



REPUBLIC OF KENYA



**Achola v Sokhi & another (Cause 1094 of 2012)  
[2018] KEELRC 270 (KLR) (20 December 2018) (Judgment)**

*Japheth Barasa Achola v B.S. Sokhi & another [2018] eKLR*

Neutral citation: [2018] KEELRC 270 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1094 OF 2012  
HS WASILWA, J  
DECEMBER 20, 2018**

**BETWEEN**

**JAPHETH BARASA ACHOLA ..... CLAIMANT**

**AND**

**BS SOKHI ..... 1<sup>ST</sup> RESPONDENT**

**PERIMETER PROTECTION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed the instant Claim on 26<sup>th</sup> January, 2012 seeking the following prayers:
  - i. That this Honourable Court do find his termination by the Respondent was wrongful and unlawful.
  - ii. The sum of Kshs. 2,599,154.40 particularized as:

Compensation for loss of employment as provided under Section 15 (c) of the [Labour Institutions Act](#) 2007

12 months wages Kshs. 9,732.42 x 12 Kshs. 116,789.40

Three Months pay in lieu of notice Kshs. 29,199.00

Severance Pay for 23 years 145 days x 326 Kshs. 47,270.00

O/T Monday to Saturday 72 hrs less 52 hrs

20hrs x 1.5 x 4 x 12 x 23 x 40/- Kshs. 1,093,443.00

O/T Sunday 12 hrs\*2\*4\*12\*23\*40/- Kshs. 1,059,840.00

Salary for March 2012 Kshs. 9,733.00



Public Holidays 11 days\*2\*12\*23\*40/- Kshs. 242,880.00

TOTAL Kshs. 2,599,154.40

- iii. Any other award or benefit which the Honourable Court may deem fit to grant in the circumstances of the case.
- iv. The Respondent to pay costs of this Suit.

### **Facts of the case**

2. The Claimant was employed as a Security Guard at a monthly salary of Kshs 9,733.00 per month. He carried out his duties diligently and dutifully from the date of employment i.e. 12<sup>th</sup> May, 1990 until 5<sup>th</sup> May, 2012 when his services were terminated on health grounds without terminal benefits.
3. The Claimant further states that he was terminated when he was sick without being given notice, without payment of terminal benefits and without valid reasons. He states that termination was done in bad faith and was unlawful, punitive, humiliating and demoralizing.
4. The Claimant gave his evidence on 11<sup>th</sup> October, 2017, reiterated the averments in the Memorandum of Claim adding that at the time of termination he was not paid his dues and the Respondent offered to pay him 24,000/=. He however declined to accept it.
5. CW1 further stated that he was not served with the Show Cause letter attached in the Respondent's Response as Appendix 1 and that he had given his medical documents to the manager at the Respondent Company.
6. The Claimant urged the Court to allow his Claim as prayed.
7. On cross-examination CW1 stated that he was paid some allowance albeit little for working overtime. He further stated that at termination he reported the matter to the union who in turn wrote a demand letter to the Respondent.
8. On further cross-examination the Claimant stated that he was never served with the show cause letter dated 2<sup>nd</sup> April, 2012 and that all documents pertaining to his treatment were handed over to the Respondent.
9. The Claimant submits that his termination was unfair and did not follow the procedure set out in Section 41 and 43 of the Employment Act, 2007. The Claimant further submitted that on the legality of the termination there was no valid notice issued which is contrary to the provisions of Section 40(1) (a), (b) and Section 41 (2) of the Employment Act, 2007.
10. The Claimant relied on the authority of Industrial Court Cause Number 1591 of 2010: Tom Ndadema & Another Versus Club Click where Justice Rika ordered that "the Claimants be paid their dues on account of "... No hearing of either Claimant is shown to have taken place as section 41 and 45 of the Act demand. Termination was not shown to have been in accordance with justice and equality and amounts to unfair termination for which compensation is awardable..."
11. The Claimant urged the Court to allow the Claim as drawn.
12. The Respondent has filed a Reply to Memorandum of Claim dated 14<sup>th</sup> August, 2012 through Macharia Waiganjo & Nyakoe Advocates where they aver that the 1<sup>st</sup> Respondent is wrongfully enjoined in these proceedings as he was neither the employer of the Claimant nor the one who terminated the Claimant's services.



