



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**CAUSE NO. 107 OF 2013**

**GEORGE ONYANGO AKUTI**

**CLAIMANT**

v

**G4S SECURITY SERVICES KENYA LTD**

**RESPONDENT**

**JUDGMENT**

1. George Onyango Akuti (Claimant) was first employed by Securicor Security Services Kenya Ltd on 1 September 2002 (Exh. 2) as a security guard on permanent basis having been engaged as a casual from 16 July 1999 (Exh. 1). On 14 February 2006 Securicor Security Services Ltd began to trade in Kenya as G4S Security Services Kenya Ltd (Respondent) after a merger between Group 4 Falck and Securicor Plc (Exh. 3). The Respondent engaged him with no change in terms and conditions of service.
2. Through letter dated 30 June 2011(Exh. 4), the Respondent appointed the Claimant as a crew commander reporting to Cash Services Manager at a yearly salary of Kshs 300,000/-.
3. Around 4 August 2011, the Respondent caused a report of theft of Kshs 610,000/- to be made to the police as a result of which the Claimant and 2 others were arrested and charged with stealing by servant contrary to section 281 of the Penal Code in Mombasa Criminal Case No. 2454 of 2011(Exh. 5).
4. On 9 October 2012, the trial Magistrate acquitted the Claimant and 2 others under section 202 of the Criminal Procedure Code for non attendance of the complainant (Exh. 5).
5. Meanwhile, through a letter dated 4 September 2011 (Exh. 6), the Respondent had summarily dismissed the Claimant from its services and the reason given was that the Claimant had *remained in police custody for over 14 days with effect from 17 August 2011*. The letter also made reference to clause (section ?) 44 of the Employment Act, 2007. The letter indicated that the Claimant would be paid for days worked up to date of dismissal and leave days earned but not taken.
6. The Claimant sought legal advice, and on 14 December 2012, a demand letter was written to the Respondent by his legal advisers. It appears there was no response as a result of which the Claimant filed a Memorandum of Claim on 10 May 2013 seeking a declaration that the termination of employment was unfair, unprocedural, wrongful and illegal and consequential damages and costs.
7. The Claimant in the Memorandum of Claim pleaded that the Respondent was aware that he had been arrested and detained in custody following an allegation of theft made to the Police by the Respondent. He further pleaded the Respondent and its witnesses never attended court for the hearing of the criminal case.
8. The Memorandum of Claim and Notice of Summons were served upon the Respondent's

- Mombasa office which acknowledged the service by stamping on the summons. An affidavit of service sworn by one Thomas Otieno Bando on 4 June 2013 and filed in Court on 5 June 2013 deposed to the service and exhibited an acknowledged original Notice of Summons.
9. On the same day, 5 June 2013, the Cause was placed before me, and having satisfied myself that the Respondent had been served, I fixed the hearing for 22 July 2013 with an order to the Claimant to serve the Respondent with a hearing notice.
  10. A hearing notice was duly served upon the Respondent's Mombasa office and an affidavit of service sworn by Thomas Otieno Bando on 14 June 2013 was filed in Court on 2 July 2013. The affidavit of service exhibited a copy of the hearing notice served and acknowledged by the Respondent's stamp.
  11. On 22 July 2013 when the Cause was called for hearing there was no appearance for the Respondent while Mr. Oguk was present for the Claimant. The Cause therefore proceeded to hearing as an undefended Cause. The Claimant gave sworn testimony.

### **Claimant's evidence**

12. The Claimant testified that some two months after his appointment as a crew commander, the Respondent alleged that he had stolen some Kshs 610,000/- with two other persons and that he was arrested and charged in court with stealing by servant. After various appearances he was acquitted because no witnesses were brought to court to testify.
13. The Claimant further stated that while still in custody he was summarily dismissed and the dismissal letter given to his wife when she went to pick his personal items. The reason given in the dismissal letter was that he had stayed in police custody for over 14 days.
14. The Claimant filed written submissions on 20 August 2013.
15. In submissions filed in Court on 20 August 2013, the Claimant sought to rely on Article 47(1) of the Constitution to submit that managerial decisions by employers to dismiss employees are properly administrative actions and thus subject to the fair administrative action provision of the Constitution.

### **The law**

16. The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act. The section provide 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.**

17. An employee therefore has the burden of proving that an unfair termination of employment has occurred.
18. An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer.
19. On the side of the employer, apart from the requirement in section 47(5) of the Employment Act to justify the grounds of termination, section 43 demand that the employer prove the reasons for the termination, while section 45(2)(a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons.
20. And if it is a case of summary dismissal for fundamental breach of contractual obligations or gross misconduct, section 41(2) of the Employment Act obliges the employer to hear and consider any representations which the employee may wish to make.

