



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**CAUSE NO. 261 OF 2015**

**DANIEL KYALO KYUMA.....CLAIMANT**

**VERSUS**

**G4S SECURITY SERVICES (K) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for unfair termination of employment. It was brought on 26.2.2015 and the claimant seeks the following reliefs:

a. Unfair termination Kshs.177,840.00

b. Notice Kshs. 14,820.00

c. Service pay Kshs.29,640.00

d. Leave pay Kshs.59,280.00

e. Overtime Kshs. 23,324.00

Kshs.304,904.00

f. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order.

g. Any other just and equitable reliefs as this Honourable Court may deem appropriate.

2. The respondent filed her defence on 20.7.2015 denying the alleged unfair termination of the claimant's services. She averred that she summarily dismissed the claimant after deserting work upon deployment to a new work station. She further averred that the claimant is not entitled to the reliefs sought.

3. The suit was heard on 14.3.2019 when the claimant testified as Cw1 and the Respondent's HR Manager Mr. Boniface Njogu testified for the defence as Rw1. Thereafter both parties filed written submissions.

**Claimant's case**

4. The claimant testified that he was employed by the respondent on 18.6.2010 as a day Guard and worked continuously until 15.4.2014 when he was dismissed unlawfully by the respondent. He further testified that on 23.3.2014 the respondent's contract with Wasila Limited, where he was attached was terminated. As a result he was told to go home for one week to await for redeployment to another station.

That on 30.3.2014, he reported to the office and the HR Manager told him that he will be deployed around Mlolongo and advised him to look for a house at Mlolongo. That he did as advised and asked the respondent for transport to transfer his belongings to Mlolongo but despite persistent calls, he was told to wait for the vehicle. That no vehicle was availed to him and instead he was called to the office and given a termination letter on 15.4.2014.

5. He further testified that he was working from 6.30 a.m. to 6.30 p.m. and his monthly salary was Kshs.14,820.

6. In cross examination, Cw1 maintained that the respondent's contract with Wasila Limited ended on 23.3.2014. He admitted that he was with 4 other guards at Wasila Limited but denied knowledge of whether they were dismissed. He contended that when he visited the respondent's Head Office on 30.3.2014, he never found his 4 colleagues. He admitted that he was paid salary for 20 days in March 2014 but nothing for April 2014.

7. He admitted that he never wrote any letter to enquire about his job but he responded to the termination letter. He further admitted that the respondent was paying NSSF for him. He contended that he was working 7 days per week but admitted that occasionally he requested for permission to attend church and other occasions he got a reliever Guard.

### **Defence Case**

8. Rw1 testified that the claimant was employed by the respondent as a counsel for the period running between 18.6.2010 and 26.3.2014. He further testified that from September 2013 the claimant was assigned guarding duties at Wasila Limited, one of the respondent's clients.

That the respondent's contract with the said client ended in March 2014 and the claimant with his colleagues were asked to report to the Head Office for redeployment. That the claimant was redeployed to a premise near Mlolongo effective 26.3.2014 but he absented himself from work without leave or authority. That his whereabouts were unknown and he could not be reached through the phone until 15.4.2014 when the respondent decided to terminate him for deserting his employment. He contended that the claimant was given a hearing before the termination but he could not be reached.

9. In cross examination Rw1 stated that he joined the respondent in 1997. He further stated that the claimant was deployed by his immediate Manager and as such he did not know the name of the Claimant's new workstation but according to him it was along Mombasa road new Mlolongo. He maintained that after transfer from Wasila Limited the claimant visited the respondent's Head office for redeployment but he never reported to the new station.

### **Claimant's Submissions**

10. The claimant submitted that his dismissal was not grounded on a valid and fair reason and the procedure followed as also unfair. As regards the reason for the termination, he submitted that he visited the respondent's office after the Wasila contract ended but he was told to go home and wait. That thereafter he was ordered to surrender his company uniform and go home until he was called back. That when he was finally called on 15.4.2014, he was served with a termination letter which he found ready for collection without any prior hearing. He therefore contended that the termination of his employment was unfair. He relied on *Gilbert Masiera Makori v Equity Bank Ltd [2016]eKLR*, *Mary Chemweno Kiptui Vs Kenya Pipeline Company Ltd [2014]eKLR* and *George Onyango Akuti Vs G45 Security Services Kenya Ltd [2013]eKLR* to emphasize his contention that without a valid reason, and/or according him a fair hearing before the termination, the termination of his employment was unfair. He therefore prayed for the reliefs sought in the suit.

