



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 418 OF 2019**

**DOMINIC OTIENO ODENY.....CLAIMANT**

**VERSUS**

**KENYA KAZI SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant has instituted the instant suit vide a memorandum of claim filed on 27<sup>th</sup> June, 2019 and through which he avers that he was employed as a security officer by the respondent with effect from 24<sup>th</sup> December, 2005 until 8<sup>th</sup> March, 2019 when he was summarily dismissed on grounds that he failed to patrol signals. On this account, he has sought several reliefs including service pay, notice pay and compensatory damages.
2. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. The claimant through his Advocate produced an Affidavit of Service deposed by one Mr. Dickson Mueke Kimeu on 26<sup>th</sup> February, 2021, through which he states that he had effected service of the statement of claim and summons to enter appearance upon the respondent. Annexed to the Affidavit of service is a copy of the copy of the Summons which bears the receiving stamp of the respondent.
3. In the premises, the court directed on 21<sup>st</sup> July, 2021 that the matter proceeds for formal proof hearing.
4. Accordingly, and as directed by Court, the matter proceeded for formal proof hearing on 19<sup>th</sup> October, 2021 and the claimant testified in support of his claim.
5. At the commencement of the hearing, the claimant sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the list and bundle of documents filed together with his claim as exhibits before court.
6. A summary of facts as presented by the claimant is that, he was employed by the respondent as a security officer with effect from 24<sup>th</sup> December, 2005. He told court that on 21<sup>st</sup> February, 2018, he was assigned night duty at Riverside Drive. That following his completion of duty the following morning, his supervisor came and found that everything was fine. That shortly afterwards, he was informed that he had failed to attend to a distress call and when he informed his supervisor as much, he was advised to ignore the call and proceed home. It was his testimony that he later fell sick, a fact he informed his supervisor. He averred that he was later served with a show cause letter and thereafter he was issued with a letter summarily dismissing him from employment. He told court that he appealed against the decision to terminate his services but his appeal was denied. He concluded his testimony by stating that he had never received a warning throughout his service with the respondent. He prayed that his claim be allowed as prayed.

**Submissions**

7. Upon close of the hearing, the claimant filed written submissions through which he urged the court to find that his termination was unfair in terms of 45 of the Employment Act. He placed reliance on the case of the **National Bank of Kenya vs Samuel Nguru Mutonyi (2019) eKLR**, **Nelson Umila Saunya vs Ideal Security Limited (2021) eKLR** and **Godfrey Anjere vs Unique Suppliers Limited (2013) eKLR**.

**Analysis and determination**

8. The issues arising from the pleadings on record, the evidence placed before court as well as the submissions can be distilled as follows;

**a) Whether the claimant's termination was unfair and unlawful?**

**b) Is the claimant entitled to the reliefs sought?**

**Whether the claimant's termination unfair and unlawful?**

9. The claimant has alleged that his termination was unfair, hence it is necessary to consider the facts and circumstances presented herein vis a vis the relevant provisions of the Employment Act.

10. The starting point is **Section 43(1)** of the Employment Act (Act), which requires an employer to prove reasons for an employee's termination, failure to which such termination is deemed to be unfair. In addition, **Section 45 (2)** of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. Tied to this provision, is **Section 45 (2) (c)** of the Act, which requires an employer to prove that it complied with the requirements of fair process in undertaking the termination.

11. The specific requirements of fair hearing are espoused under **Section 41(1)** of the Act which mandates an employer to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

12. The foregoing is a summary of the legal threshold set under the Act and which an employer must comply with, for a termination to be deemed fair. The same can be split into two parts, with the first limb being the justification of reasons for termination while second limb constitutes the process applied in terminating the employment of the employee.

