



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT [--AT NAIROBI

CAUSE NO. 1629 OF 2018

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DANIEL OUMA ODUNDO.....CLAIMANT

VERSUS

KK SECURITY.....RESPONDENT

JUDGMENT

1. Claimant brought his claim vide his memorandum of claim dated 9th December, 2019.

He says he was employed by the Respondent on 1st January, 1992 until 1st August, 2018.

He says he started as a security guard but rose to the rank of an Assistant Operations Manager.

2. He says that on 1st August, 2018 the Respondent without any justifiable reason unlawfully terminated his employment. At the time of his termination he was earning Kshs.91,500/=.

3. He avers that the reason for his termination were that he had authorized the security officers of the Respondent to live at client's premises on Granville Grove through O & M advocates.

He says the allegations were malicious as the operations officer who was his immediate boss is the one who instructed that security officers who had been transferred from Kisumu be housed there

4. He says he then received a notice to show cause letter dated 4th July, 2018. He further says he responded to the letter dated 4th July, 2018.

Claimant says he was then invited for a disciplinary hearing by a letter dated 12th July, 2018.

5. The disciplinary hearing took place on 18th July, 2018 and he says he responded to all the issues raised.

He says that on 6th March, 2017 he received a letter of intention to terminate his employment on account of carelessly and improperly performing his duties.

6. Claimant says his employment was terminated and he has paid only Kshs.410,560/30 as his final dues.

The Claimant says he then instructed his advocates to send the Respondent a demand letter.

7. He now prays for the following prayers:-

(1) Reinstatement

(2) payment of accrued benefits and other entitlements

(3) General damages

8. He says at the time of termination he was 52 years old and was to retire at the age of 60 years.

9. The prayers for the Claimant are:-

(a) Payment of Kshs.8,784,000/= being payment upto the time of his retirement.

10. An order to reinstate the Claimant and pay all his entitlements from 1st August, 2018 upto the time of his reinstatement.

11. General damages for unfair and unprocedural termination and mental anguish and loss of income.

12. Exemplary damages and any other consequential loss and interest and costs.

13. The Respondent's evidence is that the Claimant worked for the Respondent in various capacities. He worked as a security guard in EARS group which later merged with the Respondent.

He was then promoted to a Senior Security guard and was confirmed by 1st January, 1995. The Respondent says that on 20th January, 2003 he was promoted to a position of a supervisor of EARS Group Limited and on 1st December, 2008 he was appointed a one star field officer in Eldoret.

On 27th April, 2009 he was promoted to Acting Deputy Operations Manager and was placed on 6 months' probation.

The probation period was then revised to one year but he was unable to perform and was put back to Operations Assistant.

14. The Respondent states that the Claimant did not perform his work with diligence and so received several warning letters.

15. The Respondent in particular states that on 12th July, 2018 the Claimant was issued with a notice to show cause for allowing security officers to reside in the premises of a client of the Respondent without the consent of the Respondent or the client.

The Claimant defence was that even though he was aware the security guards were residing in the said premises however they were allowed by his supervisor Mr. Robert Mwinzi – The field supervisor.

16. That based on the above the Claimant was issued with a notice

to show cause dated 4th July, 2018 and he responded.

The Claimant was then invited to a disciplinary hearing and was asked to invite an employee of his choice as his witness or a union representative during the hearing.

17. The hearing was conducted on 20th July, 2018 and Claimant confirmed in writing that he was ready to proceed without a representative.

18. The hearing proceeded as scheduled and according to the Respondent the Claimant confirmed he was aware security officers were occupying the house but that did not mean he was in charge of the operations.

He admitted the issue of occupation of the house was not a problem as the respondents had not referred to it two weeks before the disciplinary hearing. He also admitted he never visited those premises.

19. After the hearing the Respondent concluded the Claimant did not perform his duties diligently and so they terminated his employment. He was given a right of appeal but he did not appeal.

20. The Respondent further avers the allegations against the Claimant are legitimate.

21. As for the allegations that they intended to render him redundant in 2017 was merely a notice to declare his position redundant but it never happened. It is therefore overtaken by events.

22. The Respondent also state that they paid the Claimant the following:-

i. Days worked in August (1) day Kshs.3050/=

ii. One month pay in lieu of notice Kshs.9,150/=

iii. Pay in lieu of leave accrued Kshs.43,737/=

Total Pay Kshs. 119,086.30/=

Severance pay	Kshs.405,900/=
Less PAYE	Kshs.114,425/=
Total Paid	Kshs.291,474.30/=

ISSUES FOR DETERMINATION

23. The issue that need to be interrogated is whether:-

- i. The Respondent had valid reason to terminate the Claimant's employment.
- ii. Whether the Respondent used the right procedure to terminate the Claimant's employment.
- iii. Whether the Claimant is entitled to the reliefs sought.

