

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 291 OF 2017

FRANK KIBEGWA OMOGA.....CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for wrongful dismissal and the alleged refusal to pay his terminal benefits. The Claimant averred that he was employed by the Respondent in 2006 as a security officer and that he rose through the ranks to the position of crew commander earning a basic salary of Kshs. 18,101/-. He averred that he was terminated vide a letter dated 30th July 2014 on allegations that he drove a company motor vehicle registration number KBN 322F without authority. The Claimant averred that the termination was unfair and unlawful as he was not accorded an opportunity to be heard and the reasons for termination were not proved. The Claimant averred that these actions by the Respondent violated Sections 41, 42 and 45 of the Employment Act and the rules of natural justice. The Claimant thus prayed for judgment for wrongful and unlawful termination of his services and prayed that the Respondent be compelled to pay his terminal benefits computed as three months' salary in lieu of notice – Kshs. 55,303/-, gratuity (to be computed), twelve months compensation for wrongful dismissal – Kshs. 217,212/-, payment for the days worked up to 30th July 2014, allowances accrued up to 30th July 2014, leave earned and not taken as 30th July 2014, costs of the suit and interest thereon at court rates.

2. The Respondent filed a defence and averred that the Claimant was earning a basic salary of Kshs. 10,116/- together with such allowances as accrued to him from time to time. The Respondent averred that the termination of the Claimant was fair and justifiable as the Claimant had aspired to be a driver in the Respondent's company and that he had been assessed for the position but he had failed the test. The Respondent averred that as a crew commander he was not authorized to drive the Respondent's vehicles. The Respondent averred that it's manager had instructed the Claimant to meet him at Kabonge to conduct a spot check. The Respondent averred that the Claimant was to be driven by Edward Mwendia and the motor vehicle they had, Registration Mark KBN 322F was involved in an accident by colliding with another motor vehicle. The Respondent averred that upon carrying out investigations, it established that the Claimant while in hospital was quoted saying that he was the driver at the time of the accident. The Respondent averred that from the Claimant's confession he was assisted out by onlookers through the driver's exit and that the damage of the motor vehicle's right hand side (the driver's side) was consistent with the injuries sustained by the Claimant thus proving that he was driving the motor vehicle at the time of the accident. The Respondent averred that the Police Officer who first attended the scene of the accident indicated that the onlookers pulled the 'driver' out of the vehicle before he passed out and this was in reference to the Claimant as Edward Mwendia had fled the scene of the accident and his soft tissue injuries were not consistent with the injuries the driver would have sustained from the accident. The Respondent averred that it issued the Claimant with a notice to show cause letter inviting him for a disciplinary hearing for an offence of driving the company's vehicle without authorization and negligently causing damage to the company property. The Respondent averred that the Claimant attended the hearing on 22nd July 2014 together his representative Anthony Paul Mugendi and denied being the driver at the time of the accident. The Respondent averred that it considered the representations made by the Claimant and decided to summarily dismiss him and the decision to dismiss him was communicated formally to the Claimant in writing on 30th July 2014. The Respondent averred that the Claimant was paid his terminal dues totalling Kshs. 75,041/- being one month in lieu of notice – Kshs 10,116/-, leave earned and not taken up to 30th July 2014 – Kshs. 6,070/-, gratuity 8 years – Kshs. 48,557, claim – Kshs. 13,627/- and that in addition he was paid Kshs . 608,194/- paid under his work injury claim and he executed a discharge voucher to confirm that he had no other claim against the Respondent. The Respondent averred that the Claimant was dismissed for gross misconduct hence was not entitled to payment in lieu of notice and gratuity in accordance with the regulation of wages (Protective Security Services) Order 1988, but he nonetheless he received these payments. The Respondent averred that the Claimant's termination of employment was lawful and justifiable as the reason for termination was valid and due process was followed as he was afforded a fair hearing. The Respondent averred that the Claimant is not entitled to any of the reliefs sought as he was lawfully and properly terminated and paid all his terminal dues although not entitled portions of it. The Respondent averred further that in the event the court finds that the Claimant is entitled to the reliefs sought, the same should be set off from the payments made to the Claimant with respect to gratuity and payment in lieu of notice. The Respondent urged that the suit be dismissed with costs.

3. The Claimant testified that they went to Karatina as instructed by the boss and that Edward Mwendwa was the driver of motor vehicle Registration Mark KBN 322F. He said that on their way via the Kerugoya-Kagumo-Karatina route they had an accident as the driver lost control while avoiding a pothole and hit an oncoming vehicle and that he sustained a fracture of his leg. He testified that even as was getting better he was called by the office and was informed that he was supposed to go through a disciplinary hearing and that at the meeting the staff tried to force him to admit that he was the one driving the motor vehicle with a promise that he would continue working and his hospital bill will be cleared. He stated that he declined to accept blame for the accident and they told him that he was trying to be clever. He testified that it was Edward Mwendwa who was the driver and even the Police abstract confirmed that. He stated that the Respondent deposited Kshs. 75,000/- in his account but that was not sufficient for the years he worked for. He said that he was a crew commander and his work was to manage the alarm system and not as a driver. He stated that he blames the Respondent for dismissing him without notice and with no basis. He testified that he had worked for the Respondent from 2005 to 2014 and his salary was Kshs. 18,101/- a month.

