



**Omwenga v Pinkertons Kenya Limited (Appeal 151 of 2022)  
[2024] KEELRC 1890 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1890 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 151 OF 2022**

**JK GAKERI, J**

**JULY 23, 2024**

**BETWEEN**

**BATHLOMEW OTWORI OMWENGA ..... APPELLANT**

**AND**

**PINKERTONS KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By a Memorandum of Claim dated 5<sup>th</sup> November, 2021, the Appellant sued the Respondent claiming special damages amounting to Kshs.563,884.75, declaration that termination of employment was unfair, costs and interest at commercial rates.
2. Briefly, the Appellant alleged that he was employed as a Security Guard in 2000 at Kshs.13,000/= per month paid via his bank account and left in August 2021 when the Respondent declined to allocate him any duties and he resigned by letter dated August 2021 and returned two pairs of uniform and a whistle.
3. It was the Claimant's case that he was not paid his salary for April 2021 as well as terminal dues set out in paragraph 8 of the claim.
4. The suit proceeded undefended and the Appellant testified on 24<sup>th</sup> March, 2022 by adopting the witness statement which rehashes the contents of the Memorandum of Claim.
5. In his submissions, counsel for the Claimant submitted that the Respondent unlawfully coerced or forced the Claimant to resign by withholding his salary for April 2021 and failing to deploy him in July 2021.
6. That the Claimant was constructively dismissed as espoused in *Coca Cola East & Central Africa V Maria Kagai Ligaga* (2015) eKLR.



7. Reliance was also made on the decision in Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd on procedural fairness in termination of employment.
8. In his judgment dated 30<sup>th</sup> June, 2022, the learned trial Magistrate found that the Appellant had proved that he was wrongfully and unprocedurally terminated from employment and awarded 2 years leave Kshs.18,200/=, one month compensation Kshs.13,000/= and costs and interest. All other claims were declined.
9. This is the judgment appealed against on the following grounds;
  - a. The learned trial Magistrate erred in law and fact by;
    - i. arriving at an erroneous judgment regarding some claims pleaded.
    - ii. proceeding on wrong principles and failing to consider relevant factors by awarding one month's salary.
    - iii. basing the award on erroneous fact in that the Appellant had stated that he was employed in 2017 and left on 9<sup>th</sup> August, 2021.
    - iv. ignoring the claim for one month's notice.
    - v. finding that the Appellant had not attached bank statement yet he had.
    - vi. finding that the claim for Kshs.136,500/= (service pay) was not proved as the Claimant provided a statement from the NSSF.
    - vii. finding that the Claimant had not complained about his salary.
    - viii. drawing erroneous inference that the Appellant was satisfied with his salary.
    - ix. failing to finding that the salary for April 2021 had not been paid.
    - x. the claim for underpayment and salary for April 2021 were meritorious.

### **Appellant's submissions**

10. Counsel submitted on the evidence before the trial court, salary arrears, merits of the appeal and costs of the appeal.
11. On the evidence before the trial court, counsel urges that the Appellant worked for 21 years at Kshs.13,000/= and had supplied his bank statement and National Social Security Fund statement, evidence the court did not consider in awarding Kshs.31,200/= which is too low.
12. Concerning salary arrears, service pay and underpayment, counsel submits that the trial court failed to award the three claims and did not take into account the Wage Orders.
13. As regards the merits of the appeal, counsel urges that as the Appellant's employment was unfairly terminated, he was entitled to compensation under Section 49 of the [Employment Act](#) and the appeal has merit.



14. On costs of the appeal, counsel relies on the sentiments of the court in *Haraf Traders Ltd V Narok County Government* (2022) eKLR to urge that the provisions of Section 27 of the [Civil Procedure Act](#) are applicable.
15. The Respondent did not file submissions.

### **Analysis and determination**

16. This being a first appeal, the duty of the court is as set out in legions of decision such as *Selle V Associated Motor Boat Co.* (1968) EA 123 as follows;

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.

17. See also *Ephantus Mwangi & another V Duncan Mwangi* (1982-1988) 1 KAR 278, *Coghlan V Cumberland* (1898) 1 ch 704 and *Rentco East Africa Ltd V Dominic Mutua Ngongi* (2021) eKLR.
18. The trial Magistrate is faulted for having made erroneous findings of fact, erroneous inferences, conclusions and awarding one (1) month’s salary only as compensation and refusing to award salary arrears, service pay and underpayment.
19. As the claim was undefended, the principles governing such suits were applicable.
20. In *Humphrey Munyiithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, the court stated as follows;

“In the case of *Monica Kanini Mutua V Al- Arafat Shopping Centre and another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”

21. In *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2018) eKLR, Abuodha J. stated inter alia;

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case . . .”

22. Similarly, in *Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & another* (2014) eKLR, the court stated;

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted.



The Claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standards of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side”.

23. See also Evans Nyakwana V Cleophas Bwana Ongaro (2015) eKLR, William Kabogo Gitau V George Thuo & 2 others (2010) KLR 526, Re H & others (Minors) 1996 AC 563 586, Place Investment Ltd V Geoffrey Kariuki Mwenda & another (2015) eKLR and Michael Hubert Kloss & another V David Seroney & 5 others (2009) eKLR among others.
24. In the instant suit, the Appellant attached his employment card, ID No. 11357671, copy of payslip for December 2000, payroll number 105472, and payroll for March 2016 payroll number 5472.
25. Also attached were two pages of the Claimant’s personal Current Account Statement.
26. Copies of the Claimant’s NSSF statement, Letter from Pinkertons dated 9<sup>th</sup> July, 2020 and Demand letter dated 11<sup>th</sup> August, 2021 were not attached to the Appellant’s List of Documents dated 5<sup>th</sup> November, 2021.
27. From the foregoing, it is evident that the Claimant has availed sufficient documentary evidence to prove that he was an employee of the Respondent and received payment on 5<sup>th</sup> March, 2021.
28. As regards termination of employment, the Appellant alleged that it was unfair and the learned trial Magistrate found that based on the evidence on record, the employer had no justifiable reasons to terminate the Appellant’s employment. The trial court based its finding on the fact that the Appellant’s evidence was unchallenged and the attendant procedures were not complied with.
29. In his claim, the Appellant stated that when the Respondent refused to allocate him duties in July 2021, he resigned by letter in August 2021 and returned his uniform and whistle.
30. In his witness statement, the Appellant states that when the Respondent declined to deploy him to work stations, he voluntarily resigned on 9<sup>th</sup> August, 2021.
31. Puzzlingly, although the witness statement identifies the resignation letter as SOA 2, no copy was attached for perusal by the Court.
32. Under paragraph 7 of the witness statement, the Appellant stated that “upon termination of my employment, the Respondent has failed to remit my salary arrears for the month of April and other benefits”.
33. Although the Appellant’s counsel submitted that Appellant was constructively dismissed by the Respondent, the learned trial Magistrate did not address the issue or make a finding on it.
34. Regrettably, the trial Magistrate did not provide an analysis of the evidence he took into consideration in arriving at the finding that termination of the Appellant’s employment was unlawful.
35. The fact that the Claimant’s evidence was uncontroverted is not sufficient proof that termination of employment was unlawful.
36. The circumstances in which the alleged termination took place are critical in making a determination of whether it was unlawful or not.
37. Based on the witness statement on record, the Claimant resigned because he was not allocated duties.



38. The quagmire the court finds itself in is who did not allocate duties when in the month of July and what did the Claimant do before he resigned on 9<sup>th</sup> August, 2021?
39. Where for instance was he serving in June 2021? Was he the only one who was not allocated duties? What did he state in his resignation letter?
40. What were the contents of the demand letter dated 11<sup>th</sup> August, 2021?
41. With no answer to these questions, the court is not persuaded that the Appellant has discharged the burden of proof that the Respondent terminated his employment and that it was unfair or unlawful.
42. In his witness statement, the Appellant stated that he resigned voluntarily as he was not deployed. As he has not alleged that the employer frustrated him and left him with no option but to quit, the court lacks a basis to make a finding that the Claimant was constructively dismissed as submitted by his counsel at trial.
43. Put in the alternative, the material before the court is insufficient for the court to find that the separation between the Claimant and the Respondent was faulty.
44. In the circumstances, the court is not persuaded that the learned trial Magistrate arrived at a correct finding of the fact that termination of employment was unfair.
45. The trial court made no attempt to assess and determine whether it was a termination or a voluntary resignation having seen and heard the witness.
46. Having found as above, the grounds challenging the low award of compensation, duration served, one month's salary in lieu of notice fall by the way side.
47. As regards other reliefs, the court was faulted for not awarding salary arrears for April 2021.
48. From the bank statement on record, the Claimant received Kshs.13,054/= on 5<sup>th</sup> March, 2021 and no salary is reflected in January or February 2021 or May, June and July 2021.
49. The bank statement's last date is 6<sup>th</sup> March, 2021, thus it is not sufficient evidence to show that salary for April 2021 was not paid.
50. The Claimant tendered no evidence why the salary for April 2021 was not paid yet there was no salary in January and February 2021 and was not claiming salary for May, June and July.
51. The court is in agreement with the findings of the trial Magistrate as regards the alleged salary for April 2021.
52. As regards unpaid leave, the court is persuaded that the Appellant was entitled to the same as found by the trial court Kshs.18,200/=.
53. As regards service pay, the trial court held that the claim was unproved and unmerited and disallowed it.
54. This court is of a similar view as the Claimant's payslips on record show that NSSF deductions were being made and the Appellant did not allege that the deductions were not remitted.
55. During trial, the Claimant relied on his NSSF statement to prove that he was an employee from 2000 to 2021 and did not raise the issue of membership of the NSSF.
56. It is trite law that the provisions of Section 35(6)(d) of the [Employment Act](#), 2007 disqualifies members of the NSSF from service pay as are members of other pension schemes.



57. On underpayment, the trial court found that the Appellant had not raised the issue or complained to the employer and the relief was undeserved.
58. It is common ground that employers are bound to observe the minimum wage as prescribed by the Cabinet Secretary from time to time under the relevant Regulation of Wages (Order).
59. Failure by an employer to pay the employee the respective minimum wage is a breach of the law as it is the employee's entitlement.
60. However, it is not the duty of courts of law to enforce stale claims.
61. The Appellant is accordingly awarded underpayment for 3 years prior to the date of separation identified as April or August 2021 Kshs.156,932.73.
62. Finally, as regards compensation for unlawful termination, having found that the Appellant failed to demonstrate that termination of his employment was unfair or unlawful, the claim was unmerited and no compensation was or is due to the Appellant.
63. From the foregoing, it is the finding of the court that the appeal is partially successful.
64. In the upshot, the judgment of the trial court is modified as follows;
  - a. The finding that termination of the Appellant's employment was unlawful is set aside and in its place a finding that the Appellant failed to prove on a balance of probabilities that termination of employment was unfair.
  - b. The Appellant's suit grounded on unfair and unlawful termination of employment stands dismissed save for the finding on unpaid leave days for 2 years Kshs.18,200.00 and underpayment Kshs.156,932.73.Total Kshs.175,132.73
  - c. The Appellant is awarded costs of this appeal.
  - d. Costs awarded by the trial court are set aside.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF JULY 2024**

**DR. JACOB GAKERI**

**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, this 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 this 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.

**DR. JACOB GAKERI**



**JUDGE**

