



**SGA Security Solutions Limited v Inonda (Appeal E050 of 2023)
[2024] KEELRC 1883 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1883 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E050 OF 2023**

**AK NZEI, J
JULY 18, 2024**

BETWEEN

SGA SECURITY SOLUTIONS LIMITED APPELLANT

AND

MATIKA MICHAEL INONDA RESPONDENT

*(Being an appeal against the entire judgment of D.O. Mbeja [PM]
in Mombasa CM ELRC No. 167 of 2020 delivered on 8th May 2023)*

JUDGMENT

1. The Appellant herein was the Respondent in Mombasa Chief Magistrate’s Court Employment Case No. E167 of 2020 whereby it had been sued by the Respondent herein seeking the following reliefs:-
 - a. One month salary in lieu of notice....kshs. 18,938.08
 - b. Compensation for wrongful/unlawful termination (18,938.08x12 months).....kshs. 227,256.96
 - c. Service pay.....kshs. 76,480.74
 - d. Unpaid leave (21 days)kshs. 107,073.33
 - e. Public holidays worked.....kshs. 55,917
 - f. Overtime.....kshs. 1,048,944
 - g. A declaration that dismissal was unfair/unlawful and illegal.
 - h. A certificate of service.
 - i. General and punitive damages.



- j. Costs of the suit and interest.
2. The Respondent had pleaded that he had been employed by the Appellant as a security guard sometimes in August 2013, earning kshs. 18,938.08 at the time of termination, and worked diligently for 7 years until 2/7/2020 when he was clandestinely terminated from employment. The Respondent further pleaded:-
 - a. that while in the course of his duty on 1/7/2020, the Respondent was summoned by his supervisor to the Respondent's main office at Nyali Mombasa, whereat he was on 2/7/2020 informed by the Respondent's Officer incharge of deployment that he had been transferred to Kilifi on one (1) day notice.
 - b. that on explaining his inability to move to Kilifi at such short notice due to financial constraints, he was required to report to Mariakani Station the following day, which he was not able to do due to the same reason of financial constraints.
 - c. that the Respondent was verbally terminated on the same date (2/7/2020) without notice and without being accorded a hearing prior to the termination.
 - d. that termination of the Respondent's employment was unlawful and unfair, as it was effected without any cogent reason, was arbitrary and contravened principles of natural justice.
 - e. that upon termination of the Respondent's employment, the Appellant computed the Respondent's dues less public holidays worked and overtime.
 3. Documents filed alongside the Respondent's statement of claim included the Respondent's written witness statement and a list of documents dated 18/11/2020, listing 5 documents. The listed documents are copies of the Respondent's National Identity card, employment identity card, payslips, KRA tax deductions statement and demand letters.
 4. The Appellant entered appearance and filed response to the Respondent's claim, denying the same. The Appellant, however, admitted having employed the Respondent as a guard. The Appellant further pleaded:-
 - a. that on 1/7/2020, the Appellant issued the Respondent with a transfer letter, effectively transferring him to Mariakani and requiring him to report there. That a transfer allowance of kshs. 3,000 was paid to him.
 - b. that the Respondent failed to report to his new station as required and without explanation, and that on 3/7/2020, the Respondent issued him with a warning letter.
 - c. that pursuant to issuance of the said warning letter, the Respondent's Advocates wrote a demand letter dated 8/7/2020, which the Appellant received on 13/7/2020, alleging unfair termination and claiming terminal dues.
 - d. that the Appellant wrote back, denied the allegations raised in the demand letter, and asked the Respondent's Advocates to advise the Respondent to report to his new station within 7 days from 16/7/2020, failing which disciplinary proceedings would follow.
 - e. that after the lapse of the 7 days, the Respondent was called for a disciplinary hearing and was given an opportunity to be heard before he was summarily dismissed from employment for desertion.
 - f. that vide a letter dated 6/8/2020, the Respondent admitted his mistake in writing.