### **Evaluation**

21. The Claimant was summarily dismissed while in lawful custody. The dismissal letter was given to the Claimant's wife. Section 44(4) treats the lawful arrest of an employee on a cognizable offence punishable by imprisonment and his not being released within fourteen days on bail or bond as comprising gross misconduct justifying summary dismissal.
22. The Claimant was released on bond of Kshs 150,000/- but it appears he could not secure his release in good time.
23. But section 44(4)(f) of the Employment Act is subject to section 41(2) of the Act. This latter section requires an employer to hear and consider any representations which an employee may have.
24. In my view, the Claimant was dismissed for misconduct because the allegation raised against him was theft. According to the letter of the statute, the employer was expected to hear and consider any representations he would have wanted to make. But this was impracticable unless the employer sought him out from custody or jail.
25. Although the letter of statute required that the employer hear and consider any representations from an employee facing the sack, and this was impractical in the present case, Article 41(1) of the Constitution enshrines the right of every person to fair labour practices. Section 23(1) of the South African Constitution has an exactly worded provision.
26. Fair (unfair) labour practices have not been defined in the Constitution or statute. This is unlike the statutory framework obtaining in other jurisdictions such as South Africa where section 186(2) of the Labour Relations Act has defined unfair labour practices. It is a flexible term not capable of precise definition. Therefore it is left to the Courts to define and determine the scope, content and extent of what would qualify to be an unfair labour practice, or to put it in the converse what conduct or practice would amount to an unfair labour practice. I also note the Constitution has not talked of lawful or legal labour practices.
27. Black's Law Dictionary, ninth edition has not defined what a fair labour practice is but it has defined 'fair' as *Impartial; just; equitable; disinterested... Free of bias or prejudice*. The same dictionary defines equity as *Fairness; impartiality; evenhanded dealing...the recourse to principles of justice to correct or supplement the law as applied to particular circumstances < the judge decided the case by equity because the statute did not fully address the issue....* What I therefore have to consider is whether the summary dismissal of the Claimant while in lawful custody was just or equitable.
28. Section 45(4)(b) of the Employment Act permits the Court to find a termination unfair if in the circumstances of the case the employer did not act in accordance with justice and equity. It is granted that the Claimant was in lawful custody while undergoing a process ordained by law. How long that process was going to take cannot be guessed but it is public knowledge criminal trials take time.
29. But in my view the summary dismissal of the Claimant must be weighed and balanced against what would constitute a fair labour practice. The Respondent had commitments with its clients to meet. The criminal process had its own momentum. The Claimant was eventually acquitted. The acquittal was because no witnesses had been presented before the trial court to testify on the charges against the Claimant and the other accused. Although it is the prerogative of the Director of Public Prosecutions to prefer and prosecute criminal cases, it cannot go without mentioning that since the Respondent is the one who reported to the Police, the failure to appear in Court and testify is telling.
30. It is germane to ask what options were available to the Respondent. Unfortunately, the Respondent did not participate in this Cause and I cannot second guess what its options were. I can only speculate, could the Claimant be placed on unpaid leave? Suspension? Could it have waited to see the outcome of a legal/criminal process? However, speculation has no room in a judicial determination.
31. On the basis that the Respondent did not participate in the proceedings, I would hold that the Respondent should have given him the opportunity to make representations before dismissing him or waited for the conclusion of the criminal trial process.
32. In the circumstances, I do find that the summary dismissal of the Claimant did not accord with justice and equity pursuant to section 45(4) (b) of the Employment Act and was unfair in the circumstances of this case.
33. And if I were wrong in my finding on the aspect of justice and equity, I would have still found in

- favour of the Claimant because the Respondent despite and inspite of service of Notice of Summons and Memorandum of Claim did not deem it necessary to file a Response and or appear at the hearing. It has thus failed to discharge the statutory burden placed upon it.
34. Unlike the practice and procedure of the High Court and Magistrates Court under the regime of the Civil Procedure Rules and the Evidence Act where a Plaintiff has to prove his case on a balance of probabilities, the Employment Act has explicitly placed certain legal burdens upon employers. Examples of these are sections 10(7), 41, 43, 45, 47(5) of the Act.
35. And practitioners should be alive to section 20 of the Industrial Court Act which provides that the Industrial Court is not strictly bound by the rules of evidence except in criminal matters.

### ***Fair Administrative Action in Article 47 of the Constitution***

36. Before discussing appropriate relief, I wish to advert to the submission by the Claimant that a managerial decision by an employer to dismiss an employee is an administrative action subject to Article 47 of the Constitution.
37. The Claimant relied on the decision by Ongaya J in *Shankar Saklani v DHL Global Forwarding (K) Ltd* (2012) eKLR where the Judge stated and held that

**The Constitution in Article 10 clearly states that the national values and principles of governance apply to all persons and the principles and values include human rights. Thus, in the instant case, the Respondent was bound to accord the Claimant the right to fair administrative action through observation of the rules of natural justice and as expressly envisaged in section 45(5) of the Act.**

38. For my part, although I have my doubts as to whether the termination of an employment relationship is subject to the right to fair administrative action dictates of Article 47 of the Constitution, the Claimant never pleaded nor mentioned the right to fair administrative action in his testimony and therefore, I find it not appropriate to make any reference to the inter play between fair administrative action and whether it is legally applicable in a decision taken by an employer, whether in the public or private sector to terminate or dismiss an employee.
39. That discussion must be left for another day.

