



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 596 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

STEPHEN ONYIEGO GICHANGA..... CLAIMANT  
VERSUS

STRAIGHT SECURITY SERVICES LIMITED....RESPONDENT

JUDGMENT

By his Statement of Claim dated and filed in Court 16<sup>th</sup> April, 2015 the claimant avers that the respondent unfairly and unlawfully terminated his employment without notice and without settling his terminal dues. He seeks the following remedies–

- a) A declaration that the Claimant’s termination from his employment was unfair and unlawful.
- b) The Claimant be paid his terminal benefits and compensation totalling to Kshs.457,500 as particularized below-
  - i. One month’s salary in lieu of notice ..... Kshs.30,000
  - ii. 9 months prorata leave x 30,000..... Kshs.22,500
  - iii. Days worked from 16<sup>th</sup> January 2015 – 9<sup>th</sup> February 2015  
24 days = x 30,000..... Kshs.24,000
  - iv..... House allowance at 15% of the basic salary  
4,500 x 10 months ..... Kshs.45,000
  - v. 12 months’ compensation..... Kshs.360,000

<b>Total Dues</b>	<b>Kshs.481,500</b>
Less Paid on account	(24,000)
<b>Total</b>	<b>Kshs.457,500</b>

- c) The Court be pleased to issue such orders and give such directions as it may deem fit to meet the ends of justice.
- d) Interest on prayer (a) above at court rates from the date of filing this suit till payment in full.
- e) Any other relief that the court may deem fit to grant in the circumstances.
- f) The Respondent to be ordered to issue the Claimant with a Certificate of Service as required by the provisions of Section 51 of the Employment Act, 2007.
- g) General damages for defamation

h) The Respondent to pay the costs of this Claim.

i) Interest on the above at Court rates.

The Claimant in his Statement of Claim avers that he was employed by the Respondent herein, a Limited Liability Company in the position of personnel Manager earning a salary of Kshs.30,000 per month.

The Claimant further averred that during the subsistence of his employment contract he performed his duties diligently and to the Respondent's satisfaction. That on 9<sup>th</sup> February, 2015 the Respondent unfairly terminated his employment on allegations of having made a non-responsive application.

The Claimant contends that he did not receive any request from the Respondent to furnish it with copies of his professional certificates as alleged and therefore it had no valid reasons for terminating his employment.

The Claimant maintained that the termination of his employment was unfair as the respondent breached the mandatory provisions of Sections 41, 43 and 45 of the Employment Act, 2007. He therefore urged the court to allow his Claim in terms of the reliefs sought therein.

The Respondent in its Statement of Response dated 5<sup>th</sup> December, 2018 and filed in Court on 6<sup>th</sup> December, 2018 admitted having engaged the Claimant. It however maintained that the Claimant's appointment was on probationary terms based on copies of his professional and academic certificates.

The Respondent further averred that the Claimant received a consolidated salary as evidenced by his payslip and therefore the Claim for house allowance does not arise.

The Respondent contended that the Claimant's performance during the subsistence of his employment contract was below expectation forcing it to scrutinize his academic certificates where it became apparent that the same were not genuine.

The Respondent further contended that it did issue the Claimant with a disciplinary letter on 3<sup>rd</sup> February, 2015 and subsequently invited him for a disciplinary hearing on 10<sup>th</sup> February, 2015.

The Respondent contended that the Claimant failed to attend the disciplinary hearing and instead sent one Mr. Chenchu and therefore the hearing could not proceed.

The Respondent further contended that the termination of the Claimant's employment was for a valid reason and that due process was followed in his termination. The Respondent further averred that the Claimant was paid all his dues at the time of separation and therefore has no Claim as against it.

In conclusion the Respondent urged the court to dismiss the claim

in its entirety with costs to the Respondent as the same is devoid of merit.

## **Evidence**

The case was fixed for hearing on 18<sup>th</sup> July, 2019 and 28<sup>th</sup> October 2019. The Claimant testified on his own behalf and Francis Mwenda Munene, the Managing Director of the Respondent testified on its behalf. Parties thereafter filed and exchanged written submissions.

## **Claimant's Case**

In his testimony, the Claimant reiterated the averments in his Memorandum of Claim. He further testified that during the subsistence of his employment contract with the Respondent he proceeded on leave once for a period of 6 days.

He further testified that his employment was terminated on 8<sup>th</sup> February 2015 and that he received a letter of termination on 9<sup>th</sup> February 2015. That the reason for his termination as contained in the said letter was his failure to submit his testimonials to the Respondent upon request.

The claimant contended that he did avail the said testimonials to the Respondent at the time of his appointment and that the respondent did not accept the same. He further testified that he was not issued with a letter requesting for the said documents by the Respondent as alleged.

He testified that he was neither issued with a notice to show cause nor accorded a fair disciplinary hearing prior to the termination of his employment and therefore his termination was unfair and unlawful on this basis.