DETERMINATION

The question of whether the Respondent had a valid reason to terminate the employment, the court have considered the detailed evidence, facts and submissions of the respective parties.

The reason given as to why the Claimant's employment was terminated was that he allowed some security officers of the Respondent to reside in a client's premises on Granville Grove without the consent of the Respondent or even the client.

24. The Respondent said that the Claimant who then was an Assistant Operations Manager failed to report to the Respondent that such security officers were in occupancy of the said building. They aver that as a result of that illegal occupation the client demanded a payment of Kshs.4,665,092.78/=

25. The Claimant in response says he was aware the security officers were living in those premises but he was informed by his supervisor the Field Manager Mr. Robert Mwinzi that they had been granted permission to occupy the premises.

He says it was not his assignment job to supervise the guards as he was allocated daily assignments by the Manager. He said he had no job description.

26. The Respondent's witness are Norine Silwe who confirmed while testifying before the court, that the Operations manager could give instructions to the Assistant Operations Manager even though the Assistant Operations Manager had a job description.

He said that the job description was supposed to be given by the Human Resource Manager and signed for by the employee.

27. The court observed that the job description produced in court as exhibit No.36 of the Respondent's list of documents was not signed by the Claimant or at all. It is not clear therefore if indeed it had been given to him officially.

28. The Respondent has not proved on balance of probability that they had made it clear that the Claimant being the Assistant Supervisor was tasked with the job of supervising the guards. I noted that during the disciplinary hearing the Manager Robert Mwinzi was present but did not give evidence.

Yet I noted that one Simon Mbandi claimed during the hearing he handed the premises to Robert Mwinzi after he evicted some Boranas who were living there.

29. The Respondents have not explained why they picked on the Claimant as the one who was negligent and nothing is said about Robert Mwinzi the Manager.

30. Section 45 (1) and (2) of the Employment Act 2007 provide that "No employer shall terminate the employment of any employee unfairly".

Subsection 2 provide that termination of an employee is unfair if the employer fails to prove that the reason of termination is valid.

31. The court finds that the Respondent has not proved as per the required standards on balance of probability that the Claimant was the one responsible for those guards and that he failed to discharge his duty. The fact that those guards were in the premises for two years shows that there must have more to this situation that what the Respondent is alleging.

The Claimant was a junior person and it is hard to believe that all other managers and supervisors in the Respondent's company did not know that there were guards occupying the premises of a prominent client like an Ambassador.

The court is not convinced by the reason given by the Respondent for terminating the Claimant's employment.

The Respondent has failed the test provided in Section 45 (1) and (2) of the Employment Act.

32. On the issue of procedure followed the Respondent did give the Claimant a notice to show cause and they called him for a disciplinary meeting.

That far the Respondent complied with the requirement of Section 41 of the Employment Act as far as procedure was concerned.

But then the reason for termination was not valid and reasonable. No wonder the Claimant says that when he went for the disciplinary hearing even despite giving his explanation he was dismissed from employment. The claimant is of the view the Respondents had already made up their mind to terminate his employment.

33. It is mandatory that the employer must have a valid reason to terminate the employment of an employees. If there is no reasonable ground or reasons given then the court must find the termination is unlawful.

34. In the cause of **WALTER OGAL VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011** it was held that in order termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness. Further Section 43 of the Employment Act obligated an employer to prove the reason for termination of employment and where the employer failed to do so the termination was deemed to be unfair.

35. The court finds that Respondent failed to give a genuine reason for terminating the Claimant's employment and so enters judgment in favour of the Claimant.

RELEIFS AWARDED

i. The prayer for Kshs.8,784,000/= for the remaining period that would have been served by the Claimant is not specifically provided in Section 49 of the Employment Act 2007 and I find is not realistic to award the same. This prayer is declined.

ii. The prayer for reinstatement is also declined because more than three years have expired since the termination of employment (1st August, 2018) as provided in Section 12 (2) vii of Employment and Labour Relations Court Act.

iii. The general damages awarded are 4 months equivalent in final settlement being Kshs.91,500/= x 4 months

Totaling Kshs.366,000/=

Let me revisit the issue of the prayer for compensation for the remaining period of the contract not served which prayer I declined and say that since the claimant is awarded general damages at least he is cushioned for the general damages and loss suffered.

Costs follow the event and so Claimant is awarded costs

iv. Interest is also awarded at court rates till full payment.

v. In conclusion the Claimant is awarded Kshs.366,000/= for general damages, mental anguish and loss of livelihood plus costs and interest.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 9TH DAY OF DECEMBER 2021.

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 15th March 2020 and subsequent directions of 21st 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE