



**Riley Falcon Security Services Limited v Nyagah & another (Appeal E003 of 2024) [2024] KEELRC 1486 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1486 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
APPEAL E003 OF 2024**

**M MBARŪ, J**

**MAY 16, 2024**

**BETWEEN**

**RILEY FALCON SECURITY SERVICES LIMITED ..... APPELLANT**

**AND**

**RAYMOND MAINA NYAGAH ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT NICHOLAS ABUCHI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment delivered on 31 January 2024 in Malindi CMELRC No.E103 of 2021 delivered by Hon. James N. Mwaniki)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 31 January 2024 in Malindi CMELRC No.E103 of 2021. The appellant is seeking that the judgment and the decree therefrom be set aside and the claim be dismissed with costs.
2. The background to the appeal is a claim filed by the respondents against the appellant on the basis that the 1<sup>st</sup> respondent was employed from 8 December 2018 to 27 October 2021 as a security guard at a monthly wage of Ksh.13, 500. He signed an employment contract but was not issued a copy. His work hours were 6 am to 6 pm without payment for overtime, public holidays or risk allowance. The 2<sup>nd</sup> respondent was employed from 5 May 2018 to January 2021 as a security guard and based at backup alarm response at Malindi Company. He had a contract but was not issued with a copy and was earning Ksh.15, 000 per month but without payment for work overtime, public holidays or leave allowance.
3. The respondents claimed that on 26 September 2020 the 1<sup>st</sup> respondent went on annual leave but before resuming on 22 October 2020, the appellant took him through a refresher course but instead of a deployment, his employment was terminated. The 2<sup>nd</sup> respondent was called by the appellant in January 2021 and his annual leave application was pending approval but instead, he was issued with

a letter terminating his employment. The respondents claimed that there was unfair termination of employment and claimed the following dues;

1<sup>st</sup> respondent;

- a. Overtime for 4 hours daily Ksh.148,500;
- b. Public holidays for 22 months Ksh.25,000;
- c. Notice pay ksh.13,000;
- d. 12 months compensation.

2<sup>nd</sup> respondent;

- a. overtime 15,000 26 days – 576 per day / 8 hours = 72 overtime of 4 hours worked daily = 288 x 26 days/ 7,500 per month x 32 months = 240,000;
- b. public holidays 28,000;
- c. risk allowance 89,100;
- d. notice pay 15,000;
- e. Compensation 180,000.
- f. Certificate of service.

4. In response, the appellant admitted the 1<sup>st</sup> respondent upon completing his annual leave and refresher training was asked to report to the office for deployment but he did not show up and efforts to reach him through phone calls were fruitless. There was no unfair termination as alleged since dismissal was due to desertion of duty. He was issued with notice to show cause but he declined to accept it or attend the disciplinary hearing.
5. The 2<sup>nd</sup> respondent's last contract was from September 2019 to September 2020 and the same was extended for four (4) months ending in January 2021 due to a shortage of relievers. There was no termination of employment as alleged. Contract lapsed by effluxion of time. The claims made for compensation or notice pay are not due since the 1<sup>st</sup> respondent deserted duty and the 2<sup>nd</sup> respondent's employment ended per his contract. Each respondent was paid under his contract terms and conditions. They each took public holidays as and when due and the claims should be dismissed.
6. In the judgment, the learned magistrate made a finding that there was an unfair termination of employment and made the following awards;

1<sup>st</sup> respondent;

- a. Issuance of certificate of service;
- b. Payment for public holidays Ksh.25,000;
- c. Risk allowance Ksh.53,460;
- d. Notice pay Ksh.13,500;
- e. 12 months compensation for unfair termination of employment Ksh.162,000.

2<sup>nd</sup> respondent;

- a. Certificate of service;
- b. Payment for holidays worked Ksh.28,000;
- c. Risk allowance Ksh.89,100;
- d. Salary in lieu of notice Ksh.15,000;
- e. 12 months for unfair termination Ksh.180, 000.

7. Both respondents were awarded costs and the claim for overtime was dismissed.

Aggrieved by the judgment, the appellant has seven (7) grounds of appeal;

1. The learned trial magistrate erred in law and fact in finding that the manner of ending of the claimant's employment amounted to unfair termination without referring to the evidence presented in court. The trial court magistrate thus meted out an injustice.
  2. The learned trial magistrate erred in law and in fact in finding that the claimants proved their claim for holidays worked and gave an award on the same despite the lack of particulars of the holidays claimed in the memorandum of claim.
  3. The learned magistrate erred in law and in fact in holding that the claimants proved their claim for risk allowance without legal basis and justification for the award.
  4. The learned magistrate erred in law and fact in awarding the prayer for salary in lieu of notice without considering the evidence and exhibits of the appellant.
  5. The learned magistrate erred in law and fact in awarding 12 months' salary in compensation for unfair termination without giving any reason and justification for such an award.
  6. The learned magistrate erred in law and fact in failing to order that the award be subjected to statutory deductions as mandated by the law.
  7. The learned magistrate wholly and completely disregarded the evidence as led by the appellant together with its written submissions summarizing the evidence, applicable law and case law hence arriving at an unjust decision.
8. On 20 March 2024 parties attended court and agreed to address the appeal by way of written submissions. The court allowed parties to attend and highlight submissions on 24 April 2024. On the due date, the appellant indicated written submissions had been filed which is not the case. The respondents filed written submissions.
9. The respondents submitted that they were employed as security guards by the appellant on 5 December 2019 and 8 May 2018 respectively. They worked until the appellant terminated employment on 27 October 2020 and January 2021 respectively when the appellant terminated their employment without good cause. The learned magistrate well analyzed the evidence and arrived at a proper finding and made correct awards which should be confirmed.
10. The respondents submitted that termination of employment was unfair according to Section 45 of the *Employment Act, 2007* (the Act). In the case of *Mursal & another v Manese (suing as the legal administrator of Delphine Kanini Manesa) Civil Appeal No.E20 of 2021* the court held that termination of employment is unfair where the employer fails to take the employee through the due process. The notice must be issued under Section 35 of the Act.

11. The appellant's case that a notice to show cause dated 3 November 2020 was issued to the 1<sup>st</sup> respondent with an invitation for a disciplinary hearing was not supported by evidence. There was no service of such notice. The allegations that the respondent refused to sign or accept the notice are without proof. This resulted in unfair termination of employment as held in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others*.
12. The 2<sup>nd</sup> respondent is alleged to have been on fixed-term contracts which were not filed. Clause 9.2 of the employment contract provided that either party was entitled to notice before termination of employment. The appellant was obligated to issue notice to the 2<sup>nd</sup> respondent before the end of his employment. The letter dated 28 January 2020 was only served after the unfair termination of employment. The remedies sought were justified and should be confirmed. Under Section 49 of the Act, the learned magistrate had the discretion to award up to 123 months in compensation. The payment of statutory deductions is not justified as the suit by the respondent was after the appellant had failed to pay terminal dues.

### **Determination**

13. The appellant has not filed any written submissions to support the appeal.
14. As the first appeal, the court must re-assess and re-evaluate the entire record and make its conclusions.
15. The assertion by the appellant is that each respondent had a contract of employment. The 1<sup>st</sup> respondent deserted duty while the 2<sup>nd</sup> respondent's contract came to an end.
16. Desertion of duty is a matter subject to summary dismissal per Section 44(4) (a) of the Act. An employee who fails to attend work without good cause commits gross misconduct. However, even in the face of such gross misconduct, the employer is required under Section 41(2) of the Act to accord the subject employee a hearing. This is to secure the right to be heard and to make representations in the presence of another employee as held in *Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR. The Court of Appeal in the case of *Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)* [2022] KECA 540 (KLR) (13 May 2022) (Judgment) emphasized that whatever reasons for an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Act.
17. The appellants' witness testified that the 1<sup>st</sup> respondent was issued with notice dated 3 November 2020 to show cause and to attend a disciplinary hearing on 5 November 2020. This evidence is at variance with the pleadings that the 1<sup>st</sup> respondent deserted duty and all efforts to trace him did not bear fruits. How then was he issued with a notice to show cause dated 3 November 2020 and he refused to accept whereas he could not be traced? The answer is found in the evidence of the 1<sup>st</sup> respondent. After he resumed his annual leave and was taken through training, he was not deployed and his employment was unfairly terminated. This is the most probable evidence. Where the appellant asserts that the 1<sup>st</sup> respondent absconded duty, there is no demonstration of what efforts were put in place to trace him. Where such efforts failed, recourse was in the law, to serve the notice of summary dismissal upon the Labour Officer under Section 18(5) (b) of the Act as held in the case of **Richard Maingi vs Wells Fargo Limited 2017 eKLR** where the court held Dismissal on account of desertion requires that the employer produces evidence showing reasonable steps were taken to contact the employee accused of desertion.
18. The 1<sup>st</sup> respondent is entitled to notice pay and compensation.

19. The learned magistrate well addressed the case of the 1<sup>st</sup> respondent and although for different reasons, the finding that there was unfair termination of employment was proper.
20. With regard to the 2<sup>nd</sup> respondent, the case is that he was under a fixed-term contract the last being for 4 months and which lapsed on its terms. Indeed, a fixed-term contract is lawful and legitimate per Section 10(3) of the Act. The employer is allowed to reorganize its operations and issue a fixed-term contract.
21. Under his last fixed-term contract, the 2<sup>nd</sup> respondent had the provision that;
22. Either party is entitled to terminate this agreement by giving the other a one-month notice in writing or by payment of a month's salary in lieu of such notice, neither the company nor the employee shall be obligated to give reasons for terminating the agreement under this subject clause.
23. Whereas it is a legal requirement to give reasons before terminating employment before the term agreed upon, issuance of a fixed term contract is lawful as held in the case of *Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR that a fixed-term employment contract does not create a legitimate expectation of renewal. Further, the non-renewal of fixed-term employment does not amount to unfair termination of employment warranting compensation or payment in lieu of notice. Such a contract has a start and an end date.
24. The court reading of clause 9.2 of the contract issued to the 2<sup>nd</sup> respondent is that, pending the end of the fixed-term contract, each party was at liberty to terminate the contract. In this case, the 2<sup>nd</sup> respondent's employment contract lapsed on its terms. He is not entitled to claim notice pay or compensation.
25. With regard to the award of 12 months compensation, this is the maximum allowed. The court has emphasized that the award of compensation is discretionary but the same must be applied judicially. The trial court must give reasons why the particular award is allocated.
26. In the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the Court pointed out that an award of a maximum of 12 months' pay must be based on sound judicial principles, and that the court must justify or explain why a claimant is entitled to the maximum award. In the case of [\*Hatari Security Guards Ltd v Odongo \(Appeal E012 of 2022\)\*](#) [2023] KEELRC 2812 (KLR) (9 November 2023) (Judgment) the court held that even under Section 49 of the Act the trial court is allowed to make an award of compensation, 12 months is the highest award the court can allocate and hence, reasons for this highest award must be stated.
27. In this case, the learned magistrate does not assign any particular reasons for the maximum award. This court is justified to interfere with this discretion and consider that the 1<sup>st</sup> respondent worked from 8 December 2018 to 27 October 2021 period of under 3 years. Compensation at 3 months gross wage is hereby found appropriate in this case.
28. The 1<sup>st</sup> respondent was earning a wage of Ksh.13, 500 per month.  
Notice pay is confirmed at ksh.13, 500.  
Compensation is assessed at ksh.40, 500.
29. Whatever reasons led to termination of employment, under Section 18(4) of the Act, the trial court must assess each claim as presented. The employee is entitled to wages earned at the end of his employment unless these are withheld for good cause.