### **Respondent's Submission**

11. The respondent submitted that the claimant admitted that after redeployment he never reported to his new station because he was not availed any means to transport his belongings. She therefore contended that the claimant absconded himself from work from 26.3.2014 upto 14.4.2014 which amounted to desertion and repudiation of the contract of service. He further contended that the said absence from work was without leave and not explained. She submitted that she did not conduct herself in a way that would amount to constructive termination. She relied on *Lear Shighadi Sinoya v Avteda Systems Ltd [2017]eKLR* and *Halsbury's Laws of England 5th (volume 41)*.

12. The respondent further submitted that due to the claimant's absence from work from 26.3.2014 to 15.4.2014 without leave or lawful cause, she dismissed him summarily under section 44(4) (a) of the Employment Act. She therefore denied that the dismissal of the claimant was unlawful and unfair.

13. As regards the reliefs sought, the respondent submitted that upon dismissal he lost his service gratuity by dint of Regulation 17(2) of the Regulation of Wages (Protective Security Services) Order 1998. She further contended that the claimant being a member of NSSF, he was disqualified from claiming service pay under section 35(6) of the Employment Act. She further submitted that after the dismissal, she paid the claimant all his monies in compliance with section 18(4) of the Act.

14. She further denied the claim for compensation plus one month salary in lieu of notice contending that the dismissal was lawful and the claimant contributed to the same through misconduct. As regards the claim for leave, she contended that the claimant was a temporary employee engaged on casual basis. She however contended that should the Court find the dismissal was unfair, then guidance should be sought from *Moi Teaching and Referral Hospital vs James Kipkoga[2019]eKLR*. Finally, she denied the claim for overtime contending that no evidence was adduced to prove the alleged overtime. She relied on *Benard Juma Okeyo v Karia Supermarket Ltd [2018]eKLR* to support the foregoing submission.

### **Analysis and Determination**

15. There is no dispute that the claimant was employed by the respondent as a casual employee for the period running from 18.6.2010 to 15.4.2014 when he was dismissed. The issues or determination are:

- (a) Whether the claimant's casual employment converted to term contract of service under the Employment Act.
- (b) Whether the termination of the claimant's services was unfair.

(c) Whether the claimant is entitled to the reliefs sought.

### **Conversion from Casual employment**

16. After considering the pleadings and the evidence tendered by both parties, it is clear that the claimant worked as a casual employee continuously from June 2010 to April 2014. That was slightly below 4 years. Section 37 (1) (a) & (3) of the Employment Act provides that :-

*“Notwithstanding any provisions of the Act, where a casual employee:-*

*(a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; ... the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.*

*(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee.”*

17. Applying the facts of this case to the foregoing statutory provisions, I return that the claimant’s casual employment converted to an indefinite term contract, terminable by at least 28 days’ notice in writing or payment of salary in lieu of notice under section 35(1) (c) and 36 of the Act effective 18.7.2010 after serving continuously for more than one month. I dare add that the converted contract is further protected from unfair termination by the employer. The power of this court to convert a casual employment to indefinite term contract is donated by section 37(4) of the Act.

### **Whether the termination was unfair**

18. Termination of employment contract of an employee is unfair if the reason cited is not valid and fair, and if the procedure followed, is not fair. A valid reason must relate to the employee’s conduct, capacity and compatibility; or based on the employer’s operational requirement, fair procedure on the other had involves but not limited to according the employee a hearing to defend himself before the termination is decided.

### **Reason for termination herein**

19. The respondent contended that after her contract with Wasila Limited Athi River ended, she redeployed the claimant to another station along Mombasa Road near Mlolongo but he absconded. That she did not know his whereabouts and could not be reached through phone calls upto 15.4.2014 when she treated him as a deserter and summarily dismissed him. However, the claimant contended that after that claimant’s contract at Athi River ended, he reported to the respondent’s

Head Office for redeployment and he was told that he will be stationed near Mlolongo where he should look for a residential house. That he secured a house at Mlolongo and requested for transport means from the respondent to transfer his belongings to the new house but it was not granted despite several calls and visits to the respondents head office.