4. The Respondent's witness was Mercy Wambui Machaga the Respondent's HR manager. She adopted her statement and the list of

documents as her evidence in chief and testified that after the hearing they recommended that the Claimant be dismissed for driving a company vehicle without authority. She stated that the driver was Edward but after investigations they realized that the Claimant was the driver at the time of the accident. She said that the Claimant's injury was consistent with the damage to the motor vehicle and the Police who attended the scene and the onlookers said that they assisted the driver after the accident and that the driver collapsed immediately. She stated this could not have been Edward who had fled from the scene of the accident. She testified that the Claimant's termination was lawful and his dues were paid. She however conceded in cross-examination that the Police abstract indicated the driver as Edward Mwendwa. That marked the end of oral testimony and parties were to file submissions.

5. The Claimant did not file submissions. The Respondent isolated two issues for determination, to wit, whether there were valid reasons to terminate the Claimant and secondly, whether the Claimant is entitled to any of the reliefs sought. On the first issue the Respondent submitted that Section 43(2) and the case of **Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR** were in its favour. The Respondent submitted that it had reasonable grounds to believe that the Claimant was the one driving the motor vehicle at the time of the accident as shown in its memorandum of defence and as confirmed by evidence and its witness testimony. The Respondent submitted that it discharged its burden of proof at the hearing and without any rebuttal from the Claimant, the investigations demonstrated that the Claimant was indeed driving the Respondent's motor vehicle at the time of the accident. The Respondent cited the case of **John Ngoko Isoe v Nyansiongo Tea Factory Co. LTD [2017] eKLR** where the Court held that *a claim for unfair termination fails once the respondent adduces evidence to show that a dismissal was founded on valid and fair reasons, and the claimant fails to adduce evidence in rebuttal*. The Respondent submitted that the reasons for termination of the Claimant's employment were valid and fair. The Respondent submitted further that the Police abstract cannot be sufficient evidence that the Claimant was not the driver. The Respondent submitted that the Police abstract is not relevant as the Police investigations were ongoing at the time the disciplinary process was conducted. The Respondent submitted that the two processes were independent and the Respondent was not bound by the outcome of Police investigations. The Respondent relied on the case of **Joseph Munyambu Karega v Charles Ogollah Obiero [2014] eKLR** where it was held that *a police abstract is evidence that an accident happened and nothing more*. The Respondent submitted thus that in any event the Police abstract cannot be of any value in proving who the driver was at the time of the accident. The Respondent submitted that it was justified in summarily dismissing the Claimant for driving its motor vehicle without authority and for causing damage to himself and the motor vehicle leading the Respondent to incur a cost of Kshs. 608,193.60 in payment for the injuries he sustained. The Respondent submitted that the Claimant is consequently not entitled to any of the reliefs sought. It submitted that in any case, the Claimant had admitted to having received a payment of Kshs. 75,042/- as his terminal dues and signed a discharge voucher to confirm that he had no further claim against the Respondent. The Respondent submitted that the claims for payment of gratuity, the days worked, allowances accrued and leave earned and not taken as at 30th July 2014 were dispensed with. The Respondent submitted that the Claimant was not entitled to any notice or payment in lieu as he was summarily dismissed under Section 44(1) of the Employment Act, but nonetheless, the Respondent paid him one month's salary in lieu of notice. Citing the case of **M'Bita Ntiro v Mbae Mwirichia & Another [2018] eKLR** and Section 107(1) of the Evidence Act, the Respondent submitted that the Claimant failed to prove the claim for 3 months' notice and his allegation that his basic salary was Kshs. 18,101/- a month. The Respondent submitted that the Claimant is not entitled to compensation as he was summarily dismissed and that it is not obliged to pay anything beyond the amount owed at the time of termination as provided under Section 18(4) of the Employment Act. The Respondent submitted that it proved its case on a balance of probabilities and that its computation of the Claimant's terminal dues was correct and that he is not entitled to any other payment and this claim should be dismissed with costs.

6. The Claimant was suspected of driving the Respondent's vehicle without authority and the Respondent undertook independent investigations after the accident. As the Claimant was employed as a crew commander, he was not authorized to drive the Respondent's vehicles. He was stated to have been pulled out of the wreckage and collapsed shortly after. The person who was supposed to be driving the vehicle one Edward Mwendia was said to have fled the scene after the accident which was inconsistent with him being the driver. The Claimant signed a discharge on 30th July 2017 and in the discharge it was clearly indicated that he had no further claim. The suit herein therefore was misplaced and an abuse of the court process. The Claimant did not prove he was entitled to any relief and this suit is dismissed with costs as he ought not have filed it.

It is so ordered.

Dated and delivered at Nyeri this 17th day of February 2020

Nzioki wa Makau

JUDGE