki access to the premises but insisted that he was within the premises.

15. A disciplinary hearing was conducted on 31<sup>st</sup> July, 2017 which was attended by the grievant in company of his colleague Richard Momanyi. During the said hearing the grievant admitted allowing a stranger (who was his son) to access the premises and the Respondent dismissed him by a letter of termination dated 6<sup>th</sup> August, 2017.

16. The Respondent denied ever getting an invitation or sitting down with the claimant for the purposes of resolving the dispute herein.

17. The Respondent however admitted getting summons from the labour office which it was dissatisfied with the recommendation made by the conciliator and sought to appeal the said decision from the conciliator who indicated that it had no power to sit on an appeal against its own decision.

18. The Respondent admitted receiving a tabulation of the grievants terminal due but failed to pay as the Respondent was of the opinion that the grievant was terminated on justifiable reasons and therefore was not entitled to any of the reliefs sought.

19. The Respondent stated that the claim is unmerited and urged this court to dismiss it with costs.

### **Hearing.**

20. During hearing the Grievant, **Richard Nyariki Ochengo (CW-1)**, testified that he was with his son the fateful day at his place of work but his son did not work for him. He testified that he made an apology to the Respondent who instead summoned him for disciplinary hearing and in the hearing he stated that he was accompanied by his friend Richard Momanyi who also gave his statement but his testimony was not considered. He maintained that he was at his place of work, outside the ATM, but did not understand why the CCTV camera failed to capture him. It was CW-1 testimony that he worked for that night and day shift since his colleague was unwell and the Bank could not be left unattended. He testified that he did not inform the supervisor about his colleague's absence as the colleague informed him that he had already called the supervisor to no avail.

21. The grievant testified further that on the date that he was alleged not on duty nothing was stolen or any anomaly reported. He stated that he was subjected through the procedure of termination but the termination in itself was unfair and prayed to be awarded the claim as prayed.

22. On cross examination, the witness testified that he was employed to guard KWFT ATM located at Olenguruone and he could sit either inside the ATM cubicle or outside. On the 15<sup>th</sup> April, 2015 his son was with him at work and he allowed his son to sit inside the cubicle while he guarded the ATM while sited outside leading to his suspension on the 28<sup>th</sup> July, 2017 and dismissal thereafter. He admitted allowing his son, Brian Nyariki, 15 years, to sit at the ATM Cubicle for security reason. He stated that his son arrived at his place of work at around 23hours and it was not safe for his son to go home alone, a fact that he apologized to the Respondent.

23. On further cross examination, the grievant testified that he was dismissed and informed that he will be paid for 5 days worked in August, 2017, Overtime, house allowance and leave days which is yet to be paid. He stated that he had a loan with Nyati Sacco that was still running.

24. The Respondent called one witness, **Jacqueline Onyango(RW-1)**, The Respondent's Human Resource officer who sought to adopt his witness statement dated 22<sup>nd</sup> February, 2019 which basically reiterated the Respondent's Response to claim.

25. On cross examination, she testified that the grievant had worked for the Respondent for 12 years. On 26<sup>th</sup> July, 2017, it received a complaint from the Respondent customer, KWFT Olenguruone, that the grievant was absent from his place of work on the 15<sup>th</sup> April, 2017. On investigation and the CCTV Footage it was discovered that indeed the grievant reported to work as usual and worked till 21 hours and was never traced in the footage till the next day.

26. The witness testified that none of the Respondent's management staff had viewed the CCTV footage prior to the disciplinary hearing save for the grievant's supervisor who was not present during disciplinary hearing. The witness stated that the Respondent conducted independent investigation that informed the grievant's termination. The witness stated also that the Respondent paid the grievant his July salary, leave days and affirmed that they did not pay any gratuity since he was summarily dismissed therefore not entitled to compensation.

### **Submissions**

27. The claimant submitted from the onset that the grievant was not subjected to substantive and procedural fairness before the termination. It was argued that for termination of an employee to pass the fairness test, there must be substantive justification and procedural fairness as was held in the case of **Walter Ogal Anuro –v- Teacher Service Commission [2013] eKLR**. Accordingly, it was submitted that there was no reason at all given by the Respondent as per section 41 of the Employment Act, to warrant the dismissal.

28. According to the Claimant, the main reason for termination of the grievant's employment was for absencing himself from work on 15<sup>th</sup> April, 2017 and handing over work to a stranger which allegation was captured in a CCTV camera, however the Claimant submitted that the CCTV was not shown to the Grievant neither was it produced during hearing to affirm the said allegation and the only person that viewed the said footage Mr. Brian Otieno, the grievant's supervisor, was not present during disciplinary hearing for cross examination or during this hearing to affirm the said allegation therefore the claimant maintained that the reason for termination was not proved and the termination thereafter was unfair in the circumstances.

29. The claimant also cited the court of Appeal case of **National bank of Kenya –v- Anthony Njue John [2019] eKLR** where the court while citing this Court's decision in **Janet Nyandiko –v- Kenya Commercial Bank Limited [2017] eKLR** stated that;

**“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.**

**The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41..”**

30. The claimant submitted further that the Respondent failed to accord the grievant a fair hearing by failing to; show the CCTV footage to the grievant despite the request, failed to conduct independent investigation to arrive at an informed decision and instead relied on KWFT management internal Audit report and the fact that the grievant was not afforded an opportunity to Appeal the Respondent decision.

31. In conclusion the claimant submitted that it has proved its claim to the required standard and urged this Court to allow the claim as prayed.

32. The Respondent on the other hand submitted that that the grievant was termination on valid ground being absconding duty and handing over duties to a stranger, failing to adhere to assignment instructions and allowing a stranger to gain access to the customer's premises without customer's consent.

33. It was argued that section 44 of the Employment Act allows an employer to dismiss an employee for breaching their obligation arising out of their contract.

34. The Respondent submitted that in the statement written by the grievant in relation to the issue herein and during the disciplinary hearing the grievant admitted allowing a stranger, who he claimed to be his son, to gain access to the ATM cubicle without permission. It was argued that the actions of the grievant breached his contract of employment therefore the respondent was obliged to dismiss him but instead the Respondent was gracious and subjected him to disciplinary hearing before the said termination. The Respondent reinforced its argument by citing the case of **Leah Nzemi Nzyoka –v- Riley Services Limited [2020] eKLR**.

35. The Respondent also submitted that the grievant's actions of allowing a stranger to its customers premises risked the customer's premises since the stranger was not a trained guard and also the Respondent risked losing the customer to others service providers. The fact that no loss of property occurred on the said night should not exonerate the grievant from the wrong doing, in this they cited the case of **Robert Kenya and another –v- Ocean sports Resort [2015] eKLR**.

36. The Respondent also submitted that the CCTV footage was not availed by KWFT a fact that was communicated to the grievant therefore the claim that the Respondent failed to allow the grievant view the CCTV footage is without any basis.

37. On whether proper procedure was followed before termination, the Respondent submitted that the grievant was subjected to disciplinary

hearing and granted a representative to appear with him being Richard Momanyi and the inclusion of the name **George Oloo** in the minutes was an inadvertence on their part.

38. It was argued that due process was followed and the grievant was dismissed on justifiable grounds and his dues calculated and sent to Nyati Sacco to offset his loan. Therefore, the claimant is not entitled to the reliefs sought and impressed upon this Court to disallow the same with costs.

39. I have examined the evidence and submissions of the parties herein. From the evidence of the parties, the grievant was dismissed for absconding duty and leaving a stranger to man the ATM at his place of assignment.

40. The grievant agreed that he indeed allowed his son – 15 years to sit at the ATM lobby as he guarded outside the bank. The CCTV footage was however not shown to the grievant by the respondents to show he was guarding outside the bank. Indeed the respondent argued that they also never saw the footage because the bank refused to release it.

41. The grievant also agreed that he was taken through a disciplinary process though he was not shown the CCTV footage.

42. There is indeed no evidence that the grievant was within the bank or not and given that the CCTV footage was not shown to the grievant or respondent, proof of the reason for dismissal is not established.

43. It is my finding that due to lack of the evidence of the CCTV footage which would have led to proof that the grievant was or was not within the premises the validity of the reason remain limbo and I find the termination unfair and unjustified.

44. In terms of remedies, I find for grievant and award him;

**1. 1 month salary in lieu of notice = 15,374/=**

**2. Salary for July 2017 = 15,374/=**

**3. Annual leave for 1 year = 15,374/=**

**4. Compensation equivalent to 6 months' salary for the unfair termination = 15,374 x 6 = 92,244/=**

**TOTAL = 138,366/=**

**Less statutory deductions**

**5. The respondents will pay costs of the suit plus interest at court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF OCTOBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Opar for Claimant – present

Odero for Respondent – present

Court Assistant - Fred