13. It is also instructive to note that the burden of proof, lies with the employer. The Court of Appeal in the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** held as much, thus; **"the burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer."**

14. On substantive justification, the reasons for the claimant's termination can be ascertained from his letter of summary dismissal which reads in part as follows;

*"RE: SUMMARY DISMISSAL*

*...On 21<sup>st</sup> February, 2018, while assigned duties at First Cargo Logistics, a failure to patrol signal was received in our National Control Centre. Our mobile response team was dispatched to check the reason for the failure and on arrival, you could not explain the reason to why you could not patrol as expeted of you. As you were being issued with a summon note, you declined to pick it and instead tore into pieces. You thereafter booked off duty in the morning and absented yourself from duty for 5 days. You informed the hearing committee that was sitting on 1<sup>st</sup> March, 2018 that you were not feeling well, you did not produce a certificate of incapacity as stipulated in section 30 of the Employment Act 2007 covering the period you were away. An employee who absents himself /herself from work without leave or other lawful cause can be summarily dismissed as stipulated in the Employment Act 2007 section 44-4-a (sic). By a copy of this letter, you are advised that the management has summarily dismissed you with immediate effect. Kindly clear to enable us process your terminal dues less any outstanding liabilities..."*

15. From the letter of summary dismissal, it is notable that the claimant was terminated on grounds of insubordination and absenteeism. The claimant has termed the allegations which constituted the reasons for his dismissal as false. Indeed, these allegations are serious in nature and constitute grounds for summary dismissal under section 44 of the Act.

16. In terms of section 45 (2) of the Act, an employer is bound to prove that the reasons for an employee's termination are valid and fair. Therefore, it is not enough to spell out the reasons/grounds for termination in the letter of summary dismissal. Logically, validity and fairness of the reasons can only be established upon analysis of the documentary and oral evidence presented by the employer during the trial process. It is only then, that the court can determine the validity and fairness of a termination from employment.

17. As stated herein, the respondent neither tendered a defence nor participated in the trial despite being served appropriately. Accordingly, there is no evidence from its end to justify the reasons for the claimant's dismissal. On his part, the claimant presented clinical summary notes from Kayole Modern Clinic. He has also produced a receipt from the said medical center to explain his absence from duty. It is not clear whether the same were ever presented to the respondent. Be that as it may, it was upon the respondent to appear in court and contest the same. This was never done, hence the claimant's evidence as presented is not controverted.

18. In light of the foregoing, the burden placed on the respondent by sections 43 (1) and 45(2) of the Act was not discharged at all.

19. As regards the second limb of fair hearing, it is implied from the show cause letter and letter of summary dismissal which were presented as exhibits before court, that the claimant was subjected to a hearing process of sorts.

20. However, for such a process to meet the threshold of fairness under the Act, there are several components which need to be proved. Such proof can either be tendered through documentary or oral evidence. It is also notable that the burden of proof rests on the employer. In this case, there is no such evidence on record as the respondent failed to tender a defence and participate in the trial process. Consequently, the burden of proof remains undischarged.

21. The total sum of the foregoing is that the termination of the respondent cannot be said to be lawful and fair in terms of sections 43(1) and 45(2) of the Act and I so find.

22. Having found as such, what remedies then, avail to the claimant?

**Reliefs**

23. Having found that the claimant's termination was unfair and unlawful, I will award him eight (8) month's gross salary as compensatory damages. This award is informed by the claimant's length of service with the respondent and the fact that the reasons for his dismissal from employment were not justified at all.

24. I further award the claimant one (1) month's salary in lieu of notice pursuant to the provisions of section 35 (1) (c) of the Act.

25. I decline to award the claimant service pay as his pay slips indicate that he was contributing towards the National Social Security Fund (NSSF), thus placing him within the ambit of the exclusions spelt out under section 35 (6) (d) of the Act.

**Orders**

26. In the circumstances, I enter Judgment in favour of the claimant against the respondent as follows;

- (a) A declaration that the claimant's termination by the respondent was unfair and unlawful.**
- (b) The claimant is awarded compensatory damages in the sum of Kshs 176,352.24 which sum is equivalent to 8 months gross salary.**
- (c) One month's salary in lieu of notice being Kshs 22,044.03.**
- (d) The total award is Kshs 198,396.27**
- (e) The claimant shall have the costs of the suit.**
- (f) Interest on the amount in (d) at court rates from the date of Judgement till payment in full.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant	Ms. Kioko
For the Respondent	No appearance
Court Assistant	Barille Sora

**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.

**STELLA RUTTO**

**JUDGE**