13. The 2<sup>nd</sup> Respondent admits having employed the Claimant and his services lawfully terminated on 11<sup>th</sup> May, 2012.
14. The 2<sup>nd</sup> Respondent denies that the Claimant worked without rest day and/or during public holiday and/or without payment of adequate compensation and that when the Claimant was required to work overtime he was adequately compensated as provided by law. Appendix 2 are copies of salary vouchers and payslips of the Claimant.
15. The 2<sup>nd</sup> Respondent submitted in the Reply to the Memorandum of Claim as follows:
  - a) That by virtue of the nature of the Claimant's engagement, physical fitness was of paramount importance.
  - b) That on numerous occasions, the Claimant was turned away by the Respondent's clients spotting laxity at work.
  - c) That the Claimant alleged to have a medical condition but was unable despite numerous pleas to provide any medical records to prove his illness.
  - d) That the 2<sup>nd</sup> Respondent followed due process while terminating the Claimant's employment as strictly provided in the *Employment Act*, 2007.
16. The Respondents urged the Court to dismiss the Claim with costs.
17. On 23<sup>rd</sup> October 2018 the Respondents witness (RW1, Daniel Wamaitho) testified. He stated that he was a Chief Operations Officer at the 2<sup>nd</sup> Respondent Company. He reiterated the averments in the Reply to the Memorandum of Claim filed in Court.
18. RW1 in his evidence stated that the 1<sup>st</sup> Respondent is one of the Directors of the 2<sup>nd</sup> Respondent Company.
19. RW1 stated that the Claimant's services were terminated after he failed to respond to the show cause letter dated 2<sup>nd</sup> April, 2012. He further admitted that there was no time frame indicated in the show cause letter but the 2<sup>nd</sup> Respondent expected that the Claimant responds to the show cause immediately.
20. RW1 further stated that there were complaints from clients of the 2<sup>nd</sup> Respondent complaining of laxity on the Claimant's part while performing his duties.
21. RW1 avers that the Claimant did not respond to the Notice to Show Cause though the same was served upon him and that subsequently his services were terminated.
22. On Cross-examination RW1 stated that he was aware of complaints but none were produced in Court as part of their evidence.
23. On further cross-examination RW1 stated that the Claimant failed to produce any documentation on his sickness despite several attempts by the 2<sup>nd</sup> Respondent to have the same furnished. He further stated that as a policy when an employee is sick while on duty, they are treated at the staff hospital and that the Claimant during his years in service never complained of being sick while on duty.
24. The Respondents did not put in written submissions to the Claim.
25. I have considered the evidence and submissions filed before Court. I note that the Claimant was terminated vide a letter dated 11/5/2012 on grounds of poor health. The Respondent had indicated in their evidence that the Claimant was terminated for failing to respond to a show cause letter. The



- Respondent exhibited a Memo dated 21/4/2012 but which had no timelines within which the show cause letter was to be responded to.
26. In his evidence in Court, the Claimant denied receipt of such a letter and the Respondent failed to prove they served the Claimant with the said show cause letter.
27. What therefore remains is the Respondent's own letter terminating the Claimant that indicates that he was terminated on health grounds.
28. Section 43 of *Employment Act* 2007 states as follows:-
- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
  - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.
29. Valid reasons must be adduced to prove any termination. The Respondent have a duty to prove the Claimant was unable to perform his duties due to health reasons, which prompted them to dismiss him. This, they did not do.
30. The Respondent also failed to accord the Claimant any hearing before he was dismissed. Section 41 of *Employment Act* 2007 states as follows:-
- “(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  - (2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.
31. Given that the Claimant was dismissed without valid reasons and without due process, I find that his termination was unfair and unjustified in terms of Section 45(2) of *Employment Act* 2007 which states as follows:-
- (2) “A termination of employment by an employer is unfair if the employer fails to prove:
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason:-
      - (i) related to the employee's conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure..”.



32. In terms of remedies I find for Claimant and award him as follows:-

1. 1 month salary in lieu of notice = 9,733/=.

2. 9 months salary as compensation for unfair termination = 9 x 9,733 = 89,597/=.

TOTAL= 97,330/=

3. The Claimant also sought for payment of over time and holiday pay but the payslips exhibited show that he was paid these wherein they arose.

4. The Respondent will pay costs of this suit plus interest at Court rate with effect from the date of this judgement.

**DATED AND DELIVERED IN OPEN COURT THIS 20<sup>TH</sup> DAY OF DECEMBER, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Wafula holding brief Macharia for Respondent – Present

Claimant – Absent