### **Appropriate relief**

#### ***Terminal dues***

40. The contract of employment dated 30 June 2011 provided for termination of employment by either party giving one month's written notice or pay in lieu of notice.
41. Considering the contract of employment and sections 35 and 36 of the Employment Act, I would hold that the Claimant is entitled to one month pay in lieu of notice of Kshs 25,000/-.

#### ***Gratuity***

42. The Claimant's contract of employment provided for a staff retirement benefits scheme. Retirement age was set at 60 years. The Claimant did not testify on whether he was paid or would be entitled to any payment under the scheme.
43. In both the pleadings and testimony the Claimant made reference to the claim for gratuity for 10 years. The Claimant did not explain whether the claim for gratuity was contractual or statutory. The contract of employment has made no reference to gratuity and there is no express contractual term I can rely on.
44. The business in which the Respondent operates is covered by the Regulation of Wages (Protective Security Services) Order, 1998. Regulation 17 thereof provides for gratuity at the rate of eighteen days pay for each completed year of service after five years service with an employer. The Claimant served for 10 years and therefore would be entitled to gratuity as provided for in the said Regulation of Wages Order.
45. The formula to compute the gratuity is to take the basic salary and house allowance and divide by

twenty six and multiply by the number of days. The Claimant was getting a consolidated monthly pay of Kshs 25,000/-. This divided by twenty six gives Kshs 961/-.  
46. Because the Claimant served for 10 years he would be entitled to gratuity equivalent to 180 days. Kshs 961/- multiplied by 180 days give Kshs 172,980/-

### ***Annual leave***

47. Again in both the pleadings and testimony the Claimant stated he did not take his annual leave for 2011. Under the contract of employment the Claimant was eligible for 24 working days annual leave. An employee covered by the Regulation of Wages (Protective Security Services) Order is entitled to annual leave of 26 and not 24 days with full pay. In so far as the contract provided for 24 days annual leave as against the statutory minimum of 26 days, it is invalid to that extent.  
48. By virtue of sections 10(3) & (7) of the Employment Act and the Regulation of Wages (Protective Security Services) Order, I find the Claimant has made a case for an award of Kshs 25,000/- in lieu of leave not taken.

### ***General damages for wrongful and unlawful termination***

49. The Claimant sought general damages for wrongful and unlawful termination to be assessed by the Court. It is trite law that general damages are not awardable for wrongful termination.  
50. Wrongful termination is a concept of the common law and the authorities which I need not recite here limited any damages to the notice or reasonable notice period.  
51. What the Employment Act has provided for is an award equivalent to a number of months wages not exceeding twelve months based on the gross monthly wages. Indeed this is one of the primary remedies for unfair or wrongful termination.  
52. This award though is discretionary and the statute has set out some thirteen factors which the Court ought to consider. The Court could take into account any, some or all of the factors.  
53. The Claimant had the benefit of legal representation. He did not plead for an award under this head. If he were a layman, I would have considered exercising my discretion to grant an award under this head. In the present case, I decline to exercise my discretion in favour of the Claimant.

### ***Damages for lost income from date of dismissal to retirement age***

54. The Claimant did not lay any contractual or statutory basis for this particular head of claim. The position at common law is well known and I need not repeat what the Court of Appeal has opined on this head of Claim. No statutory provision or decided authority exactly on the point was cited by the Claimant in his submissions on this point and I decline it.

### ***General damages for unlawful arrest, detention and malicious prosecution***

55. Again the proper party in a claim for this particular relief should have included the State through the office of the Director of Prosecutions or the Honourable Attorney General. I say no more except that I decline to make any award herein.

### **Conclusion and Orders**

56. In conclusion, I do find and declare that the summary dismissal of the Claimant was not in accord with justice and equity and therefore unfair award him

a. One month pay in lieu of Notice	Kshs 25,000/-
b. Gratuity (180 days/10 years)	Kshs 172,980/-
c. One month accrued leave for 2011	Kshs 25,000/-

TOTAL	<b>Kshs 222,980/-</b>
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57. The claims for general damages for wrongful termination, lost income, unlawful arrest, detention

and malicious prosecution are declined.  
58.The Claimant will have costs of the Cause.

**Delivered, dated and signed in Mombasa on this 30<sup>th</sup> day of August 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

**Mr. Ojuk instructed by S.O. Ojuk**

**& Co. Advocates for Claimant**

**Respondent did not file Response or appear at hearing**