20. After considering the evidence and submissions tendered by the two parties, I am persuaded to believe the respondent’s contentions. The claimant admitted in his evidence that he went to the respondent’s office for redeployment and that he never reported to the new station. It seems that the reason for his failure to report to his new station was because he was not assisted by the employer in transporting his belonging from Athi River to Mlolongo. He did not produce any evidence to prove that under his employment contract he was entitled to be given transport means or allowance by the employer upon transfer. He also did not prove that he indeed visited the respondent’s office and made calls to explain his inability to relocate to Mulolongo due to lack of transport means.

21. Under section 44(4)(a) of the Employment act, the employer is entitled to summarily dismiss his employee who absents himself from the place appointed for performance of his duties without leave or other lawful cause. In this case, the claimant suggested that his failure to report to his new workstation was because the employer failed to assist him transfer his belongings from Athi River to his new house at Mlolongo. In this courts view, the claimant was on the wrong in failing to report to his new station because he was not prevented from doing so by the employer. Had his contract provided for an obligation on the part of the employer to provide transport before reporting to the new station, then the claimant would be said to have a lawful cause of absenting himself from work. Consequently, I find and hold that the claimant’s absence from work from 26.3.2014 to 15.4.2014 was without leave or other lawful cause and as such, the respondent had a valid reason for summarily dismissing him on 15.4.2015.

### **Procedure followed**

22. The respondent admitted that she never accorded the claimant any hearing before dismissing him on 15.4.2014 and the reason given was that the claimant’s whereabouts were unknown and he could not be reached via phone calls. The claimant denied that he was not reachable and contended that he severally visited the office even made calls there. He also testified that he was called to the office to surrender his uniform on 4.4.2014 and on 15.4.2014 to receive his termination letter. Such evidence has not been challenged. I believe that story by the claimant, otherwise, why is the respondent not demanding back his official uniform?

23. In view of the foregoing, it is courts finding that the claimant was reachable by phone if the employer was keen to take him through a fair disciplinary process. She was able to serve him with show cause letter and even invite him to a disciplinary hearing. It was not impossible on the part of the respondent to secure the claimant’s attendance, to the disciplinary hearing.

24. Under section 41 of the Employment Act, an employer has an obligation, before terminating services of his employee for misconduct, to explain the reason for the intended termination to the employee in a language he understands in the presence of another employee or shop floor union representative of his own choice and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. Failure to comply with that obligation as in this case, renders the termination unfair within the meaning of section 45(2) and (4) of the Act because it was not done in accordance with equity and justice. Consequently, I return that the summary dismissal of the claimant before according him a hearing rendered the termination of the contract of service unfair despite the existence of a valid reason under section 43 of the Act. The foregoing view is fortified by Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited [2014]eKLR where Mbaru J held that:-

***“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.***

***The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”***

#### **Reliefs**

25. In view of the foregoing, I award the claimant one month salary in lieu of notice plus three months’ salary compensation for the unfair termination under section 49(1) of the Act. In making the said award, I have considered the fact that the claimant contributed to the dismissal through misconducts and also the fact that he served for 3 complete years.

26. The claim for service pay is however dismissed because the claimant admitted in evidence that his employer contributed NSSF for him. Under section 35(6) of the Employment Act, an employee is disqualified from service pay if his employer is making NSSF contributions.

27. The claim for overtime is also declined. The claimant contended that he used to work from 6 a.m to 6 p.m. 7 days a week and prayed for Kshs.23,324. He however did not demonstrate by way of particulars and evidence how he arrived at the sum claimed. In addition, he admitted in evidence that there are some occasions when he was given a reliever guard and also permission to attend church. Without clear particulars and evidence to support the claim, the court finds that the claimant has not proved the claim for overtime on a balance of probability. For the same reasons the claim for leave pay also fails.

#### **Conclusion and determination**

28. I have found that the reason for dismissing the claimant from employment was valid and fair but returned that the termination was rendered unfair by the respondent’s failure to follow a fair procedure before the termination. Finally, I have found that the claimant is entitled to the reliefs sought to the extent granted herein above. Consequently I enter judgment for him in the following terms:-

Notice.....14820

Compensation.....44,460

**59,280**

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The said award is subject to statutory deduction but in addition to costs of the suit plus interest at court rates from date hereof.

**Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019**

**ONESMUS N. MAKAU**

**JUDGE**