The claimant confirmed payment of Kshs.24,000 at the time of separation with the Respondent. He testified that the sum was less than the amount he expected from the Respondent and that he made his tabulation dated 11<sup>th</sup> February 2015.

The claimant testified that he was qualified to fill the position as he holds a Diploma in Human Resource Management with a working experience of over 25 years working with large and reputable companies. He further testified that he holds Part 1 & 2 of CPS.

He testified that he was not a casual employee as alluded by the Respondent as he received his salary on a monthly basis as evidenced by his payslips.

He urged the court to allow his Claim as prayed.

On cross examination, the claimant testified that he did not receive any request from the Respondent to furnish it with his testimonials. He further testified that he was not aware that the Respondent questioned the authenticity of the said documents.

The claimant testified that he was neither served with a notice to show cause nor was he invited for a disciplinary hearing on the issue of his testimonials and therefore termed the termination unfair. He denied sending Mr. Chenchu, who was known to him and the Respondent, to attend the disciplinary hearing on his behalf as alleged by the Respondent.

### **Respondent's Case**

RW1, FRANCIS MWENDA MUNENE, the Respondent's Managing Director, adopted his witness statement dated 2<sup>nd</sup> December, 2018 and filed in Court on 23<sup>rd</sup> January, 2019 as his evidence in chief. In his statement RW1 reiterates the averments made in the Response to the Claim.

RW1 testified that the Claimant failed to avail copies of his testimonials as requested by the respondent and therefore was not issued with a letter of appointment. He further testified that this was a valid reason for his termination.

RW1 testified that he personally served the Claimant with the letter dated 3<sup>rd</sup> February 2015. He further testified that he informed the Claimant of the disciplinary hearing scheduled for 10<sup>th</sup> February 2015 which the claimant did not attend.

He further testified that during interview, the Claimant presented copies of his certificates and testimonials as he indicated the originals were in Kisii. RW1 testified that it was agreed that the Claimant was to be issued with an appointment letter with terms and conditions of service once he availed the original certificates for inspection.

He testified that the Claimant failed to avail the said originals despite promising to do so. That this prompted the Respondent to issue the Claimant with the letter dated 3<sup>rd</sup> February 2015 and subsequently invited the Claimant for a disciplinary hearing on 10<sup>th</sup> February 2015 which invite the claimant did not honour but sent Mr. Chenchu to appear on his behalf.

RW1 testified that the Claimant was paid Kshs.24,000 as terminal dues at the time of separation and signed a discharge voucher to the effect that he had no other Claim against the Respondent.

RW1 testified that the Claimant has not been defamed as alleged. He testified that the Claimant is guilty of obtaining employment with the Respondent by fraud as he believed that the claimant had no original testimonials, having failed on several occasions to avail the same for inspection by the Respondent.

On cross examination RW1 testified that the Claimant was engaged on a temporary basis subject to the production of the original certificates and testimonials.

On further cross examination RW1 confirmed that the Claimant was paid Kshs.24,000 for days worked. He testified that the Claimant was not paid prorated leave as he had exhausted all his leave days.

He further testified that the Claimant was not issued with a Certificate of Service as he was dishonest. He maintained that the Claimant is not entitled to the reliefs sought in his claim and urged the court to dismiss the same with costs to the Respondent.

### **Submissions by the Parties**

It is submitted by the Claimant that his termination was unfair and unlawful as the Respondent failed to accord him an opportunity to defend himself and show cause why his employment should not be terminated. That this is contrary to the mandatory provisions of Section 41 and 45 of the Employment Act 2007.

The Claimant further submitted that contrary to the Respondent's assertion it had no valid reason to terminate his employment. He urged the court to find that the termination of his employment was unfair and invalid.

It is on this basis that the Claimant maintained that he is entitled to the reliefs sought in his Claim which he urged the court to allow as prayed.

### **Respondent's Submissions**

The Respondent on the other hand submitted that it had a valid reason to terminate the Claimant's employment as at that time it genuinely believed that the Claimant did not have his original academic and professional qualifications for the position he held. The respondent relied on the provisions of Section 43 of the Employment Act, 2007 and the case of **Janet Melly Otieno v Kenya Ports Authority (2018) eKLR**.

The Respondent further submitted that in terminating the Claimant's employment it did comply with the mandatory provisions of Section 41

of the Employment Act, 2007. The Respondent relied on the case of **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya (2014) eKLR**.

The Respondent submitted that the Claimant is not entitled to the reliefs sought in his Claim. On the Claim for One month's pay in lieu of notice the Respondent maintained that the Claimant is not entitled to the same, the Respondent having complied with the procedural fairness under Section 41(1) and 43(2) of the Employment Act, 2007.

With regards to the Claim for 9 months prorated leave, the Respondent submitted that the Claimant is only entitled to a sum of Kshs.9,750 the Claimant having admitted proceeding on 6 days leave during the subsistence of his employment with the Respondent.