- g. that termination of the Respondent's employment was fair, procedural and for valid reasons as required under Sections 41,43,44 and 45 of the [Employment Act](#).
- h. that the Respondent was paid his terminal dues, and had no further claims against the Appellant.
5. Documents filed alongside the Appellant's response to claim included witness statements of Caroline Wanga (dated 6/8/2021) and Emmanuel Angore, and a list of documents dated 6/8/2021, listing 9 documents. The listed documents included the Respondent's letter of appeal dated 6/8/2020, a summary dismissal letter dated 29/7/2020, attendance sheet for disciplinary hearing dated 29/7/2020, Minutes for the disciplinary hearing dated 29/7/2020, invitation letter dated 23/7/2020, a show cause letter dated 22/7/2020, a letter dated 3/7/2020, leave request forms, and copies of warning orders.
6. The Respondent filed a supplementary list of documents dated 1/12/2021 and listed bundles of his payslips for the years 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020.
7. The Appellant filed a supplementary list of documents on 18/3/2020 (dated 18/3/2022) and listed 13 documents, which included a transfer letter dated 1/7/2020, a staff transfer advice dated 1/7/2020, a warning letter dated 3/7/2020, a demand letter dated 8/7/2020, reply to demand letter dated 16/7/2020, a show cause letter dated 22/7/2020, Minutes dated 29/7/2020, and attendance sheet dated 29/7/2020, among other documents.
8. At the trial, the Respondent (being the claimant in the primary suit), adopted his filed witness statement as his testimony and produced in evidence the documents mentioned in paragraphs 3 and 6 of this judgment. The Respondent admitted having declined transfers to Kilifi and to Mariakani respectively. He further admitted having been paid kshs. 3000, but said it was a soft loan. He also admitted having attended a disciplinary hearing which was about transfer, but stated that the hearing did not take place. That the Respondent only signed attendance lists.
9. Cross examined, the Respondent testified that he wrote a demand letter and was required to report back to work within 7 days. He denied having been given a show cause letter, but admitted having been invited to a sitting on 29/7/2020 and having been terminated on 29/7/2020. He however stated that he had been terminated verbally. He denied having signed any leave application forms and testified that he never took leave. The Respondent admitted having been a member of NSSF, and admitted that holidays worked were indicated in his payslips.
10. The Appellant called two witnesses. RW-1 (Caroline Wanga) adopted her filed witness statement and produced in evidence the Appellant's listed documents. The witness further testified that when the Respondent wrote a demand letter, he was asked to go back to work as he had not been terminated. That he did not return to work, and therefore deserted duty. That he was invited for a hearing and attended with a shop steward, but was not interested in continuing to work. That he was given a letter, and was given an opportunity to appeal. That his letter (of appeal) dated 6/8/2020 sounded remorseful. The witness further testified that the Respondent used to pay NSSF and used to go on leave, and had not particularized any particular leave days, holidays or unpaid overtime.
11. Cross -examined, RW-1 testified that the Respondent was an employee of the Appellant from 2013 to 2020. That the Respondent was paid kshs. 3,000 for the transfer but wanted more money. That the Respondent's payslips did not have any leave entry (indication); though leave would be indicated on the payslips. That the leave request forms showed the number of years that the Respondent went on leave.
12. RW-2 (Emmanuel Angore) adopted his filed witness statement as his testimony. The trial Court delivered its judgment on 8/5/2023 and made a finding that the Respondent's employment had been



unfairly terminated. The Court allowed the Respondent's claims as set out in the statement of claim, save for the claim for service pay. The trial Court rendered itself thus:-

"I find a case of wrongful, unfair and unlawful termination of employment of the claimant by the Respondent and that the Claimant is entitled to the reliefs sought in the statement of claim guided by the evidence on record. Having into consideration that the claimant was terminated without notice, then he is entitled to one month pay in lieu of notice coupled with five months' compensation for unfair termination all circumstances considered.

....the claim for service pay is declined...the claim for overtime is allowed as per the statement of claim coupled with the claim for unpaid leave days and public holidays worked, guided by the evidence on record.

In the result, judgment is entered in favour of the claimant against the Respondent in the sum of kshs. 1,325,562.81 all circumstances considered. The Respondent to deliver the certificate of service in 30 days from the date of judgment. The above award shall carry costs of the suit and interest at Court rates from the date of filing suit."

13. Aggrieved by the said judgement, the Appellant preferred the present appeal and set forth the following grounds of appeal:-

- a. that the learned Magistrate erred in law and in fact in finding that the Respondent was unfairly terminated.
- b. that the learned Magistrate erred in law and in fact in awarding the Respondent one month in lieu of notice yet there was no evidence to prove that he was unfairly terminated.
- c. that the learned Magistrate erred in law and in fact in awarding the Respondent five months salary as compensation for unfair termination yet there was no evidence to prove that he was unfairly terminated.
- d. that the learned Magistrate erred in law and in fact in awarding the Respondent kshs. 1,048,944.00 as overtime as prayed for in the memorandum of claim [and] yet the Respondent did not specifically mention the days and hours that he worked overtime and was never paid.
- e. that the learned Magistrate erred in law and in fact in awarding the Respondent kshs. 107,073.33 as unpaid leave despite the evidence provided by the Appellant confirming that the Respondent used to go for leave.
- f. that the learned Magistrate erred in law and in fact in awarding the Respondent kshs. 55,917.00 as public holidays worked yet the Respondent failed to specifically mention the public holidays that he worked and was never compensated.
- g. that the learned Magistrate erred in law and in fact by completely disregarding the Appellant's evidence on record.

14. The Appellant sought the following reliefs on appeal:-

- a. that the entire judgment of Hon. D.O. Mbeja (PM) in CMCC ELR Case No. E167 of 2020 (Mombasa) delivered on 8th May 2023 be set aside.
- b. that the appeal be allowed in terms of dismissing Mombasa CMC ELR Case No. E167 of 2020.
- c. that the Appellant be awarded costs of the appeal.



15. This is a first appeal, and the evidence presented in the trial Court, which I have analysed in this judgment, is before this Court for fresh evaluation. This Court, however, takes cognizance of the fact that it never saw or heard the witnesses testify first hand.
16. Having considered the pleadings filed in the trial Court and evidence presented thereon, issues that fall for determination, in my view, are as follows:-
 - a. whether termination of the Respondent's employment was unfair.
 - b. whether reliefs sought by the Respondent in the trial Court were deserved.
17. On the first issue, it was a common ground that the Respondent was employed by the Appellant as a security guard, and worked from 2013 to 2020. It was also a common ground that the Respondent's employment was terminated by the Appellant. It is also not in dispute that the Respondent's employment was terminated after he failed to report to a new duty station (Mariakani) after being transferred there on 2/7/2020. Although the Respondent alleged to having been terminated on 2/7/2020 and even instructed his advocates to write to the Appellant in that regard, the Appellant wrote to the said advocates on 16/7/2020 and stated that the Respondent had not been terminated. Vide the said letter, the Appellant gave the Respondent 7 days to report to his new duty station, but he did not.
18. The Respondent did not deny having received the said letter. He admitted in evidence to having received the same. Although the Appellant alleged to having issued a show cause letter dated 22/7/2020 to the Respondent, the said letter is not shown to have been served on/received by the Respondent. The Respondent denied having received it. A day after the date of the said alleged show cause letter (on 23/7/2020), the Appellant is shown to have issued an invitation to the alleged Respondent to attend a disciplinary hearing on 29/7/2020. The said letter is not shown to have been received by/served on the Respondent.
19. The Appellant is not shown to have told the trial Court how it expected the Respondent to respond to the show cause letter dated 22/7/2020 within 24 hours as stated in the said letter, even assuming that the Respondent received it. The letter states in part:-

“ Therefore, you are hereby required to give your written explanation within 24 hours from the receipt of this letter as to why an appropriate disciplinary action should not be taken against you as per the above lapse.”
20. The Respondent was not shown to have responded to the aforesaid letter. He was not expected to respond to it as it was not shown to have been received by him. Further, the 24 hours period given in the said letter was inordinately short. I have previously stated in this Court's decisions that any period below 3 days, depending on the circumstances of each case, is unfair. An employee ought to be given reasonable time to respond to charges levelled against him by his employer.
21. The Respondent testified that he attended the disciplinary hearing scheduled for 29/7/2020, and that the hearing did not take place. That he only signed attendance sheets. The brief minutes dated 29/7/2020 and produced in evidence by the Appellant are not shown to have been signed by the Respondent or by a person accompanying him to the hearing.