30. On the award of public holidays, as outlined in the grounds of appeal, upon such a claim, the subject employee must give particulars of the public holidays worked. These are gazette days by the Minister and particular. This cannot be a general claim.
31. The general award by the trial court is not justified.
32. Risk allowance is also not a legal right. It must be outlined in the contract of employment or an agreement. This is not part of the contracts issued to the respondents and none produced a private treaty or agreement assigning such a benefit.
33. On the claim for overtime of 4 hours worked daily, each respondent set out a general claim. Under the Regulation of Wages (Protective Security Services) (Amendment) Order, a security guard is allowed to work for 8 hours each day. Any extra hours are treated as overtime. Under the Wage Orders, overtime pay is addressed as follows;

Overtime

- (1) An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rates –
    - (a) one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and
    - (b) Twice the normal rate of wages per hour in respect of any time worked on a rest day.
  - (2) For the purpose of calculating payment for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employee is not employed by the hour, be deemed to be one-two hundred and twenty-fifth of the employee's basic monthly wage.
34. The appellant as the employer is required to submit work records upon a claim for overtime as held in Kenya National Private Security Workers Union v G4s Kenya Limited & 2 others; Central Organization of Trade Unions Cotu (K) & 4 others (Interested Parties) [2021] eKLR. The work records are supposed to guide the court on how the subject employee's work hours were tabulated. This is to give the start and end hours. A schedule of how overtime was compensated. This is not addressed by the appellant at all.
  35. The 1<sup>st</sup> respondent claimed overtime at 4 hours each day at Ksh.148,500. Without any work record to challenge this claim, the learned magistrate should and ought to have awarded this claim. It is due.
  36. The 2<sup>nd</sup> respondent was on a contract of 4 months. His previous contract was running from September 2019 to September 2020 and the same was extended for four (4) months ending in January 2021. Within the meaning of Section 90 of the Act, his claim for overtime hours worked over this period is due. This amounts to 16 months and not 32 months. Total overtime pay due is Ksh.120, 000.
  37. On the grounds that statutory dues were not factored in the judgment of the trial court, payment of statutory dues is a legal requirement whether this is directly addressed or not. Any award by the court must be under Section 49(2) of the Act;
    - (2) Any payments made by the employer under this section shall be subject to statutory deductions.

38. Any award of the court is subject to the provisions of Section 49(2) of the Act and before the employee is paid, statutory deductions should be withheld by the employer.
39. On costs, in employment claims, upon allocation of the due terminal dues and compensation where employment is terminated unfairly, costs are discretionary and ought not to follow the cause. For this appeal, the same being partially successful, each party bears its costs.
40. As I deliver the judgment, I note the appellants written submissions dated 28 March 2024 but they have no bar code to confirm when they were filed. The matter was mentioned on 25 April 2024 and no written submissions had been filed by the appellant. It cannot be correct that the written submissions now filed are dated 25 March 2024. These submissions are not analyzed in this judgment as noted in the body of the judgment.
41. Accordingly, the judgment delivered on 31 January 2024 in Malindi CMELRC No.E013 of 2021 is hereby reviewed in the following terms;

1<sup>st</sup> respondent's employment was terminated unfairly and is awarded the following;

- a. Certificate of service;
- b. Notice pay Ksh.13,500;
- c. Compensation Ksh.40,500;
- d. Overtime pay Ksh.148,500;

2<sup>nd</sup> respondent;

- a. Certificate of service;
- b. Overtime ksh.120, 000.

The awards above are subject to the mandatory provisions of Section 49(2) of the Employment Act, 2007. Costs of the trial court as awarded. For the appeal, each party bears its costs.

**DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant:

..... and .....