On days worked the Respondent submitted that the Claimant is not entitled to the same having already been paid a fact that is admitted by the Claimant herein.

The Respondent further submitted that the Claimant is not entitled to house allowance as his pay was a consolidated salary as demonstrated in his payslip.

The Respondent submitted that having a valid reason for termination of the Claimant's employment and having complied with fair procedure, the claimant is not entitled to compensation for unfair termination as pleaded.

The Respondent urged the court to dismiss the Claim in its entirety with costs to the Respondent.

### **Analysis and Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, there is no dispute that the Claimant was employed by the Respondent from 21<sup>st</sup> April 2014 until February 2015. The issues for determination therefore are:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

### **Unfair termination**

Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in Section 47(5) of the Employment Act. The section provides that –

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

### **Reason for Termination**

The reason cited for the termination of the Claimant's employment herein was failure to furnish the Respondent with his original academic certificates and testimonial despite requests to furnish the same.

The Respondent contends that the Claimant was accorded a hearing having been issued with a notice to show cause. It is further contended that the Claimant failed to honour the invite for a disciplinary hearing on 10<sup>th</sup> February 2015 and instead sent a representative one Mr. Chenchu as a result of which the said hearing could not proceed.

The Claimant on the other hand denied being issued with any show cause letter or being accorded a hearing prior to his termination. He further denied being asked to furnish the Respondent with his original certificates and testimonials and failing to comply with such a request.

The Claimant maintained his suitability to fill the position held at the Company. He urged the court to find that the Respondent had no valid reason to terminate his employment and to further find his termination was unlawful and unfair in the circumstances.

In 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.”*

Further in the case of Francis Mbugua Boro v **Smartchip Dynamics Ltd (2017) eKLR** it was held that: -

*“..It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”*

In the disciplinary hearing form at Appendix 5553 of the respondent’s bundle, it is minuted that Mr. Chancha attended the disciplinary hearing and made a plea for the claimant on 10<sup>th</sup> February 2015. On the following day, the 11<sup>th</sup> February 2015, the claimant wrote a letter tabulating his terminal dues wherein he makes reference to the message sent to him by the respondent through Mr. Chancha. He subsequently collected the salary for the 24 days worked on 13<sup>th</sup> February 2015. The minutes state that the claimant would be discharged through mutual consent.

From the foregoing, I find no evidence of unfair termination of employment.

**Whether the Claimant is entitled to the reliefs sought**

**i. Kshs.30,000 being one month’s salary in lieu of notice**

The discharge letter dated 13<sup>th</sup> February 2015 states that the claimant had been discharged from the company. This means that he was not dismissed but was terminated. He is thus entitled to one month’s notice or pay in lieu. I award him **Kshs.30,000** being one month’s salary in lieu of notice.

**ii. 9 months’ prorated leave Kshs.22,500**

The Claimant maintained that he was entitled to the above relief having not proceeded on leave during the entire period of his employment with the Respondent.

The Respondent on the other hand submitted that the Claimant had taken 6 days leave and was therefore only entitled to 9.75 days in prorated leave. This position was confirmed by the Claimant in cross examination. The Respondent therefore submitted that the amount that the Claimant was entitled to under this head was Kshs.9,750.

I award the claimant **Kshs.9,750** for 9.75 days prorated leave

**iii. Days worked from 16<sup>th</sup> January 2015 to 15<sup>th</sup> February 2015 Kshs.24,000**

The Respondent maintained that it did pay the Claimant for days worked a fact that was admitted by the Claimant in cross examination. He is therefore not entitled to any compensation under this head.

**iv. House Allowance totalling to Kshs.45,000**

The Claimant submitted that he is entitled to payment of house allowance as none was paid to him during the entire period of his employment with the Respondent.

The Respondent submitted that the Claimant is not entitled to the same as the salary he received was a consolidated salary. Indeed from the payslip attached to the pleadings it is clear that the Claimant received a consolidated salary and is therefore not entitled to payment of house allowance as pleaded. The Claim is therefore dismissed.

**v. 12 months’ compensation due to unfair termination Kshs.360,000**

Having found that the termination of the claimant’s employment

was by mutual consent and that the claimant was not unfairly terminated, the claimant is not entitled to compensation.

**vi. Certificate of service**

The claimant is entitled to certificate of service by dint of Section 51 of the Employment Act, 2007.

The claim for general damages for defamation was not proved and is dismissed.

**Award**

In conclusion, Judgment is entered in favour of the claimant as follows:

i. One month’s salary in lieu of notice..... Kshs.30,000

ii. 9.75 days prorata leave..... Kshs.9,750

**Total Award**

**Kshs.39,750**

iii..... Certificate of service

iv..... The respondent shall pay claimant's costs for the suit.

v. Interest shall accrue from date of judgment till payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**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 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, the 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 Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the 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.

**MAUREEN ONYANGO**

**JUDGE**