22. Section 41 of the *Employment Act* is not shown to have been complied with. It was held as follows in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR:-

“...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

23. The Court of Appeal stated as follows in the case of *Naima Khamis v Oxford University Press*[EA] Ltd[2017 eKLR:-

“...We wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair.

Also, Section 45(2) (c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair.

A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord an employee an opportunity to be heard as by law required.”

24. It is my finding that termination of the Respondent’s employment was substantively fair, but procedurally unfair; and therefore uphold the trial Court’s finding of unfairness to that extent.

25. On the second issue, and having made a finding that termination of the Respondent’s employment was procedurally unfair, I uphold the trial Court’s award of the equivalent of five months’ salary being compensation for unfair termination of employment. I have noted from the Respondent’s payslips for June 2020 that his gross monthly salary at the time of termination was kshs. 16,978.97. The equivalent of five months’ salary is therefore kshs. $16,978.97 \times 5 = 84,894.85$, which I award to the Respondent. The award by the trial Court based on kshs. 18,938.08 as the Respondent’s monthly salary is hereby set aside.

26. The award of one month salary in lieu of notice is hereby upheld, but at kshs. 16,978.97. The award of kshs. 18,938.08 is hereby set aside. It was not demonstrated that the Respondent was issued with a termination notice pursuant to Section 35(1) (c) of the *Employment Act* or paid in lieu thereof.

27. The award of service pay was properly declined by the trial Court pursuant to Section 35(6) of the *Employment Act* as the Respondent demonstrated and admitted to having been a member of and a contributor to the NSSF.

28. On the claim for unpaid leave days [21 days per each year served], the Appellant did not discharge the burden of proof placed on it by Section 74(g) of the *Employment Act*. The leave request forms produced in evidence by the Appellant are not shown to have been signed and/or thumb-printed by the Respondent. The spaces provided on the said forms for the Respondent’s signature/thumb-print are blank. The Respondent denied having signed the forms or having proceeded on leave during the period of employment. Further, although the said forms are ticked to indicate that leave travel allowance was paid to the Respondent, there is no indication of such payment in the Respondent’s payslips produced in evidence. I award the Respondent kshs. 83,197 being payment for untaken leave days, and hereby



set aside the award of kshs. 107,073.33 awarded by the trial Court as calculation thereof is not shown to have been based on the Respondent's monthly salary.

29. It ought to be noted that non-payment of leave pay from one leave earning year to another is a continuing injury as contemplated in Section 89 of the *Employment Act* (formerly Section 90). The Respondent is shown to have filed the primary suit within twelve months from the date of termination of his employment, which was the date of cessation of the said continuing injury.
30. The award of kshs. 55,917 being payment for public holidays worked is hereby set aside. No particulars of the alleged worked public holidays were pleaded, and the claim was not proved. Further, the Respondent admitted in evidence that payment for public holidays worked was reflected in his paylips. I have noted that his gross monthly pay at times fluctuated, reflecting different sums.
31. The award of ksh. 1,048,944 being overtime pay is hereby set aside. No particulars of years; months and dates when the Respondent allegedly worked for extra hours and/or past the usual (contractual) working hours were pleaded, and none were proved. Such claims are in the nature of special damages and must always be specifically pleaded and proved.
32. The appeal herein succeeds to the extent set out in this judgment. For avoidance of doubt, and having considered written submissions filed herein, judgment is hereby entered for the Respondent against the Appellant as follows:-
 - a. Compensation for unfair termination of employment.....kshs. 84,894.85
 - b. Notice pay.....kshs. 16,978.97
 - c. Leave pay.....kshs. 83,197Total kshs. 185,070.82
33. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
34. Each party shall bear its own costs of the appeal.
35. The Respondent is awarded costs of proceedings in the Court below, plus interest on the sum herein awarded to be calculated at Court rates from the date of the trial Court's judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH JULY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

